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The Prognosis

It may not be as dire as it looks.

Two prominent dealmakers, Damien Zoubek and Jenny Hochenberg, see some flickering signs of vitality in the M&A market that could be harbingers of a way out of the present coma. Mr. Zoubek, after 22 years at Cravath, moved to Freshfields and for the past 14 months has been the firm's co-head of Corporate and M&A for the U.S. Ms. Hochenberg is a Freshfields partner, who also joined from Cravath after 13 years, and is an award-winning thought leader in that practice. Both assert that assessments of the past twelve months of M&A can suffer more by comparison to the previous year than from any chronic illness that might be threatening the future health of the dealmaking world. "You always have to keep things in perspective because 2021 was just so big, so incredibly busy that it was almost absurd," Mr. Zoubek says. What's more, it all could have been a whole lot worse.

The drop in 2022 was certainly bad enough. The data show just how far dealmaking has declined. It's a long casualty list. Over the last half of 2022, deal value totaled $1.4 trillion. The first six months of the year, that figure was $2.2 trillion. That is the most glaring disparity from one six-month period to the next since records began in 1980, according to Refinitiv. The number of mega-deals, those worth over $10 billion, collapsed from 25 in the first half to 11 in the second. The total value of global M&A fell 37 percent to $3.66 trillion after 2021's record of $5.9 trillion.

M&A faced a bomb cyclone in 2022. Who could have foreseen a pandemic, a war in Europe, interest rates erupting, new leaders in antirust regulation and the ever-increasing power of foreign investment regimes, as well as the threat of inflation, market volatility, supply chain disruptions, Federal Reserve policies that have hamstrung financing and more, and all at the same time? "For a long time, the market was very resilient in the face of a lot of headwinds," Mr. Zoubek recalls, but practitioners were bracing themselves. "We were saying to each other when it was so busy in 2021, 'We just have to get through the summer and on to the flip side of Labor Day.' Then the conversation was typically about getting through to the end of the year to see what January would turn out to be like. Every time we thought there was going to be something that would slow it all down, it just didn't seem to happen. But we knew it was coming at some point. And it finally did. And that really wasn't a surprise, especially to those of us who have been at this a while."

Now what? Where is the yellow brick road back to the Emerald City? Follow the money.

The flaming asteroid roaring through the M&A solar system is the paucity of easy money, or any financing at all, to start the deal process and to get to the closing. The mystery of how to price transactions in a volatile market adds to the problem and Fed policies on the cost of borrowing only make matters worse. "In the blink of an eye," says Ms. Hochenberg, "we went from a world of virtually zero interest to one in which capital is expensive and not easy to come by." Junk bonds have retreated from the fiery glare, a particularly painful prospect for private equity firms trying to finance transactions. Banks that agreed to fund deals are now bound by the terms that were agreed to before M&A began to stagger. "The banks are sitting on a lot of loans," says Mr. Zoubek. "I do think

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M&A Today

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Damien Zoubek
Freshfields

Jenny Hochenberg
Freshfields

that at some point they are just going to have to start lending to finance M&A again and when that happens that will be super helpful."

De-SPACs, which propelled a significant portion of activity to record heights in 2020 and 2021, have come to a halt. But with the IPO market also silent, there are already stirrings. For private companies looking for a liquidity event but with both the stock markets and the IPO markets untenable, M&A emerges as an attractive alternative. "This is a new trend that we are seeing. De-SPAC companies are pursuing M&A transactions for various reasons," notes Ms. Hochenberg. "Some of them are trading at valuations that are much lower than where they IPO-ed. You have de-SPAC companies with a limited cash runway because in a lot of de-SPAC transactions, especially toward the end of the de-SPAC boom, the redemptions were very high. They need external financing, especially if they do not have products generating stable cash flows, to sustain their business model and accomplish their objectives. They therefore become attractive M&A counterparties where they can benefit from being part of a bigger platform with more plentiful resources."

The second most important factor that Mr. Zoubek and Ms. Hochenberg emphasize is not far behind the financing crunch. It is the essential need for perceptions and expectations to change. Mr. Zoubek says there is an intense debate in boardrooms at public companies across the country as to whether they can expect to be trading at the high multiples seen during the recent boom or whether all that has receded. "You need a willing seller and a willing buyer to do a deal," Mr. Zoubek points out. "You have boards that aren't really sure whether or not they want to transact at these new levels. It takes a little time for it all to sink in."

Ms. Hochenberg feels the same way. "People are going to get accustomed to the new reality as they start living it." M&A did drop from 2021 but the volume and value of deals remained higher than the same figures for both 2016 and 2017, which were banner years for M&A. "What we have today is not all that different from what used to be the old normal before COVID," she argues, if you compare multiples, valuations, premiums and the like to those of the recent past. "It may well be that the years 2020 and 2021 are simply outliers," Ms. Hochenberg maintains.

There are already glimmers of what might be the dawn of a return to better days. "We do see important bright spots," Mr. Zoubek says, including health care deals, technology transactions, and energy deals. Activism is also still a force in the market, driving sales of companies or rationalizations of asset portfolios. Public companies on their own are still doing spin-offs and separations or divestitures of non-core assets. Then there are strategics who are on the alert for a play that will expand their reach or a rival's move on the M&A chessboard that requires a response. All these forces are likely to continue apace. "I've talked to a lot of people," Mr. Zoubek says, "who have pipelines that are relatively full and are being replenished."

