

CMS International Construction Study 2024

Foreword

In recent years international construction has faced a heady mix of challenges old and new. Familiar problems such as inflation and labour shortages have rubbed shoulders with developments such as the rise of ESG concerns and the growing use of digital technologies in buildings and infrastructure.

Going forward, the picture is mixed. Inflation appears increasingly under control in many jurisdictions and some of the sector's supply chain issues have been resolved. The 4Q 2023 RICS Global Construction Monitor shows a steady rise in worldwide construction activity (albeit with variable regional performance).

However, many challenges remain, ranging from geopolitical tensions to imperatives for inclusivity. Decarbonisation is now a huge concern: according to the International Energy Agency the buildings sector accounts for over one-third

of global energy consumption and emissions. The need to build greener buildings, in a greener way, is more widely accepted than ever before.

Inevitably, we are seeing some of these issues play out in disputes and changing attitudes to risk management. But as our 2024 survey shows, the principal drivers of disputes are still those that have been familiar to generations of construction professionals – even if some of the circumstances in which they arise are novel.

One thing that is changing is the use of new technology in managing legal risks and resolving disputes. This is the first year in which our survey has tracked the use of artificial intelligence tools by in-house lawyers. Our findings indicate that it is not yet as widespread as many people may imagine. But other factors suggest that even sceptical lawyers will find themselves using AI sooner than they might expect.



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Our 2024 survey

In partnership with YouGov, we surveyed 125 senior in-house counsel in the international construction, infrastructure and engineering industries, about half of them working in businesses with annual revenues of over \$1bn. We should like to thank all those who participated in our survey and, in particular, our interviewee in this study, Małgorzata Fido-Bruszezwska.

Our survey was conducted between 18 January and 16 February 2024.

Due to rounding, some chart values in this document do not total 100%.

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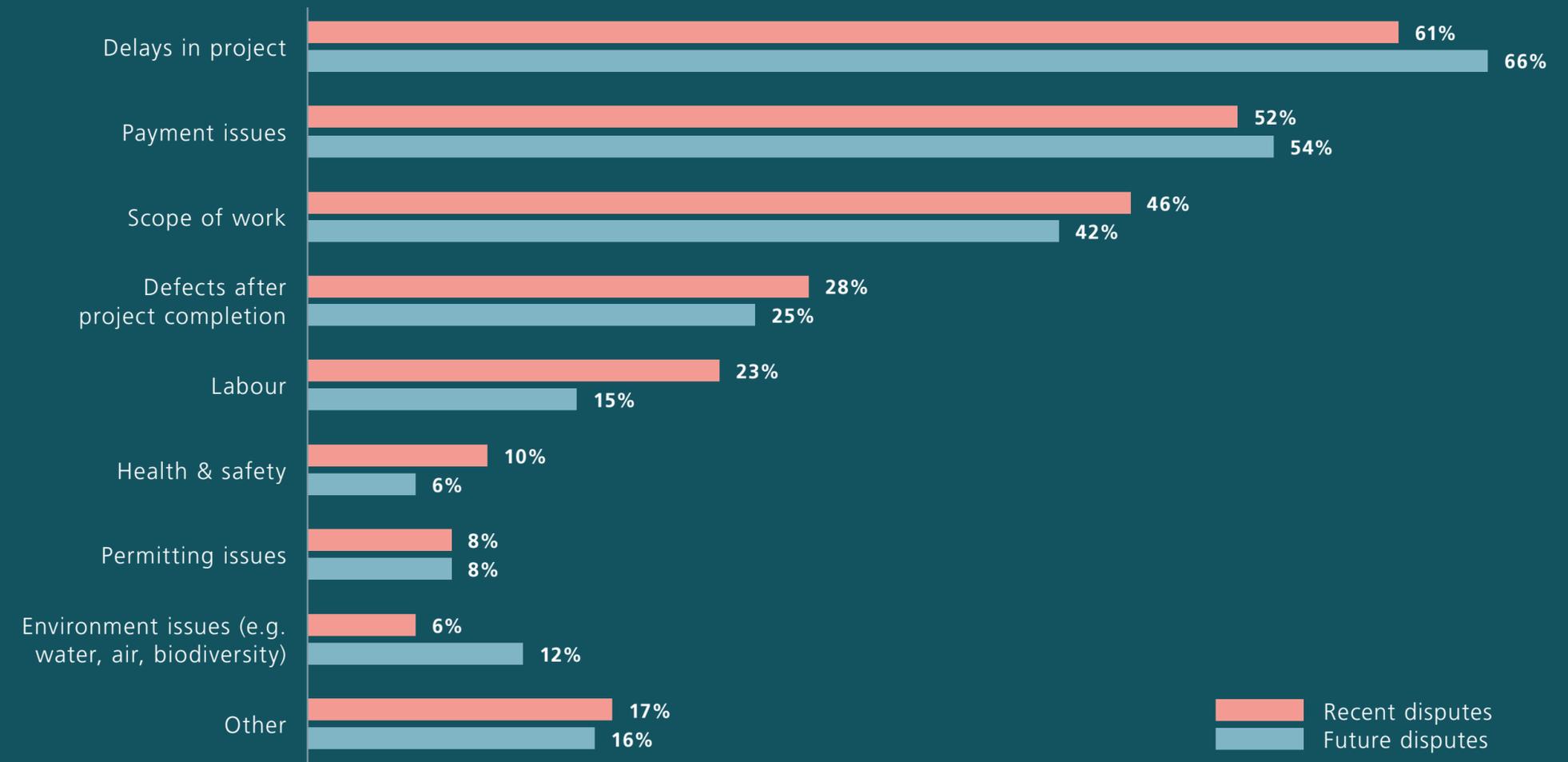
The state of play

