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Technology Transformation

Drive innovation, mitigate the risks

November 2024

Contents

Read **Technology Transformation: Drive innovation, mitigate the risks** online at cms.law

Introduction

In 2024 we conducted a survey of over 500 international businesses. We wanted to understand how their approach to managing technology risk may have changed since our Technology Transformation report of 2022.

In 2022, we had asked GCs, senior in-house counsel and risk managers about their experiences and expectations relating to the use of new technologies. What were the principal drivers for their organisation in the adoption of business-critical technology? Did they have confidence in their management's understanding of the risks associated with new technologies and the measures taken to mitigate those risks? Where did they see the greatest potential for disputes and how did they believe such disputes would be resolved?

We focused on sectors which are large-scale adopters of new forms of technology, including all subsets of AI (such as machine learning and generative AI): Consumer & Retail, Financial Services, Life Sciences & Healthcare, Media and Energy.

The results were eye-opening. Respondents believed that the appetite for investment in technology would accelerate, and indeed implementation of new technologies was a sheer necessity for their businesses. By the same token, they appreciated the risks connected with new technologies. However, they largely conceded that they did not have all the necessary systems in place to deal with those risks and they recognised the need to establish and regularly update those systems. They viewed AI as one of the main drivers for future technology-related disputes.

Two years later we asked ourselves:

Has the landscape changed?

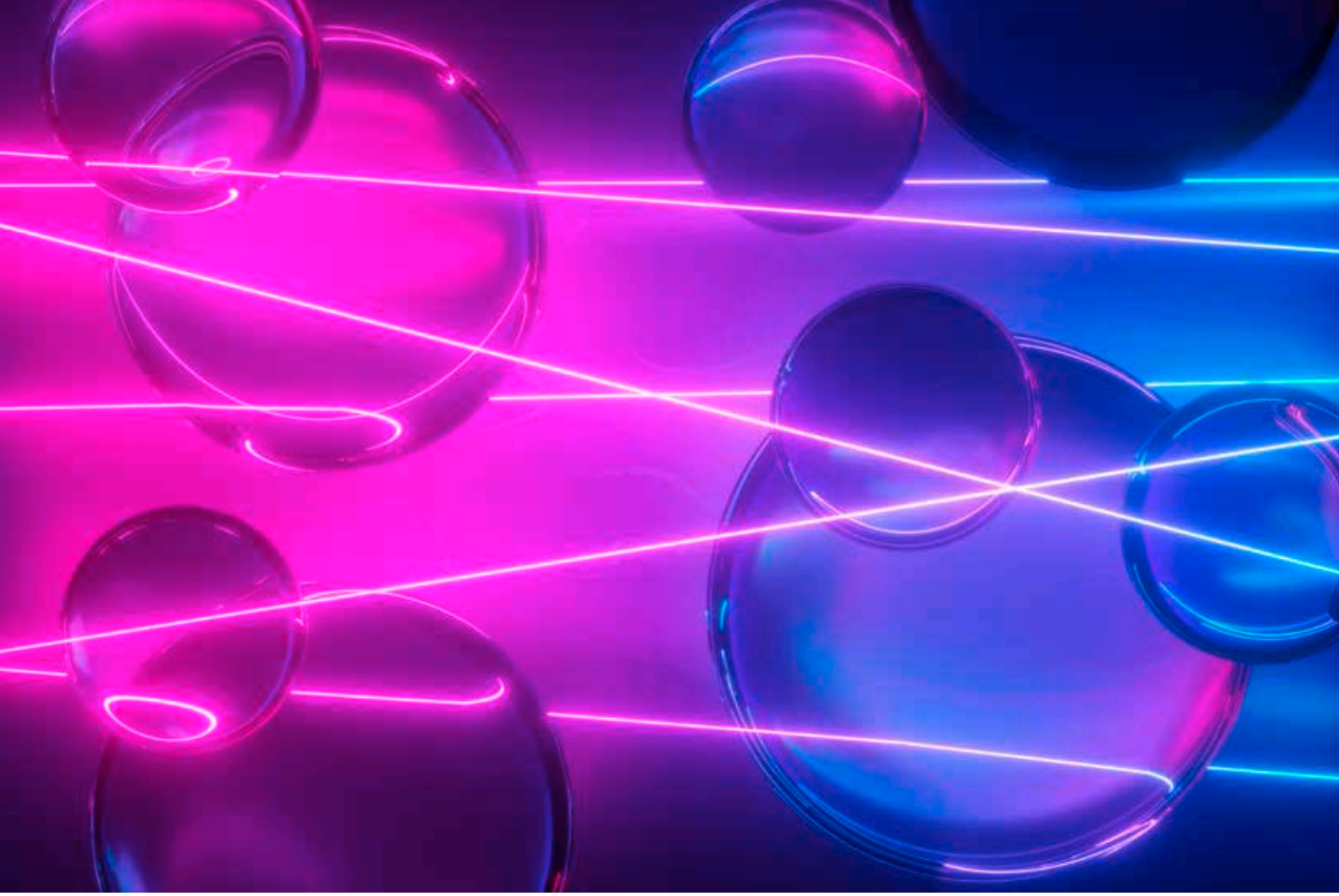
Are there new drivers for the implementation of new technologies?

Are new risks emerging?

Were our respondents right in predicting that the use of AI would evolve as one major source of disputes?

In 2022, businesses were just starting to deploy AI (in particular generative AI) in their operations on a larger scale. Two years later, the use of AI had intensified around the globe and there would be more data to confirm or disprove the assumptions of 2022.

This led us to repeat and refresh our survey. The answers we received revealed some very interesting new findings. They form the basis of the 2nd edition of CMS's Technology Transformation report, which we are happy to share with you. We hope you will enjoy reading and analysing the material we collected. We would be keen to learn whether the results and analysis match your experience and expectations.



Key findings

The results from our survey are, in some respects, quite different from what we expected.

A more pragmatic approach for the drivers of new technology

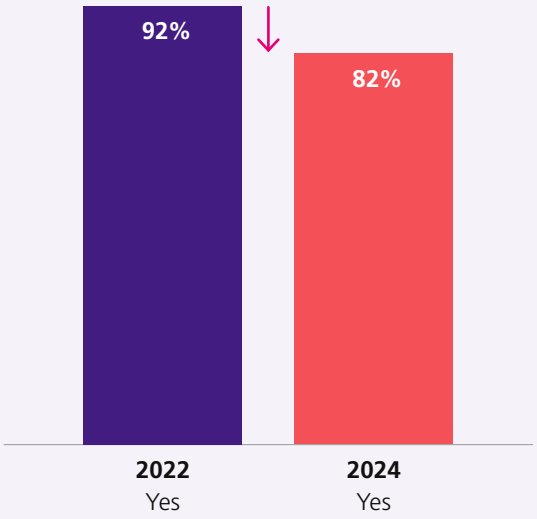
In a world where cyber breaches are in the news on a daily basis, data management and security has risen sharply as a main driver for the adoption of new technology. In addition, supplier demands have surged. Together with customer demands, which were already identified as one of the key drivers in 2022, it can be deduced that practical concerns like the threat of cyber attacks and the pressures of market forces have replaced more general aspects such as enthusiasm to try out something new.

Concerns grow, confidence drops, lack of countermeasures even increases

In line with this, concern over emerging technology risks has persisted. Interestingly, confidence in management to deal with these challenges has dropped, highlighting a growing disquiet regarding senior executives' understanding of the risks associated with current technologies (there has been a 10% decrease in respondents stating that senior executives understand these risks extremely or somewhat well).

Figure 1.

Confidence in senior executives' ability to manage risks associated with current technology has fallen



Q: Do senior executives in your business understand your company's current areas of technology risk and the primary risks associated with the adoption of new technologies well?

We expected that in response to growing concerns, organisations would have increased their risk management processes. But the contrary is true. Almost all processes to manage risks have reduced to some extent since 2022. What is the reason for this? Are there budgetary constraints preventing organisations making the necessary investment, is there a lack of appreciation of the level of risk management in place, or are organisations increasingly willing to take greater risks? Our report reveals that this is not just about money. It is about the lack of time and skills.

AI disputes: The unwanted guest to the party – still expected but yet to arrive

When it comes to the subject matter of disputes, respondents' expectations from 2022 regarding an increase in the number of AI-related disputes have not yet been realised. The actual number of disputes arising from the use of AI is low. Interestingly, this does not seem to have any impact on expectation. AI disputes are still considered likely to be one of the main areas of technology dispute in the coming years. In fact, the number of respondents anticipating an increase in disputes arising from the use of AI has grown by 3%, despite the relative lack of actual disputes of this nature. In particular, respondents expect AI disputes relating to IP, breach of business secrets, product liability and data protection issues.

Whilst compliance/regulatory disputes appear to be the most frequent area of current dispute (topping the list of respondents' three most likely sources of technology dispute in the past three years), respondents do not expect an imminent increase in these disputes. These disputes are last on the list of respondents' anticipated sources of dispute for the next three years.

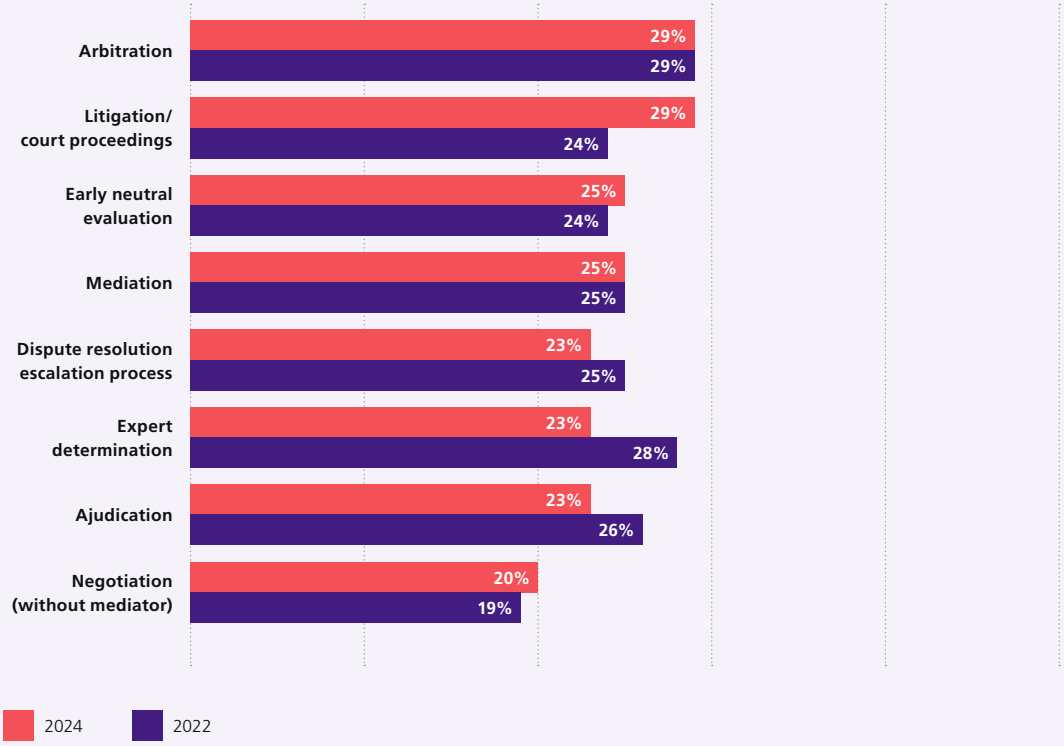
> *In view of these survey results, businesses should also invest in their people, to their continuous development and to empower them to face the technological challenges of the future. Operation of even more complex systems safely will be down to the expertise and capacity, and also risk awareness of the team members. The price for not taking appropriate measures will be higher than the cost of investment in people if critical technology fails and no proper management systems are in place with well-trained people to apply them.*
>
> **Dora Petranyi, Partner, TMC**

The renaissance of state court litigation

Confidence in state courts has increased. In 2022, 24% of respondents ranked court litigation in their top two favoured dispute resolution processes, well behind arbitration on 29%. The two are now equally favoured, with both on 29%.

