

Freedom to Succeed



Pre-empting and Resolving Technology, Media and Telecoms Disputes

International Dispute Resolution Survey





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Introduction



David McIlwaine,
Partner and
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The term 'Technology, Media and Telecoms disputes' is a very broad one. This survey asked users and suppliers of technology about the main types of TMT disputes that arise, and also examined a question that is common to all of them: how can they be efficiently resolved?

Technology affects all aspects of business life. It is critical to every organisation in every sector, and many businesses go to great lengths to gain a competitive edge by procuring technology solutions and services; acquiring companies in order to take advantage of their technological capabilities; and working closely with strategic partners, suppliers and even competitors. No surprise then, that business spending on technology continues to rise, but with that comes significant risk.

Businesses face many risks which could undermine their value and threaten their very survival and they are under intense pressure to pre-empt and manage them. Customers, suppliers, collaborators, shareholders, stakeholders, regulators and competitors are watching. When a business encounters threats or failings, how it responds can be critical. It can reveal a strength or weakness. It can affect its market standing, share price and the strength of its hand when doing business across the globe.

In an aggressive market, the businesses that succeed are the ones that can confidently pursue their ambitions. At times, that may mean using the threat of dispute resolution to secure recompense, protect their position or beat their competitors. Businesses that fail to seize these opportunities can suffer real damage to their operations, reputation, and ability to enter new markets quickly. As such, an approach to dispute resolution is a key element of any business development strategy.

For example, recently a client faced a failing major IT programme in a jurisdiction known for delays and problems with its Court system. The client acknowledged that the perceived lack of sanction was affecting the whole delivery of the programme – because it was inconceivable that, if a dispute arose, the parties would progress to the national Court. The situation would have been different if the contract had provided for international arbitration as an effective dispute resolution mechanism, since the threat of appropriate sanction should drive the right business behaviour.

This report's in-depth analysis of attitudes towards TMT disputes will allow business leaders to compare their dispute resolution policies against those of their peers, both suppliers and potential customers. So I am confident that all users and suppliers of technology across the globe will be interested in the results of this study.

Pinsent Masons is very proud to sponsor Queen Mary for the first time. It is very exciting for this firm to use its internationally recognised TMT disputes capability to support the continuation of Queen Mary's pre-eminent surveys. We would like to thank Professor Mistelis and Gustavo Moser (Pinsent Masons Research Fellow) for their dedication to this project. We also thank all the survey respondents and other individuals and institutions who have contributed to the success of this publication.

November 2016

Business spending on technology continues to rise, but with that comes significant risk



Pinsent Masons

It is my great pleasure to introduce the 2016 International Dispute Resolution Survey. It is the seventh survey released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. It is the first prepared with the generous and unconditional support of Pinsent Masons, and the first to focus on Technology, Media, and Telecommunications disputes.

Built on 343 questionnaires and 62 personal interviews, the survey assembles the views of a wide range of actors within the dispute resolution community, and provides invaluable insight into stakeholders' perceptions of international arbitration. In fact, it is the largest sector-specific empirical study we have ever conducted in international arbitration.

Given that disputes in a cross-border and cross-cultural context are inevitable, even when it comes to globalised market sectors, having a well defined but flexible policy relating to dispute resolution and becoming dispute-savvy is critical for all businesses. Exploring the views of users of dispute resolution as well as specialist dispute resolution practitioners from all over the world will assist the readers of the survey to have a well-rounded and impartial picture of the current state of affairs in international dispute resolution in the TMT sector.

When we designed the survey, there was much that we wanted to know. TMT has acquired a central role in world economy but has never featured as a major user of international arbitration and ADR. Is this impression correct? What are the main considerations that stakeholders take into account when deciding how to resolve a TMT dispute? Why are certain dispute settlement mechanisms preferred? Does it depend on the context and external factors? And, most importantly, who makes these decisions?

Indeed, the survey provides answers to many of these questions, and sheds some light on how businesses approach TMT disputes – something which until now was rarely explored. We hope that it will help people in the sector to identify weaknesses and strengths, and more effectively to use the various dispute resolution mechanisms that are available. In short, to improve the way they approach dispute resolution. As a corollary one would expect that dispute resolution providers might have to adopt their rules and procedures to better meet the needs of the significant TMT sector and to overall improve the dispute resolution experience businesses have.

Thank you for taking the time to read this survey report. I hope that you find it interesting and useful.

November 2016



Professor Loukas Mistelis,
Director, School of International Arbitration,
Centre for Commercial Law Studies



This is the largest industry-sector empirical survey we have ever conducted in international arbitration

Executive summary

This report identifies and considers critical factors for all businesses (in all sectors) when establishing an effective dispute resolution strategy. The reality is that businesses will need to use, or be prepared to use, different mechanisms to protect their position and to improve their negotiation strategy.

With the ever-increasing internationalisation of the supply chain, it may be appropriate that businesses include an international arbitration provision within their contracts, to ensure that their rights and remedies are enforceable, across multiple jurisdictions. However, business will face non-contractual risk too, for example, IP infringement, regulatory issues, competition/anti-trust matters, cyber-security and data breaches etc. In these situations, the use or threat of litigation may well be the right approach. As such, a business's "dispute resolution toolkit" needs to be broad and flexible, allowing it to deal with disputes with contracting parties, both domestically and internationally, and with third parties.

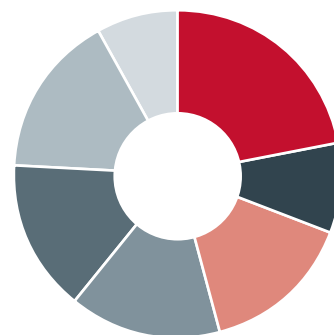
Furthermore, whilst significant improvements have been made with emergency international arbitration procedures, businesses may need swifter solutions that neither litigation nor arbitration alone can provide. The digital world moves fast, and approaches to risk management and dispute resolution will have to change with it, as they can fundamentally affect a business's ability to operate. This might include an increase in the need for early intervention and the development of commercial leverage for negotiations. Mediation may also be an option. However, success in mediation or negotiation is highly dependent on a party's bargaining position, and its ability to threaten and if necessary, pursue effective sanction if agreement cannot be reached.

For any business, success is a product of many factors. The right approach to dispute resolution is undoubtedly one of them. This report is an excellent reference point for assessing this in the context of the digital economy. It provides insights into ways that dispute resolution is addressed in key industries and jurisdictions. It provides useful statistics on the nature and instances of technology disputes, and the relative merits of the different resolution mechanisms that are available.

This report anticipates which areas may be contentious in future, and how the market may need to respond. This enables businesses to predict and pre-empt future risks and issues.

This survey represents a truly global view of the TMT dispute resolution market. The breakdown of respondents is as follows:

Businesses may need swifter solutions that neither litigation nor arbitration alone can provide



EU and EEA	22%
Other Europe	9%
North America	15%
Asia	15%
Latin America and the Caribbean	15%
Africa	16%
Oceania	8%

The key findings from the survey are:

Types of TMT dispute

- This year's survey focussed on one area of disputes. However, the results showed a wide variety of potential dispute types related to technology matters. Respondents indicated experience of at least 17 different types of TMT related dispute
- There are a variety of reasons for disputes arising in relation to IP, IT implementation programmes, data related issues, reputation management issues and outsourcing programmes
- TMT disputes are high risk and high-value, particularly in Europe and North America: many involve sums in excess of US\$100m
- Predicted future areas for disputes are: IP, collaborations and data/security issues

In-house dispute resolution policies and preferences

- 75% of organisations surveyed had a dispute resolution (DR) policy
- Within DR policies mediation is the most encouraged mechanism, followed by arbitration
- Where a DR policy specifies arbitration, the three most important elements are: institution, seat, and confidentiality
- IT and Telecoms suppliers were less in favour of arbitration, preferring litigation and expert determination respectively
- When assessed at an all-respondents level (i.e. including private practitioners and other dispute resolution practitioners), arbitration is the most preferred DR method for TMT disputes. Court litigation is the least desirable method
- There is a lack of familiarity with mediation, particularly within civil jurisdictions

Dispute resolution mechanisms in practice

- Not all disputes progress to a binding decision. 41% of all disputes were settled via an amicable settlement
- The decision whether to initiate litigation or arbitration is a Board issue
- Whether or not a matter progresses to litigation or arbitration ultimately depends on legal and commercial factors
- Arbitration was most preferred but litigation was the most used
- Decisions are determined primarily by costs and legal merits and the parties' relationship

Suitability of international arbitration for TMT disputes (present and future)

- 92% of respondents indicated that international arbitration is well suited for TMT disputes
- Despite some criticisms and acknowledgement of opportunities for improvements, 82% of respondents believe there will be an increase in the use of international arbitration
- The attractive features are: enforceability, the ability to avoid a foreign jurisdiction, expertise of the decision maker and confidentiality/privacy
- There is a desire to use technology to improve the international arbitration process

Choosing the players

- Expertise in the arbitral process and technical knowledge of the industry are both important to selecting external counsel and arbitrators
- Geography is a determining factor both in selecting the institution and in appointing counsel in the same jurisdiction as the contract governing law
- The most used institutions for TMT disputes are: ICC, WIPO, LCIA and SIAC. WIPO is more favoured in relation to IP matters

The Study

Section 1: TMT disputes

KEY POINTS

- TMT disputes are high risk and high-value, particularly in Europe and North America: many involve sums in excess of \$100m
- Predicted future areas for disputes are: IP, collaborations and data/security issues
- For IT suppliers, most disputes relate to delivery of the contracted service. In Telecoms, disputes centre more on the sector’s regulatory framework

What is a TMT dispute?

The term ‘TMT’ encompasses a very wide range of products and services across a broad range of sectors. We asked about the types of dispute that respondents had experienced.