By some margin, the biggest sources of disputes relating to construction projects remain project delays, payments and scope of work. And the clear expectation among the in-house lawyers we surveyed is that this will remain the case in the medium term.

Our data suggests some other trends – for instance, there is a clear indication that environmental issues are expected to cause more disputes going forward – but there is no sign that the relative prominence of delays, payment problems and scope of work issues will change.

So if these are the main concerns, how are businesses seeking to prevent or mitigate disputes?

The main sources of disputes and anticipated future disputes



Q. Currently, what are the main sources of disputes in your role (please select up to three)? What do you anticipate being the main sources of dispute in your role in three years' time (please select up to three)?

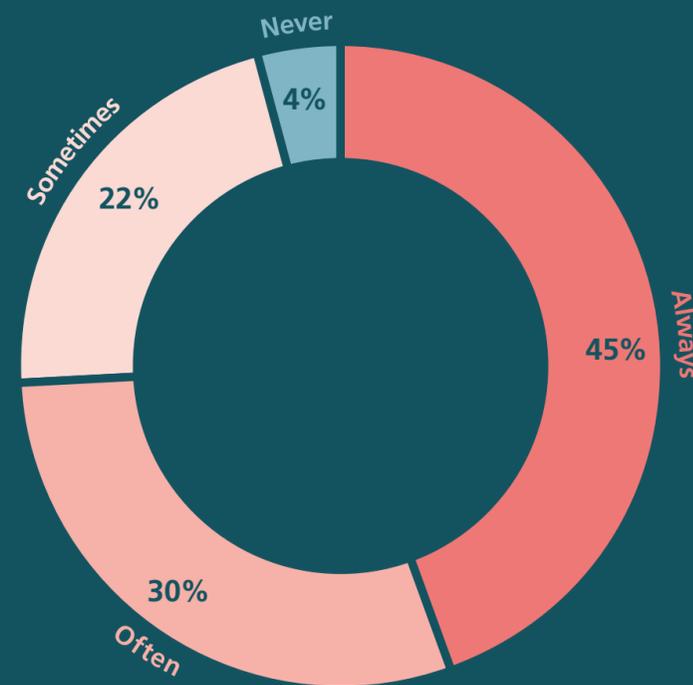
Risk management

Market conditions inevitably drive risk allocation. For example, we have recently seen a greater use of cost-plus contracts and material price escalation clauses in the light of inflationary and financing pressures. But perhaps surprisingly, fewer than half the businesses we surveyed reported that the in-house legal or contract management team is always consulted at the start of a project to identify areas of risk and to establish appropriate risk management strategies.

In a majority of businesses, such consultation only happens 'sometimes' or 'often' – making it clear that many projects are undertaken without any assessment of risk from a legal perspective.

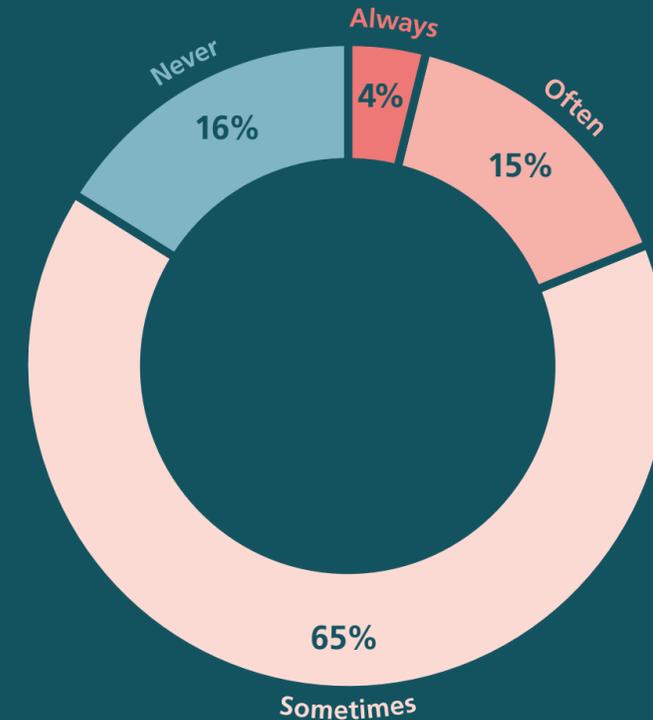
External counsel are consulted even less frequently, with two-thirds of businesses seeking such outside advice 'sometimes'. One business in six never seeks outside legal advice on managing risks in projects.

