

**SHOOSMITHS**

# Litigation risk 2024

Assessing the litigation outlook for business

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**FOR  
WHAT  
MATTERS**



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# Welcome



**I'm delighted to be able to introduce you to our latest Shoosmiths report, in which we share insights and perspectives about the litigation environment, the challenges and the inherent risks that lie ahead.**

In putting together this report, we have spoken to more than 360 general counsel (GCs) and senior in-house lawyers from large UK-based businesses, the majority of whom are expecting to increase the resources they allocate to dispute resolution over the next three years. In addition to getting views across all sectors, we have focused specifically on businesses in financial services, automotive and technology sectors to which many of our clients belong. Our analysis of High Court claims using litigation analytics platform Solomonic tells us that the volume of cases has decreased over the past year, while the average claim value has grown, signalling a need for GCs to maintain vigilance around significant one-off cases that may evolve into higher-value disputes.

Most of the respondents to our survey tell us that they feel satisfied with the way in which their organisations identify, mitigate and respond to disputes, but there is much more that needs to be done – only 41% of those that we questioned have so far developed litigation response plans, for example.

At a time when many industry sectors continue to suffer pandemic impacts, the fallout from geopolitical turmoil and other external shocks, GCs can rightly anticipate increasing caseloads alongside escalating litigation costs.

However, we believe respondents underestimate likely claims from environmental, social and governance (ESG) disputes. Stakeholders, regulators and society have changing demands and expectations, and these may emerge as legal liabilities, reputational damage and investor action.

The need to stress-test budgets and systems while prioritising preparedness and board alignment will be more apparent than ever moving through 2024.

We hope you find our report useful – please don't hesitate to get in touch if there is anything you would like to discuss in more detail or if we can support your teams in managing the risk of litigation.

**Alex Bishop**  
PARTNER AND HEAD OF DISPUTE RESOLUTION & LITIGATION, SHOOSMITHS

# Key findings

## LITIGATION IS ON THE RISE



A large proportion of respondents anticipate more disputes over the next three years, with group litigation, environmental claims, supply chain disputes and employment issues being most concerning.

## BUT BOARDS ARE MISALIGNED WITH GCs ON RISK



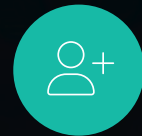
While there is a degree of alignment between boards and legal teams on the key areas of litigation risk, there is room for improvement in all but 13% of the respondents' businesses.

## GCs AND BOARDS DISAGREE ON THE SIGNIFICANCE OF DATA BREACHES



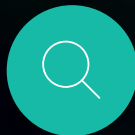
Two in five (38%) respondents say data breach follow-on litigation is one of their board's top concerns, but GCs and legal teams see it as less of a worry.

## LITIGATION SPEND AND HEADCOUNT IS SET TO INCREASE



More than three in four senior lawyers expect to increase headcount and 82% expect to increase spending on dispute resolution over the next three years.

## GCs NEED TO GET BETTER AT IDENTIFYING NEW RISKS



Companies are more confident in their ability to respond to disputes than they are in their ability to identify emerging areas of risk. Half are not horizon-scanning insights into legal changes and 64% do not undertake trend analysis on their sector.

## GCs LACK JOINED-UP STRATEGIC APPROACHES TO RISK MITIGATION



Fewer than half of respondents provide internal training on specific litigation risks, only 46% conduct litigation preparedness reviews and only 36% carry out contract audits.

One senior in-house lawyer states: 'As a business, we could employ much more joined-up thinking. Everybody tends to work in silos, with little awareness of the company's overall risk profile.'

## Emerging areas of litigation risk

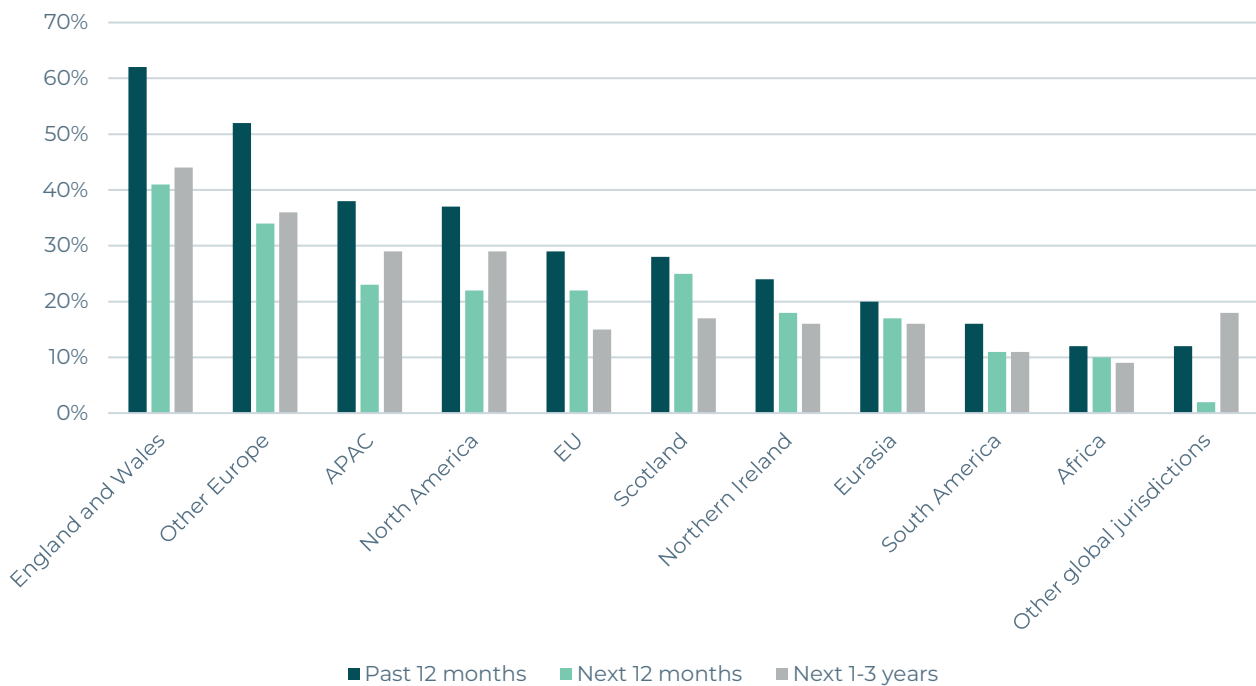
Disputes are by no means constrained to the UK, with respondents working in a variety of jurisdictions. However disputes are likely to decrease in most jurisdictions

### Jurisdiction

Most respondents believe disputes will be concentrated in England and Wales, followed by non-EU Europe in the next three years

The majority of the 360 UK-based GCs and senior in-house lawyers interviewed during the research for this report have dealt with a dispute in England and Wales during the past year, while 52% have been engaged in disputes in non-EU Europe over the past 12 months and 38% have dealt with cases in Asia Pacific.

Figure 1: In which jurisdictions have you engaged in disputes over the past 12 months/will you in the next 12 months/and in the next 1 to 3 years? (% of respondents)



Looking forward over the next three years, most expect to be dealing with a smaller number of disputes than they are currently but anticipate that the busiest jurisdictions will remain England and Wales, non-EU Europe, Asia Pacific and North America.

Around one in four respondents have dealt with cases in Scotland (28%) and Northern Ireland (24%) in the past year, with 17% and 16% respectively expecting to be engaged in cases in those markets in the next three years (see Figure 1).