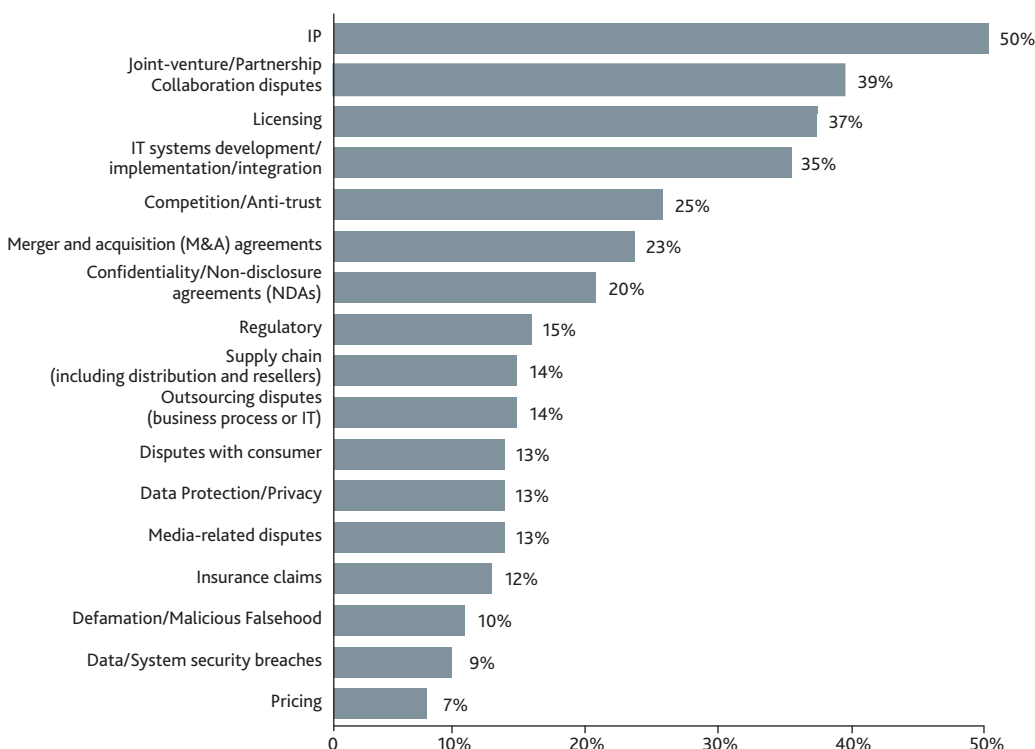
The commonly encountered types of dispute are shown in Chart 1, below.

We expected that IP and licensing matters would feature strongly. Technology necessarily involves protecting the intellectual creativity behind innovations, and owners of such intellectual property will take action to defend and exploit the fruits of their work. Further, with technology moving at a rapid pace, innovation cannot be held back by invalid or wrongly enforced rights and disputes will therefore arise to clear IP rights that are blocking further innovation.



Innovation cannot be held back by invalid or wrongly enforced rights

Chart 1. Which types of dispute have you encountered in the last 5 years?



In the modern age of start-ups, digital disruption and ever-changing technology, for companies to stay ahead of the game (or even just to get in it) they must work with other businesses

It might be surprising to see such a high number of disputes around joint ventures, partnerships and collaboration. However, in the modern age of start-ups, digital disruption and ever-changing technology, for companies to stay ahead of the game (or even just to get in it) they must work with other businesses. That might be through strategic partnering and alliances, or by using a strategy of merger, acquisition or consolidation. For example, telecoms operators often work together to share the heavy costs of developing, installing, maintaining and upgrading the infrastructure required for telecommunications networks.

Disputes about IT systems also feature highly. This work is the core offering of traditional technology service providers. Billions of pounds are spent on such projects by big corporates and the public sector and they are highly dependent on the success and sustainability of their IT infrastructure. The challenges and high instance of project failings are well known.

The high occurrence of competition disputes is a reminder that compliance and regulation are ever present threats to business success, particularly in the Telecoms industry and for IT suppliers who provide services to highly regulated industries.

Do different industries face different challenges?

We were able to analyse the respondents' answer according to their industry. We had good response rates from the following industries: (i) IT (hardware, software and services), (ii) Energy, (iii) Manufacturing, (iv) Telecoms, (v) Financial Services and (vi) Construction. Clear distinctions arose when considering the types of dispute that each industry faces. Let us look specifically at the top five disputes facing the two largest supply industries: IT suppliers and Telecoms providers (Charts 2 and 3 respectively).

This indicates that for the IT industry, many of the problems are caused by the delivery of the actual service (IT development or outsourcing). Whereas in the Telecoms industry the issues are more to do with the sector's regulated business framework.

Chart 2. Which types of dispute have you encountered in the last 5 years? (Top 5 IT sector results)

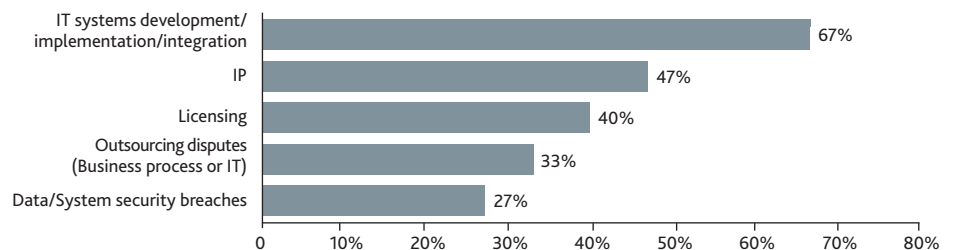
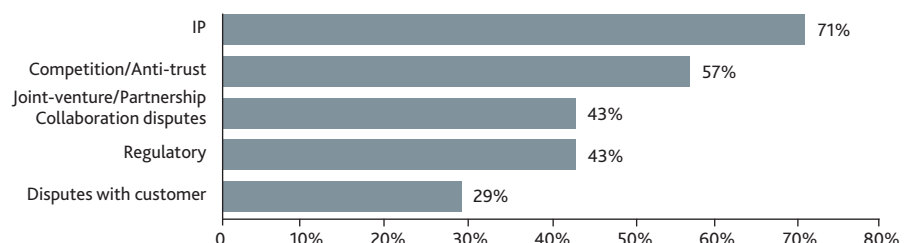


Chart 3. Which types of dispute have you encountered in the last 5 years? (Top 5 Telecoms sector results)



Why do TMT disputes happen?

The survey also sought to understand why disputes might arise, and to identify any common themes. We considered the specific reasons for certain types of disputes.

IP disputes

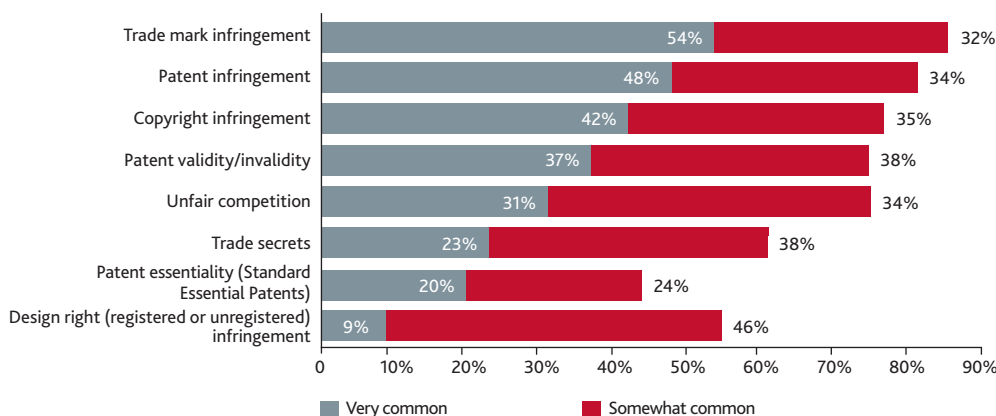
The three most common forms of IP disputes were, in order: trade mark infringement, patent infringement and copyright infringement (Chart 4).

One might have expected copyright infringement to feature higher up the list, given that this is the primary protection offered to software. However, brand protection is an issue facing all businesses, and hence the prominence of trade mark issues.

When looking at individual sectors, Telecoms, IT, Energy and Manufacturing each placed patent infringement as the most common type of IP dispute. This is a powerful illustration of how important this protection is to technical advancement, and of how businesses need to be able to challenge wrongfully granted rights which create blocks to innovation and competition.

One interviewee, an arbitrator and former head of legal for an IT supplier, said that he had seen an “explosion” of patent cases.

Chart 4. How common are the following reasons for IP disputes?



IT systems development/ implementation/integration disputes

Chart 5 considers reasons for IT systems disputes. The most frequently given reason was delays, which may of course be a consequence of other failings rather than an original cause. Other common causes were: requirements, failures to achieve business case or objectives, and delivery or implementation issues.

Do suppliers of technology give the same reasons for problems as their customers? There was some overlap – both saw requirements as the hotbed of disputes. However, the importance of that issue for suppliers was startling: 89% of the IT sector respondents (compared to 51% of respondents generally) identified requirements as a very common reason for dispute. The articulation of the customer’s needs will shape the system scope and requirements specification, and this is the biggest single source of problems for suppliers. Linked to this is the issue of change management: 50% of suppliers considered this a common reason for dispute with the usual argument being whether new requirements really constitute true change (as a supplier would say), or whether they are simply a clarification or elaboration of the original project scope (as the customer would say). Only 10% of IT suppliers felt that issues relating to the live service operation of the system were very common reasons for disputes, against 27% of the wider respondents.

Outsourcing

A similar pattern emerged when we analysed disputes about outsourcing (both of business processes and IT) (Chart 6).

Across all respondents, the standout cause of outsourcing disputes was service levels: 51% of respondents identified this as ‘very common’. IT suppliers apparently disagreed: the equivalent figure for the IT sector alone was just 25%.

Effecting change through transition or transformation was identified by IT suppliers as the source of most disputes: 60% identified transition (to the new service provider) as a problem area: 51% identified the transformation stage (rationalising the transitioned outsourced service to improve processes, quality and cost-efficiency).

This difference between the customers’ perspective and the suppliers’ is striking. This may well be because the customer is highly focused on the end-user service, and not on the mechanics of how the service delivery is shaped. For the supplier, executing a smooth handover and an efficient re-modelling of the service delivery will be critical.

Chart 5. How common are the following reasons for IT systems disputes?

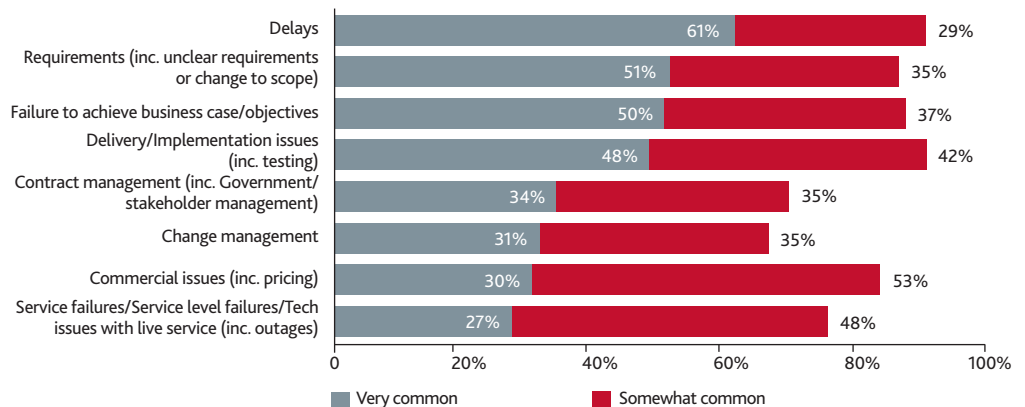
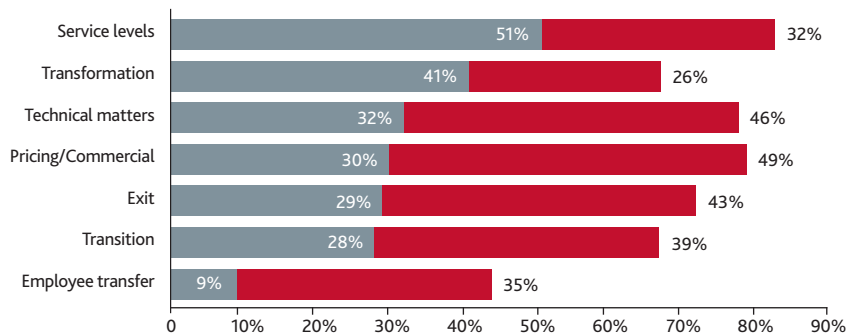


Chart 6. How common are the following reasons for outsourcing disputes?