Are in-house lawyers consulted about risk at the start of a project?



Q. How often is there a conscious effort to consult the internal legal/contract management team at the outset of the project to identify areas of risk and put in place strategies to manage these risks?

Are external counsel consulted about risk at the start of a project?



Q. How often is there a conscious effort to consult external counsel at the outset of the project to identify areas of risk and put in place strategies to manage these risks?

A changing risk landscape?

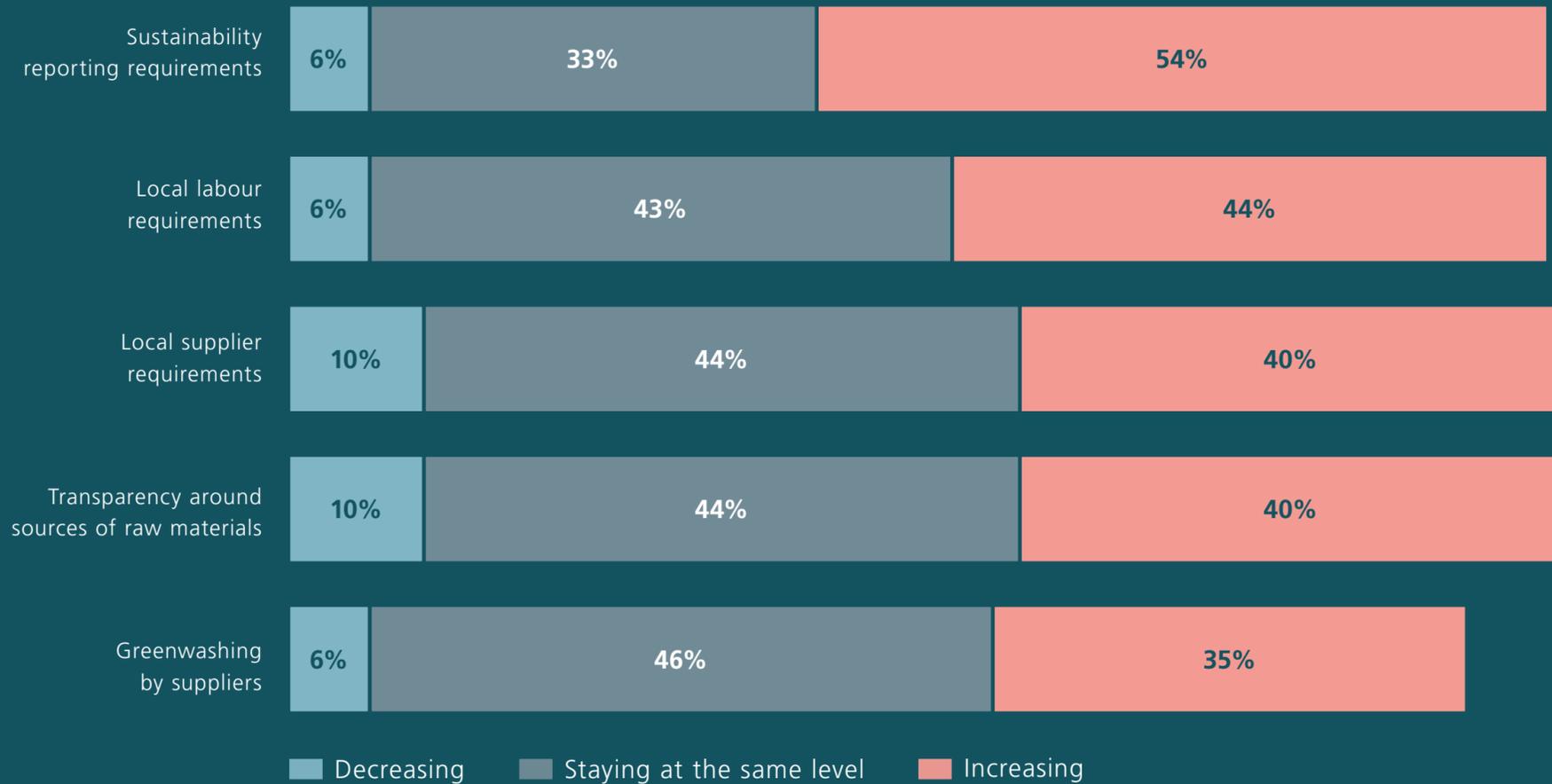
The past few years have been a case study in how specific events – a pandemic, a war – can upend the risk environment. But it's also clear that long-term trends are reshaping the risk environment in a way that is less spectacular but which may have more lasting impact.

In particular, climate change and ESG concerns are increasing. For example, 54% of the lawyers we surveyed expected to experience more risk around sustainability reporting requirements over the next year.