We have witnessed a high number of supply chain claims in the automotive and tech industries in the past few years, many of them relating to the aftermath of the pandemic and the fallout from the war in Ukraine, so the focus on the non-EU European countries that are often at the epicentre of those cases is unsurprising.

It is reassuring to see that England and Wales remains the jurisdiction of focus for dispute resolution, reflecting the fact that in times of geopolitical uncertainty these courts are considered favourable when it comes to resolving difficult matters.

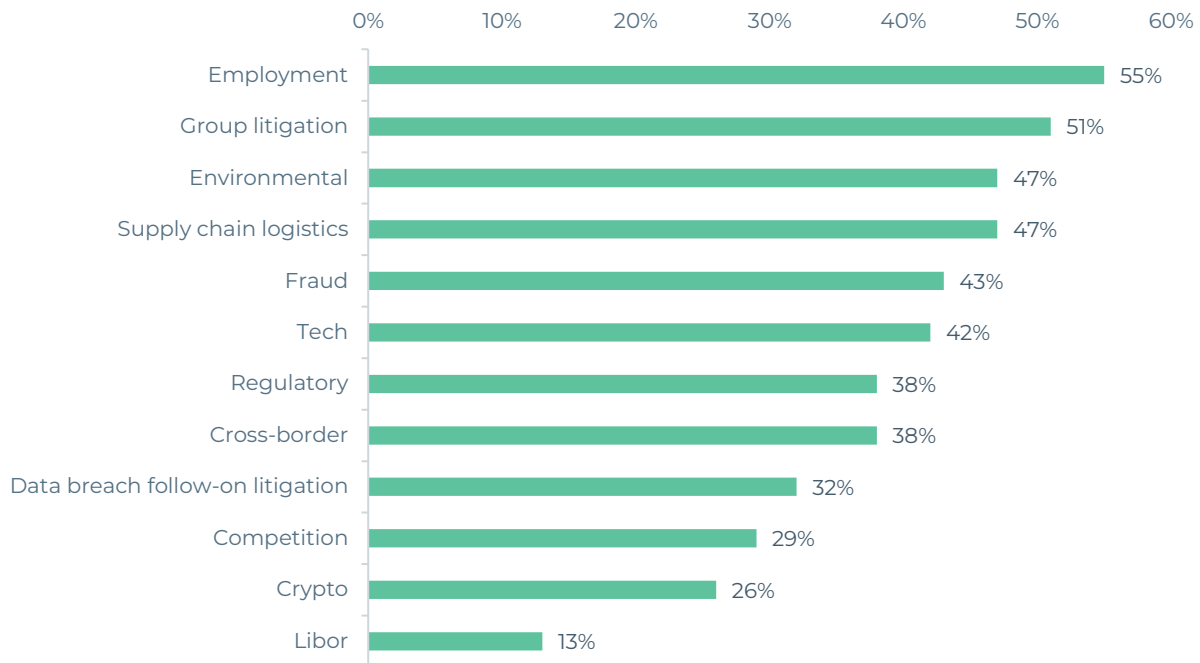
Scotland and Northern Ireland feature strongly in the activities of our respondents and we imagine that is somewhat reflective of a post-Brexit increase in claims on these shores.

## Types of litigation

### Massive changes to the ways in which people work, particularly following the pandemic, will drive disputes relating to employment

Looking at the outlook for disputes by theme, employment disputes, group litigation, environmental claims and supply chain logistics are the issues respondents expect to be most engaged with over the next three years (see Figure 2). It is perhaps unsurprising to see employment cases featuring so heavily, given the huge changes that have taken place in the world of work due to the pandemic and technological advances to enable remote working in the past few years. Significant pressure on wages owing to inflation and recessionary threats have given rise to more union activity and strike action in recent times.

Figure 2: How do you expect the risks of the following disputes to change over the next three years? (% of respondents expecting an increase)



The EU's Representative Actions Directive has opened the possibility of more group litigation in Europe. Simultaneously, the availability of litigation funding, the fact that technology is enabling parties in group actions to better coordinate, and the concerns associated with climate change also look likely to increase activity in this space. We already see signs of greater pressure from shareholders and banks to act on climate concerns, which is driving more environmental litigation.

The predicted uptick in supply chain logistics disputes can be linked both to the long tail of Covid-related supply chain disruption and to ongoing economic instability. Issues around interest rates, trade tariffs, Brexit, energy prices and technological disruption have all had an impact on the movement of goods. The increasingly global interconnectedness of supply chains will continue to add to the risk of such cases going forward.

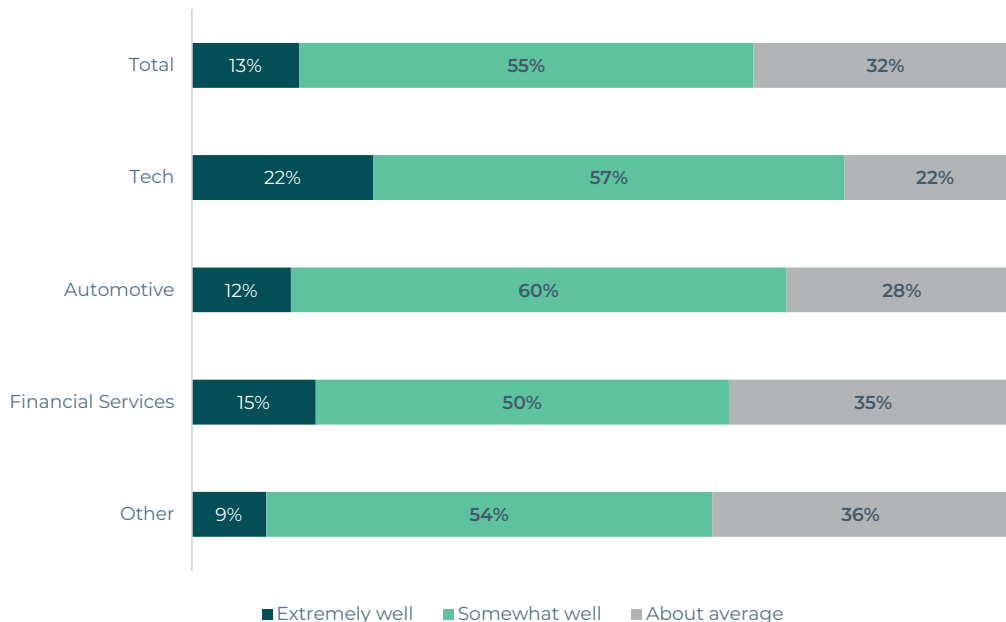
Those working in the technology sector anticipate an uptick in cases relating to technology and data breaches, while those in financial services are more concerned with a growing exposure to employment (72% expect disputes in this area will increase), fraud (65% expect an increase) and group litigation (53%) claims. The automotive industry anticipates more cases relating to supply chains and environmental issues (70% expect an increase in each of these areas) and 63% expect an increase in cross-border disputes.

## Board alignment

**Boards and GCs are generally aligned on where to focus, but there are some anomalies, in particular for employment, data breach, regulation and technology**

There is broad agreement between boards and legal teams on emerging areas of risk, with most GCs feeling that their organisations deal well with disputes at every level. In all, 55% feel that their board aligns well with the legal team on issues of risk management, with another 13% saying they align extremely well (see Figure 3).