Reputation management

Companies increasingly recognise the importance of reputation management: how they are perceived and how they respond to threats to their reputation are vital elements of their brand.

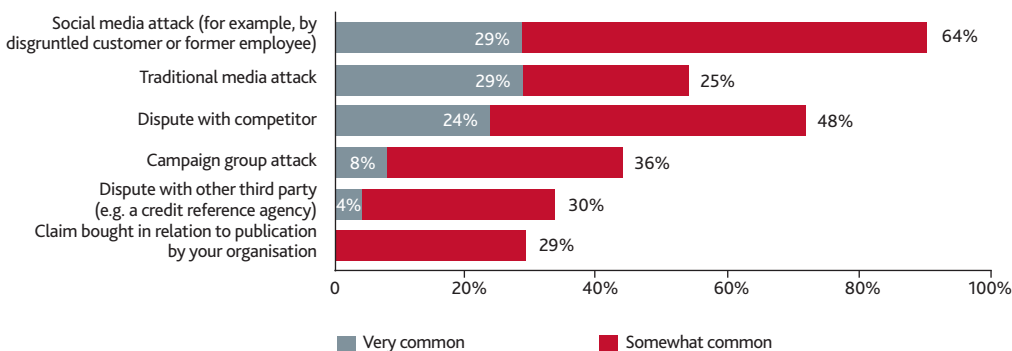
29% thought that social media attack and traditional media attack were very common reasons. Adding the somewhat common responses takes the totals to 93% for social media attack and 54% for traditional media attack (Chart 7).

It might be expected that social media would be a much more common cause of defamation/malicious falsehood disputes than traditional media, as it is easy to publish on-line. However, the impact of the two types of threat may be different. Attacks via social media (by disgruntled customers, for example) may be far more frequent than criticism from the traditional media, but the target organisation may be less likely to take legal steps to challenge the content posted by the social media user. "It is worth taking action?" must be a frequently asked question when businesses are faced with social media issues. Even so, social media attack is clearly an issue for most businesses.



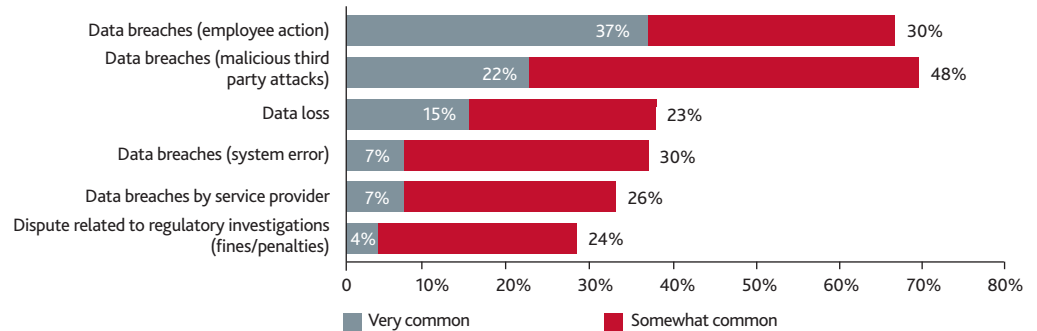
Companies increasingly recognise the importance of reputation management: how they are perceived and how they respond to threats to their reputation are vital elements of their brand

Chart 7. How common are the following reasons for reputation disputes?



Human risk represents the most common cause of data breaches, significantly more than system failures

Chart 8. How common are the following reasons for data breaches?



Data/system breach

In an increasingly connected world, information and data is a highly valuable commodity. With this comes risk: data is an increasingly common cause of TMT disputes. These results indicate that human risk represents the most common cause of data breaches, significantly more than system failures (Chart 8). While this might appear to be welcome news for suppliers, the reality is that weaknesses in IT systems, or their management, make it much easier for individuals to take the actions which cause the breach. So responsibility may remain with the supplier. While malicious third party attacks and disputes related to regulatory investigations are less common, the potential reputational and financial damage may be very significant for a business.

Number and value of TMT disputes

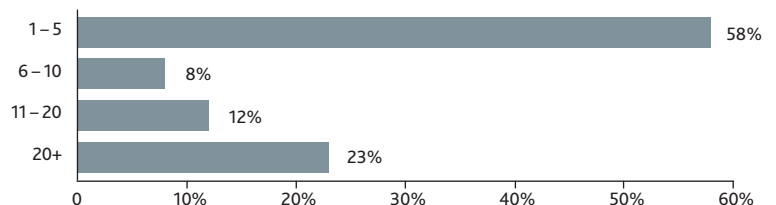
We see the increasing spend and dependency on technology reflected in the size, scale and frequency of TMT disputes. 23% of the in-house lawyer respondents had experienced 20+ TMT disputes (Chart 9).

34% of respondents had been involved in at least one dispute involving a sum in excess of US\$100million. Among respondents the highest value disputes were IT disputes (38% more than \$100m) and IP disputes (37% more than \$100m).

As we might expect, the experience of disputes varies according to the business sector and its cultural norms (Chart 10).

- The Telecoms industry appears to be the most contentious, 71% of respondents had experience of more than 20 disputes and 83% of its respondents said that their largest dispute was at the highest end of the scale (more than \$100m).
- For the IT sector 20% of respondents had experience of more than 20 disputes and 20% of its respondents said that their largest dispute was valued at more than \$100m.
- In the Energy sector, only 8% of respondents had experience of more than 20 disputes. The majority (69%) had experience of only one to five TMT disputes. 23% of its respondents said that their largest dispute was at the highest end of the scale (more than \$100m).

Chart 9. Over the past five years, approximately how many TMT disputes has your organisation been involved in?



This may support the theory that Telecoms disputes tend to relate to the regulated market and business environment, rather than service. As such, we may see more of the 'bet the industry' types of dispute.

Similarly, results varied with geography (Chart 11):

- Asia reported the most experience of disputes: 37% had experience of more than 20 disputes. 25% said that their largest dispute was at the highest end of the scale (more than \$100m).
- 31% of North American respondents had experience of more than 20 disputes, and 38% had experienced a dispute of more than \$100m.
- Europe was similar. 29% had experience of more than 20 disputes – with 41% (the highest proportion of all geographical areas) having experience of a dispute of more than \$100m.

- In Latin America, 14% had experience of more than 20 disputes, and 10% had experienced a dispute of more than \$100m.
- No respondents from the Middle East and North Africa had experienced more than 20 disputes, and 25% had experienced a dispute of more than \$100m.

So it appears that most high-value disputes occur in Europe and North America. There might be many reasons why: relatively mature commercial and legal markets; many multi-national technology companies are headquartered there; and a more litigious business culture.



31% of North American respondents had experience of more than 20 disputes, and 38% had experienced a dispute of more than \$100m

Chart 10. High value and high frequency of disputes in the Telecoms, IT and Energy sectors

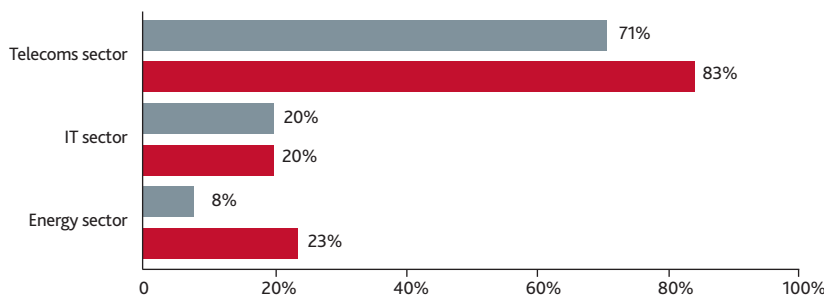


Chart 11. High value and high frequency of disputes by geography

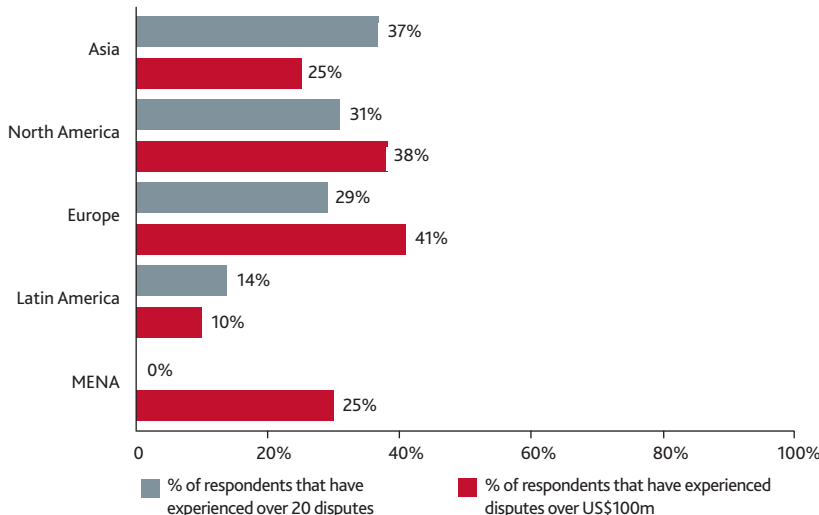


Chart 13. The greatest anticipated increase in the types of TMT dispute



TMT disputes: the future

In an era of fast paced technological innovation, what does the future hold?

Ownership and licensing of technology will continue to be a likely source of disputes: 51% said IP would be the most likely type of dispute in the future, while 44% named licensing.