Climate change is also heightening more practical project risks. The industry is already coming to terms with the issue of losing more work days to extreme weather events – a problem exacerbated by the fact that historical weather data is an increasingly poor guide to what can be expected going forward.

The evolving nature of construction risk will see changes to standard contracts and negotiation positions. It may also bring more disputes, particularly where those changes lag behind project realities.

How are ESG risks changing?



'Don't know' responses have been omitted from the chart.

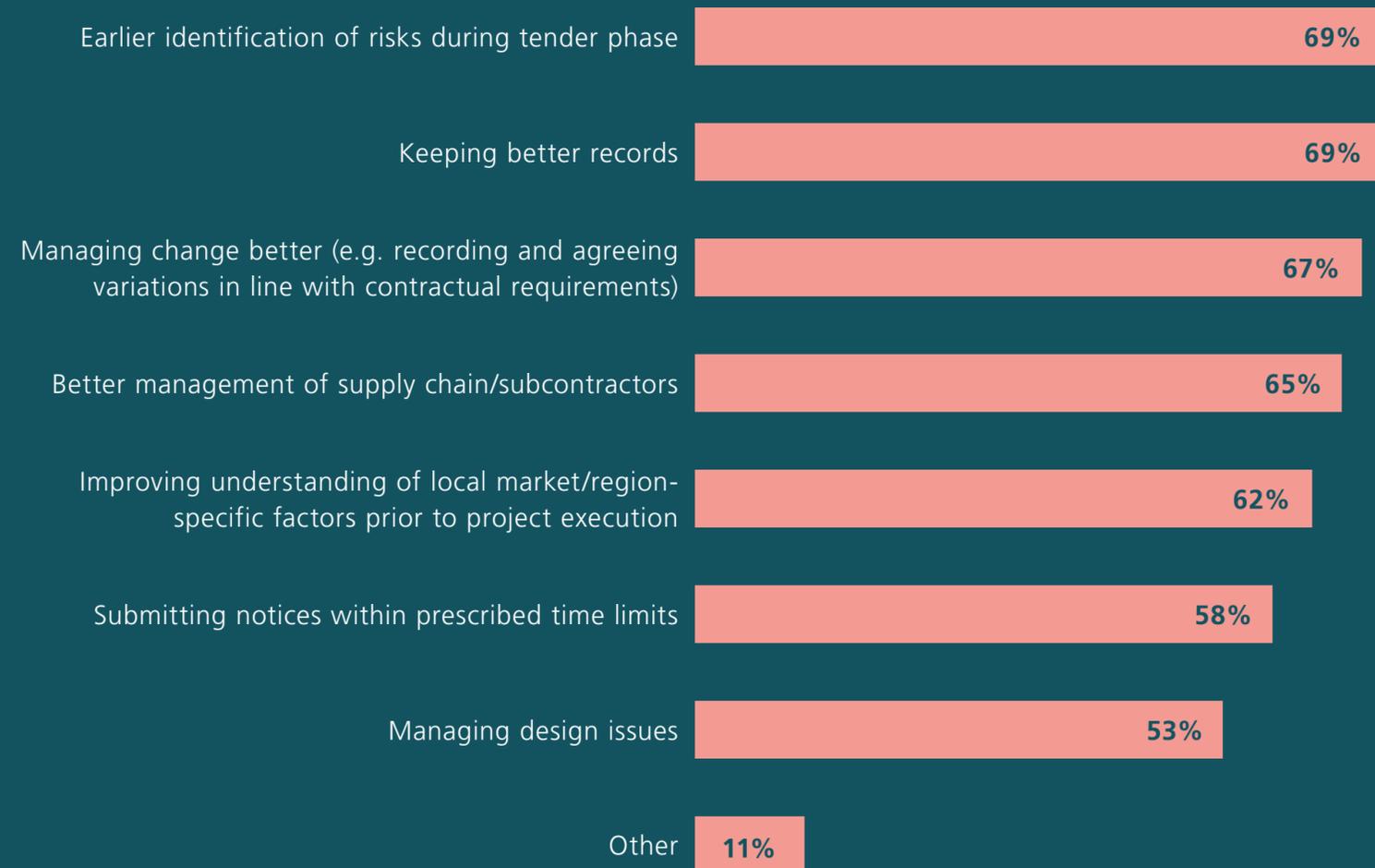
Q. Do you expect the frequency with which you experience these ESG risks to increase, decrease, or stay at the same level over the next year?

Room for improvement

We asked in-house lawyers how their businesses could improve the way in which risks are managed during the course of projects.

Most of them cited multiple areas in which improvements could be made. Rather like the main sources of disputes, most of these areas have remained broadly consistent over time. Clearly, even where improvements are made, there is often room for more.

What would improve risk management?