Figure 2.

Arbitration and litigation are now equally favoured



Q: Which of the following methods do you prefer to use to resolve technology-related disputes?
Answers ranked in the top 2.

We deal with these key findings and more over the following pages.

Perception and reality of technology risks

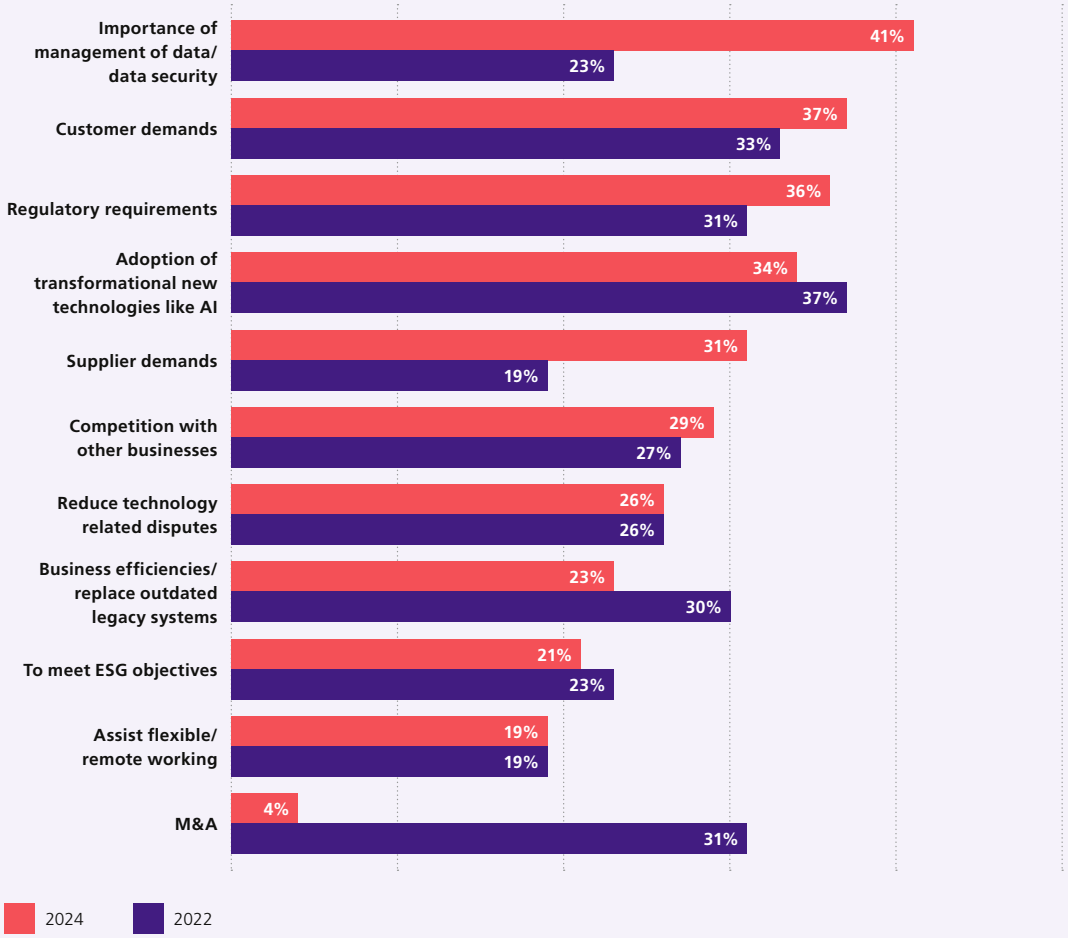
A change in the drivers for adoption of business-critical technologies?

In 2022, the leading driver of business-critical technology adoption cited by survey respondents was access to emerging technologies such as AI, with 37% of respondents ranking it in their top three drivers. Notwithstanding the continued growth of AI, only 34% of respondents to the 2024 survey placed this in their top three reasons for adopting business-critical technology, ranking it in fourth place.

Instead, in 2024 respondents cited the importance of data management and security as the key reason for adopting business critical technology, with 41% placing it in their top three drivers (jumping to 50% of respondents in APAC), compared to 23% in 2022 (and 22% in APAC). This is not surprising. In 2022, 69% of respondents had adopted (and 30% planned to adopt) tabletop exercises to simulate a cyber breach as part of incident response planning and 54% had adopted (and 46% planned to adopt) an incident response plan to manage breaches. Further, 33% of 2024 respondents cited cyber or other data security disputes in their top three causes of disputes during the past three years, ranking it in third place. This prevalence of cyber and data security disputes and the impact such an incident can have on a business, will likely underlay the drive to acquire new technology to facilitate data security.

Figure 3.

Data management and security emerge as the key drivers to technology adoption

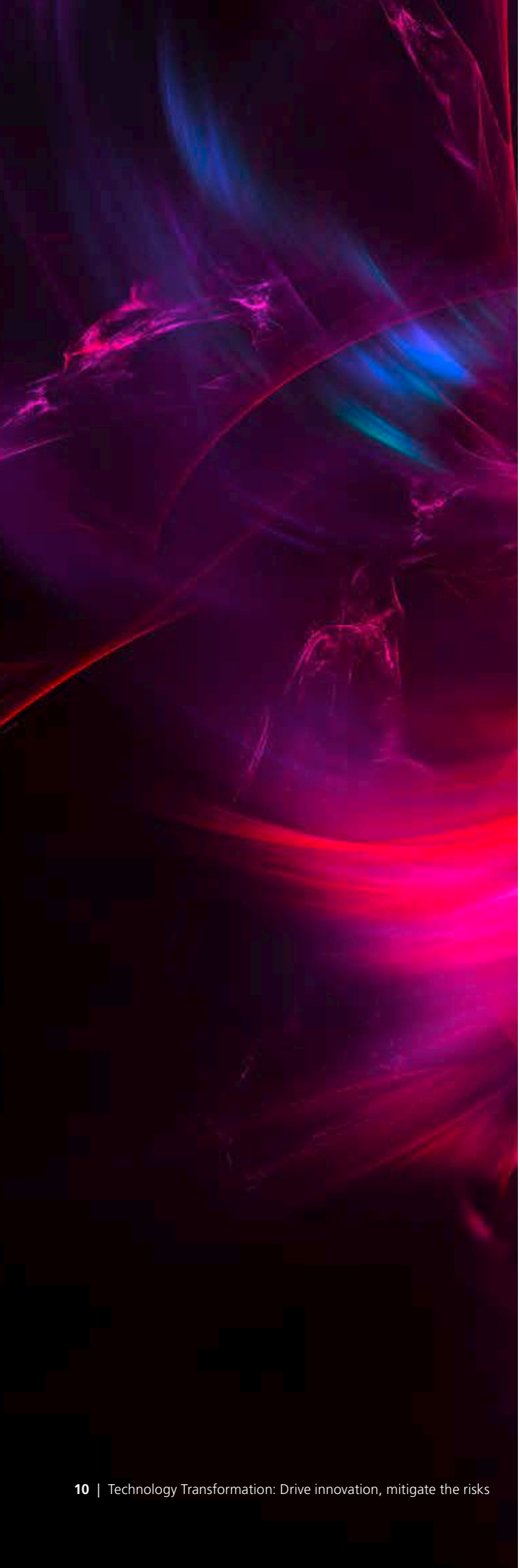


Q: From the perspective of your role, what are the principal drivers in the adoption of business-critical technology?

Answers ranked in the top 3.

Regulatory requirements have also increased as a driver for the adoption of business-critical technology from 31% in 2022 to 36% in 2024, putting it in third place behind data security and customer demands. Again, this is not surprising given that 42% of respondents in 2022 and 35% of 2024 respondents placed compliance and regulatory disputes in their top three sources of technology dispute over the past three years.

The survey results suggest an increase in both supplier and customer demands as a driver for technology adoption. Supplier demands have surged, rising from last place in 2022 (19% ranking it in their top three drivers) to fifth position in 2024 (31%). This increase is especially prominent in both the Financial Services and Consumer & Retail sectors, which have seen a rise from 15% to 41% and 17% to 37% respectively. Respondents also note the increasing importance of customer demands, with 37% identifying them in their top three drivers for technology adoption, up 4% since 2022.



Business efficiencies and the need to replace outdated legacy systems have decreased significantly, falling from 30% in 2022 to 23% in 2024. This perhaps suggests that adoption of technologies over the last two years has to some extent addressed business concerns about the age and suitability of their technology estate.

The increase in the prominence of supplier and customer demands, and the reduction in the need to replace legacy systems, may also indicate an increase in the impact of external market forces on driving change within organisations. In competitive markets, suppliers and (particularly) customers can indirectly influence a business approach to technology adoption, and consequent risk. This will particularly apply where organisations are looking to standardise and automate their business operations to save cost and remain competitive.

One clear change in the drivers for technology adoption is M&A. Two years ago, M&A was the third most important driver, but it has now dropped to the bottom of the list, mirroring a significant decrease in M&A activities.

Concern over emerging technology risks has persisted

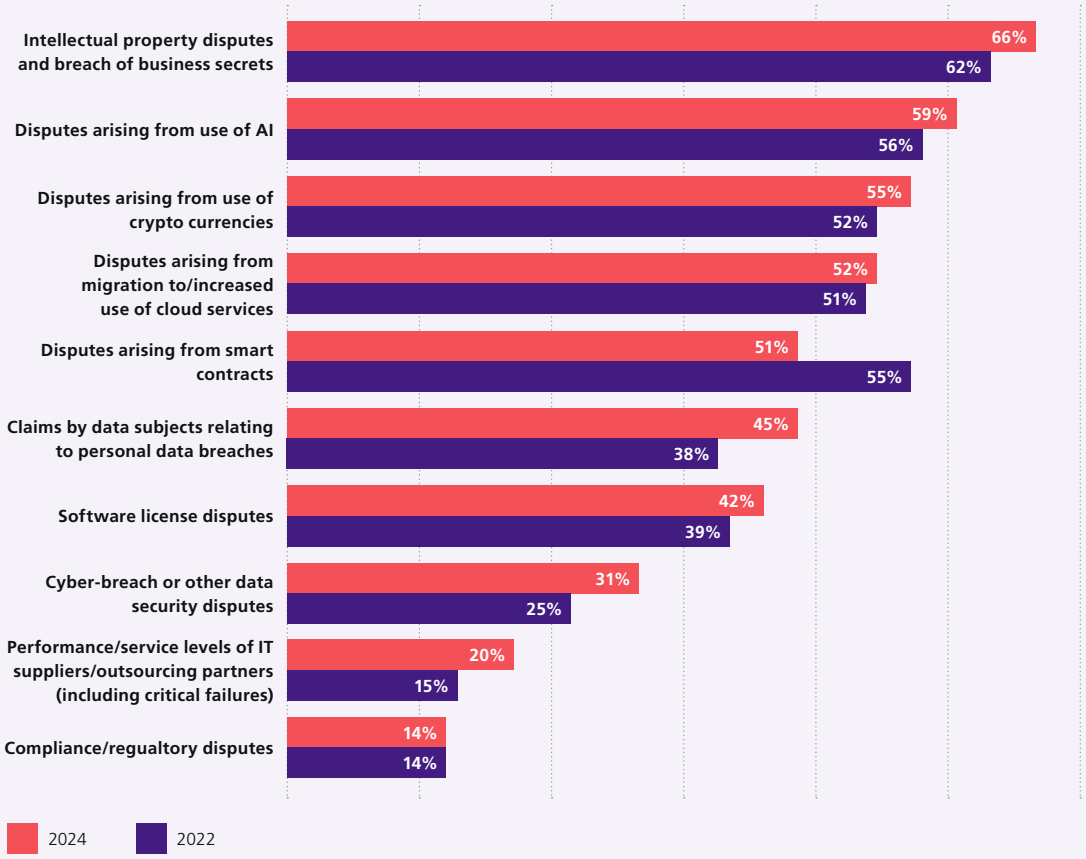
It is clear from the survey that whilst the drivers for the adoption of business-critical technology may have changed, concerns over the risks posed by such technologies have increased.