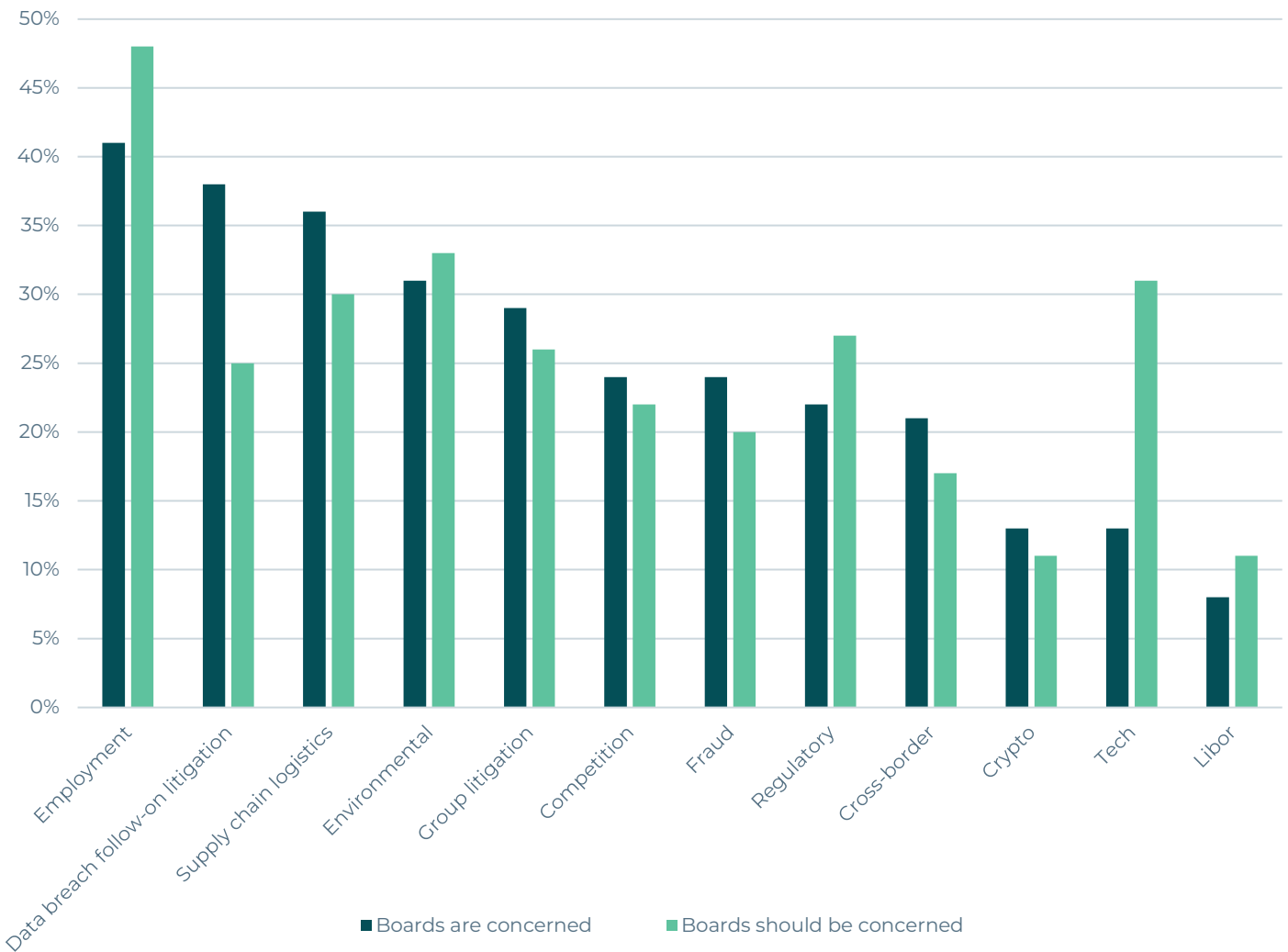
Figure 3: How well do you feel the board aligns with the legal team on risk management? (% of respondents)



One GC at a UK-based financial institution tells us: ‘That relationship between the legal team and the business is critical. There is an education and understanding piece, helping with the stakeholder buy-in in relation to mitigating the litigation risk and getting the legal team in early to avert disputes and try to find different ways of resolving issues.’

There are some areas of misalignment when it comes to the emerging risks that boards prioritise versus those that GCs would like them to focus on. Data breach follow-on litigation is front of mind for boards, for example, whereas GCs do not believe that is something boards should be unduly concerned about. This may be symptomatic of the fact that data breaches are more often the domain of Chief Technology Officers and therefore not the priority of GCs. Instead, in-house lawyers would like their boards to give greater priority to employment, regulatory, environmental and particularly technology litigation, which likely reflect these burgeoning legal trends (see Figure 4).

**Figure 4: Which of the following areas of emerging risk causes your board the most concern? And which areas of emerging risk should your board be concerned about? (% of respondents)**



Having conducted additional analysis of insights from litigation analytics platform Solomonik, it is apparent that perception does not always match reality when considering litigation trends, so it is important that legal teams are led by the data. It is still the case that breach of contract claims remain the dominant category in the High Court, for example, highlighting the importance of assessing contractual vulnerabilities before disputes emerge, particularly in today’s volatile geopolitical climate.

As one GC explains, the current macroeconomic environment might increase the chance of disputes as parties feel more inclined to pursue claims they feel think they might win. Conversely, the cost of litigation deters claimants when the economic backdrop is tough.



Data breach is highlighted as a major concern by boardrooms. Threats of data breaches, privacy violations and hacks continue to escalate, with the UK's National Cyber Security Centre – part of GCHQ – pointing to a growing threat from state-aligned groups engaging in aggressive cyber activity.

Conversely, boardrooms are remiss in underestimating the number of claims likely to emanate from ESG disputes. As stakeholders increasingly demand commitments from business in relation to sustainability, companies find themselves exposed to legal liabilities, reputational damage and investor action.

## Sectors

### Financial services has the highest volume of disputes

Looking specifically at sector trends, Solomonik data shows financial services is the sector with the highest number of disputes, with regulatory activity a particular theme. Our respondents in financial services worry that their boards overlook emerging risks in areas such as technology disputes, group litigation, crypto and employment. They expect non-EU Europe and Asia Pacific to be among the most active jurisdictions for them when it comes to dealing with disputes.

While technology disputes dipped 48% last year, GCs in the sector would like to see their boards more alive to emerging risks around technology, employment, environmental and regulatory issues.

In the automotive sector, group claims have reduced in the past year after a spike (likely resulting from the emissions group actions), with in-house lawyers worried that boards are overlooking threats around technology disputes, supply chain logistics, employment, crypto and group litigation.



## Chapter 2:

# Allocating resources for disputes

In-house teams expect to be boosted in the coming three years in line with rising costs of litigation and organisations are actively investigating novel ways to reduce costs.

## Building in-house capacity

### Organisations are generally looking to build more in-house capacity

As in-house teams work to respond to the rising costs of disputes and deteriorating economic conditions, most expect to increase both headcount and spending. Over the next three years, 77% of respondents intend to increase their specialist in-house litigation teams, which is a big jump on the 31% that say they have increased headcount in the past year and the 34% that expect to increase it in the next 12 months.

These signs suggest an acceleration in in-house resource investment over time, and that need is most acute in the technology sector, where 88 % plan to grow their teams in the next three years versus 68% in financial services. It is possible that the large financial institutions in our survey already have sizeable teams that are equipped to deal with litigation in-house. Equally, we have seen banks scaling back their legal teams in recent years and not replacing headcount. In that context, the fact that they still plan to grow headcount for disputes by 35% in the next year is significant.