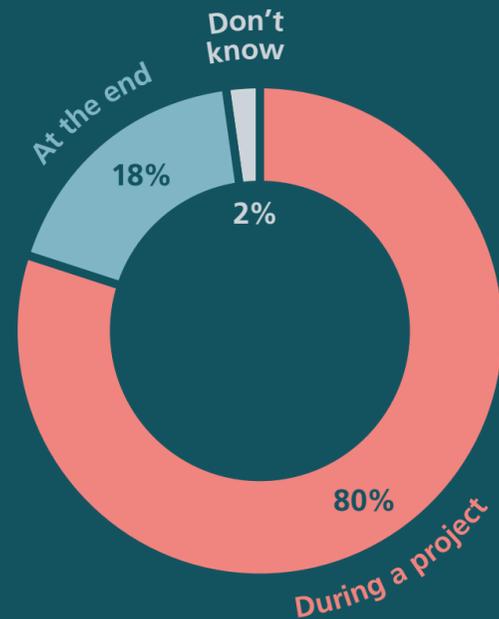


Q. In which of the following ways, if any, could your organisation improve risk management during projects?

Resolving issues early

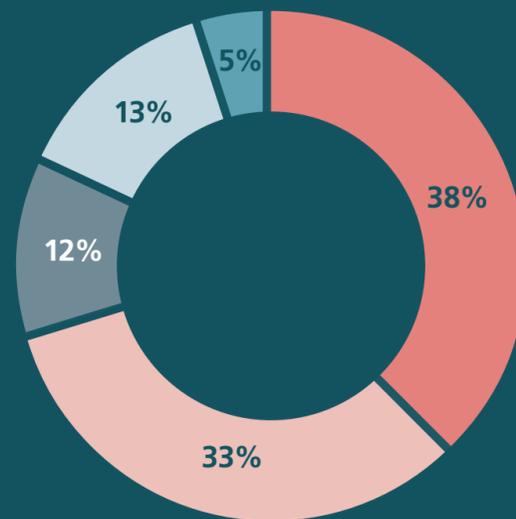
Construction project stakeholders are increasingly looking to resolve disputes separately during the course of a project, rather than at the end. Four-fifths (80%) of our respondents said that issues solved separately during the course of a project result in greater success, compared with 18% who felt it was better to resolve issues all together at the end of a project.

Is it better to resolve issues separately during a project or all together at the end?



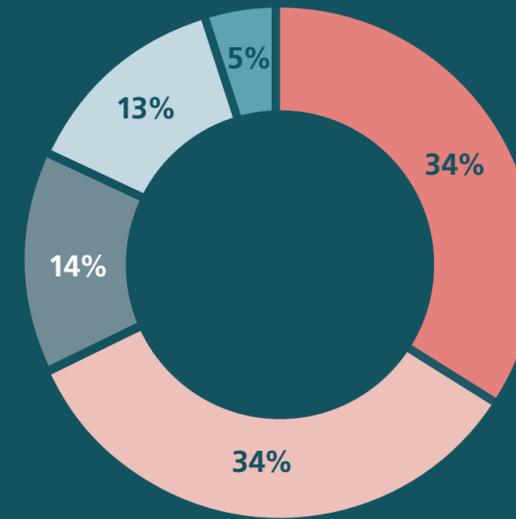
Seven out of ten in-house lawyers (70%) also agreed that spending time and money on legal advice during the course of a project can avoid the need to spend large amounts at the end of a project – almost four times as many as those who disagreed (18%).

Do you agree that spending time and money on legal advice during the course of a project can avoid the need to spend large amounts at the end of the project?



A similar number felt that spending time and money on legal advice during the course of a project can assist in achieving the early resolution of conflict points.

Do you agree that spending time and money on legal advice during the course of a project can assist in achieving the early resolution of conflict points?



Strongly agree Tend to agree Neither agree nor disagree Tend to disagree Strongly disagree

Interview: Małgorzata Fido-Bruszevska



Małgorzata Fido-Bruszevska
Head of Investments,
Expansion and Energy
Budimex

In your experience, what issues most often cause disputes?

Costs and payment issues are a problem in many contracts. Often the contracts are not precise enough and sometimes there are increased expectations for the standard of materials. The rising prices of materials and labour mean there is a need to improve remuneration to rebalance the economic interests of the parties.

Indexation provisions are already making their way into contracts, especially with big public contracting authorities. Nevertheless, changes in the costs of contract performance, sometimes due to factors beyond the control of the investor or contractor such as protracted administrative procedures, are quite common and could result in potential disputes.

I don't think the causes of disputes will change much in the near future – although any major market disruption, such as substantial breaks in international supply chains, could result in an avalanche of claims.

Do your stakeholders consult the legal team at the start of a project to address potential conflicts or disputes?

It's a common standard that before a bid or proposal is submitted by the general contractor, all the potential risks, including potential conflicts or disputes, are analysed by the internal legal team. We try to eradicate any ambiguous provisions in the contract to avoid potential disputes in the future.

If a contract is to be performed by a consortium, the terms of cooperation – with the emphasis on the division of works and subsequently the liability – are meticulously drafted.

The challenge of following all local requirements, which unfortunately are not fully unified within the European Union, is also increasingly important for us as we expand in foreign markets.