In 2022, 56% of respondents expected disputes relating to AI to increase in the next three years, and 52% said the same about crypto. In 2024, 59% and 55% of respondents respectively expected disputes in these areas to increase (representing the second and third most cited issues where respondents expected an increase in disputes). In fact, the number of respondents expecting to see an increase in technology-related disputes has risen in all areas save for smart contracts. This arguably demonstrates an increased awareness amongst respondents of the risks and potential sources of dispute posed by new technologies.

The 4% decrease in relation to smart contracts may reflect the fact that uptake in the use of smart contracts has not been as widespread as expected. In addition, what falls within the definition of a smart contract is not concrete, potentially resulting in respondents being unsure how to classify the subject matter of those disputes.

Figure 4.

Businesses expect IP and AI to be the greatest sources of technology disputes in the next three years



Q: Do you expect to see an increase in technology-related disputes in the following areas for your organisation over the next three years?

Whilst, as noted above, respondents to the 2022 survey expected AI and crypto disputes to increase during the period 2022 to 2025, in fact the 2024 survey results do not indicate any significant change in the actual number of disputes in these areas. Only 27% of respondents ranked AI among their top three sources of disputes in the past three years, down from 30% in 2022. For crypto disputes, this figure is effectively flat at 20% compared to 22% in 2022. It is unclear whether this is due to the fact that there has not been sufficient time between the surveys for these disputes to develop, or if in fact respondents are overestimating the expected numbers of disputes in these areas.

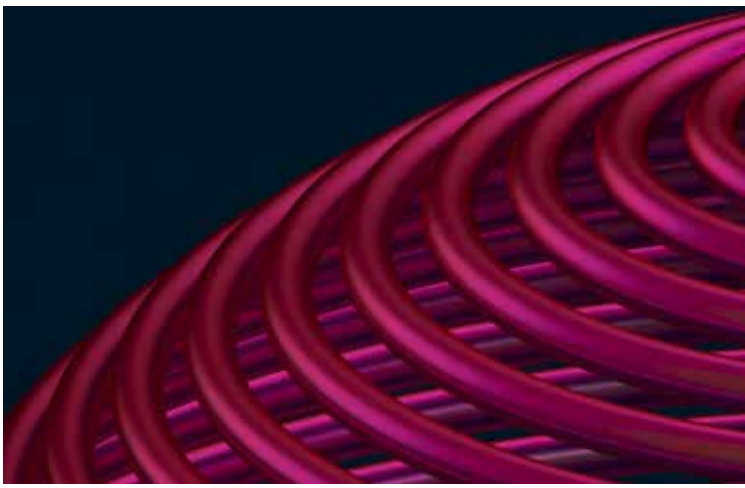
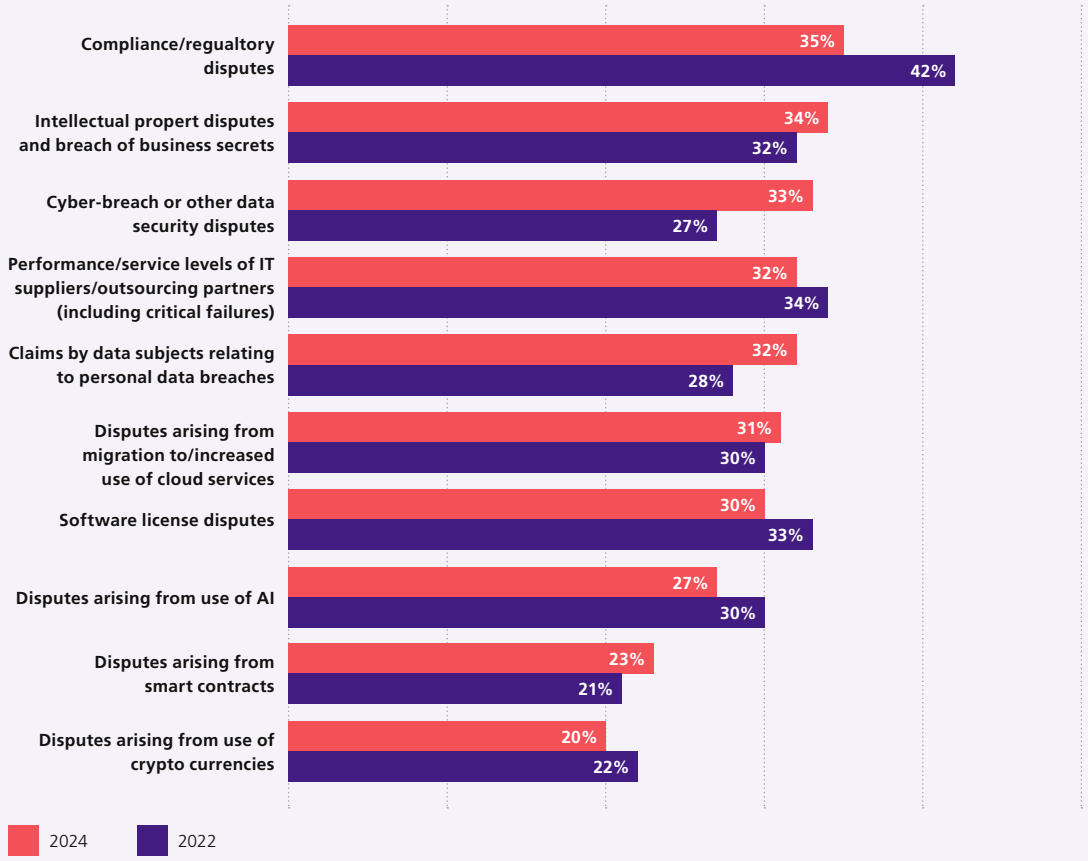


Figure 5.

Compliance and regulation have been the greatest source of disputes in the past three years



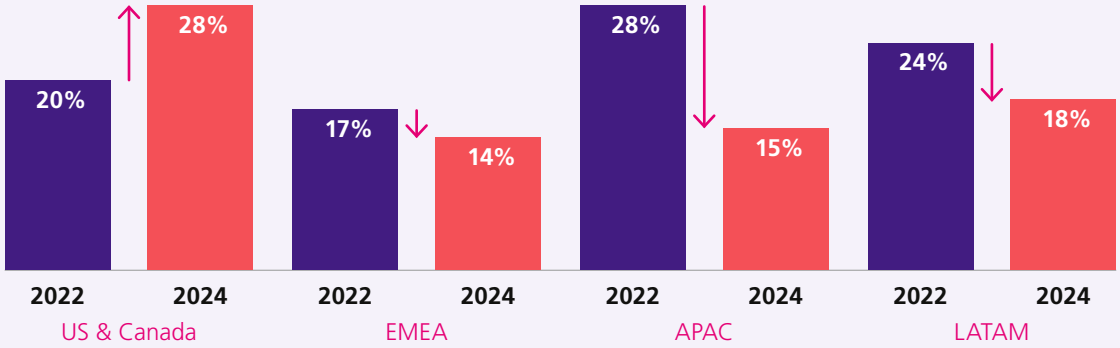
Q: Please rank the primary sources of technology-related disputes for your organisation over the last three years.

Answers ranked in the top 3

Crypto disputes are more prevalent for respondents located in US and Canada, where 28% ranked crypto in their top three sources of disputes in the past three years (compared to 14% EMEA and 15% APAC respondents). This is an 8% increase from 2022. Whether this increase will occur in other regions is to be seen; however, it may suggest that respondents in other regions are right to expect an increase in crypto disputes during the next three years.

Figure 6.

Crypto currencies are a growing source of disputes in North America, but not else-where



Q: Please rank the primary sources of technology-related disputes for your organisation over the last three years.

Percentage of responses ranking "**Disputes arising from use of crypto currencies**" in top 3.

Compliance and regulatory issues remain the most frequent area of dispute. Whilst the number of respondents placing it in their top three sources of disputes has declined (from 42% in 2022 to 35% in 2024), it continues to score highly across all geographic regions and was the greatest source of disputes for companies based in LATAM (38%) and in North America (37%).

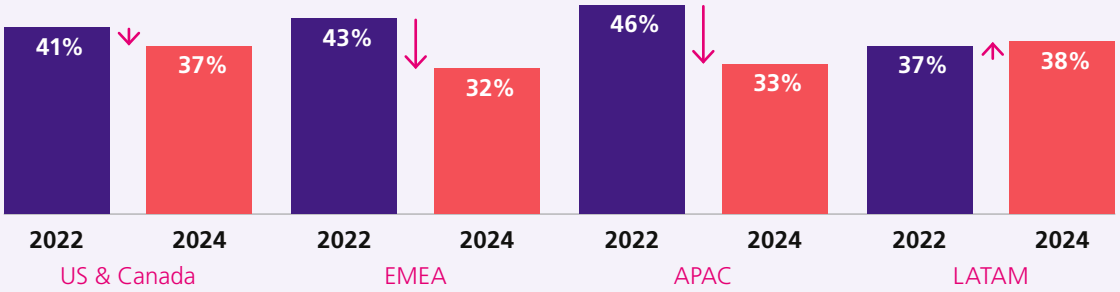
This prevalence of compliance and regulatory disputes was not anticipated by survey respondents in 2022. Only 14% expected to see an increase and 76% anticipated a reduction. These numbers have remained surprisingly static in the 2024 survey results, notwithstanding the fact that regulatory and compliance issues are cited as the most common area of dispute for the past three years.

There is little variation between sectors, notwithstanding the increased regulation and compliance experienced in the Financial Services and Life Sciences sectors.

> *Compliance and regulatory issues, particularly with the introduction of new regulations in cybersecurity, artificial intelligence, crypto-assets and data protection, remain critical in Latin America. These issues, once lacking robust regulation, now present significant challenges for companies. The evolving legal landscape requires businesses to navigate complex rules and ensure adherence to new standards. In this context, companies must take a leading role in interpreting these regulations, especially as authorities may lack experience or familiarity with these issues. This can lead to overly conservative or inadequate interpretations of the regulations. Therefore, businesses must be proactive in shaping and clarifying regulatory expectations, as incorrect scrutiny by authorities could pose additional challenges.*
>
> **Carolina Veas, Partner, Competition**

Figure 7.

Compliance and regulation disputes have fallen in all regions bar Latin America



Q: Please rank the primary sources of technology-related disputes for your organisation over the last three years.

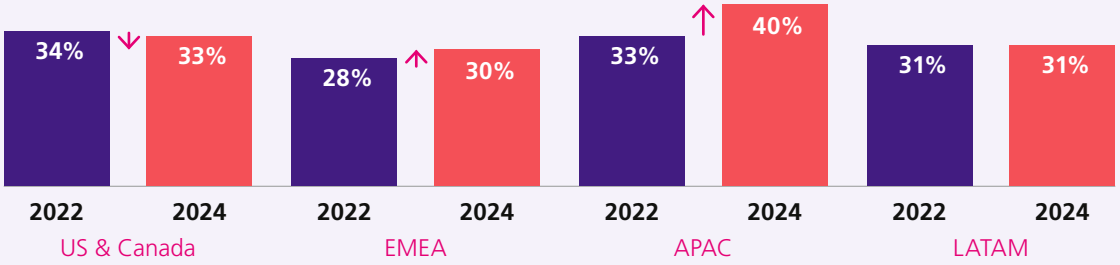
Percentage of responses ranking "**Compliance/regulatory disputes**" in top 3.