When it comes to litigation budgets, more than four out of five respondents expect to increase resources, with the commitment most notable in the automotive industry where 93% intend to grow spending over the next three years. In addition, the financial services industry expects spending to grow 78% and the tech sector expects it to increase by 65% over the next three years.

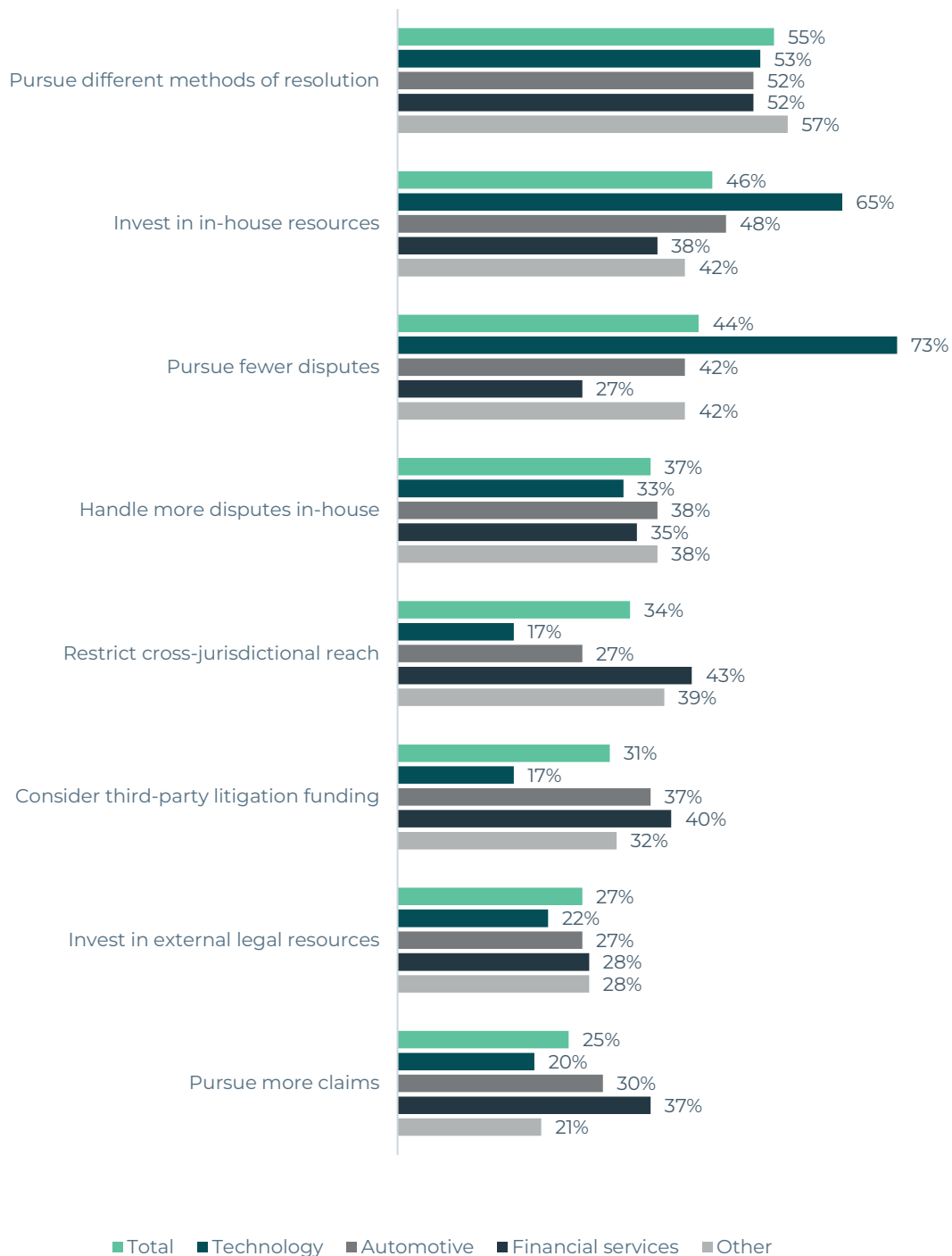


## Rising costs

### Increasing costs associated with litigation encourage organisations to explore new methods of funding

In response to the rising costs of litigation, GCs surveyed say they will consider third-party litigation funding, will restrict their cross-jurisdictional reach and will handle more disputes in-house (see Figure 5).

**Figure 5: Which of the following are you most likely to adopt in response to the rising costs of dispute resolution? (% of respondents)**  
(overall figures shown along with responses from technology, automotive and financial services companies)



Third-party litigation funding can remove the short term cost of funding litigation and limits the risk of adverse costs when coupled with after-the-event insurance to protect against adverse costs orders. Businesses benefit because there is no initial outlay of costs as the case is progressed, while in the event of recovery a proportion of damages is shared with funders.

Our research shows a marked difference in appetite for third-party funding solutions between different industry sectors, with twice as many GCs in the technology sector likely to consider it as a tool to combat rising costs compared with those working in financial services. Financial services businesses may be less inclined to adopt third-party funding because they are less likely to be in the position of claimant.

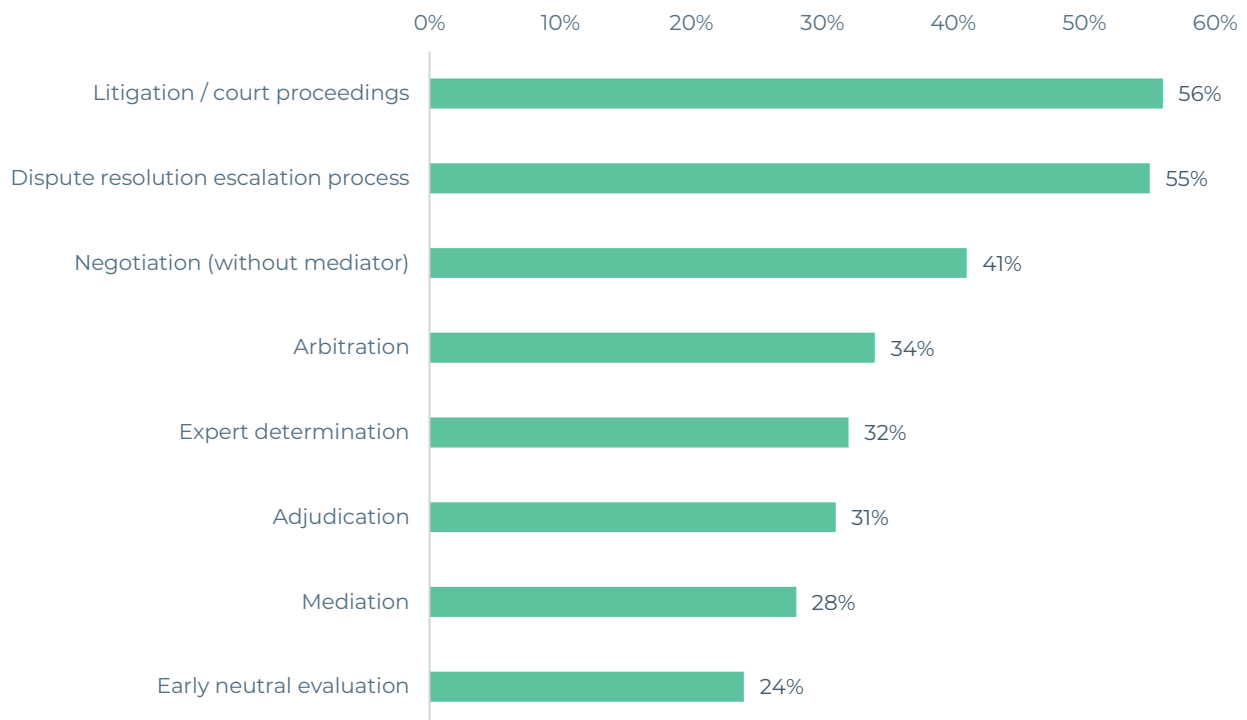
One group GC we spoke to at a financial institution tells us: ‘Given the costs of disputes it is important to consider the commerciality of pursuing claims, whether that is the law firm fees involved or the amount of management time required, including distraction from running the business. We will obviously try to be as smart as possible in relation to mitigating costs, through the use of technology, for example, or by outsourcing certain parts of the litigation process to lower cost centres.’