Ms. Hochenberg is not concerned about a deep slowdown in M&A. Even over the second half of the year, when some say the situation was truly grim, she saw an encouraging number of large, interesting and complex deals, some that closed successfully and others still moving through the pipeline. As just one example, she cites her work with the Freshfields team that advised bp on its $4.1 billion acquisition of Archaea Energy, a leading provider of renewable natural gas projects at U.S. landfills as well as gas-to-energy facilities around the country. Archaea went public on September 21, 2021, through a SPAC transaction that merged it with Aria Energy. "Bioenergy is one of five strategic transition growth engines that bp intends to grow rapidly through this decade," the company's London press office announced in a statement released on December 28, 2022. "bp expects investment into its transition growth businesses to reach more than 40% of its total annual capital expenditure by 2025, aiming to grow this to around 50% by 2030."

This deal is an example on many fronts of what Ms. Hochenberg sees as sectors of the future that turn to M&A for growth. The $4.1 billion deal was announced in October and the closing came in the last days of 2022. "It was the first public buy-side deal for bp in a very long time," she says. "It shows the importance of renewable and sustainable energy transactions that are in line with today's emphasis on ESG."

ESG has recently come under attack as too vague and beside the point. But it is rapidly becoming a stimulant for M&A deals. "I have certainly heard people say that the focus on ESG as a driving theme behind M&A has become less intense," Ms. Hochenberg says. "ESG may not be the primary factor driving investment decisions and M&A in general, but it is still a factor that is very prominent in people's minds." Says Mr. Zoubek: "I do not think my clients are banking on a backlash against ESG and saying to themselves, 'Well, we don't have to focus on that stuff anymore.'" [See below: "ESG's Small, but Growing, Role in M&A."]

There is, of course, more than enough for M&A practitioners to focus on. Deals have become ever more complex as they face foreign direct investment regimes proliferating around the world and aggressive anti-trust regulators in the U.S. and elsewhere poised to pounce. "It's easy for lawyers to over-emphasize and over-estimate the risk but this is not necessarily a good thing for clients if internally they're saying that it looks as if the deal won't clear for a year and you clear it in thirty days. Many clients have told me that they don't want to hear a whole parade of horribles that might or might not happen," says Ms. Hochenberg. "They want to be able to calibrate the risk in a realistic way."

Antitrust is just as replete with complex issues as foreign direct investment review, Ms. Hochenberg says. "Every time I'm asked to talk about key provisions in an M&A agreement, somehow we always gravitate toward the technology around allocating antitrust risk, particularly now that the government lately has had a tendency to use litigation as a mechanism for stopping deals. Targets are reluctant to sign up to anything other than a very high regulatory commitment from the buyer and on the other side, if you're the buyer, given the unpredictability you don't want to sign up to any provision except one that says 'I don't have to do anything.'" Advisors have resigned themselves to the fact that all these nuances and complexities and high-risk choices are now routine matters in negotiating transactions.

Clients and advisors now have to face the downturn with the same equanimity. "We're just going to have to work our way through this," says Mr. Zoubek. "It's hard to say how long this will take to reorganize itself. One thing I know is that I've been doing this a long time and I've often sat around tables or on calls or met people for drinks and spent time predicting what the market will do next. And we just don't know."

As Yogi Berra is said to have said, it's tough to make predictions, especially about the future.

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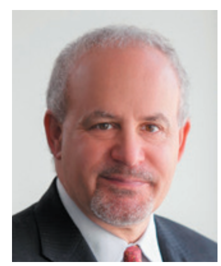
ESG's Small, but Growing, Role in M&A



Carl Valenstein
Morgan Lewis

In recent years, environmental, social, and governance (ESG) has been a key topic of discussion in board rooms and by fund managers with respect to how they present ESG credentials to various stakeholders, including investors, employees and customers. Less attention has been paid to the role of ESG on mergers and acquisitions (M&A), but that is starting to change.

While financials and fundamentals are and likely will remain the primary drivers behind M&A, ESG factors – which run the gamut from carbon emissions to diversity targets to corporate giving and philanthropy – are not being ignored. A 2021 survey from SRS Acquiom about M&A professionals' observations on the influence of ESG factors on their dealmaking strategies showed that ESG factors are having an impact on deal dynamics, but are not currently a dominant element in general M&A strategies.

But ESG factors are creeping into M&A strategies as companies increasingly make ESG a strategic priority. Nearly half of respondents to the survey said they are taking actions to support their strategic response to ESG, including forming an internal task force or hiring a third-party expert or consulting firm to advise on their plans.

Respondents viewed the impact to brand and reputation, and external regulation or pressure from outside groups or shareholders, as the largest drivers of ESG-related M&A policies in their organizations or their clients' organizations. Future financial results also were cited as a driver of ESG M&A policies.

For those professionals that are taking ESG factors into consideration when choosing

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acquisition targets, they are seeing a more in-depth due diligence process to thoroughly vet companies based on a broader set of factors. In addition to enhanced ESG due diligence, that can also include new representations or warranties in the transactional documents as a consequence of ESG factors.

ESG considerations are now a prominent part of what is considered a strategic fit in acquisition targets. Climate change and related transition risks have already prompted restructuring efforts in the energy sector. We are seeing more attention paid to a shared corporate culture as investors evaluate workplace culture and allegations of bad actors when considering a merger or acquisition. And there is increased scrutiny of the corporate governance practices of an acquisition target to ensure that the integration of a new company won't negatively affect the ESG commitments of the acquirer.

But are buyers willing to pay a premium for companies with positive ESG records? Unsurprisingly, deal fundamentals must make sense before ESG factors can be considered, with few respondents indicating a willingness to sacrifice deal economics in support of ESG goals. Only 17% of respondents reported that they would be willing to prioritize social or environmental goals at the expense of deal economics.

ESG Due Diligence: Where the Rubber Meets the Road

ESG due diligence is the implementation of any ESG contractual commitments or board/management directives and regulatory requirements. It addresses legal, financial, and reputational risk and has both screening and impact measurement components.