A total of 34% of respondents placed IP and business secrets disputes in their top three sources of disputes over the past three years, making this the second most cited source of disputes. It was the greatest source of disputes for respondents based in APAC, with 40% of respondents placing it in their top three. It is also the area in which most respondents expect to see an increase – 66% expecting an increase in such disputes over the next three years (rising to 77% of respondents in APAC, 73% from the Energy sector and 72% from the Life Sciences & Healthcare sector).

Whilst survey respondents were not asked to specify the area in which they anticipated IP disputes to arise, as we explore further in section 2 of this report, 69% indicated they expect an increase in disputes relating to third-party violation of IP rights by training/use of AI in the next three years.

Figure 8.

IP disputes are most prevalent in APAC

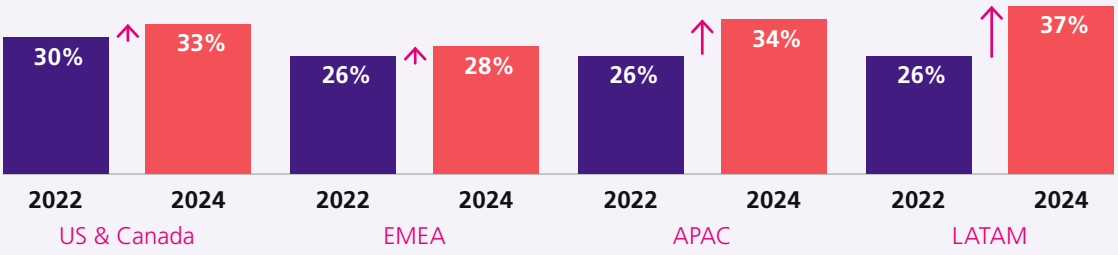


Q: Please rank the primary sources of technology-related disputes for your organisation over the last three years.

Percentage of responses ranking "**Intellectual property disputes and breach of business secrets**" in top 3.

Figure 9.

Cyber security-related disputes are becoming more prevalent in every region

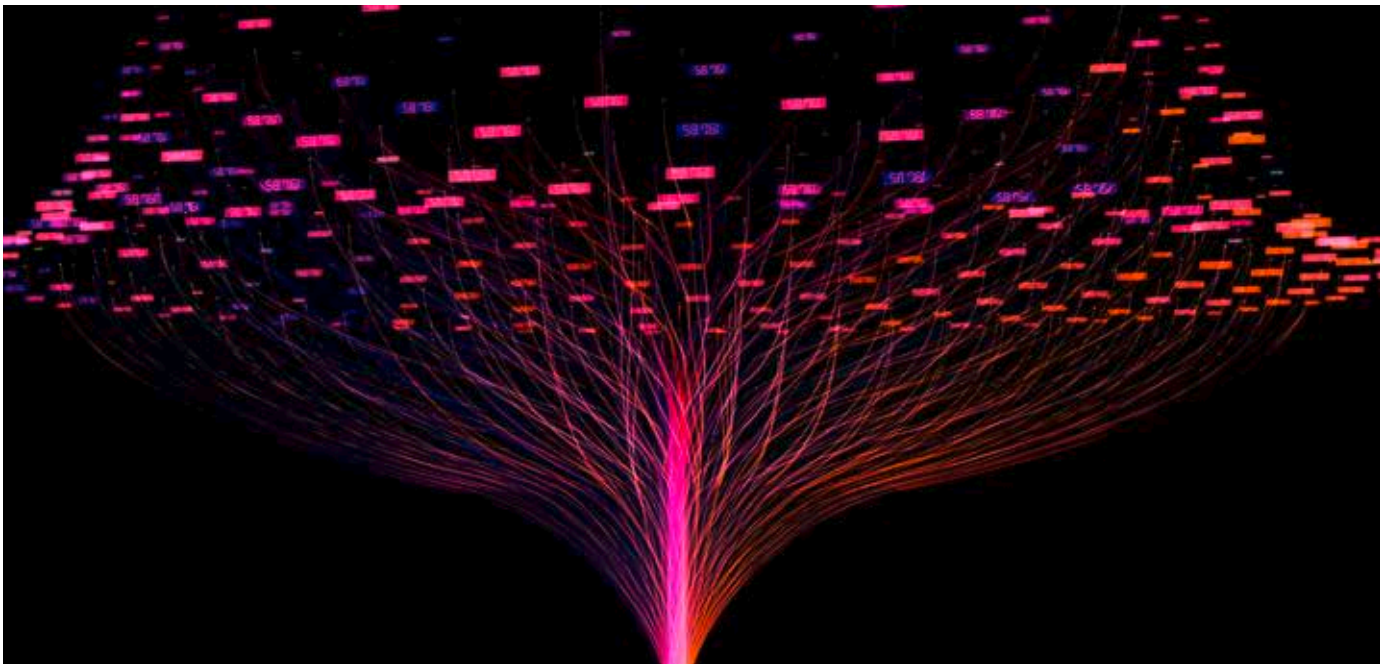


Q: Please rank the primary sources of technology-related disputes for your organisation over the last three years.

Percentage of responses ranking "**Cyber breach or other data security disputes**" in top 3.

Cyber and other data security disputes were placed in the top three causes of disputes by 33% of respondents (up from 27% in 2022), making this the third most cited source of disputes. Interestingly, whilst 28% of respondents in EMEA ranked cyber breaches or other data security disputes in their top three sources, that number decreases to 21% when considering only European based respondents.

Looking forward to the next three years, 35% of respondents indicated that they expect cyber or other data security disputes to significantly decrease (with as many as 80% of respondents in the Consumer & Retail sector expecting some level of decrease). In circumstances where cyber and data breaches are the fastest-growing sources of disputes (up 6% and 4% respectively compared to 2022 survey results) and data management and security was ranked as the top driver of technology adoption, it will be interesting to see whether the data security technologies deployed result in the anticipated decrease in cyber and data security disputes, or if the hopes placed in such technologies are unfounded.



AI risks in focus

In recent years, technical progress in AI technologies has accelerated rapidly, driving digital transformation. The use of AI opens a wide range of opportunities for companies to optimise their processes and tap into new areas of business.

Areas of application of AI

— In the Consumer & Retail sector, chatbots based on generative AI are used to provide efficient customer service with personalised and targeted responses. Retailers are implementing AI-based predictive analytics to understand future market opportunities and customer behaviour.

— In the Healthcare sector, AI systems are used in detection and diagnostics to detect diseases more accurately, reliably and earlier.

— In the Financial Services sector, AI is helping to develop new investment strategies and is playing an increasingly important role in asset management.

— In the Media sector, AI is used to create content and create targeted advertising campaigns.

— In the Energy sector, AI is used to create more precise forecasts for energy generation and consumption. This is particularly important for the integration of renewable energies such as wind and solar power, whose availability fluctuates.

It is therefore not surprising that more and more companies stand to reap the benefits and opportunities provided by AI. A total of 75% of the respondents to our survey said that they expect their organisation to make greater use of new technologies such as AI in the next three years (up from 69% in 2022).

The potential drivers of AI disputes

Whilst 27% of respondents ranked disputes arising from the use of AI in their top three sources of technology disputes in the past three years, this number will only rise as more companies adopt the technology. A total of 52% of respondents agreed with the statement that the use of AI technologies will lead to risks and disputes that cannot be foreseen, and 30% said that the use of AI technologies is likely to lead to more disputes.

The development and use of AI not only offers opportunities, but also creates significant risks for companies that develop, distribute or use AI. AI-related disputes may concern the following:

Violation of third-party IP rights by training/use of AI
The training of generative AI requires the use of very large data sets. If copyrighted works are incorporated into those data sets without the consent of the respective rights holders, there is a risk of claims by the rights holders. Whether training with copyrighted works constitutes infringement is unclear and could be answered differently from jurisdiction to jurisdiction. In the USA, several prominent court cases against producers of generative AI are pending on this issue.

Liability for products using AI
If damage occurs when using an AI product because the AI system does not function as intended, the question arises as to who is liable for the damage caused. Several parties may be involved in the development, distribution and use of the product and the underlying AI system. Further difficulties arise if the error or defect is due to decisions made by the AI system itself based on machine learning processes.

Disputes arising from the regulatory status of AI (e.g. EU AI Act)
Liability issues may arise from AI-specific laws. In July 2024, the EU established a major set of regulatory ground rules for dealing with AI-controlled systems to avoid discrimination, surveillance and other potentially harmful effects, especially in areas relevant to fundamental rights. The regulations will be applied gradually from 2025. Under the EU AI Act, heavy fines can be imposed for non-compliance.

Disputes arising from the use of AI in the workspace
To the extent that AI is used by employers for recruitment, promotion or performance evaluation, they will need to manage the risk of discrimination or data protection violation. If these risks are not mitigated, disputes may ensue. In addition, the introduction of an AI system may lead to disputes with an organisation's works council, trade union or other industry body. In Germany, for example, a works council has a right of co-determination if the employer wants to introduce technical equipment that is suitable for monitoring the behaviour or performance of employees. In principle, this also applies to AI systems. On the other hand, the use of AI tools by employees carries the risk of data protection violations and the infringement of trade secrets.

Ownership of AI output
The question whether the user of generative AI can claim copyright in the AI-generated content based on their ideas and specifications and, to that extent, whether the unauthorised use of this content can constitute a copyright infringement, has not yet been resolved.

> *AI generated output will be utilised with increasing prevalence by the creative industries. Consequently, it is inevitable that output that is material to a specific project will be appropriated without permission, obliging the Courts to grapple with issues of authorship and subsistence. In the majority of instances, it seems unlikely that output generated wholly by an AI system will be protectable as a copyright work, as the output will not result from personal, creative, choices, but originates instead from statistical calculations based on the relationships between specific words and letters. The resulting judgment(s) will clarify whether such content is protectable and will subsequently have a material impact on how and when we use AI.*
>
> **Ben Hitchens, Partner, TMC**

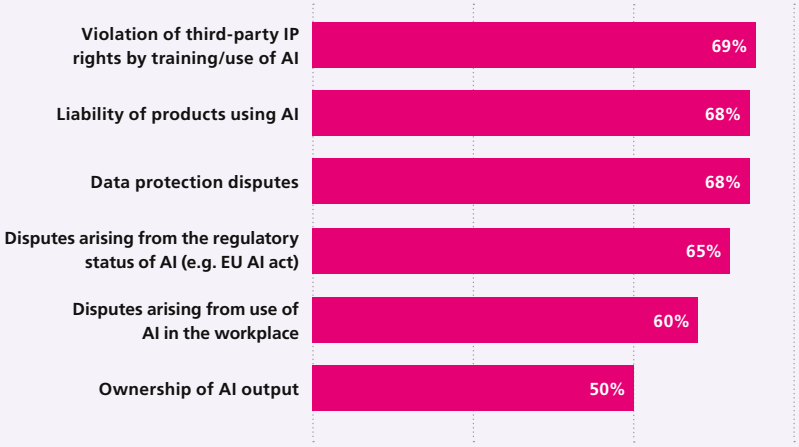
While respondents are in principle aware that the use of AI is associated with considerable risks, it seems that they are unsure which areas of dispute (relating to the use of AI) are most likely to increase or decrease. In 2022, 56% of respondents expected AI-related disputes to increase. This led us to examine the concerns of respondents regarding AI-related disputes in more detail in the 2024 survey.