Another GC working in the automotive industry says: ‘Prevention is better than cure so the extent that we have any level of control we try to prevent a dispute from starting. Once it begins, we have a number of options, one of which is settling early. But that obviously comes with an associated cost of its own.’

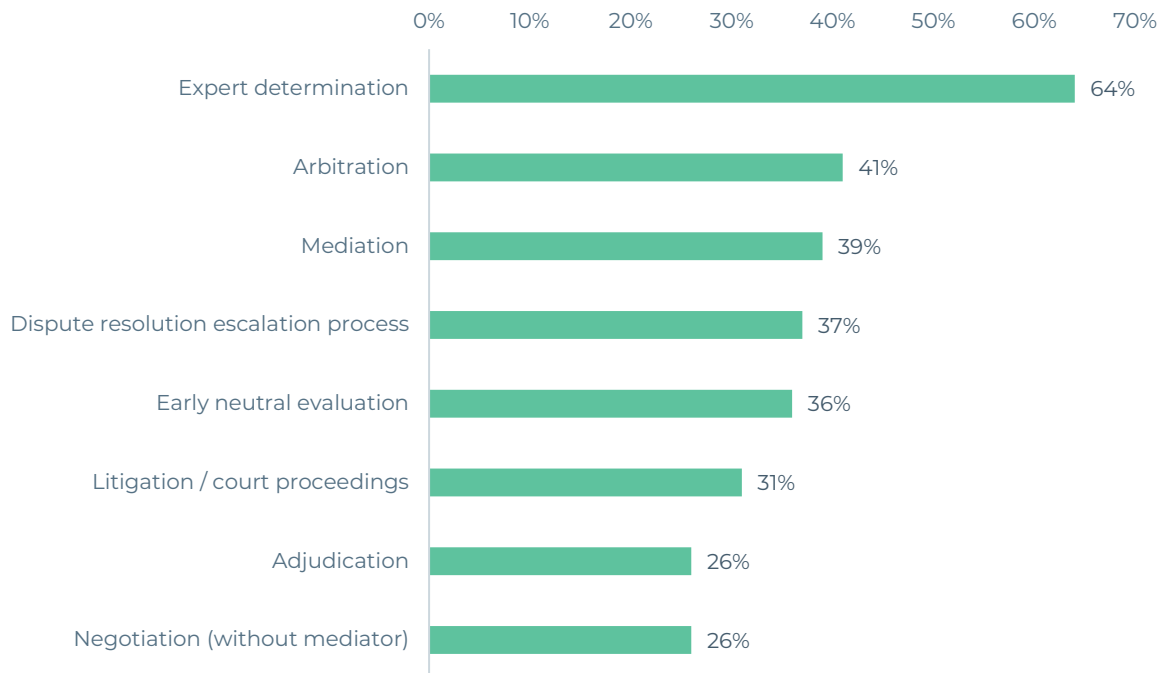
He adds: ‘There are ways to try to control the costs – through estimates, caps and fixed fees, for example – but those are very tricky in litigation because things are unpredictable and cases do change course. The emphasis is on trying to settle things if possible and trying to take the most reasonable approach in order to try not to get hit by the other side’s costs as well.’

There is a mismatch among respondents between the methods of dispute resolution considered to be the most effective and those that are fastest. Litigation and court proceedings are favoured for delivering results, followed by dispute resolution escalation processes, but the fastest outcomes can be achieved by expert determination, arbitration and mediation (see Figure 6).

**Figure 6: Which of the following methods of dispute resolution have you found most effective in producing successful outcomes?**  
(% of respondents)



Which of the following methods of dispute resolution have you found most effective in producing fast outcomes? (% of respondents)



Thinking about the methods of dispute resolution, one GC points out that it is not always something over which there is much choice: ‘There are cheaper alternatives but then you need the consent of the other party – there must be buy-in to a settlement, to expert determination or to mediation, and there usually isn’t. There is usually a hard-headed belief that the case will be won. You have to break the other side before you can get to a point of compromise.’

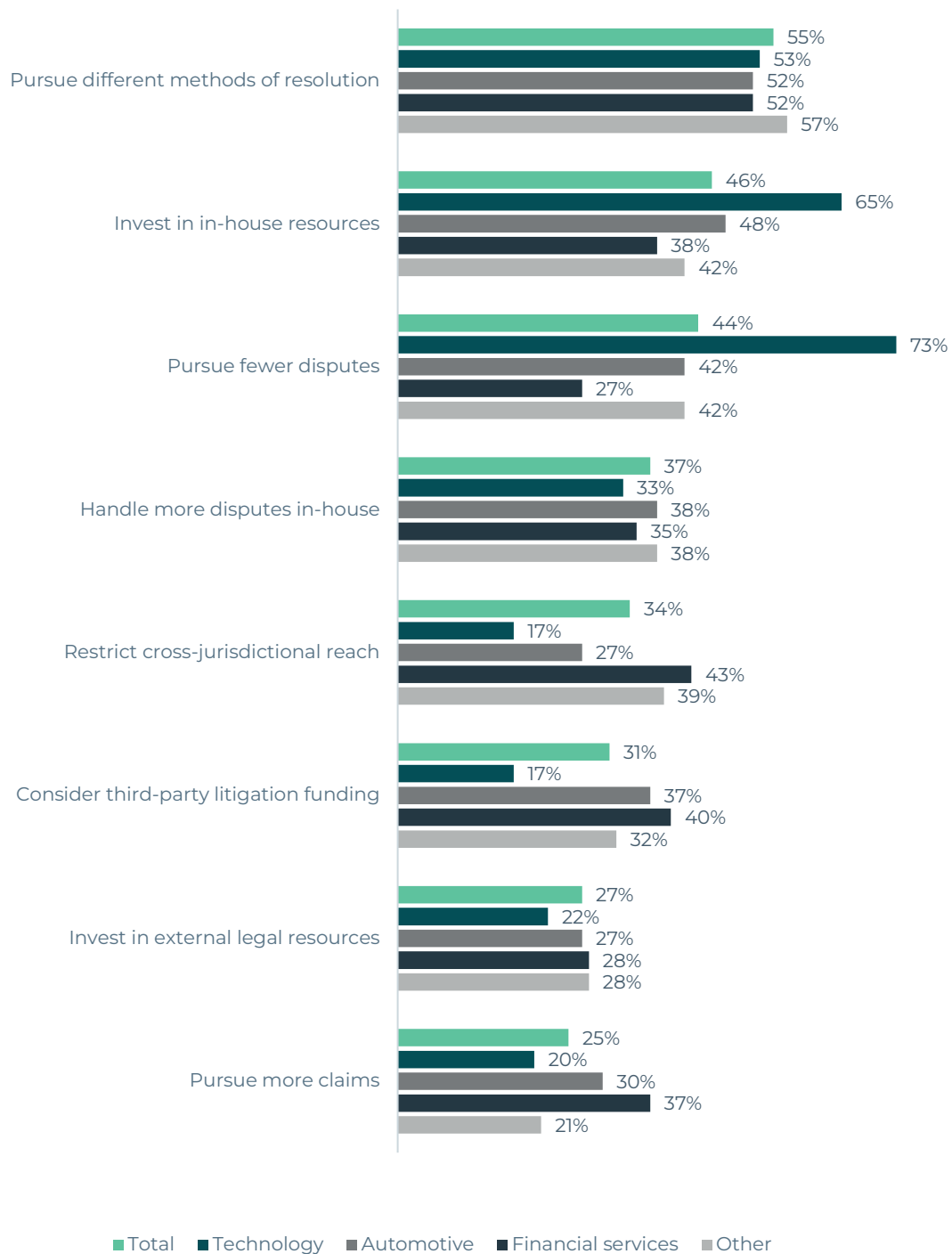
The fastest options may not always be the most effective, with most respondents agreeing that mediation can be efficient, but the best results are delivered through court proceedings.