Screening can be both affirmative and negative, while impact measurement focuses on the key performance indicators and public or private metrics, such as those from the United Nations Sustainable Development Group, the Sustainability Accounting Standards Board, and the Task Force on Climate-Related Financial Disclosures for measurement and reporting purposes.

The ability to conduct ESG due diligence will depend on the stage of development of the target company, its internal resources, and whether it has an ESG policy or measures and reports on the impact of that policy or those measures.

Those undertaking the process should expect increased use of consultants, outside advisors and third-party verification firms with respect to ESG due diligence, data collection, analysis, and reporting. This is in no small part a reaction to greenwashing allegations and concerns, including the recent ESG backlash (seen in the form of anti-ESG legislation in some states), as well as the lack of standardization of ESG reporting.

As more regulatory attention is being paid to ESG commitments and communication, having visibility into the conduct of acquisition targets and their vendors and third parties is an essential part of the due diligence process to protect a company's brand, reputation, and its own ESG reporting goals.

Morgan Lewis partner Carl Valenstein, co-leader of the firm's ESG & Sustainability Advisory Practice, focuses his practice on domestic and international corporate and securities matters, mergers and acquisitions, project development, and transactional finance.

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M&A Disputes Expected To Rise in the Coming Year

When times are tough, the tough go to court.

In its third annual M&A Disputes Report, Berkeley Research Group (BRG) found that dealmaking disputes rose higher than expected in 2022. Respondents now predict that the figure is likely to increase yet further in 2023. In a far more difficult environment for M&A than in the years of the most recent boom. Here is the foreword, written by Mustafa Hadi, managing director, leader of the firm's Asia-Pacific region and co-leader of its Global Economics practice.

Foreward

In last year's M&A Disputes Report, we predicted an escalation in mergers and acquisitions (M&A) disputes as global dealmaking volumes hit a record high, with $5.9 trillion in transactions propelled by easy access to capital and roaring stock markets. We also questioned what the fallout could be when that frenzied M&A activity hit "the inevitable bump in the road" and the abundant liquidity dried up.

That speed bump arrived with a bang this year amid mounting geopolitical tensions, surging inflation and turmoil in financial and energy markets. These macroeconomic headwinds are changing the calculus for dealmakers—and fuelling a new wave of post- transaction disputes.

That's according to Berkeley Research Group's (BRG) third-annual M&A Disputes Report, which finds that the volume of disputes has risen further in the last year, with respondents expecting increased activity over the coming 12 months. Our latest report again brings together the perspectives of some of the world's top deal lawyers, disputes lawyers and private equity professionals, along with leading BRG experts, to reveal valuable insights into how the current market environment is changing the characteristics of those disputes. Among our key takeaways:

- Macroeconomic concerns are expected to drive disputes in the coming year, ahead of the direct effects of geopolitical tensions and the lingering impacts of COVID-19.
- Disputes increased the most in the FinTech industry in 2022 amid the cryptocurrency market meltdown. Energy & Climate— where environmental, social and governance (ESG) factors are playing a more significant role—and Traditional Financial Services rounded out the top three.
- The Construction & Real Estate sector, amid upheaval in the Asia–Pacific (APAC) region and volatility in the tight US housing market, is expected to see the biggest increase in disputes in 2023, with Energy & Climate and FinTech tied for second place.
- The Europe, Middle East and Africa (EMEA) region is expected to drive dispute activity in the coming year, with strict regulatory regimes and political strife seen as bigger factors than in North America or APAC.

This year's survey results suggest that in a volatile economy, dealmakers may deepen their focus on opportunistic transactions—potentially increasing the likelihood of disputes. Alongside larger disputes, we are also seeing major companies and institutions pursuing a greater number of smaller ones, perhaps to recoup funds in a constrained market. Most are settled before trial, and lawyers are increasingly counselling their clients to take steps to mitigate disputes, such as conducting enhanced due diligence.

Private equity (PE) involvement in M&A further complicates the picture, as such firms—

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whose tolerance for risk in a downturn may be higher than that of corporate dealmakers—remain well stocked with dry powder and continue to raise funds and hunt for bargains in a distressed environment.

"Since we embarked on this annual study three years ago, its focus and findings have been set against a backdrop of 'the unprecedented'—from the pandemic to war, energy crises and the threat of global recession", said BRG President Tri MacDonald. "This year's study sees considerations around cryptocurrency markets and ESG come to the fore—both areas that might only have featured fleetingly in previous years. Clearly it's hard to make firm predictions in this climate. That complexity highlights the value of our report, which combines industry, market and technical insights from BRG experts with perspectives from some of the leading disputes and transactions lawyers from across the globe".

We hope this report will help our clients and readers keep their ears to the ground in this quickly evolving landscape. In this spirit, BRG will continue to provide updates on this rapidly changing space over the coming year.