Continued on next page

Interview (continued): Małgorzata Fido-Bruszevska

However, it is not always possible to envisage risks which could materialise at a later stage. The legal department must be flexible and creative.

Whenever we see the potential for a dispute, we tend to assess all possible scenarios with the aim to find the best solution under given circumstances.

We rarely consult external lawyers at the outset of a project. We sometimes use outside counsel during disputes, but as we have a strong legal department with experienced litigators we only seek external support in the most complex and time-consuming cases. When international arbitration is ahead of us, we engage external advisors to be prepared in advance.

The cost element is always an issue and the costs of arbitration are huge. If there are chances for a settlement, we rely mainly on internal legal resources.

Do you address points of dispute as they arise during a project or do you seek to resolve them collectively at the end?

If any problem arises, especially a technical one, it is vital to record the facts diligently and communicate it to the contracting party without delay. We submit any claims as they arise, practically on a daily basis.

How do you view the use of artificial intelligence in disputes and contract management?

AI is the future. We have already used it to review huge amounts of documentation during the performance of a contract, to track the development of specific issues and the arguments supporting the parties' standpoints.

It is especially useful if a lot of documentation has been produced over a long period and personnel rotation means there is limited organisational memory.

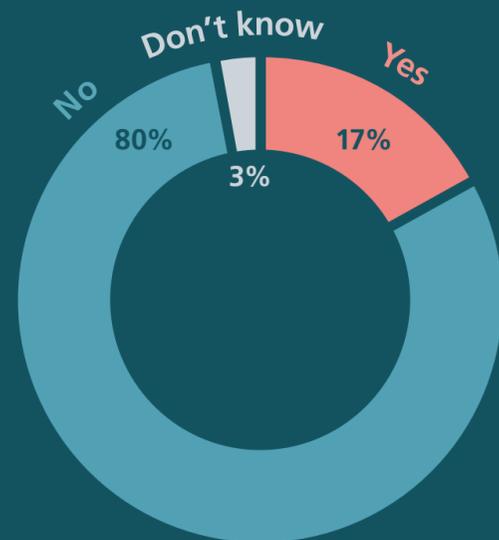
But while AI can facilitate the analysis of documents and data, an experienced lawyer will always choose the strategy and the arguments in a dispute.

Artificial intelligence

Artificial intelligence is currently huge news, which is why we decided to feature it in our survey this year. But our findings show that in-house lawyers are more cautious than other parts of the construction industry about adopting AI.

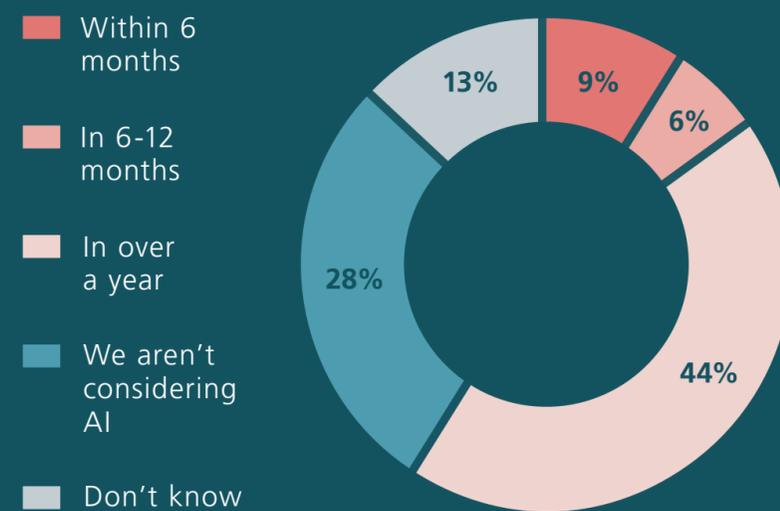
Only 17% of the lawyers we surveyed are using artificial intelligence in disputes or contract management.

Are you currently using AI in dispute management or contract management?



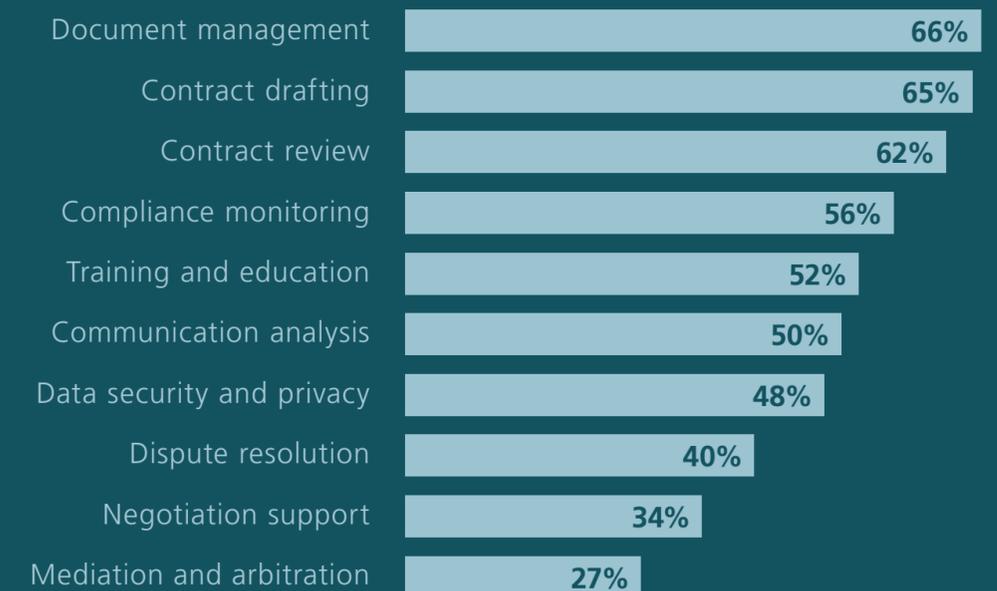
Most of the rest are at least a year away from using it, with many saying that they may not use it at all. But while many in-house legal departments are yet to come to terms with AI, other parts of the construction industry have already embraced its use in activities ranging from site planning and design to the production of reports and the operation of 'smart' buildings.