## Macro challenges

### Tightening budgets encourage organisations to look at new ways to resolve disputes

When asked how they might respond to the deteriorating economic environment, in-house lawyers say they will pursue different methods of dispute resolution, build in-house resource and pursue fewer disputes, with the technology sector outliers heavily skewing towards investing in in-house resources and particularly to pursuing fewer disputes (see Figure 7).

Figure 7: Which of the following are you most likely to adopt in response to the deteriorating economic environment? (% of respondents)



Some respondents are exploring the way in which they engage with external advisers to staff matters. One head of litigation at a specialist lender says: ‘We went through a tender process last year and substantially reduced our external legal spend by moving law firm. Our current model uses more paralegals rather than junior associates as we did in the past – a lot of claims can be dealt with by skilled paralegals that are well supervised.’

Among those looking to build in-house resource, there is some appetite to embrace technological solutions as part of the dispute resolution toolkit. The head of litigation continues: ‘We also consider ourselves to be fairly tech positive. We are small, lean and focused on getting better information to management to show how our strategies are working. We are taking a portfolio view on risk and I’m really interested in ways we can make better decisions using data.’

As cases become more complex and document-heavy, there is a growing appetite for embracing sophisticated legal technology for e-discovery and analytics, helping to keep costs down, enhance efficiencies and deliver strategic advantage. Law firms are increasingly using e-disclosure, AI disclosure review, case data analytics and tools like AI contract review, risk analysis, dispute prediction, all of which can support GCs in assessing likely outcomes and streamlining reporting to boards.

One group GC tells us: ‘Looking forward, in-house teams need to prioritise working more closely with law firms to understand the changing landscape on the technology side. When we are in a dispute, what are the advancements that mean we can be dealing with those massive amounts of paper in a much more cost-effective way?’

Nevertheless, as teams battle to address the rising costs of dispute resolution, they remain committed to pursuing cases that make commercial sense. ‘Litigation has always been expensive,’ says one GC. ‘I tell my board that it’s not a win to end up in the High Court at all, but am I prepared to do that, and would I recommend we do that? Yes, in certain circumstances I would. The commercial outcome is by far the driving factor and the priority.’



## Chapter 3

# Anticipating and mitigating exposure

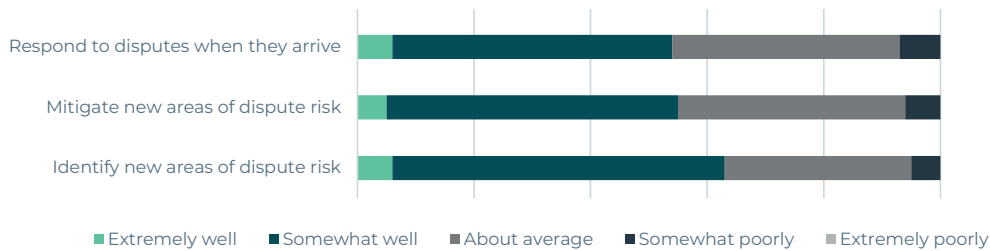
**Businesses could be doing more to anticipate and mitigate disputes by getting ahead of risks.**

### Be prepared

Respondents could use a wider variety of techniques to prepare for potential disputes

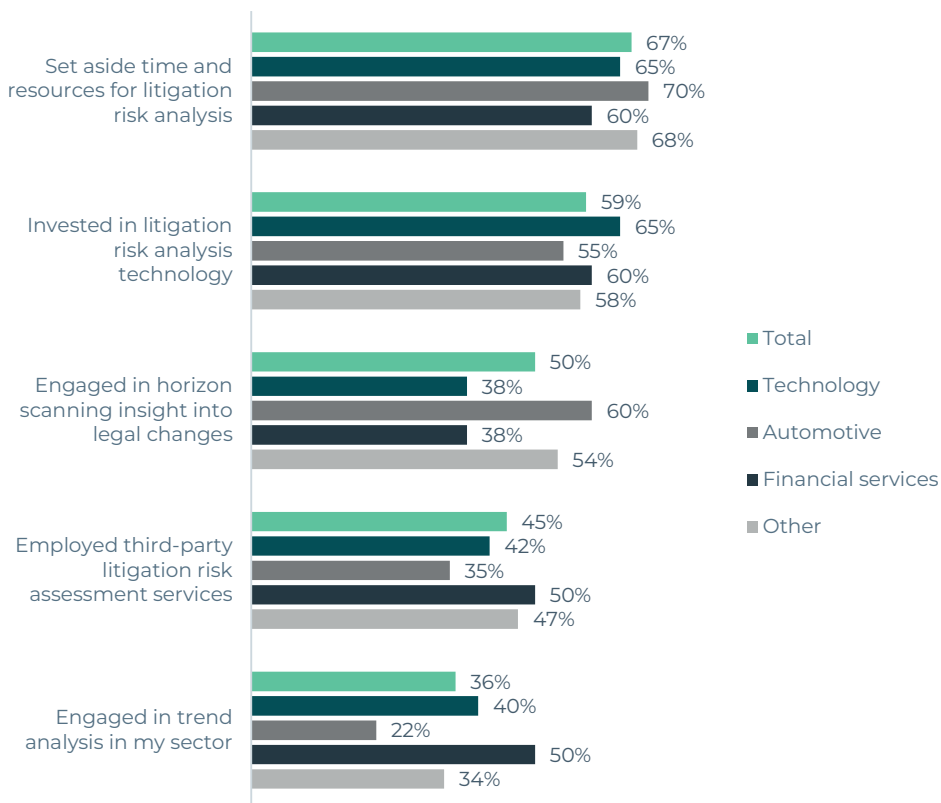
The majority of our survey respondents feel confident that their businesses are doing well at identifying, mitigating and responding, with more than half placing their firms ahead of competitors (see Figure 8).