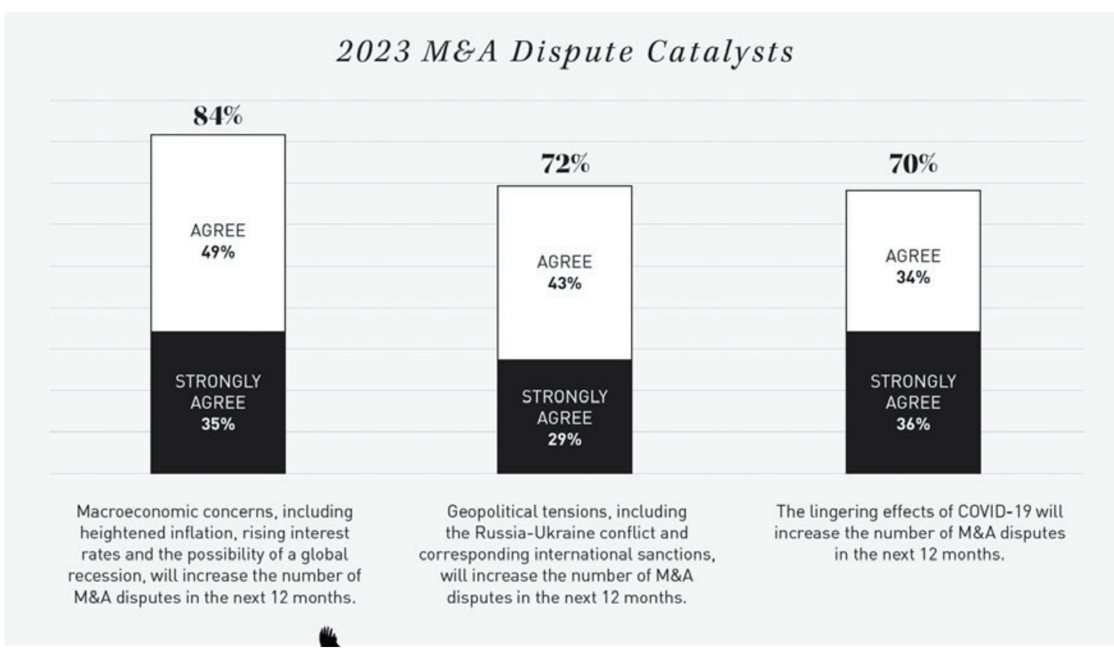
Executive Summary

Changing Economic Tides: M&A Deals and Disputes Heading into 2023

The upheaval from COVID-19 is giving way to new shockwaves hitting global markets. Yet while merger volumes have moderated, dealmakers on the lookout for opportunistic transactions—including private equity firms flush with unallocated capital—continue to scoop up companies as changing conditions present new countercyclical deal opportunities. This ongoing transactional flow and the increased volatility across multiple fronts, from swings in energy prices to soaring inflation, are expected to drive growth in mergers and acquisitions disputes in the next 12 months. Those changes are also triggering increased dispute activity in sectors such as FinTech and Energy & Climate.

These are some of the key findings from our latest survey of 181 respondents, conducted as a follow-up to BRG's 2021 M&A Disputes Report. Maintaining the global focus of that research, this year's report includes respondents from across Asia–Pacific, Europe, the Middle East and Africa and North America, consisting of 75 lawyers (private practice and in-house), 58 PE professionals and 48 corporate finance advisors. Our 2022 findings were informed further by qualitative interviews with a dozen M&A transaction and disputes lawyers from leading law firms around the world.

Our report found that dispute activity increased in 2022— a trend that respondents expect to continue over the next 12 months as fallout from the economic downturn accelerates and the likelihood of disagreements over key deal aspects (such as valuations) increases. More than 8 in 10 respondents (84%) said macroeconomic concerns, including heightened inflation, rising interest rates and the possibility



of a global recession, will increase disputes in the coming year. Nearly three-quarters (72%) said geopolitical tensions, such as the Russia–Ukraine conflict and related international sanctions, would also be a factor, and 70% cited COVID-19's lingering effects.

"As the economic effects of higher interest rates and increased energy costs feed through to the wider economy, we expect that buyer hesitancy will increase and performance of recent acquisitions may fall short

of expectations", said BRG Director Kevin Hagon, who specialises in M&A disputes. "This period of adjustment is likely to produce an upswing in M&A disputes over the coming year and may cause a further slowdown in new deal activity if sellers don't adjust quickly to lessfavourable valuations".

Macroeconomic Concerns Drive Sector Shifts

The above dispute catalysts represent a shift from 2021, when COVID-19 still loomed large over transactions, leading to disputes in industries that were hard hit by the outbreak, like Hospitality & Leisure, as well as sectors that notched big pandemic gains, such as Life Sciences and Technology.

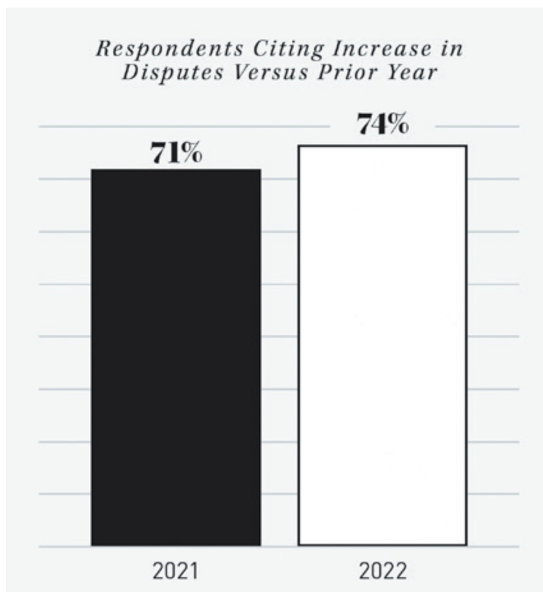
The dramatic developments of the past year—from plunging stock prices and cryptocurrency tumult to real-estate market disruptions and the energy crunch in Europe and elsewhere—have put other industries in the hot seat. Those dynamics are fuelling disputes in FinTech, Energy & Climate and Traditional Financial Services, while respondents rank Construction & Real Estate as the top industry for increased dispute activity in the year to come.

"Over the past year, we've seen more disputes about cryptocurrency", said Richard Rollo, a trial lawyer and director at Richards, Layton & Finger in Delaware. "Everyone thinks this is the next big thing, so everyone is trying to launch their own crypto-related business".