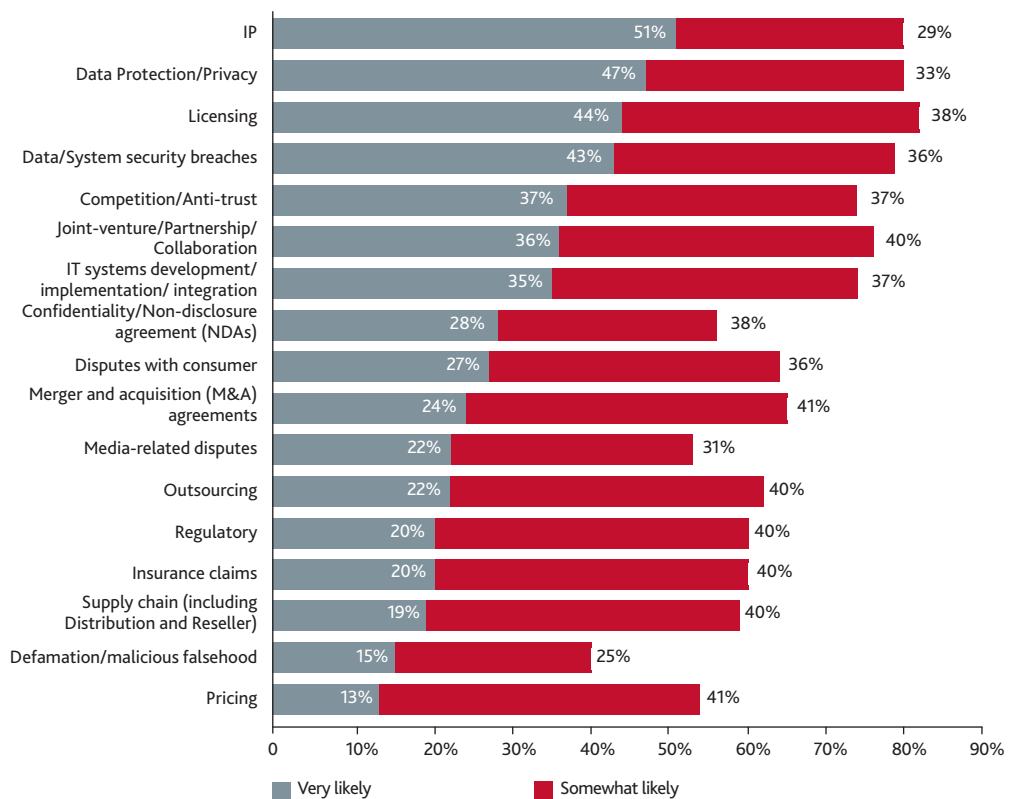
Two potential future trends stand out: more disputes arising from collaboration, and a greater number of data and system security breaches.

Respondents clearly believed that businesses would continue to collaborate, and that this would lead to disputes. 36% of them thought that such disputes were 'very likely' and a further 40% 'somewhat likely'.

As seen in Chart 1, only 9% of respondents had experience of data and system security breaches, and 13% of data protection issues, which appears low. However, the responses strongly suggest that both types of dispute are likely to occur in the future (Chart 12). 79% of respondents identified data/security system breaches as being either 'very likely' or 'somewhat likely' in the next 5 years, and 80% said this for data protection issues. Disputes around pricing and insurance claims are also on the rise (Chart 13).

Clearly, these issues are troubling both suppliers and users of technology. They are a significant risk area, which will need to be managed and mitigated in the future.

Chart 12. In the next five years, how likely are the following types of TMT dispute to arise?





Section 2: In-house dispute resolution policies and preferences

KEY POINTS

- 75% of organisations surveyed had a dispute resolution policy
- Mediation is the most encouraged mechanism (50%), followed by arbitration (47%)
- IT and Telecoms suppliers were less in favour of arbitration, preferring litigation and expert determination respectively
- There is a lack of familiarity with mediation, particularly within civil jurisdictions

The differing nature of dispute resolution mechanisms

Circumstances can dictate the timing and nature of the dispute resolution mechanism threatened or pursued, and using one of them does not necessarily exclude using one or more of the others.

For example, mediation is a widespread mechanism for dispute resolution but it does not have a fixed form and it is not necessarily a final and binding resolution technique as it will depend on the parties reaching agreement. While adjudication does provide a decision which binds the parties, this may be overturned by a Court. Expert determination is often similar, where it is common to provide in contracts that the decision is binding until it is challenged before the Court.

Consequently, parties may progress through mediation and then, if the matter is still unresolved, progress to either litigation or arbitration.

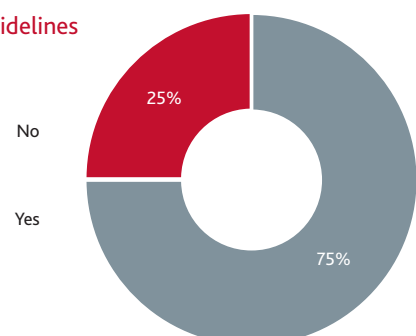
Dispute resolution policies

Dispute resolution (DR) policies take different forms. They may be formal and fully crystallised; or they may be informal, operating more as a recommendation or a basis for negotiation. This is undoubtedly influenced by industry norms, geography and corporate culture.

Across all sectors only 25% of in-house respondents indicated they do not have any kind of DR policy (Chart 14). It may be that many of these organisations have decided not to have one, possibly because they prefer not to impose a standardised process on disputes which are, by their nature, non-standard.

Alternatively, they may simply avoid many contentious situations. Among the 25% who do not have DR written guidelines or policies there is slight consensus that mediation best meets their needs.

Chart 14. Does your organisation have written guidelines or policies for drafting DR clauses in contracts?



DR policies and DR mechanisms

For those in-house respondents who indicated that their organisation had a DR policy we asked what that policy said about different dispute resolution mechanisms. This question relates to disputes in general rather than TMT disputes specifically, as it is likely that organisations have a single generic DR policy.

Chart 15 shows that in DR policies, mediation is the most encouraged form of dispute resolution mechanism, with arbitration following closely behind (50% and 47%, respectively). Litigation was the second least encouraged (32%), and most discouraged (29%).

Responses varied by sector:

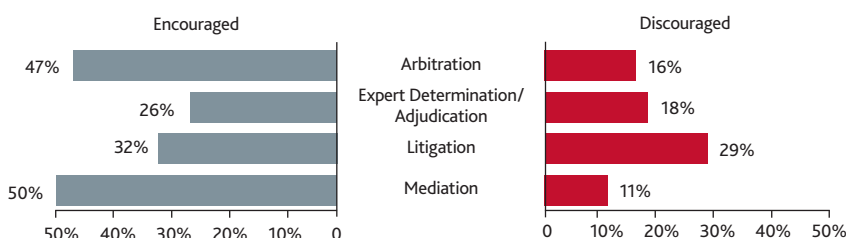
- For Telecoms sector respondents, expert determination/adjudication was the most encouraged method, with mediation and litigation falling jointly behind that. No respondent said that arbitration was positively encouraged.
- In the IT sector, litigation was the most encouraged mechanism (50%). Arbitration scored 27%.
- By contrast, respondents from the Energy, Construction and Manufacturing industries all rated arbitration as the most encouraged DR mechanism.

So, remarkably, we may conclude that IT and Telecoms suppliers encourage litigation over arbitration, but the opposite is true of some of their potential customers. This suggests that when customers and suppliers draw up commercial contracts, the drafting of the dispute resolution clause could be a contentious point.



We may conclude that IT and Telecoms suppliers encourage litigation over arbitration, but the opposite is true of some of their potential customers

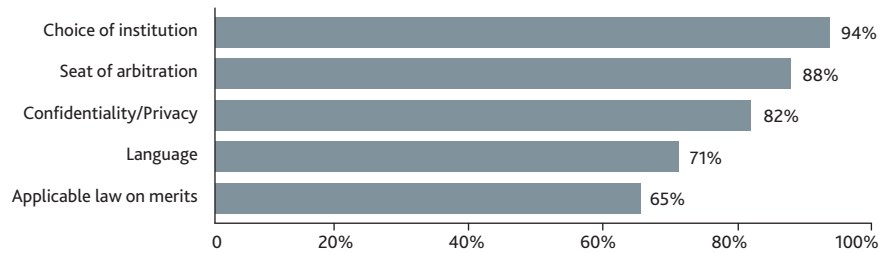
Chart 15. Are the following DR mechanisms encouraged or discouraged by your organisation's DR policy?



"I am a greater believer in mediation: things are not necessarily 'black and white', especially in the international arena: different interests, cultures... mediation has a lot to offer to that effect"

An experienced arbitrator

Chart 16. Which of the following considerations are part of your organisation's DR policy in relation to arbitration?



Factors affecting the choice of arbitration

Where international arbitration is included within a DR policy, respondents generally try to ensure that a basic arbitration provision is included. Typically they use a standard (model) clause.

The five most important factors are highlighted in the Chart 16.

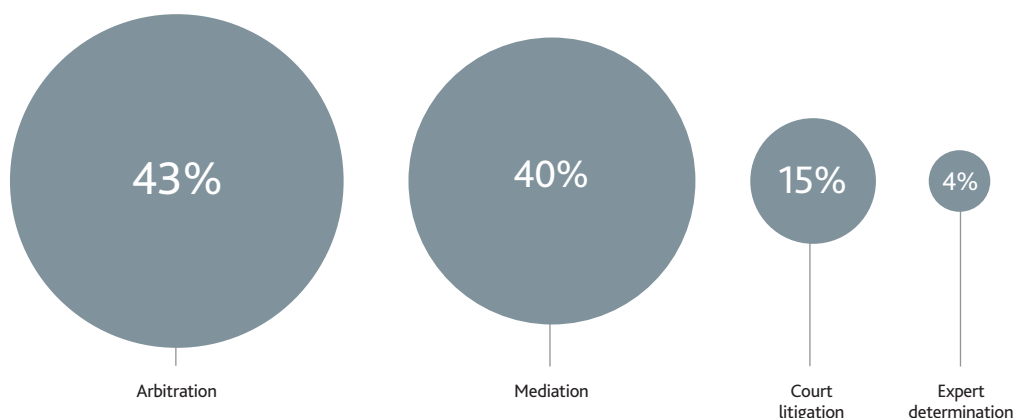
Preferred dispute resolution mechanism

We asked all respondents (not just in-house lawyers) to state their personally preferred dispute resolution mechanism for TMT disputes specifically. This revealed a strong preference for arbitration over litigation (Chart 17).

Thus while in-house DR policies tend to prefer mediation over arbitration, the wider respondents' personal preferences is for arbitration (i.e. when private practitioners and other dispute resolution practitioners are included). In the interviews we conducted we found that people tend to be unfamiliar with mediation – particularly those from a civil law background.

Importantly, there is no common view of what form mediation takes. In some jurisdictions (particularly civil) the process may be more of an evaluative one, with mediators giving opinions on the merits of the case. In other jurisdictions, for example the UK and the US, mediation is essentially a facilitated negotiation. As mentioned above, the lack of binding resolution unless agreement is reached, may also be seen as a disadvantage of mediation. Nevertheless, interviewees acknowledged that mediation is cheaper, less disruptive, can narrow down disputes going forward, and can achieve an early settlement.