**Figure 8: Compared to its competitors, how well does your organisation do the following? (% of respondents)**



Companies are generally more confident in their ability to respond to disputes when they arise than they are in their ability to identify emerging areas of risk, and when we drill down into the measures adopted to identify new areas of litigation risk, only two-thirds set aside time and resources for litigation risk analysis. Furthermore, only 59% of those questioned have invested in litigation risk analysis technology. Half have engaged in horizon scanning to gather insights into legal changes and only 45% have employed third-party litigation risk assessment services (see Figure 9).

**Figure 9: Which of the following measures have you adopted in order to identify new areas of litigation risk? (overall figures shown along with responses from technology, automotive and financial services companies) (% of respondents)**





Finally, just a third of the GCs, heads of legal and senior lawyers questioned are engaged in trend analysis in their sector, which we see proving invaluable for pinpointing emerging areas of risk such as supply chain disputes, environmental litigation and class actions in the automotive space, and Consumer Duty and commission claims in financial services.

One group GC in a financial services firm says most in-house teams are inherently responsive. 'We can horizon-scan and be aware there are certain buckets of risk that are more likely to happen than others, and we can speak to the business about mitigating those as problems,' she says. 'But outside of that we are quite reactive, particularly in banking where there is an inherent flow of complaints from customers that we have to deal with as they arise.'

The head of litigation at a specialist lender says: 'Managing the current reactive caseload well is only bronze medal level for us. We want to get to a situation where, through good horizon scanning, we are predicting things coming down the pipeline and then improving our processes and product offerings to prevent issues like those occurring in the future.'

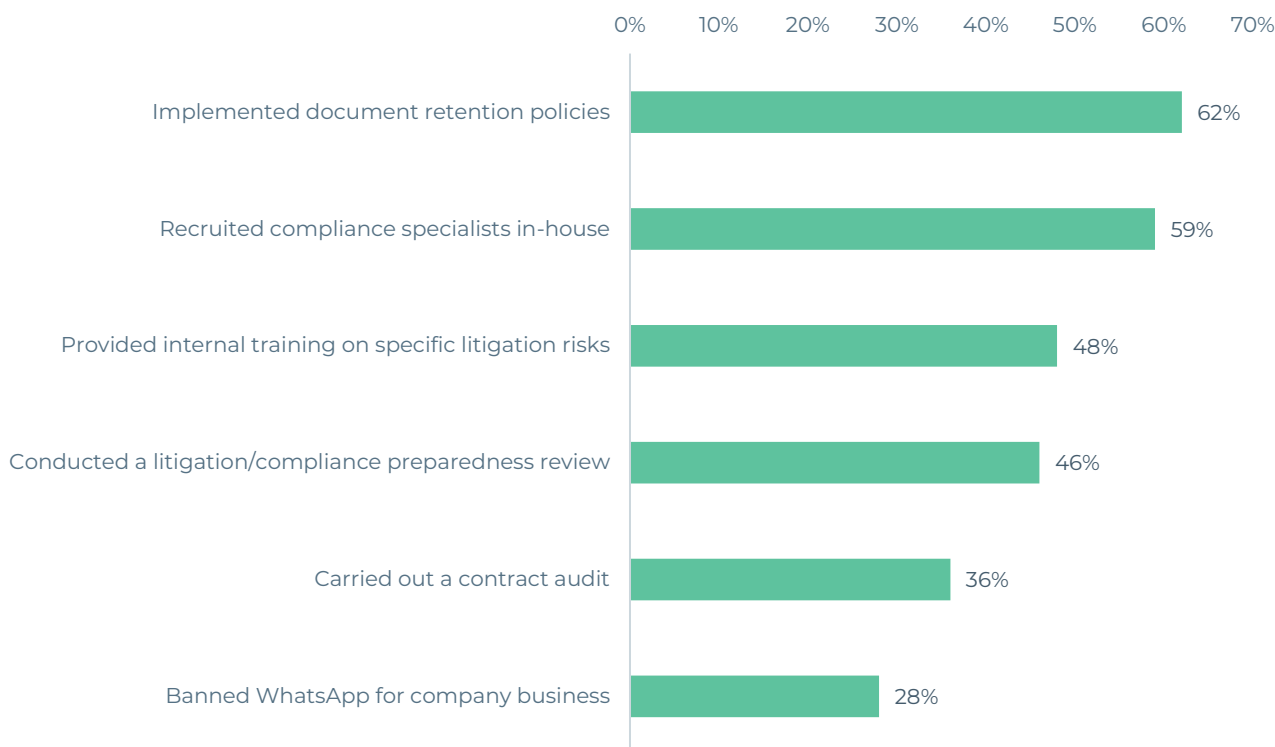
Now is the time for businesses to reflect on whether they are doing enough internally to prepare for the next wave of inevitable disputes. The predominant claims still relate to breaches of contract, so understanding where documents are held and ensuring they are appropriately archived is an essential first step. Beyond that, companies can now use AI tools to conduct basic contract review exercises: identifying new regulations coming down the line, checking whether contracts are compliant and then addressing any weaknesses.

## Mitigating risk

### Firms could also do more to mitigate against potential risks

When it comes to mitigating litigation risk, it is clear businesses can do more. Just 62% of respondents have so far implemented document retention policies, only 59% have recruited compliance specialists in-house and fewer than half have provided internal training on specific litigation risks. Furthermore, we found that 46% have conducted litigation preparedness reviews and only 36% have carried out contract audits (see Figure 10).

Figure 10: Which of the following measures have you adopted in order to mitigate litigation risk? (% of respondents)



Only a quarter of our respondents have so far banned WhatsApp for company business and yet in this data and tech-driven age, the biggest risks to businesses often relate to the careless use of electronic communications where employees overlook the fact their chats may end up in court. That means there is a clear need to review and refresh document creation, retention and deletion policies, and to ensure that there is sufficient understanding of the IT infrastructure to be able to ring-fence electronic data quickly in order to protect it from automatic document destruction protocols that may attract court sanctions.

It is also important to educate staff about the use of social media at work, including the fact that communications via social media, text message and WhatsApp will be subject to disclosure orders in the event of a claim. The further that company communications are allowed to move away from formal communication styles, the more danger there is that a litigator reviewing the messages in court might misinterpret loose wording, leaving the business open to reputational damage.

The risks associated with AI adoption are manifold and are another area that GCs will want to monitor carefully in order to get ahead of exposures.

One senior in-house lawyer working in the automotive industry says his business could do more to mitigate risk. 'As a business, we could employ much more joined-up thinking,' he says. 'Everybody tends to work in silos, so the people selling things try to sell and focus on their targets with little awareness of the company's overall risk profile. There needs to be a more strategic approach to how one little action in one part of the company can impact other areas. That is obviously easier said than done in a big organisation but better communication would be a step forward.'

He adds: 'One thing that we do well is internal investigations, so if we think there is a problem that could potentially be big, we will voluntarily employ people from outside to really dig down and analyse that. They can then produce a report and the outcome of that will colour our approach to the problem and how we deal with it. If there is a sense we have done something wrong, we will put that effort in early to see if that is justified.'

When it comes to mitigating the risk associated with class actions, particularly in relation to environmental claims, it is important that companies are clear on their ESG messages and do not allow erroneous promises to be made. Claims that cannot be substantiated – which might slip into poorly-drafted marketing materials and website content or be casually mentioned in conversation with potential clients – can easily leave the company exposed to claims of greenwashing.