In the oil and natural-gas sector, years of underinvestment—and the practical realisation that the energy transition is complex and will take time—have led to disruption in energy supply and prices, said BRG Managing Director Aaron Howell. Geopolitical upheaval is now causing further stress. "Increased urgency around energy security is straining relationships within the sector and driving shifts in investment and regulatory behaviour", Howell said. "In this environment, defensive behaviour is expected, leading to an inevitable increase in disputes".

Key Finding

Across all regions, 74% of respondents say they are seeing more disputes so far in 2022 than in 2021. Last year, 71% reported a yearover- year (YOY) increase in dispute activity.



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M&A disputes are again up YOY, with a further rise expected in 2023

Recession fears and inflation concerns were the top two dispute catalysts this year, according to disputes lawyers and corporate finance attorneys and advisors.

Macroeconomic concerns are now driving disputes, a switch from 2021's COVID-influenced dispute climate.

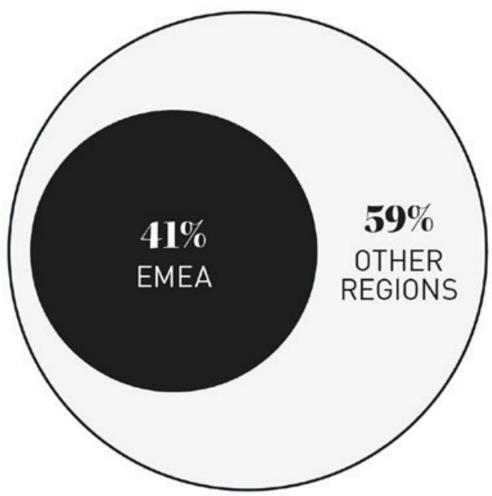
For respondents who expect dispute volume and value to increase in the coming year, 41% cited EMEA as the key region to watch, reflecting deepening economic and political uncertainty in the region.

This is a shift from last year's focus on APAC, which remains active but was ranked second at 32%.

Financial and energy market turmoil is driving M&A dispute activity.

FinTech, Energy & Climate and Traditional Financial Services are the top-ranked sectors for increased dispute activity this year. In 2021, the leaders were Hospitality & Leisure, Life Sciences and Technology.

Enhanced due diligence is a must. Lawyers strongly advise both buyers and sellers to conduct enhanced due diligence as a preventative disputes measure. But for sellers, material adverse change (MAC) and material adverse effect (MAE) clauses are less essential than situation dependent.



Regions Driving M&A Dispute Activity

Full Findings

BRG M&A Disputes Report 2022

M&A Market Outlook

Deal Volumes Expected to Rise after Moderating in 2022, with Dispute Activity to Follow

Global dealmaking is coming down from 2021's breakneck pace, when strong economic conditions and pent-up demand drove record transaction values and volumes. In the first half of 2022, worldwide M&A activity totaled $2.2 trillion, down 21% from the prior-year period and marking the slowest opening six months for M&A in two years, according to Refinitiv.

But transactions are still going forward—and though some experts predict economic uncertainty could dampen merger activity in the coming months, the majority of BRG's survey respondents maintained a rosier outlook. Nearly half (45%) expected deal volume to increase slightly over the next 12 months, while 27% predicted a significant rise (i.e. more than 20% higher). Nearly 40% expected deal value to increase slightly during that period, and more than a quarter (26%) predicted a significant increase.

Dealmakers Seek Opportunity Amid Upheaval

"This kind of unpredictability can give businesses pause and perhaps even stop them from entering particular transactions, but it can also create opportunities, and we've definitely seen that in the last year", said Byron Phillips, a disputes lawyer and partner at Hogan Lovells in Hong Kong.

For example, whilst Greater China has seen a recent slowdown in M&A activity, the push to digitise industries there is fuelling M&A, Phillips said, with "lots of traditionally non-tech businesses looking to acquire or collaborate with tech businesses. This creates such an interesting dynamic across the globe and particularly in Asia Pacific, where there's a huge focus on tech and innovation across multiple-sectors and flourishing tech start-up ecosystems.". This digitisation by acquisition is likely to result in post-merger management challenges and cultural issues, as well as disputes, as acquirers try to integrate offline and online business models.

The rise of ESG investing and related regulations may also be driving merger activity in a down market. "For companies that are listed in the West, fossil fuels are a dirty word, and so you come under pressure to divest those assets and play down your involvement", said Matthew Weiniger KC, a dispute resolution partner at Linklaters in London and chair of the firm's international arbitration practice. "If you're divesting, it means someone's buying. I have a client in the Southern Hemisphere that is busily buying lots of assets that people have gotten rid of ".