Respondents to the 2024 survey indicated that the violation of IP rights in the training or use of AI is the area where the risk of disputes is most likely to increase. A total of 69% of respondents said that they expect the number of disputes in this area to increase slightly or significantly. This is followed by liability for products that use AI and data protection disputes, each with 68%.

Disputes arising from the regulatory status of AI, e.g. EU AI Act, came fourth (65%), even though AI is still only marginally regulated in large parts of the world.

Figure 10.

Violation of third parties' IP rights is the most widely anticipated source of AI-related disputes

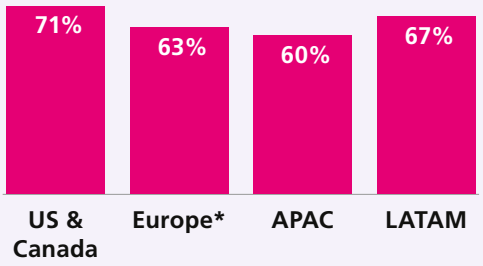


Q: Specifically in relation to AI technologies, do you expect to see an increase in disputes for your organisation in the following areas over the next three years?

With the EU AI Act due to be passed at the time of the survey, it is not surprising that more respondents in Europe (63%) than APAC (60%) expect disputes to increase in the next three years. In the US and Canada, the figure is as high as 71%.

Figure 11.

North American businesses are most likely to expect disputes related to AI regulation



Q: Specifically in relation to AI technologies, do you expect to see an increase in disputes for your organisation in the following areas over the next three years?

*Europe, not EMEA, used in this chart to show potential impact of EU AI Act.

It is noteworthy that at least 60% of respondents expect an increase in almost all areas in which AI-related disputes may arise in the next three years. At the same time, the percentage differences between the individual areas of future AI disputes are small. Clearly, respondents recognise the broad nature of disputes associated with the use of AI.

However, the fact that the survey results are fairly homogeneous also suggests that there is uncertainty where the risks lie with the use of AI and which of those risks may ultimately lead to disputes.

The IP issue: ownership of AI output is the least concerning for survey participants. 50% of participants stated that they anticipate an increase in disputes in this area in the near future.

The most likely counterparties in AI disputes

Regulators are considered to be the most likely counterparties to AI-related disputes, with 48% of respondents ranking them in the top three.

Ranked second are developers of the underlying AI model, at 42%. This is in line with the fact that the violation of third-party IP rights by the training or use of AI had the highest number of responses in an area where respondents expect an increase in disputes. Added to this are the liability and recourse disputes concerning products that use AI.

According to the survey participants, insurers will also very likely be party to an AI dispute (41%).

Surprisingly, the owners of IP rights are at the bottom of the list of potential AI counterparties, notwithstanding the fact that IP violation is considered a growing area of AI-related risks. This strongly indicates considerable uncertainty about the risks associated with the use of AI.

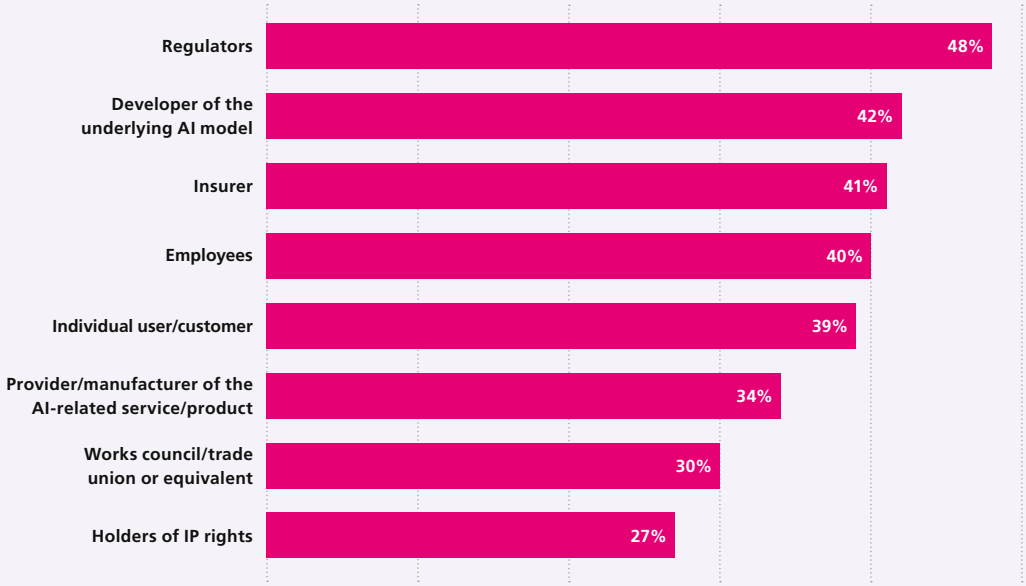
AI-related disputes call for new approaches

Advances in technology are opening up new possibilities, whilst at the same time legal risks must be carefully considered. The potential drivers of AI disputes are many and varied. The future of AI promises an increase in AI disputes. It will be interesting to see whether the resolution of these disputes will follow the same principles as the resolution of disputes in connection with non-AI technologies.

Only 28% of our survey respondents agreed with the statement that disputes arising from AI technologies will be resolved according to the same principles as disputes arising from non-AI technologies. In fact, 57% of survey respondents believe that new forms of dispute resolution should be used to resolve disputes related to new technologies.

Figure 12.

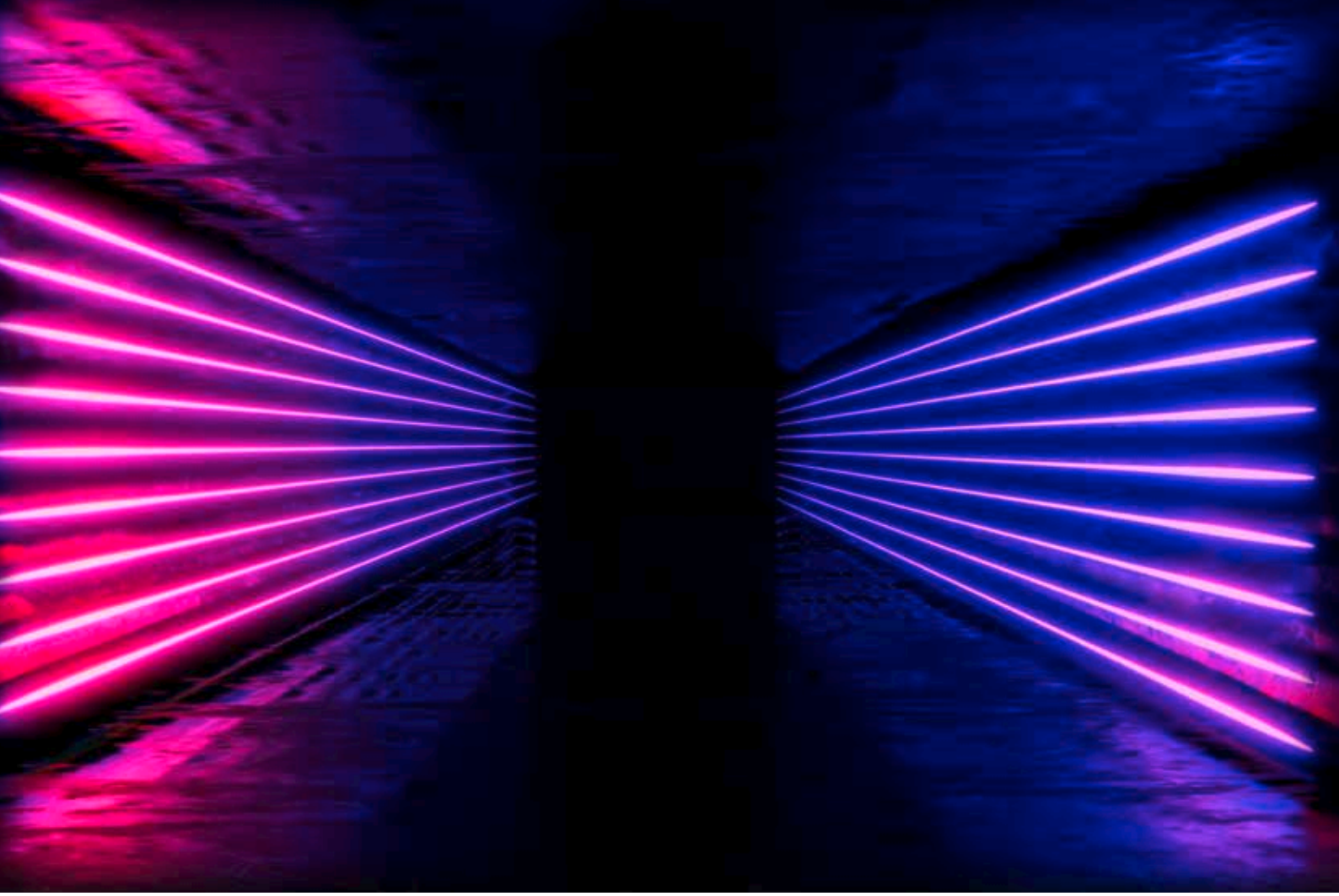
Regulators are the most likely counterparties to AI disputes, executives expect



Q: Which of the following are most likely to be the counterparties in AI disputes your organisation might be involved in during the next three years?

Answers ranked in the top 3.

> *Companies may seek cover under a range of different insurance policies when AI-related disputes arise. For example, a professional services firm may seek cover under its professional indemnity policy in relation to advice provided to a client where AI was used to assist. Equally, we can envisage AI related claims in relation to cyber; crime; directors and officers; and general liability policies. We have also seen new AI specific insurance products for those operating in the AI space, e.g. developers. It is important that companies across all sectors who use AI consider the risk mitigation steps they have in place in relation to AI use, carefully check the terms of all potentially relevant policies, and seek advice from their insurance brokers to ensure that they have adequate coverage in place.*
>
> **Luke Gething, Senior Associate, Dispute Resolution**



Managing risks

Confidence in managing current technology risks has fallen

Business leaders have a handle on the risks associated with new technologies, the majority of respondents believe. Nearly nine out of ten (89%) believe their senior executives understand these risks well. This confidence is particularly apparent from the respondents in legal roles (97%), whilst respondents in risk and compliance roles are more cautious (87%).

Whilst confidence in understanding the risks arising from new technologies is high, there is growing disquiet about senior executives' knowledge of the risks associated with current technologies. Although the proportion who are confident remains high, at 82%, this is a 10% drop compared to 2022. This confidence is especially low among respondents in the Life Sciences & Healthcare sector (69%). There has been a significant rebalancing in the Media sector: in 2022, 100% of respondents had confidence in their executives understanding of current tech; in 2024 that had fallen to 79%.

One explanation may be that senior executives' attention has been distracted away from their current technology operations to focus on emerging technologies. Moreover, yesterday's new technology is today's current technology. Many respondents will have updated their technology since our first report, and perhaps discovered that their professed understanding of new forms of technology was overstated.

Whatever the explanation, it will be important for executives to maintain a focus on managing risks across both current and new technologies.

Figure 13.

Respondents are more confident that their senior executives understand risks from new technologies than from current ones

Q: Do senior executives in your business understand your company's current areas of technology risk and the primary risks associated with the adoption of new technologies well?

Some risk management measures have declined

The general picture is a high level of understanding of technology risks, with some growing caution. However, this does not appear to translate into action, with low levels of uptake of policies and procedures to manage common technology risks.

In some cases, risk management appears to have relaxed. For example, in 2022, 61% of respondents said they had a policy to regulate IP licensing. Despite growing concerns about AI-related IP disputes, this proportion fell to 55% in 2024. Adoption of this policy only grew among respondents in the Life Sciences & Healthcare sector, suggesting a greater awareness of disputes of this nature.