Chart 17. Preferred dispute resolution mechanism for TMT disputes (all respondents)





Section 3: TMT disputes: dispute resolution mechanisms in practice

KEY POINTS

- The decision whether to initiate litigation or arbitration is a Board issue
- Arbitration was most preferred, but litigation was the most used
- Decisions are determined primarily by costs and legal merits and the parties' relationship

Having analysed in-house lawyers' views on their dispute resolution policies, and all respondents' personal preferences for dispute resolution mechanism, we then looked at the respondents' actual experiences of dispute resolution mechanisms in practice.

Amicable settlement

We asked: "Over the past five years, what is the approximate percentage of TMT disputes that you or your organisation have managed to settle amicably, through direct negotiation or mediation, (i.e., before litigation, arbitration, or other formal adjudicative proceedings were started)?" The answer was 41%.

Some sectors had a higher success rate: in the Telecoms sector 81% of disputes were resolved by amicable settlement, and in the IT sector it was 78%.

The results suggest that suppliers tend to be reluctant to enter formal dispute resolution. Of the 59% of TMT disputes that were not resolved amicably, 48% were pursued to arbitration, expert determination, adjudication or litigation. However, in the Telecoms sector, only 18% of disputes that were not settled were pursued to arbitration, expert determination, adjudication or litigation. In the IT sector, it was 24%.

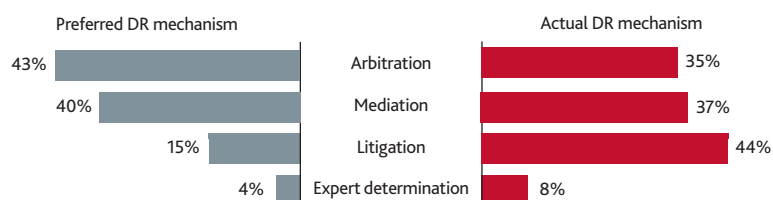
Actual use of different DR mechanisms

One of the most revealing statistics from this year's survey was that although respondents said that arbitration was their preferred mechanism, in reality the mechanism that was most often used over the last five years was litigation (Chart 18).

What are the reasons for this startling difference?

First, international arbitration has become significantly more popular in the last ten years. As many disputes emerge more than five years after the contract is drafted, it is possible that disputes which arose in the last five years may have involved contracts written before this surge, and consequently did not include an arbitration provision within the DR clause.

Chart 18. Preferred and actual dispute resolution mechanisms for TMT disputes



Secondly, it may be that although arbitration is encouraged or preferred, it is not possible to introduce the necessary arbitration provision into the DR clause during the contract negotiation process. The stark difference in attitudes between customers and suppliers identified above (that suppliers are more pro-litigation) may be one reason for this, if suppliers are refusing to accept arbitration.

Thirdly, as we discuss further below, litigation may be the default position, for example for disputes which are not between contracting parties.

Additionally, at the procurement stage when the terms and conditions are being negotiated, the parties may give little or no time to the DR provisions, partly because of time constraints and partly because neither anticipates a major dispute arising. The apparent disconnect between the respondents' preferences for DR and the actual mechanisms used suggests that more attention should be given to this important area when contracts are drafted.

This result also suggests that the parties require greater assurance and confidence in the international arbitration process before their theoretical preference for it can become a reality.

Factors considered before initiation of formal legal proceedings

Given that only a relatively small proportion of TMT disputes ultimately end in formal legal proceedings, it is important to understand the most significant factors driving such a decision. These are set out in Chart 19.

Ease of enforcement (26%) ranks slightly lower than in other business sectors we have surveyed. In our 2013 Industry-focused survey of the Energy, Infrastructure and Financial Services sectors, for example, enforcement was generally ranked in the top three factors.

Who makes the decision to pursue legal proceedings?

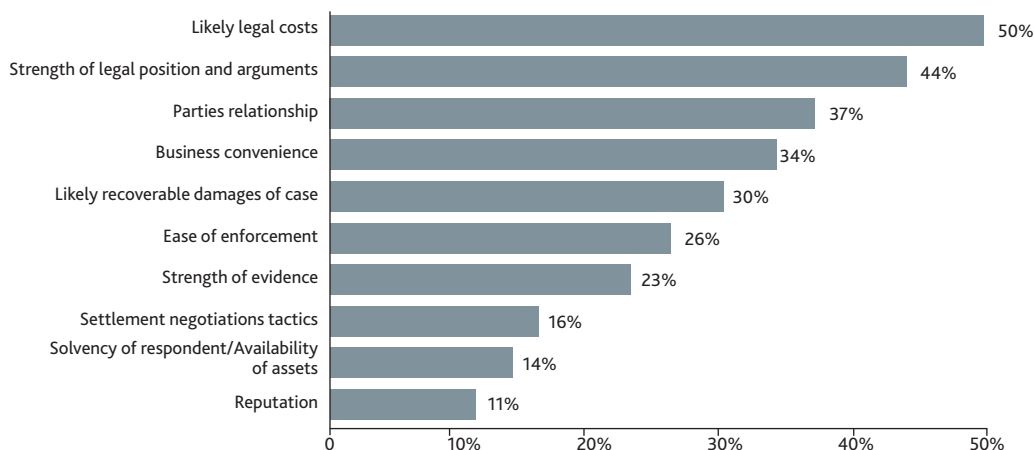
By a very clear margin, the ultimate decision on whether to initiate litigation or arbitration proceedings rests with the Board of Directors, the Senior Executive or the CEO of the Claimant party (57%) with the General Counsel or Head of Legal (36%) as the second most commonly cited option.

This question was answered by in-house lawyers only.



This result suggests that the parties require greater assurance and confidence in the international arbitration process before their theoretical preference for it can become a reality

Chart 19. What are the most significant factors in deciding whether or not to initiate formal proceedings?





Section 4: Suitability of international arbitration for TMT disputes (present and future)

KEY POINTS

- 92% of respondents indicated that international arbitration is well suited for TMT disputes
- Despite some criticisms and acknowledgement of opportunities for improvements, 82% of respondents believe there will be an increase in the use of international arbitration
- The attractive features are: enforceability, the ability to avoid a foreign jurisdiction, expertise of the decision maker and confidentiality/privacy
- There is a desire to use technology to improve the international arbitration process

How effective is international arbitration in resolving TMT disputes, now and in the future?

The survey asked whether respondents thought international arbitration was well suited for TMT disputes, and if so, to what extent. 92%, a striking majority, agreed with the statement *"International arbitration is well suited for TMT disputes"*.

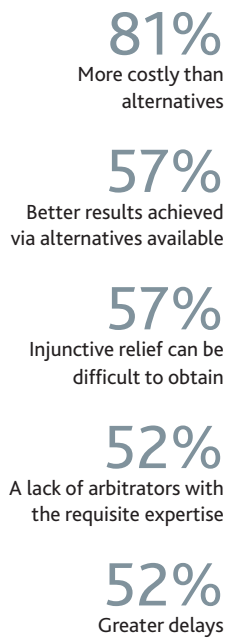
It is salient that, despite the preferences for other types of dispute resolution mechanisms in DR policies indicated by the IT and Telecoms sectors, both sectors indicated that TMT disputes are well suited to the use of international arbitration (73% and 80% respectively).

82% of respondents indicated that it was likely that there will be a general increase in international arbitration to resolve TMT disputes.



92%, a striking majority, agreed with the statement *"International arbitration is well suited for TMT disputes"*

Chart 21.
If international arbitration is not very well suited for TMT disputes, it is because:



“Arbitration brings legal certainty which is not always found in judicial courts”

**Head of Legal,
Oil & gas company**

Why is international arbitration well suited? What makes it attractive?

We asked respondents to say which features of international arbitration make it an appealing mechanism in resolving TMT disputes (Chart 20).

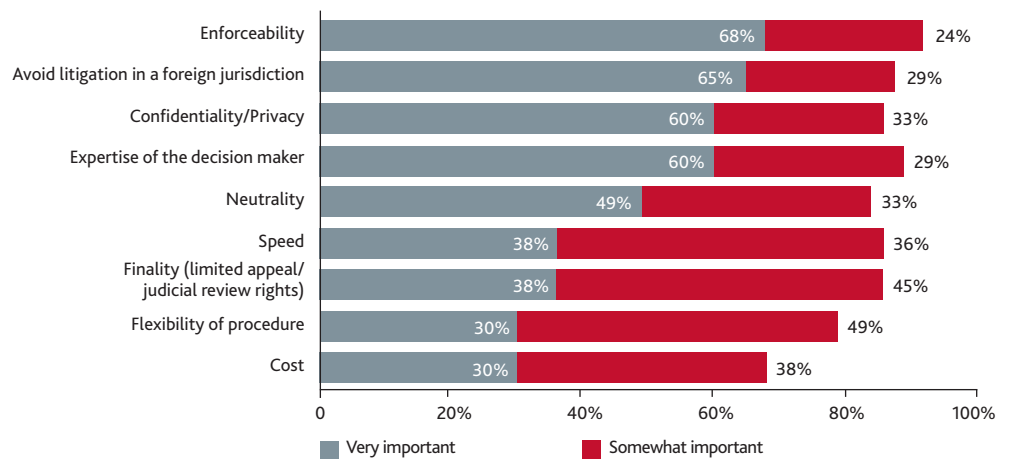
Arbitration was praised by some interviewees as a “go-to” option in TMT disputes. One of the reasons is that such disputes are often complex, and arbitration offers a procedural flexibility that is likely to be unavailable in judicial courts. Interviewees also mentioned confidentiality, and enforceability of the decision in multiple jurisdictions as key advantages.

Investment in IT is usually a strategic business issue for the customer, in which suppliers gain detailed knowledge of the customer’s business strategy and procedures. Customers will want to ensure, as best they can, that this information remains confidential and away from any public hearing.

As TMT contracts and supply chains become increasingly international, multi-jurisdictional disputes are likely to arise, and therefore the need for instruments (or tools) that facilitate enforcement in foreign jurisdictions becomes more critical. Enforcement is of course a huge advantage of international arbitration as a result of the 1958 New York Convention. Being able to adopt a common process and forum for dispute resolution whichever jurisdiction is the source of the issue may well be perceived as a benefit, as will the ability to enforce the award in practically every business jurisdiction.

In relation to enforcement, for those with disputes relating to the UK, Brexit may influence the decision to bring proceedings and the choice of DR mechanism. In an uncertain climate, providing for international arbitration has obvious attractions.

Chart 20. How important are the following features of international arbitration in TMT disputes?



Why is international arbitration not well suited?