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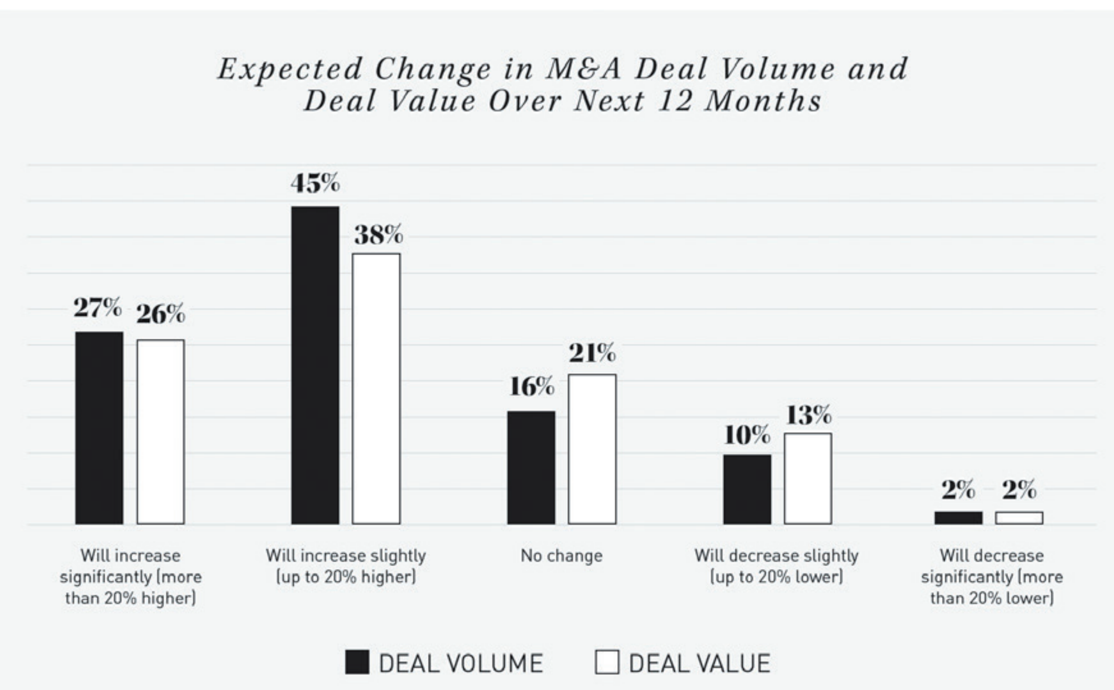

M&A

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SPACs Lose Steam, but PE Funds Keep Striking Deals

One major 2021 M&A trend—transactions involving special-purpose acquisition companies (SPACs)— appears to be losing steam as the valuation bubble bursts and regulators step up scrutiny. Disputes lawyers said SPACs have not taken off in international markets as they did in the United States, where those deals have become more litigation prone.

Increased PE participation continues to shape the M&A landscape, including how disputes arise and are litigated. Despite the challenges tight credit markets pose for traditional leveraged buyouts, the private equity industry continues to play a significant role in merger deals, accounting for 30% of all global controlling-stake M&A volume in the first half of 2022, according to Bloomberg. Some funds are amassing dry power even against this uncertain economic backdrop—for instance, Hong Kong–based Baring Private Equity Asia recently raised $11.2 billion, one of the largest PE funds ever raised in Asia.

"The valuation and M&A landscape in the US market is challenging", said BRG Managing Director Dan Galante, who specialises in transaction-related diligence. "We are seeing an increase in private capital activity for investors willing to take a minority position or subordinating credit; or equity incentives such as recapitalisation or refinance transactions in the next year". This could be part of a broader trend, where private capital steps in as traditional credit providers, such as banks, retrench.

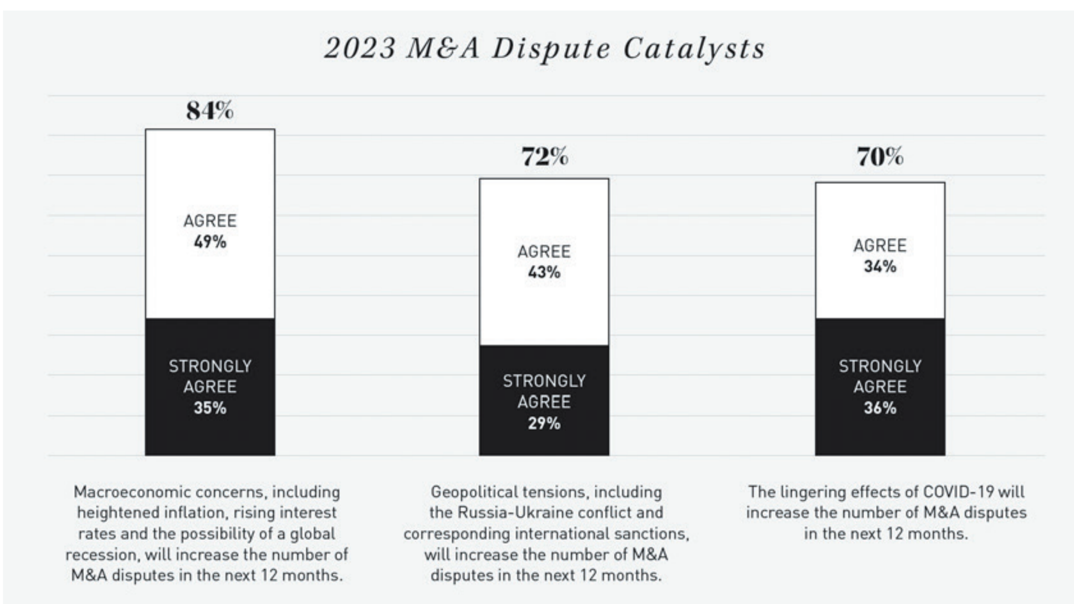
"Significant deal flow is likely to be generated by companies with healthy US-dollar balance sheets because of the dollar's strength against other major currencies", said BRG Managing Director Andrew Webb. "Those companies will be looking to acquire assets and technology on an opportunistic basis, taking advantage of faltering profitability and/or distressed share prices".

However, evaluating distressed assets or companies brings its own risks, Webb cautioned, noting that disputes frequently arise from worse-than-expected liabilities or operability. And in many sectors exposed to consumers, he added, cost pressures and sales and pricing volatility are likely to cause financial distress to businesses—even if they're several stages up the value chain, such as suppliers of raw materials.

In this volatile environment, the dealmakers, lawyers and PE executives BRG surveyed expect the pace of disputes to ramp up. "The cumulative impact of the war in Ukraine, sanctions and COVID may amount to a perfect storm, generating additional disputes and at the same time harsher economic conditions that make parties less willing to leave money on the table", said Amy Kläsener, an international arbitration partner at Jones Day in Frankfurt. "We generally see a time lag of 12 to 18 months, but I do think we'll see a lot of disputes activity in the coming year as a result of these cumulative impacts".