As noted elsewhere in this report, there has been a growing incidence of data-related claims over the last two years. Perhaps surprisingly, that has not translated directly into risk management measures, at least in the form of risk management plans. Only 56% of respondents had an incident response plan to manage a cyber breach, a modest increase from 54%. Meanwhile, the proportion of respondents which carry out tabletop exercises to simulate a cyber-attack reduced from 69% to 64%, and respondents which had plans to manage claims by individual data subjects of a breach or misuse of data reduced from 60% to 54%.

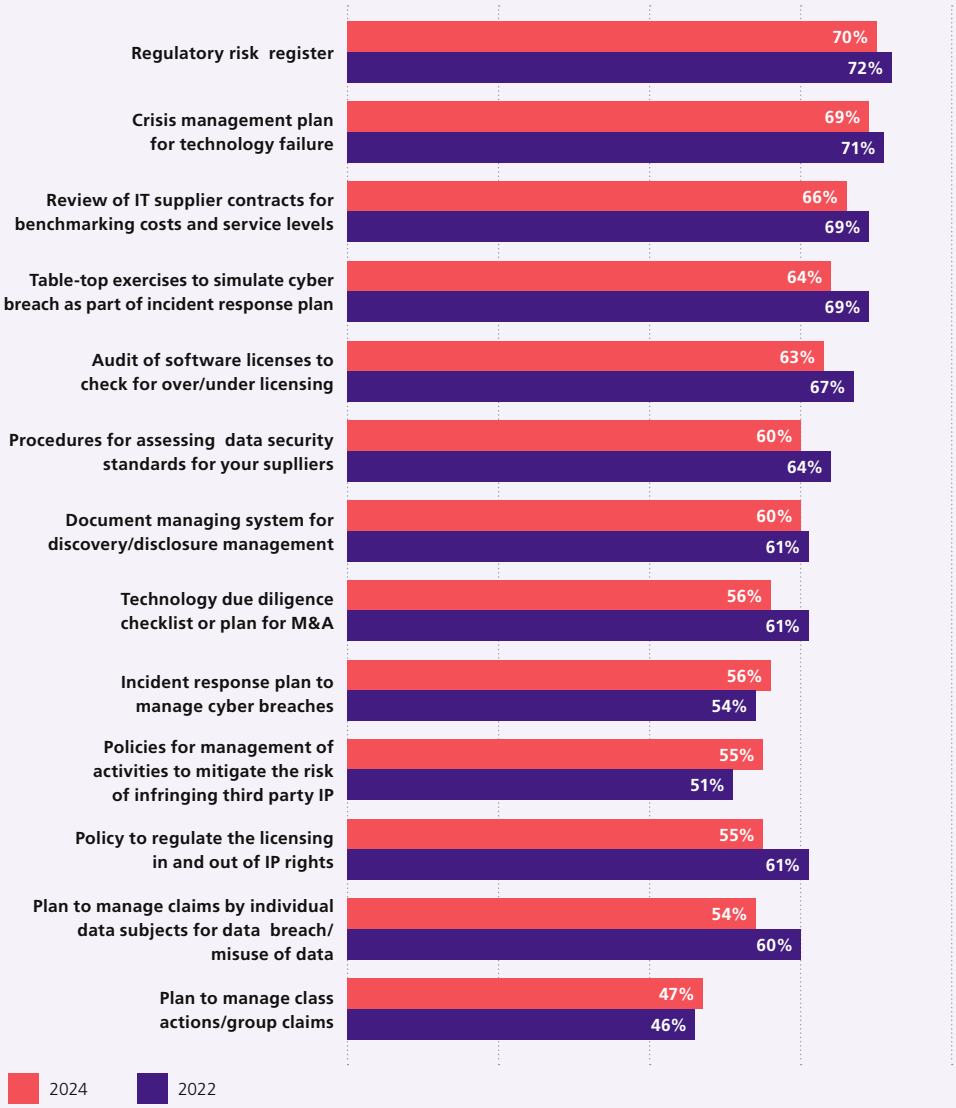
Given the indication by survey respondents that the management of data and data security is the principal driver for adoption of new technologies, this may indicate an over-reliance by businesses on technological solutions to manage the risks relating to a data claim and, potentially, a lack of investment by businesses in the policies and procedures to deal with the risk of human error.

When it comes to managing a general technology failure, businesses in the Media sector should fare better than others, with 80% having plans in place. Businesses in the Life Sciences & Healthcare (49%) and Financial Services (66%) sectors would manage less well.

Overall, businesses in the Consumer & Retail sector showed a noticeably greater level of preparedness than other sectors surveyed, but those businesses are not well prepared for managing class actions, with only 33% having plans for the management of group claims. Across the geographical regions surveyed, there was relatively little difference in the overall levels of preparedness.

Figure 14.

Processes to manage current and future technology-related risks have decreased



Q: Has your organisation adopted the following plans or processes to manage current and future technology-related risks?

Barriers to risk management

Internal barriers to minimising technology-related risks have remained largely steady since 2022, with a couple of notable changes: fewer respondents identified resistance to change as a leading barrier this year (47%, down from 54%), but this is offset by an increase in the proportion who report a lack of time or resources (54%, up from 49%). Life Sciences & Healthcare businesses in particular are concerned about lack of time and resources, with 64% reporting it as an issue.

There are significant variations across sectors. Consumer & Retail respondents are particularly concerned about lack of board commitment, with 60% reporting this as a barrier to effective risk management, whilst the figures for respondents in the Energy and Financial Services sectors are only 17% and 21% respectively, indicating strong alignment between directors and the legal and risk management teams.

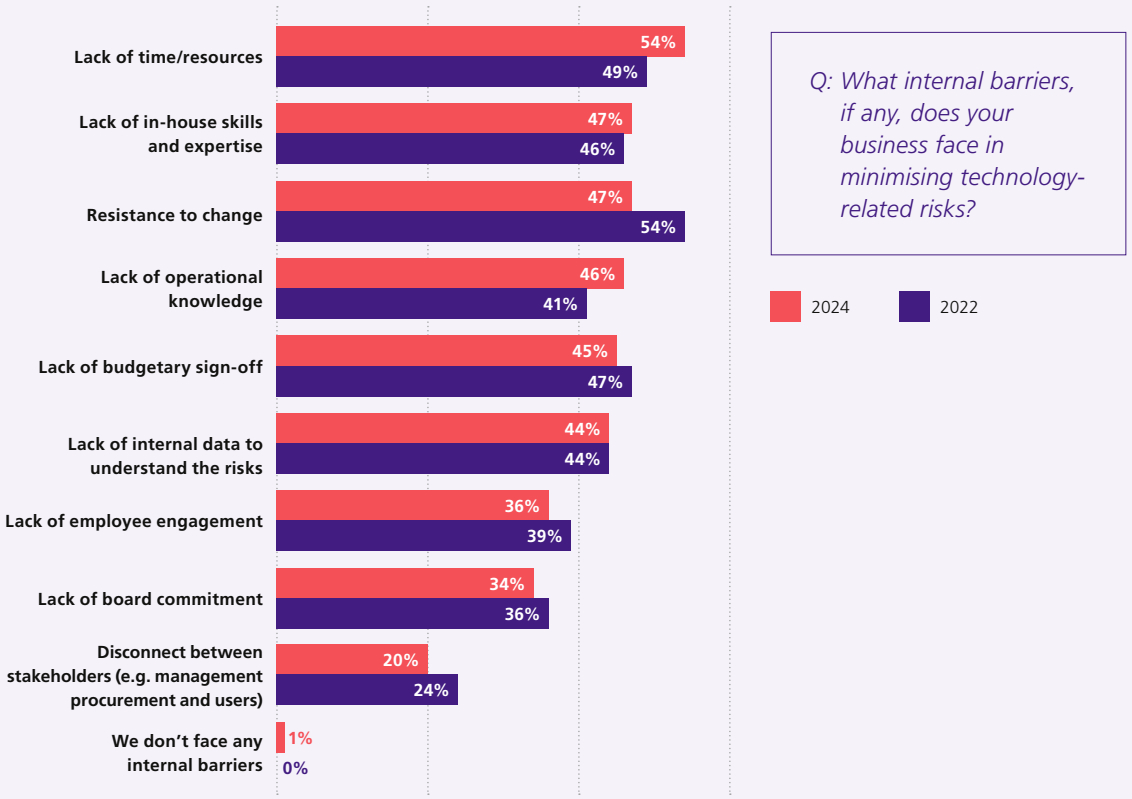
Only 37% of respondents in the Consumer & Retail sector identify lack of in-house skills and expertise as an issue, much lower than other sectors surveyed.

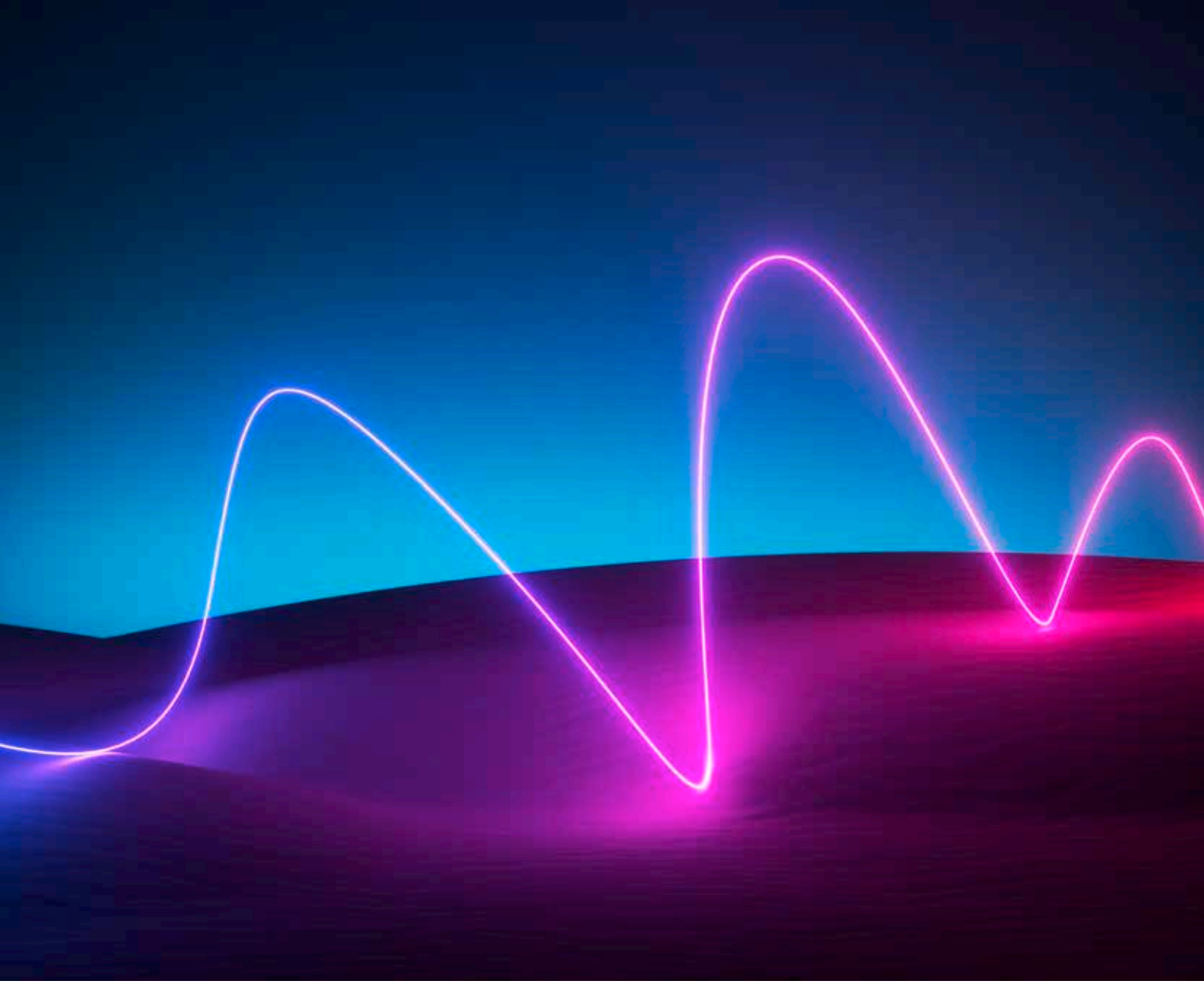
Perhaps surprisingly, respondents from larger organisations were more likely to identify lack of time and resources as an issue: 73% of businesses with 250k+ employees. Those respondents also considered resistance to change to be an issue (70%), whilst this was noticeably lower for smaller businesses (41% for businesses with 50,000 or fewer employees) suggesting the larger organisations are less flexible or more set in their ways.