If you are not currently using AI for this, when do you expect to do so?



From a menu of tasks where AI might assist the in-house legal team, mediation and arbitration were seen as among the least likely use cases. Only 27% of the in-house lawyers we surveyed said they might use AI in this area.

What tasks do you expect AI to assist you with?

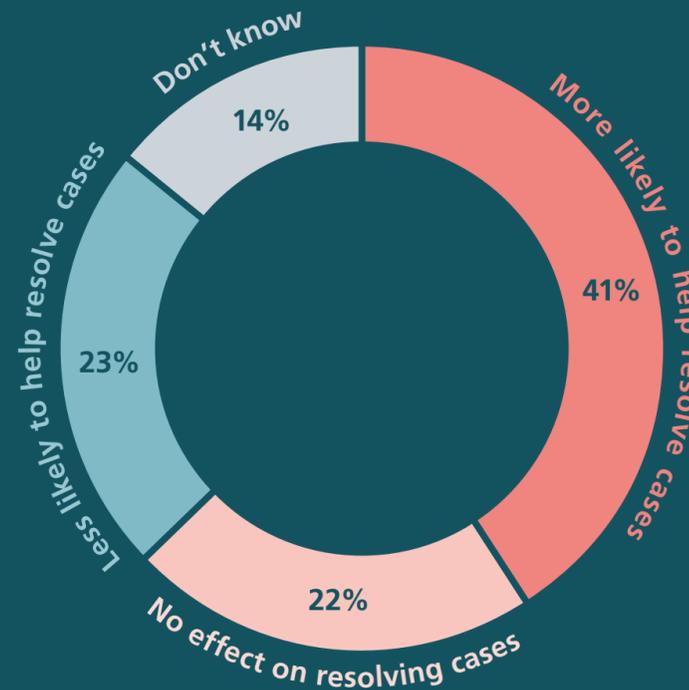


Competing visions of the future?

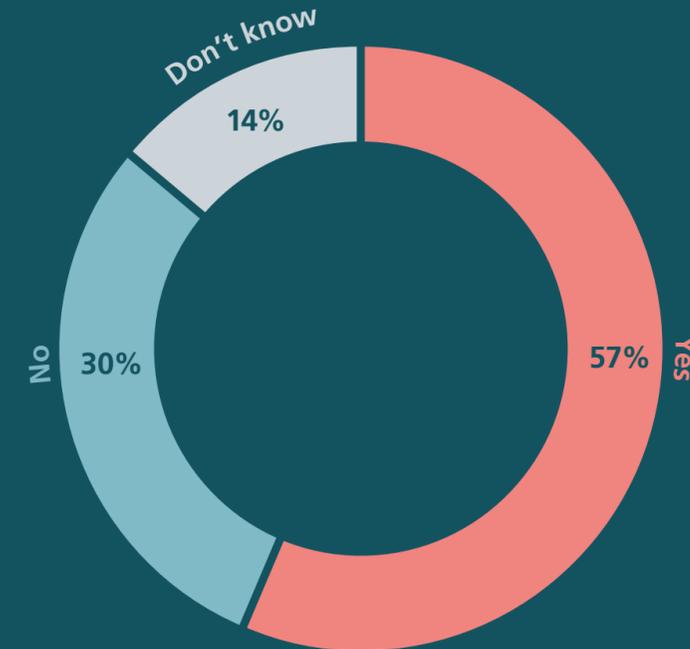
While 41% of the in-house lawyers we surveyed believed that the use of AI might help to resolve disputes, 23% thought it was actually *less* likely to resolve disputes.

We were also surprised to find that only 57% of in-house lawyers expected their external legal counsel to AI tools, compared with 30% who did not expect this.

What effect will the use of AI have in dispute resolution?



Do you expect external legal counsel to be using AI tools in their delivery of work?