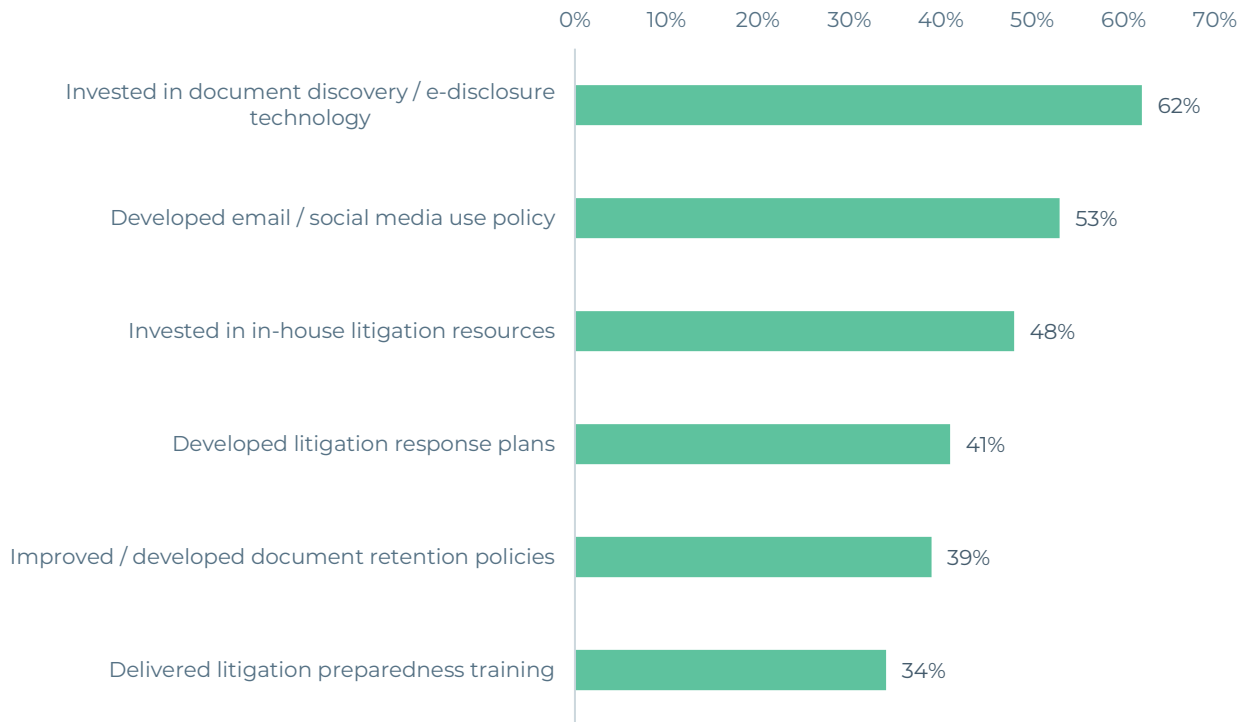
## Improving responsiveness

### More can be done to improve crisis preparedness

Finally, we asked respondents about the measures they have adopted to improve their response to litigation when it arises, and found 38% have not invested in document discovery and e-disclosure technology, 47% have not developed email and social media policies and 52% have not invested in in-house litigation resources. Clearly, these numbers could be improved (see Figure 11).



Figure 11: Which of the following measures have you adopted to improve your response to litigation when it arises? (% of respondents)



A GC tells us: ‘What I find helps a lot is to have well-established teams of external people that you can trust to help you deal with cases when they arise. That reduces the risk, the level of stress and all sorts of problems that can come up along the way with a piece of litigation.’

Only one in four of the GCs surveyed have so far developed litigation response plans and just 34% have delivered litigation preparedness training within their companies, and yet there is much that can be done around crisis preparedness to improve response times. We would advise companies to set aside time, potentially with external lawyers, to work on war gaming and risk mapping, and then to allocate resource to planning for certain eventualities, such as cyber-attacks, in order to ensure the most effective, efficient and comprehensive response possible.

**“What I find helps a lot is to have well-established teams of external people that you can trust to help you deal with cases when they arise”.**

GC

## How can you respond?

Litigation risk continues to diversify as businesses face economic, technological and environmental disruption, causing growing concern among GCs and their boards. Furthermore, this risk is set to rise, particularly in areas such as employment, group actions, environmental and supply chain logistics, with the average cost of disputes also set to increase.

It is no surprise that businesses are looking to respond with increased spend and headcount and are exploring all options when it comes to mitigating risk and optimising their response to litigation. The following action list is designed to help you get your business in the best shape possible.

### Actions for legal teams:

#### 1. Understand unknown unknowns

Set aside more time and resource for litigation risk analysis, invest in risk analysis technology and embed horizon scanning and trend analysis into your operations, particularly in areas of high risk. Companies have to get better at identifying risks earlier – the emergence of AI being a case in point



#### 2. Double check contracts for vulnerabilities

Focus on contractual vulnerabilities via a contract audit, including reviewing the robustness of force majeure clauses and embracing technology to manage contract expiration, renewal and termination risks



#### 3. Get on top of your documents

Embed comprehensive document creation, retention and deletion policies to ensure information can be ring-fenced and made available as required in the event of disputes.



#### 4. Make sure staff understand the risks

Develop internal training programmes to make all staff aware of new and emerging litigation risks, including in relation to the use of social media, messaging, WhatsApp and AI at work.



#### 5. Be prepared

Conduct litigation and compliance preparedness reviews and develop litigation response plans to ensure the most effective and timely reactions should issues arise.



#### 6. Plan your long-term budget

Build long-term resourcing strategies for dispute resolution, with appropriate planning to increase headcount and spending over time.



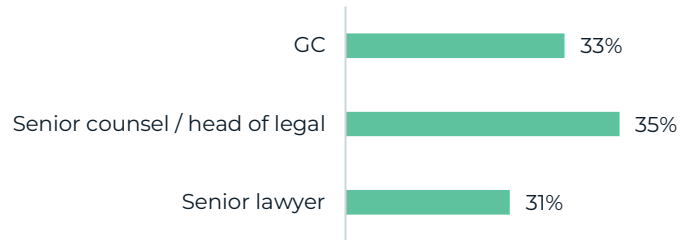
#### 7. Make sure you and your board are aligned

Prioritise the ongoing alignment of the board and the legal team to ensure maximum effectiveness in the face of rapidly changing and dynamic markets.



## Methodology

During July and August 2023, Shoosmiths conducted a phone-to-web survey of 360 respondents working in technology and telecoms, automotive, financial services and other industries. All respondents were based in the UK and worked for companies with revenues in excess of £100 million.



## Our Dispute Resolution and Litigation team

Shoosmiths is a law firm clients choose for excellent service, incisive thinking and above all for our ability to focus on what matters.

Our specialist team of litigation, international arbitration and dispute resolution lawyers help our clients redress the balance – maximising value, minimising risk and enhancing reputations.

By bringing together our litigation experts from every area of our business, we provide holistic, strategic and pragmatic advice to minimise risk and avoid disputes arising.

Where disputes do arise, we work with our clients providing strategic and specialist guidance to resolve them swiftly on favourable commercial terms or put them in the best possible position to win if contested.

We work with some of the world's most exciting and ambitious businesses, particularly in areas including financial services disputes and investigations, technology, automotive and real estate disputes.

## Contact us to discuss your litigation challenges



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