Notwithstanding the challenges in managing technology risks, according to our survey respondents, 82% of businesses across all sectors consider that they need constantly to update their technologies to compete with others in their sector. In the Energy sector, 96% held that view, and 75% of respondents expect to make greater use of new technologies such as AI over the next three years, with 87% of respondents in the Media sector holding that view.

Figure 15.

Lack of time and resources is the most common barrier to minimising technology-related risks





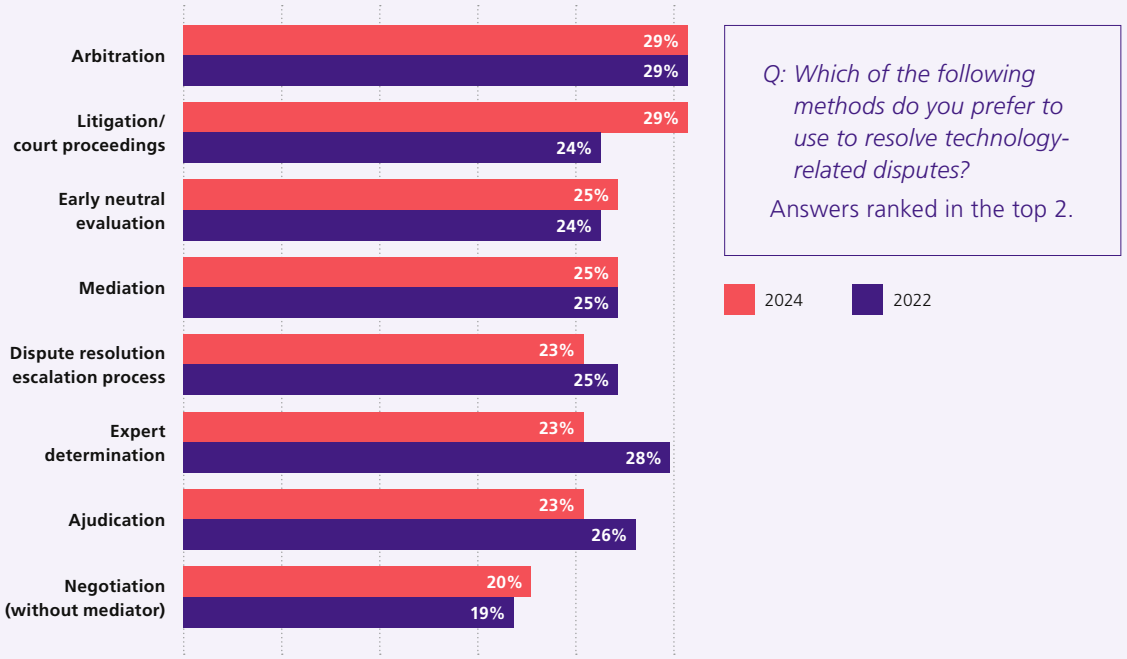
Evolving dispute resolution

In our 2022 report, we noted that arbitration was the preferred method for resolution of technology disputes, with 29% of respondents ranking it as one of their preferred two methods. The popularity of arbitration remains unchanged, still on 29%. However, its advantage over litigation has been eroded, with 29% of respondents also ranking litigation as one of their top two processes, a significant increase from 24% two years ago.

This is largely explained by a surge in popularity of litigation in EMEA, where 34% of respondents rank litigation in their top two processes, a very significant increase from 14% in 2022. Over the same period, the popularity of arbitration has fallen in EMEA from 36% to 28%. There may be a number of explanations for this change; perhaps parties considering that disputes arising from new forms of technology are more suitable for determination by courts rather than an arbitral tribunal.

Figure 16.

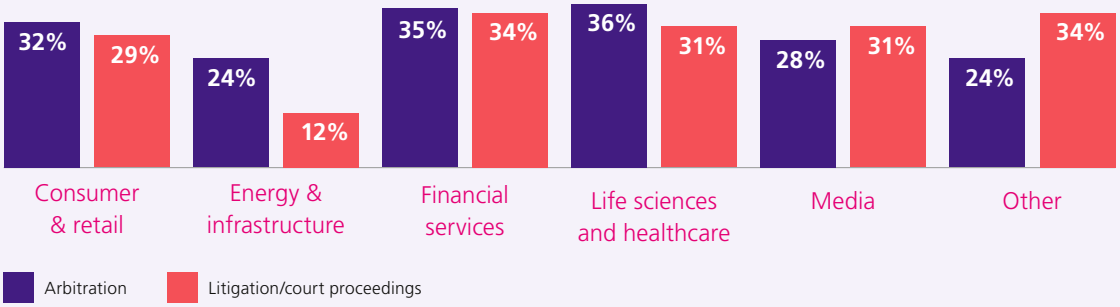
Methods for resolving technology-related disputes



> *In recent years, many countries have taken significant steps to digitize court proceedings and improve efficiency, such as introducing e-filing and virtual hearings. In addition, several European countries have established specialized commercial courts that allow parties to have more control over the structure of the proceedings, litigate in English and appear before judges with specialist expertise. As a result, state courts now often offer some of the advantages traditionally associated with arbitration, which may explain why parties are increasingly turning to litigation for their technology disputes.*
>
> **Marcus Weiler, Counsel, Dispute Resolution**

Figure 17.

Arbitration is preferred over litigation in most, but not all, sectors



Q: Which of the following methods do you prefer to use to resolve technology-related disputes?
Answers ranked in top 2.

There are, unsurprisingly, differences across sectors in the relative popularity of arbitration and litigation, with arbitration generally considered more favourably across all our focus sectors other than Media. Respondents in the Energy sector view neither process favourably, with early neutral evaluation being by far their preferred process (45% ranking it in their top two).

Overall, non-adversarial dispute resolution processes had less appeal in 2024 than 2022, with 23% of all respondents ranking expert determination as one of their top two processes (down from 28%) and 23% favouring adjudication (26%). Respondents' preference for early neutral evaluation has remained effectively steady, with a quarter ranking it in their top two approaches (but as noted above the Energy sector being particularly well disposed).

These non-adversarial processes allow parties to appoint an independent expert to resolve a dispute, which can have many benefits, especially in circumstances where a detailed understanding of the technology will assist in the determination of the issues. However, experts may have the technical expertise, but parties may see the appeal of a more robust dispute resolution process, which brings certainty, but still allows opportunity to engage an expert to provide opinion evidence of technical matters.

Negotiation remains the favoured approach

Of course, most parties will wish to avoid the costs of litigation or arbitration, which can be expensive processes, particularly in common law jurisdictions. This is one of the reasons why processes such as expert determination and early neutral evaluation will continue to have appeal.

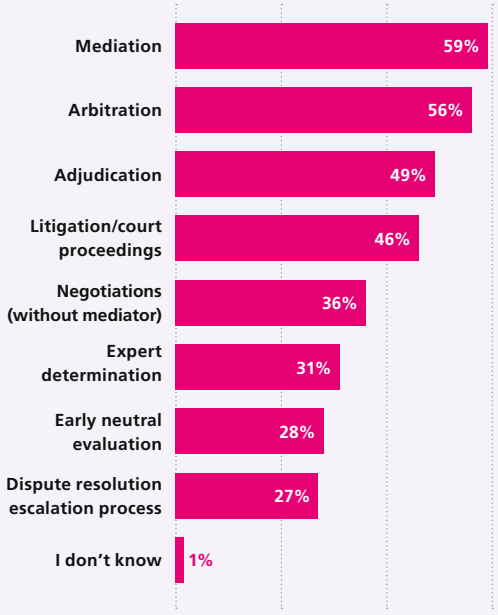
Most disputes which go through an adversarial process settle before trial or arbitration hearing. Many settle before proceedings are issued. Unsurprisingly, therefore, negotiation in its various forms remains a popular approach, with 25% ranking mediation in the top two in both years of the survey, 20% ranking negotiation without a mediator (up from 19%) and 23% preferring to follow dispute escalation procedures (down from 25%), which generally involve negotiation before proceedings can be commenced.

How disputes are actually resolved

In terms of the dispute resolution processes actually used to resolve disputes over the last three years (as opposed to respondents' preferred processes), there is experience of all processes across all sectors surveyed, although there are wide variations between the sectors. The majority of respondents have experience of mediation (59%) and arbitration (56%), but other processes are less widely used – (expert determination (31%) and early neutral evaluation (28%)), although it is notable that even in relation to those lesser-used processes, over a quarter of respondents have some experience of them. In many cases the process to be followed is determined in the contract, and whilst the parties have the freedom to agree a different process, in practice they rarely depart from the contractual procedure.

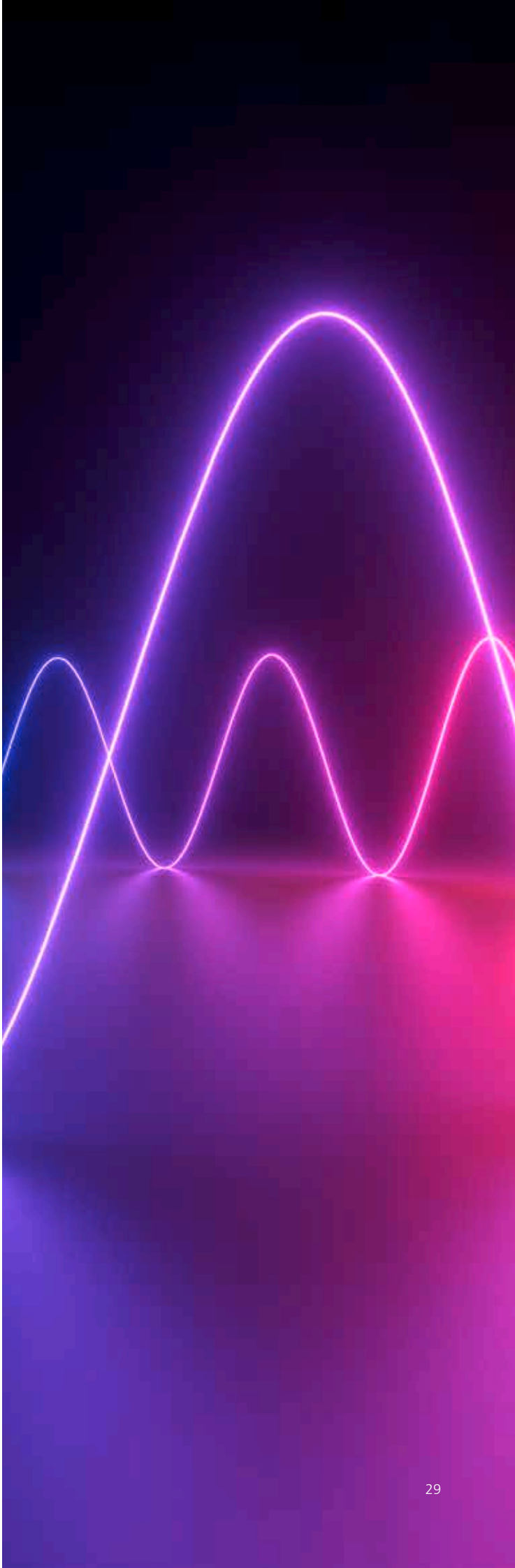
Figure 18.