Using AI in construction disputes

Despite the low takeup of AI among in-house lawyers, and apparent scepticism about its prospects, there is already ample evidence of the advantages that using AI in dispute resolution – with appropriate guidelines and guardrails – can bring.

In part, this is because AI has been around for much longer than the current wave of media hype. Previous generations of AI and machine learning are already familiar to many lawyers. Predictive coding, for example, has been successfully used during disclosure for well over a decade.

AI can be invaluable in reviewing the massive amounts of documentation generated by some projects. And in addition to reviewing, analysing and summarising (and translating) documents, AI has the capacity to produce initial drafts of arguments, correspondence, expert reports and other material, as well as being able to assist in visualising data and creating simulations or other visual aids for use in the presentation of arguments.

Able to do in a few hours what unassisted humans might take days or even weeks to achieve, AI can be invaluable in cases where speed is of the essence – for example, where emergency relief is required. And the speed of AI might also enable a business to pursue some disputes whose potential costs would otherwise be prohibitive.

Used in early case assessment, AI offers the possibility of rapidly identifying the key strengths and weaknesses of a party's position, facilitating timely and decisive action. It is able to find case law and precedents and identify key facts. With access to the right dataset, AI can even analyse previous disputes and evaluate the likelihood of different outcomes or the range of likely settlements.

AI can optimise processes, planning, scheduling and other elements of case management. It is also very well suited to the sort of risk management improvements that most of our respondents identified as desirable.

Additionally, AI has the potential to revolutionise the way in which a business handles its portfolio of contracts. Large organisations typically have many thousands of contracts: reviewing them en masse with AI is a way to tease out systemic issues or patterns of risk that would be almost impossible to uncover with a manual review. Similarly, a wide-ranging evaluation of past contracts by AI can identify strategies and data points which may then be used to de-risk future agreements.

There are also many ways in which the use of AI can help a business to avoid disputes, such as:

- Reviewing and analysing contracts.
- Increasing the effectiveness of project management and project review.
- Providing early warning of potential issues.
- Improving estimates, reducing the likelihood of cost or time overruns.
- Ensuring compliance with e.g. local legal and regulatory requirements or reporting requirements.

Looking forward

As our survey has shown, most in-house lawyers believe their businesses have a lot of scope to improve the way that project risks are managed. And AI has the potential to be a game-changer in this area. Its capacity for analysis, its ability to handle huge volumes of data, the ease with which it can synthesise information from widely disparate sources and the speed with which it operates will mean that many businesses come to rely on it in project planning and operation.

Those abilities will inevitably lead to its increasing use by the parties to disputes. And smart in-house lawyers will also be exploring the scope to use AI to reduce risks before projects begin, through better analysis, documentation, planning and preparation.

Says CMS partner Adrian Bell: “AI will not change construction disputes overnight. But it’s already clear that there’s a much stronger use case for it than many lawyers believe, both in preventing and resolving disputes.

“In just a few years, I think there’ll be a radical shift in attitudes. AI is only going to get better, making its use cases even more compelling. Businesses such as OpenAI are already aiming to introduce new generations of AI with greatly enhanced abilities to reason and plan. There’s already evidence to show that, at least in some markets, it’s become the most rapidly adopted technology in commercial history.

“Legal departments will inevitably be encouraged by their businesses to use it, not least because of the prospective cost savings. And when they see their peers deploying it – or the other side in a dispute using it to gain a material advantage – demand will only increase further.

“Technology is never going to replace lawyers. But lawyers who use technology effectively will ultimately replace the lawyers who don’t.”

“AI will not change construction disputes overnight. But it’s already clear that there’s a much stronger use case for it than many lawyers believe.”

About CMS

With more than 80 offices in nearly 50 countries, and some 5,800 lawyers altogether, CMS combines deep local market understanding with a global perspective.

Our construction lawyers advise on both the contentious and non-contentious aspects of some of the world's largest and most complex projects.

As one of the first firms to recognise construction law as a specialist area and create a dedicated team of construction experts, we can leverage many years' experience of helping our clients to avoid, manage and resolve construction disputes. But as a future facing firm, we are also committed to using the latest technology to support our clients.

We already deploy a variety of AI and other machine learning programs in dispute resolution, including specialist litigation AI such as Solomonic and more general AI tools such as Harvey and Microsoft Copilot.

We would be delighted to discuss either the use of technology in dispute resolution or more general aspects of construction disputes with you.

Please contact Adrian Bell, the co-head of our Infrastructure, Construction and Energy Disputes Group, or your [local](#) CMS team.



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CMS Infrastructure, Construction and Energy Disputes 2023

Partners

22

Lawyers

67



Excellent heavyweight practice...

Legal500

Law-Now updates

50



A well resourced, efficient team

Chambers & Partners

Number of countries with active disputes

30

Global Arbitration Review 60 ongoing cases

USD 32bn



The team's service levels and responsiveness are first class

Chambers and Partners

Active arbitrations and litigations

85



CMS has the right resources for every job, the people there are bright and motivated, with very good team spirit

Legal500

Number of partner directory rankings

40+

Team rankings



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500

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