Macroeconomic Impact on Deals and Disputes

Macroeconomic Concerns are Driving Disputes



in Churning Fiscal Waters

Upheaval across financial and energy markets is reshaping the landscape for both deals and disputes in 2022, as urgent concerns about macroeconomic issues such as inflation and rising interest rates assume greater importance than pandemic-driven uncertainty.

Such pressures are likely to increase in the coming year. More than four-fifths (84%) of survey respondents expected macroeconomic concerns to increase the number of M&A disputes. Respondents also selected geopolitical strife (72%) and COVID-19's lingering effects (70%).

Volatility Weighs on Deals

"The increase in disputes is likely because prices are more volatile", Weiniger said. "So when you sign the deal today to close in three months' time, there's a greater chance that your economic assumptions will be completely wrong at closing".

The geopolitical situation in Europe is also creating turbulence across global energy markets, with significant

regional price differentials in liquefied natural gas (LNG), for example, creating incentives for disputes in energy supply contracts, said BRG Director Crosby MacDonald. "Companies that have control over LNG cargoes will seek to send them to the highest-priced markets to take advantage of the arbitrage opportunities enabled by price differentials", he said. "I expect to see further LNG contractual disputes regarding issues such as volumes, flexibility and force majeure, as well as prices".

Disputes lawyers and corporate finance lawyers and advisors agree that recession fears and inflation concerns

were the two main drivers of M&A disputes over the past year. Those factors are reflected in the frequency of M&A deal events like changes in valuation, which respondents said were occurring somewhat often (52%) or very frequently (40%).

"One of the debates is whether to run a valuation before or after a deal closes", said Nicholas Lingard, a partner at Freshfields Bruckhaus Deringer in Singapore and head of the firm's international arbitration practice

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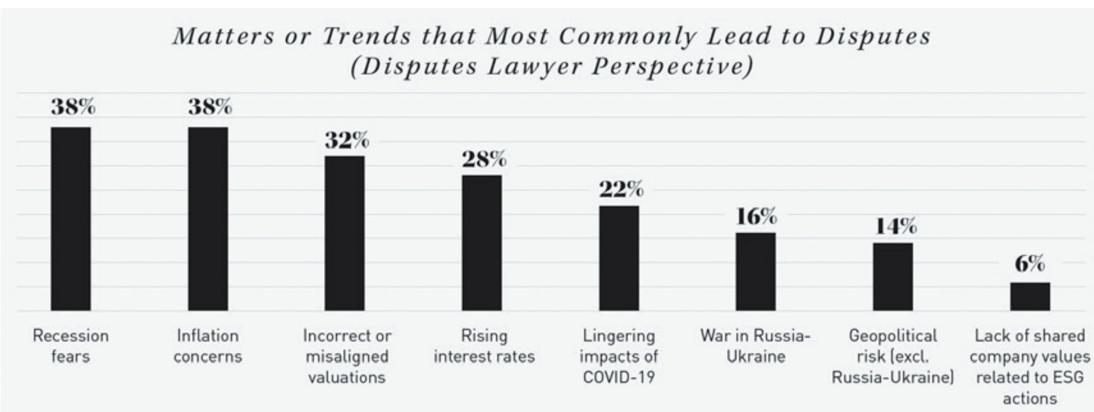

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in Asia. "As market conditions become more challenging, that question will become very acute. The valuation differentials could be really stark between a year ago and now".

Buyers are also renegotiating purchase prices, with 82% of respondents seeing this happen somewhat often or very frequently. While some deals incorporate provisions aimed at ensuring the final price reflects the agreedupon value of the acquired business on the closing date, those terms can also lead to disagreements. "Parties are now building in price-adjustment mechanisms more than before to deal with potential volatility, and there will always be disputes based on the accounting metrics you've used", said Andrew Short, a commercial litigation partner at Mishcon de Reya in London.

Regional Outlook

EMEA Is the Focus of Future Disputes as Macroeconomic Concerns Deepen

It's not surprising that EMEA passed APAC as the region to watch for M&A disputes in 2023, as Russia's war in Ukraine, related sanctions and energy market turmoil significantly disrupted the region's economic activity. When asked which region they expected to most drive increases in M&A dispute volume and value, 41% of respondents selected EMEA, up from 30% in 2021.

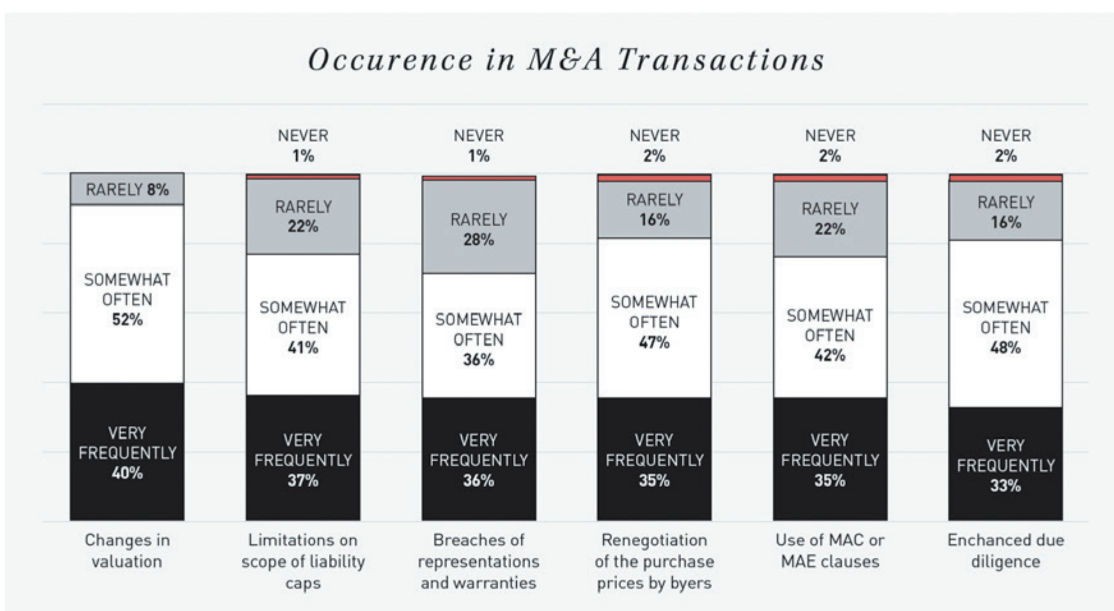
Macroeconomic concerns were expected to be the most significant driver of 2023 disputes across EMEA, APAC and North America. EMEA also had the highest expectations for political strife in the region to drive disputes, with 30% of respondents there citing it as a factor, compared to 26% in APAC and 24% in North America.