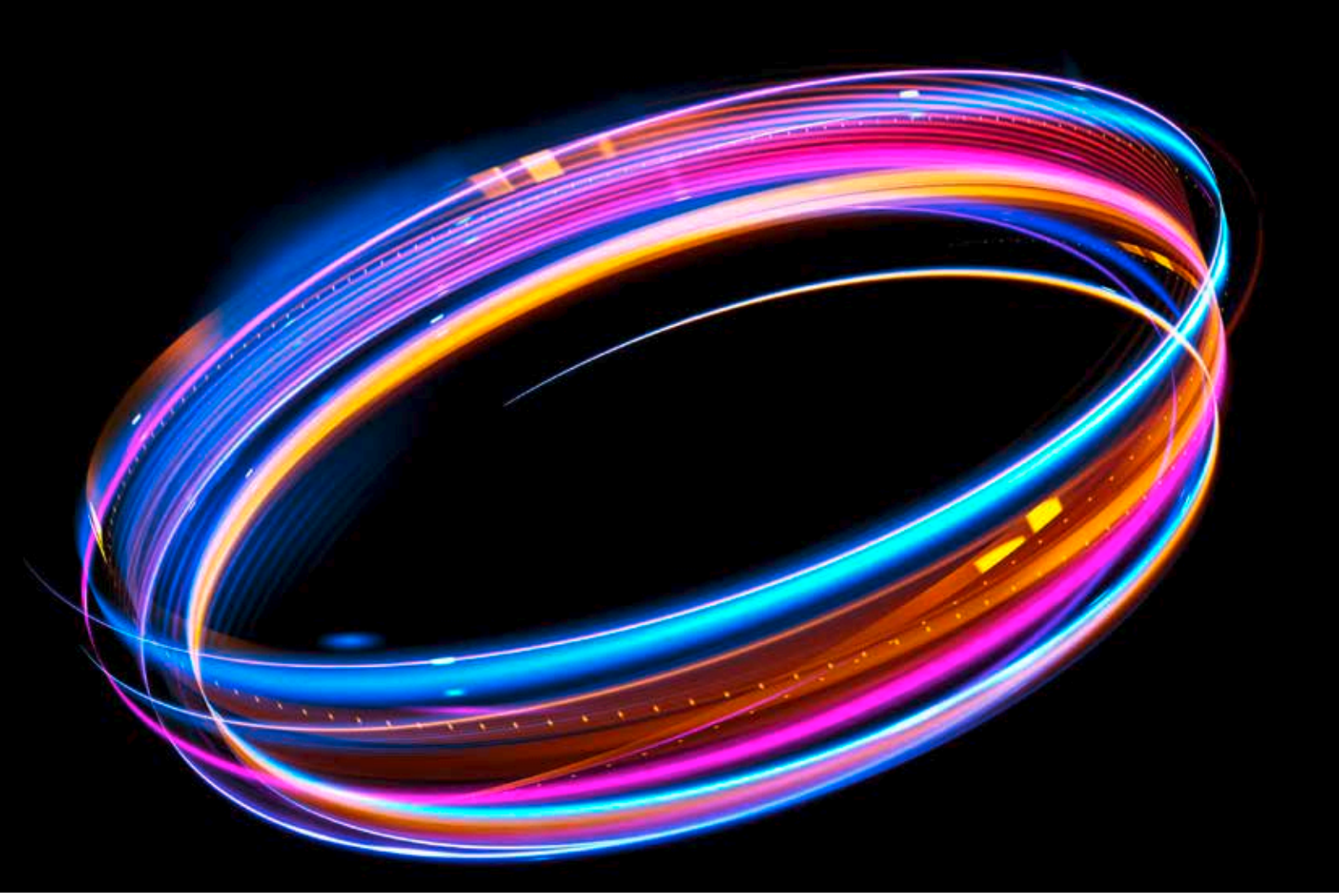
Mediation is the most widely used method for resolving technology disputes



Q: Which of the following methods do you prefer to use to resolve technology-related disputes?

Top two answers.





Conclusion

The results in this year's report highlight many of the evolving technology related risks facing organisations. Perhaps the key themes coming out of this report are:

1. the tension between the need to manage current technology risk, whilst ensuring competitiveness with the timely adoption of new technology

2. the potential impact a more cautious approach to technology transformation might have on the adoption of new AI tools

3. whether dispute resolution systems, generally, are fit for purpose for the evolving range of technology related disputes that are expected to arise

Never mind the future, are you taking care of the present?

Responses to our 2024 survey point to a growing awareness that organisations need to know their current technology well. The sharp increase in concerns around current data management and data security driving the adoption of new technology in Section 1 (figure 3) points to this, as does the view that compliance/ regulatory disputes remain the greatest source of disputes for organisations (figure 5). A tension here is driven by the growing regulation over technology across the world, be it data protection, operational resilience (for some regulated sectors) and the emergence of AI regulation.

Although regulatory/compliance disputes remain high, they have fallen in all regions bar Latin America (figure 7). This may point to the growing understanding of the need to take into account the regulatory risk in decision making over technology transformation. That may also explain two results in Section 3: the drop in confidence of senior executives' understanding of current technology (figure 13) and the lack of time/resources and skills/expertise to minimise technology risk (figure 15).

This paints a picture we have also observed, that organisations are running highly complex, legacy, technology systems. With migration to the cloud now mainstream, many opportunities exist for organisations to migrate away from legacy environments to newer, more stable (and potentially secure) cloud systems. In many cases, the complexity of legacy systems (otherwise in need of modernisation) drives the challenges to the adoption of new environments that meet the current standards of data and cyber security, and regulatory compliance are great. Substantial time and resource are being deployed in organisations to manage this, and executives are probably appreciating the challenges involved.

AI risks, but what risks?

The potential for AI to revolutionise the way organisations work remains, but the appreciation of risks with AI adoption is clear. What is far less clear is exactly where those risks will manifest. The relative even spread of risk factors identified in Section 2 (figure 10) highlights this well. That, as well as the regulatory framework that is evolving might result in slowing of the rate of adoption of AI at an enterprise level, as the risks of data migration and security, AI regulation and other operational risks will all have to be assessed and managed in great detail.

If not mediation: something else?

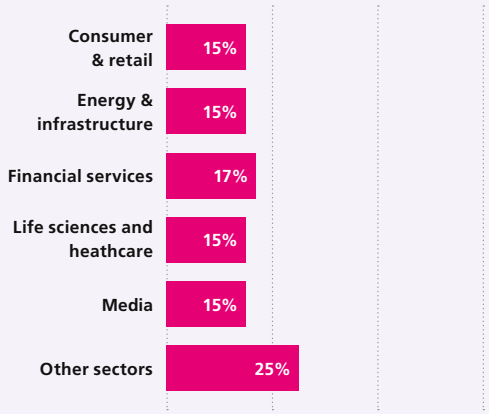
A key finding for this year is that the majority of respondents (57%) believe new forms of dispute resolution will be needed for disputes relating to new technologies. There is probably a great deal to unpack in that result, ranging from users' (potentially negative) experience of current dispute resolution processes, which may be influencing their preference for new approaches, and the appreciation that as organisations digitise, it makes little sense to resolve disputes by analogue procedures.

Practitioners should also take note of the drop in the popularity of arbitration in EMEA (Section 4) against a growth of popularity of litigation in the region. Again, the factors here may be numerous. Some forms of arbitration have seen a hard time in recent years, with the EU's prohibitory approach to the use of arbitration for investor-state dispute resolution, and recent concerns around the presence of corruption in a small number of arbitrations. The technology sector has generally been more wary of arbitration than others, and that may now be influencing other sectors, with a sense that litigation may be a better (or less worse) option for technology disputes, given the perceived expertise in some courts and, of course, the appeal process in the event a first instance judge 'gets it wrong'. The report suggests this will be an area to watch in coming years as attitudes towards litigation and arbitration evolve, and new technology driven options become available.

Methodology

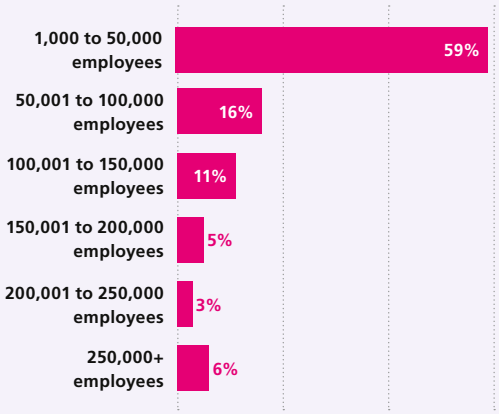
Field work for this study was undertaken in April and May 2024, surveying 510 risk managers and in-house counsel from multiple industries around the world. Respondents were screened via telephone and then completed the questionnaire via a web form. Please note that not all charts will add to 100% due to rounding.

Industries surveyed:



Q: What is the principal sector in which your company operates?

The average respondent organisation has: 71,521 employees:

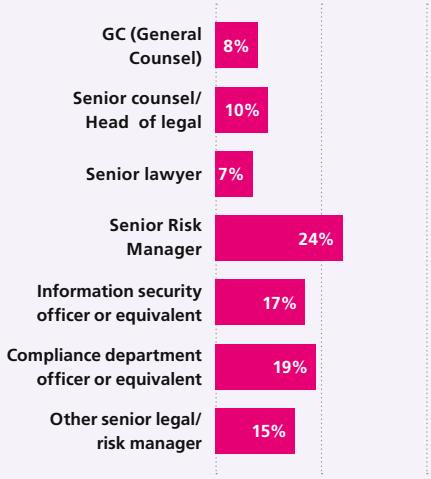


Q: What is the size of the organisation you work for?

Respondent responsibilities covered:

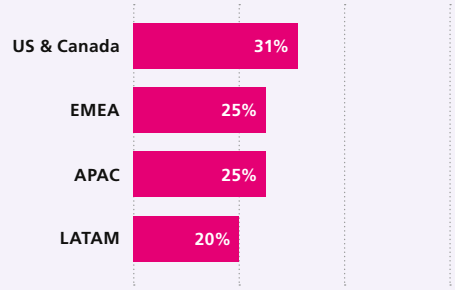
Q: Which of the following are included in your role?

Respondents had the following job titles:



Q: What is your job title?

Respondents came from:



Q: What region is your organisation based in?

Key contacts

Lee Gluyas
Partner
T +44 20 7524 6283
E lee.gluyas@cms-cmno.com

Guy Pendell
Partner
T +44 20 7367 2404
E guy.pendell@cms-cmno.com

Pietro Fringuelli
Partner
T +49 221 7716 165
E pietro.fringuelli@cms-hs.com

Stephanie Woods
Senior Associate
T +44 20 7067 3239
E stephanie.woods@cms-cmno.com

Frankie Gough
Associate
T +44 20 7367 2265
E francesca.gough@cms-cmno.com

Alexander von Bossel
Partner
T +49 221 7716 226
E alexander.von.bossel@cms-hs.com

Dora Petranyi
Partner
T +36 1 483 4820
E dora.petranyi@cms-cmno.com

Zsolt Okanyi
Partner
T +36 1 483 4837
E zsolt.okanyi@cms-cmno.com

Johannes Kuhl
Associate
T +49 221 7716 226
E johannes.kuehl@cms-hs.com

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