We note that a high percentage of respondents (57%) think that injunctive reliefs are difficult to obtain or implement in arbitration (Chart 21). It is common in commercial contracts to provide that the parties are not obliged to follow the DR procedure where emergency relief is required. In this situation, going straight to Court may be preferred. In arbitration, the parties would need to opt for emergency arbitrator procedures (which may not be available depending on the arbitration rules chosen), or the expedited formation of tribunals, all of which may take longer than applying to Court. We also expect that the market will demand improved emergency arbitration procedures, so that international arbitration can offer injunctive relief similar to national Courts.

The statement proposed in the survey that *"most TMT disputes are, by operation of law or regulation, not capable of resolution,"* was not strongly supported by the respondents. It may be that the term "most" has influenced the respondents. Many of the types of dispute that were identified as common (Chart 1) are all primarily non-contractual matters (i.e. IP, competition, data protection, data security), which might involve, for example, the national competition authority or industry regulator. It is difficult to see how such disputes could be resolved via arbitration since this mechanism must be agreed between the parties. If the relationship is not created or governed by a contract, then litigation will almost certainly be the default dispute resolution mechanism.

Complaints regarding international arbitration have largely been connected to costs, delays and the arbitrators' behaviour. Some interviewees suggested that arbitration should go back to where it started and not mimic the same *"tricks"* of litigation. There was some scepticism about how arbitration will develop in the near future. In addition, there were suggestions that arbitration proceedings should be less *"judicialised"*.

A key change demanded by respondents was for more specialised arbitrators, in particular with TMT expertise, and a need for greater confidence in the capabilities of arbitrators.

When asked about the future, 87% of respondents thought that it was likely that there would be an increased specialism of arbitrators to deal with TMT disputes in the next 10 years.

38%

Arbitrators tend to "split the baby"

24%

Arbitration does not contribute to the development of the law

19%

Arbitration does not create precedent

19%

Specialised judicial courts are better

19%

Most TMT disputes are not capable of resolution by arbitration

5%

Higher damages in litigation

Chart 22.
What changes would make international arbitration more attractive/better suited for TMT disputes?

58%
 Lower costs

43%
 Neutral system for the accreditation of specialist arbitrators

42%
 Creation of specialised rosters of arbitrators for TMT disputes

40%
 Appointment of more industry experts

34%
 Creation of specialised arbitration rules

34%
 Use of ODR

26%
 Rules and guidelines regulating conduct

Improving international arbitration

We asked respondents what changes might make international arbitration a more appealing option (Chart 22).

Unsurprisingly, lower costs took the lead, in keeping with the answers to the previous question. Interviewees suggested a variety of ways to reduce costs:

- Use of technology
- Better disclosure processes
- Having more robust arbitrators who can manage the processes without being concerned of challenge by one of the parties
- Permitting only limited evidence
- Submissions with page limits and a more focused structure
- Limited cross-examination
- Arbitrators highlighting the format of the hearing at the outset and committing to a schedule for delivery of the Award

Respondents also said that it is critical to develop policies, technology and human-based tools which encourage the use of ADR.

The second most important group of suggestions was those connected to arbitrators' abilities, with a focus on increased specialisation. These included: "the creation of a neutral system for the accreditation of arbitrators specialising in TMT disputes" (43%); "specialised roster of arbitrators" (41%); and "the appointment of more industry experts" (40%).

It is clear that there are real concerns that it is challenging to appoint arbitrators with sufficient expertise in TMT matters. Interviewees expressed a desire for more industry-expert arbitrators as opposed to the "usual suspects". Some interviewees confirmed that a roster would be welcomed, especially for highly technical disputes.

Interviewees also said that they would welcome less "due process paranoia," and highlighted a need for better disclosure of an arbitrator's track record in similar matters. Particularly in the area of information technology and outsourcing services disputes, respondents cited a need for arbitrator candidates to have greater expertise in the subject at issue.

Another point addressed by interviewees is the level of engagement between arbitral institutions and TMT players. One person said that "There is still a sense of unfamiliarity from the TMT users' perspectives towards arbitral institutions."

The root of the respondents' concerns seems to be the arbitrator's performance. Specific criticisms included lenience towards one party, fear of being unjust, and unwillingness to make the proceedings move forward. Respondents also criticised arbitrators for lack of proactivity and control of case management, in some cases.

When asked how to improve the process, respondents suggested that arbitrators should be more aware of their role, more active in case management, and less inclined to think of arbitration as a "transition to sophisticated litigation". They also recommended giving arbitrators the power to enforce deadlines agreed by the parties, and suggested that more time should be spent on the merits of the case rather than on procedural aspects.

Lastly, respondents said that they would welcome a shift towards more "professionalisation" of arbitration, including transparency, accreditation of neutrals, and institutions being more active about the appointment of neutrals.

What role does technology play in international arbitration?

Almost all businesses and industries have changed with the use of technology. As the survey was aimed at respondents with experience of supplying or using technology, it was a good opportunity to investigate the use of technology in international arbitration. First, we asked respondents for their views on online dispute resolution (ODR) tools.

63% of all respondents expected an increase in the use of ODR in TMT disputes in the next ten years. In the EU, the Directive on Consumer ADR and the Regulation on Consumer ODR are now driving forward the use of ODR in the consumer context, particularly for cross-border matters. Similarly, in Canada, and in particular British Columbia, there is the Civil Resolution Tribunal, which is the world’s first government-sponsored ODR forum.

Similar initiatives are being progressed in many other jurisdictions. ODR has arrived, and we anticipate widespread adoption in the

future.

Technology tackling the challenges of international arbitration

We found that respondents do believe that technology can influence international dispute resolution, largely by making the process more efficient and by helping to avoid unnecessary and costly delays (Chart 23).

Two answers stood out in particular: *“more efficient e-disclosure and document review”* and *“e-case management/resolution software”*. Adopting e-tools may well help too: 45% of respondents thought that ODR mechanisms could improve international dispute resolution.

The answers may also indicate a desire for a move to virtual arbitral hearings and an opportunity for innovation in arbitration.

24%

Creation of specialised arbitration institutions

22%

Award review structure

21%

Feedback and rating of the arbitration experience

19%

Disciplinary procedure and code of ethics

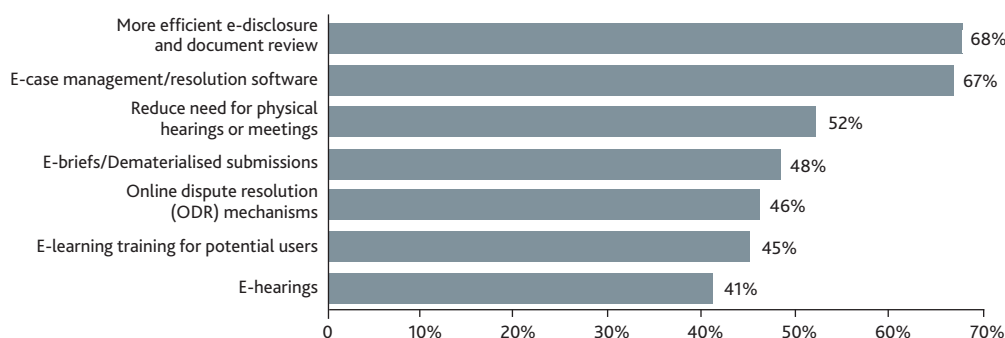
19%

Rules and guidelines regulating the conduct of party representatives

11%

Arbitrators appointed exclusively by the Arbitration institution

Chart 23. How can technology improve international arbitration?





Section 5: Choosing the players

KEY POINTS

- Expertise in the arbitral process and technical knowledge of the industry are both important to selecting external counsel and arbitrators
- Geography is a determining factor both in selecting the institution and in appointing counsel in the same jurisdiction as the contract governing law
- The most used institutions for TMT disputes are: ICC, WIPO Center, LCIA and SIAC. WIPO is more favoured in relation to IP matters

Counsel: how are they chosen in a TMT arbitration?

80% of respondents' organisations have a panel of pre-approved or preferred law firms. 39% will frequently use panel firms for TMT arbitrations. 22% always will.

Attributes of a TMT counsel

We asked respondents to indicate the most important attributes of an outside counsel for TMT disputes. Chart 24 summarises the most important factors identified.

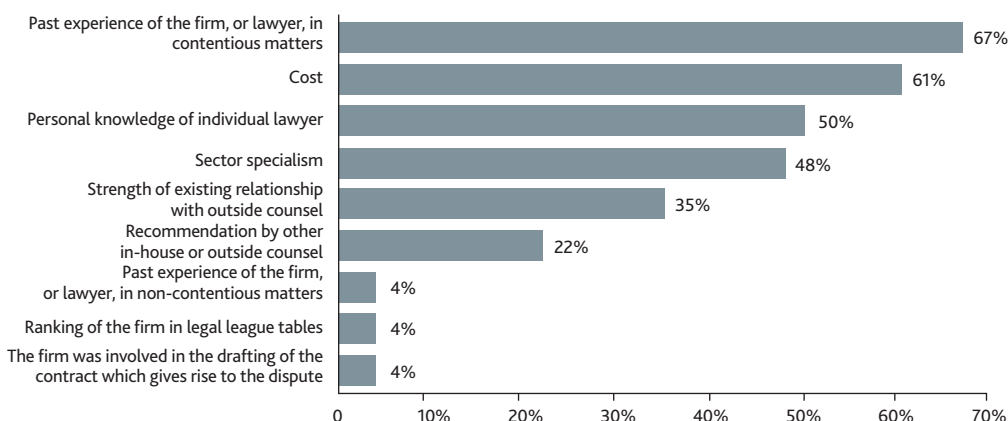
We also asked whether expertise in the arbitral process or technical knowledge of the industry sector were more important. The scores were close: 54% for expertise in the arbitral process and 46% for technical

knowledge of your industry sector. Interviewees confirmed that a good balance between arbitral experience and subject matter expertise is key.

There were some notable sector variations where technical knowledge was valued above arbitral experience. In the Telecoms sector, 60% thought that technical knowledge was more important than expertise in the arbitral process.

In the Telecoms sector, 60% thought that technical knowledge was more important than expertise in the arbitral process

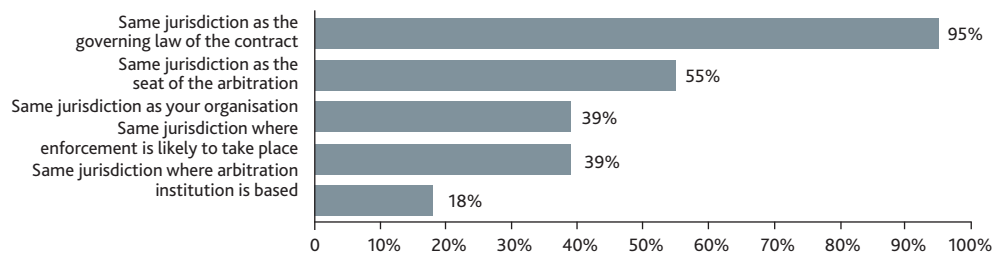
Chart 24. What are the most important factors when selecting outside counsel?



"In TMT disputes we tend to go for the 'black-belt' arbitrators"

Former General Counsel (Technology sector), experienced arbitration counsel

Chart 25. What are the most important factors influencing your choice for the location of outside counsel?



To what extent does location matter?

A striking majority of respondents said that it is absolutely key for counsel to be located in the same jurisdiction as the governing law of the contract (Chart 25). When entering into contracts it is worth factoring this into consideration of how an issue or dispute would be handled should relations between the parties deteriorate.

New technology may change these perceptions in the future, particularly the use of ODR or virtual arbitration hearings.

Arbitrators: how are they chosen in a TMT arbitration?

Respondents were asked to indicate the three most important factors in nominating an arbitrator (Chart 26). Knowledge of the subject matter scored higher than knowledge of the arbitral process.

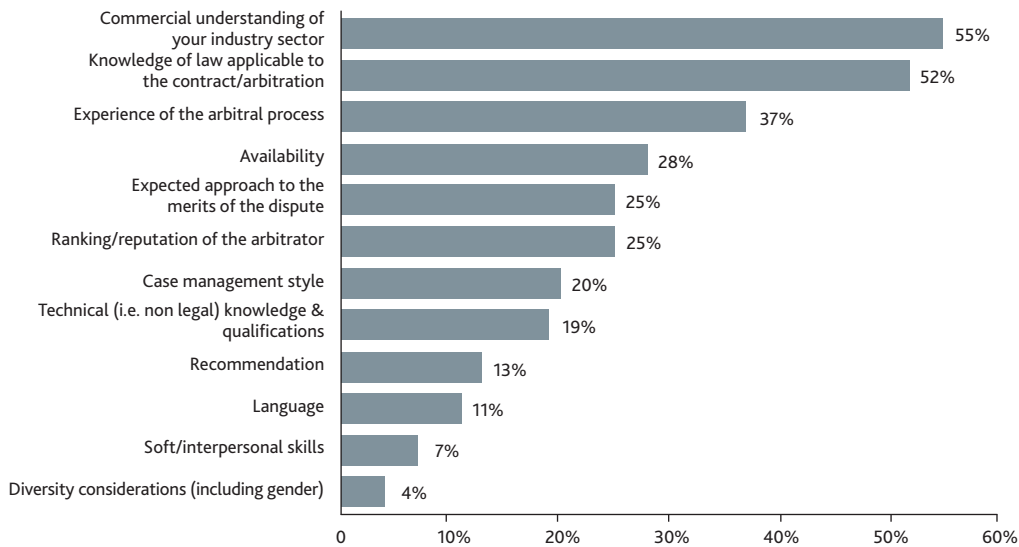
While there is a desire for specialists, in reality arbitrators are selected based on their arbitration experience, and are not always experts in the subject matter. Those with the benefit of first hand experience of arbitration said that parties need to take greater care to ensure that the arbitrator or some of the tribunal members have sufficient knowledge and expertise to understand the facts within the business context. Some people called for increased transparency as well: revealing not only the expertise and caseload of the arbitrator, but also the results of actual international arbitrations.

This is a reason why trade practitioners would be welcomed.

It is worth noting that diversity considerations and soft/interpersonal skills were rated as the lowest considerations, with 4% and 6%, respectively. However, in the interviews some people did mention the need to draw users' attention to a pledge for more diversity in arbitration.

The interviews provided an opportunity to gain unfiltered feedback. Some interviewees complained strongly that arbitrators do not use their managerial powers where possible. One said: *"We look for an arbitrator who has a firm wrist, able to say 'no' to a party fearlessly."*

Similar phrases came up repeatedly: *"split the baby"*, *"due process paranoia"*, and *"broken wing syndrome"* – all regarding the arbitrator's behaviours towards parties, including the fear of being challenged and the inclination towards being "pleasant to parties" rather than reaching a merited decision. When these respondents were asked to elaborate further on the underlying reasons for this behaviour, some said that arbitrators *"tend to be more concerned about getting the next appointment"*.

Chart 26. What are the most important factors influencing your choice of arbitrator?

Some said that arbitrators “tend to be more concerned about getting the next appointment”

Arbitration institutions: which arbitration institutions are used the most?

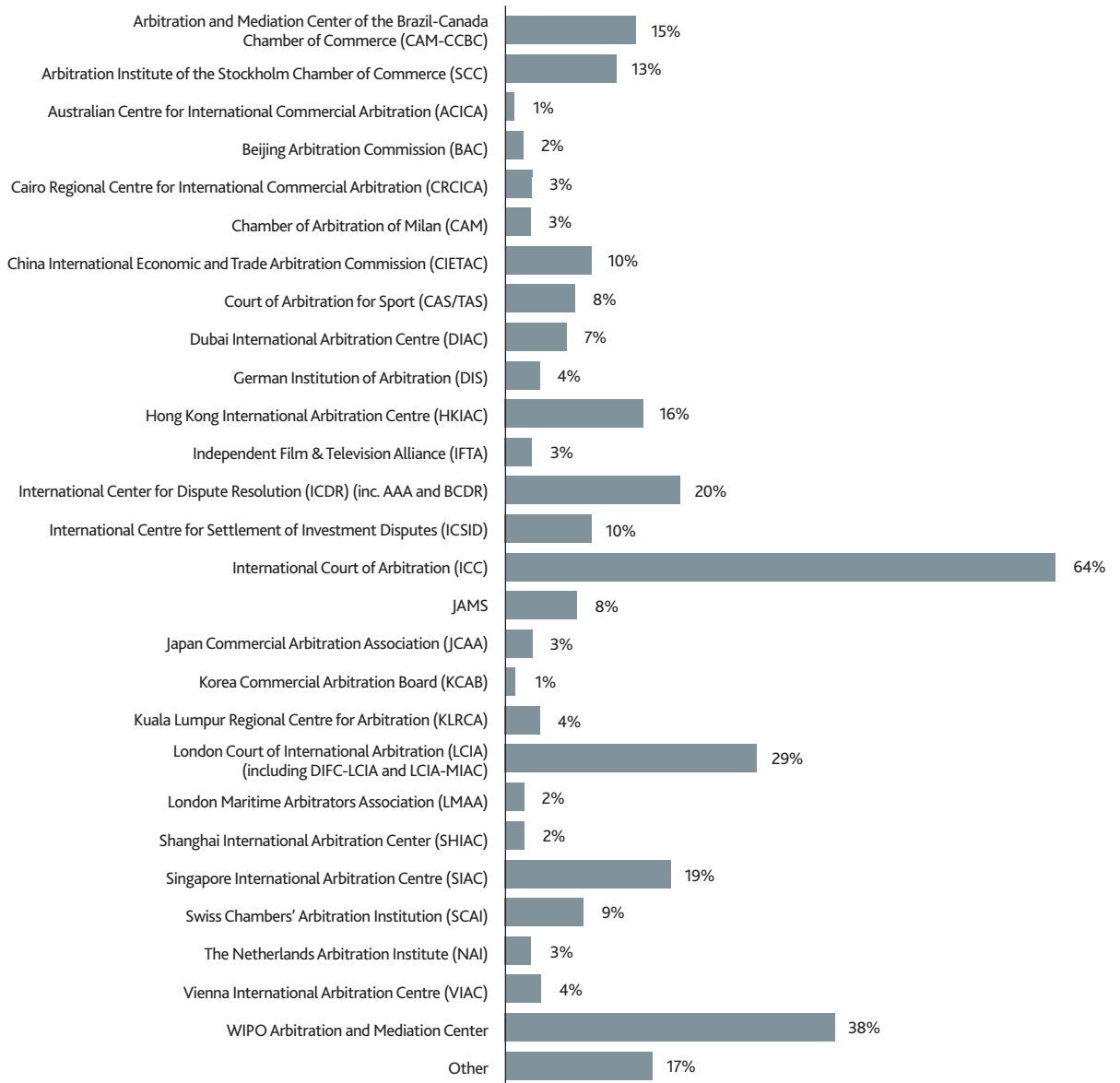
The most used institutions for TMT disputes are the International Court of Arbitration (ICC), the WIPO Arbitration and Mediation Center (WIPO Center), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) and the Singapore International Arbitration Centre (SIAC) (Chart 27).

An examination of the responses from respondents who had experience of IP disputes put ICC at 59% and the WIPO Center close behind at 55%. Thus, the WIPO Center understandably remains a popular forum for IP disputes.

Geography is inevitably important. Looking at different institutions experienced in the last five years, split by the location of the respondent, we find the following:

- The most frequently experienced institution for US-based respondents was the ICDR (55%)
- For EU based respondents the ICC came highest with 74%
- In the Middle East North Africa it was also the ICC with 67%
- For Asia it was close between SIAC (67%) and the ICC (61%)
- For Latin America the ICC and the Arbitration and Mediation Center of the Brazil-Canada Chamber of Commerce (CAM- CCBC) came out joint top with 61%

Chart 27. Which of the following arbitration institutions, or types of arbitration, have you or your organisation used in the past 5 years for TMT disputes?



Are any arbitration institutions preferred?

The majority of respondents did not indicate a preferred arbitration institution (58%) and did not seem to be entirely convinced that any

particular institution is more suited to TMT disputes. Of those that expressed a preference for an institution, the top three were WIPO (11%), ICC (9%) and LCIA (6%).

Appendices

Methodology

The research for this study was conducted from March to July 2016 by Gustavo Moser, LLB, LLM (UFRGS), PhD Candidate (Basel) and Pinsent Masons Research Fellow, School of International Arbitration, Queen Mary, University of London, together with Professor Loukas Mistelis, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration; and Director, School of International Arbitration, Queen Mary, University of London.

The other academic members of the School of International Arbitration have provided generous support through feedback in the questionnaire design. Support was provided by Pinsent Masons transactional and disputes lawyers.

An external focus group comprising senior in-house counsel, senior representatives of arbitral institutions, academics, and arbitrators provided comments on the draft questionnaire.

The research was conducted in two phases: the first quantitative and the second qualitative.

Phase 1

An online questionnaire of 55 questions was completed by 343 respondents between 18 May 2016 and 31 July 2016. The survey sought the views of a wide variety of stakeholders in the resolution of TMT disputes.

The respondent group was made up as shown in Chart 28.

The respondents came from civil law (42%) and common law (32%), with 21% of the respondents combining both legal families.

The respondents' regions of operation were spread around the world, as shown in Chart 29.

Chart 28. What is your primary role?

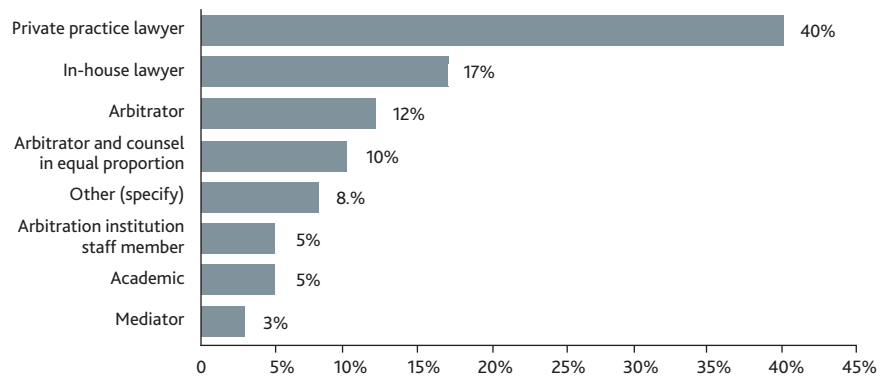
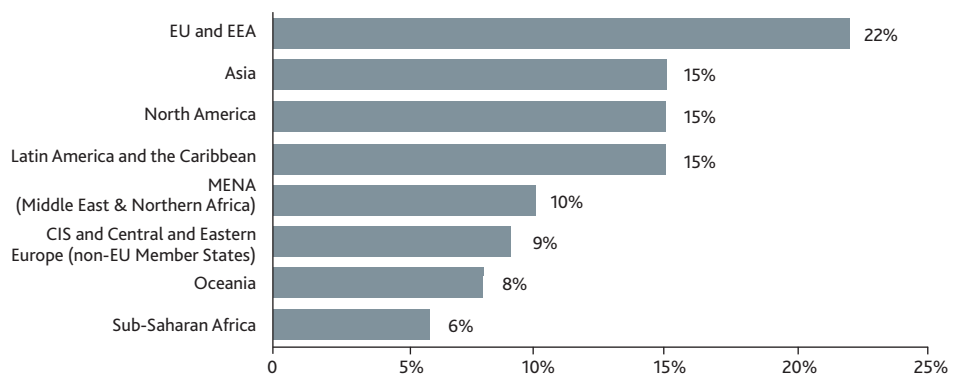


Chart 29. In which geographic regions does your organisation operate?



The majority of the respondent companies had a gross annual turnover of more than US\$500million (Chart 30).

The overwhelming majority of the respondent companies had a dedicated legal department (86%). This corroborates the data where the majority of the respondent companies (66%) had stated to be over US\$500million in size.

The majority of the respondent companies had a disputes team or department (55%), however a non-negligible number of the respondent companies also did not have one (45%).

As shown in Chart 31, the input provided by the respondents came from a wide range of industry sectors.

Phase 2

62 face-to-face or telephone interviews ranging from 15 to 120 minutes were conducted between 5 June 2016 and 3 August 2016. Interviewees were drawn from a diverse group based on seniority, gender, and experience in international arbitration. Respondents from all continents (excluding Antarctica) were interviewed.

The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, to contextualise and explain the findings, and to cast further light on particular issues raised by the survey.

Chart 30. What is the size of your organisation (by gross turnover per year)?

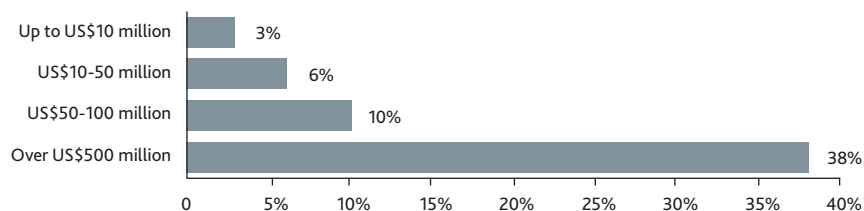
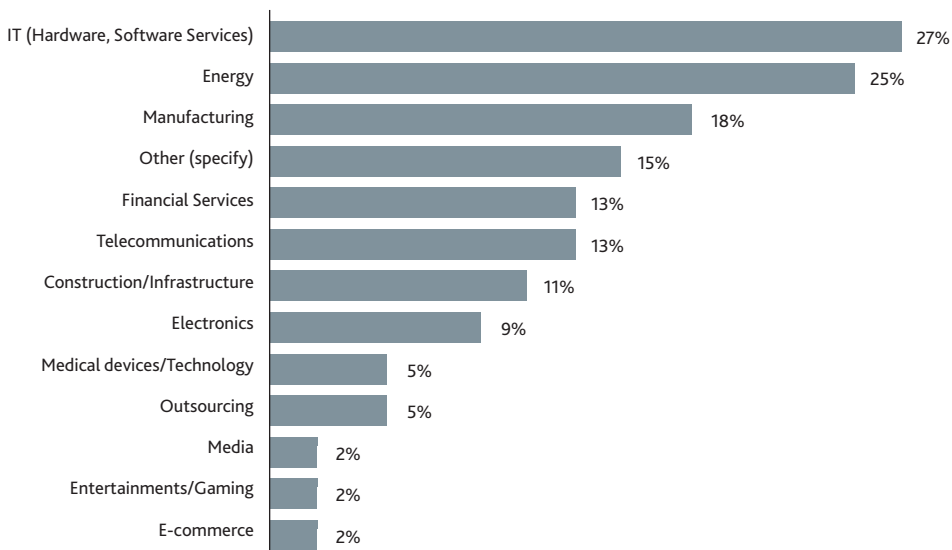


Chart 31. What is your organisation's primary industry sector?



School of International Arbitration, Queen Mary, University of London

It is 32 years since the School of International Arbitration was established under the auspices of the Centre for Commercial Law Studies, Queen Mary University of London.

Its aim was, and remains today, to promote advanced teaching and research in the area of international arbitration and international dispute resolution generally. To achieve these objectives, the School offers a wide range of international arbitration courses including specialist LLM modules, postgraduate diplomas, professional courses and training, and one of the largest specialist PhD programmes in the world. Today the School is widely acknowledged as the world's leading postgraduate teaching and research centre on international arbitration.

Since its establishment, over 3,000 students from more than 100 countries have graduated from the School, and 30 PhD students have successfully completed their doctoral studies there. Many of our graduates are now successfully practising arbitration around the world as advocates, in-house counsel, academics, and arbitrators. Others serve international organisations, including UNCITRAL and the World Bank, or work for major arbitration institutions.

From one academic member at the outset, the School now has three full teaching professors, three senior lecturers, a strong network of part-time and visiting academic members, and campuses in London and Paris. In addition to its academic staff, the School involves high-profile practitioners in its teaching programmes. This adds crucial practical experience to academic knowledge and analysis.

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We work with General Counsel and Boards to inform and enable their business strategies in competitive markets where technology has become ever more key to success. We represent companies, financial institutions and governments as they embark on ambitious new ventures and tackle technology challenges, failings and conflict that become business critical issues. Our sector-leading skills and technology experience are invaluable in developing solutions to ensure our clients can realise their business objectives, manage risks, protect their reputation, and resolve issues swiftly. We are specialists in large, complex international disputes and arbitrations.

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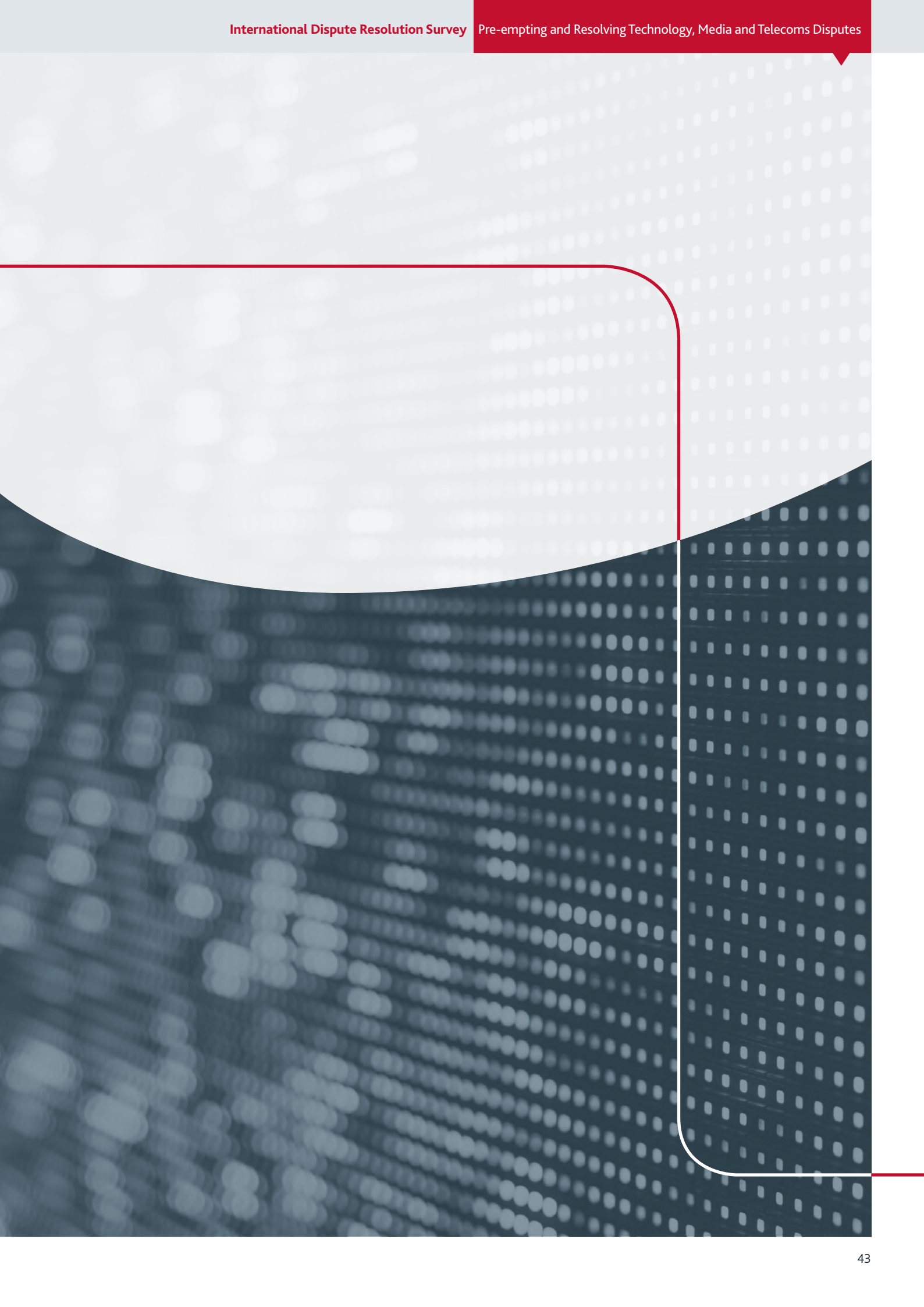
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