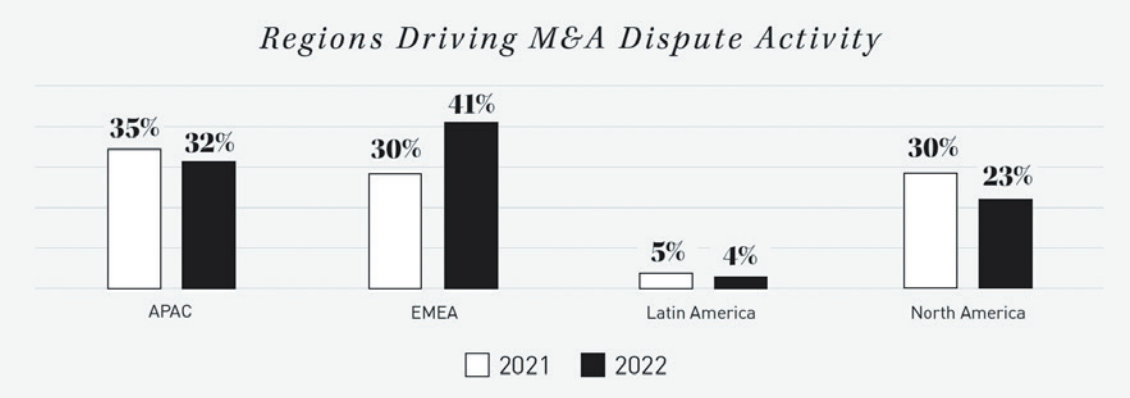
"The reality is it's often quite hard to pinpoint one factor, because so many are bubbling in the background", said Julianne Hughes-Jennett, a disputes partner at Quinn Emanuel Urquhart & Sullivan in London. "We are in a very unusual period of history in that sense. Not only are we dealing with a land war in Europe, but also inflation and coming out of a pandemic".

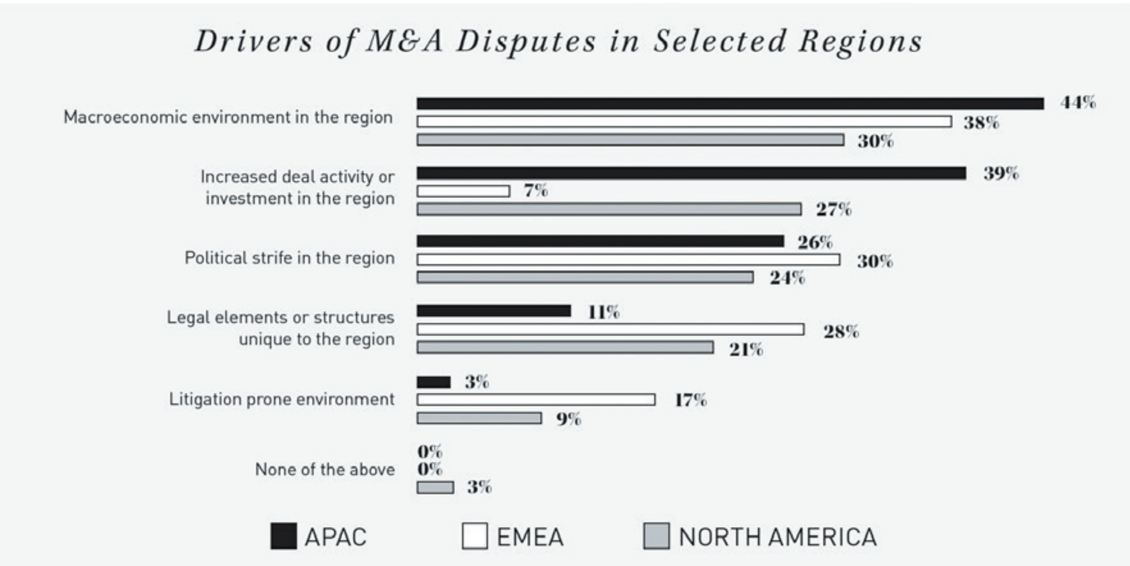
Active APAC Deal Market and Political Upheaval in Latin America May Fuel 2023 Disputes

In APAC, respondents selected deal activity/increased investment in the region as the leading factor in disputes for the coming year. "I'd expect to see more from India. They are very active in post-M&A disputes, and I believe those will increase", said Lingard. "We're seeing bigger deals, control deals from financial sponsors and private equity clients in India. So, I'd expect the value of these disputes could become even larger too". This appears to be part of a broader trend involving increased overseas investment and deal flow into South and Southeast Asia, in line with geopolitical developments.

Macroeconomic concerns were slightly ahead of increased deal activity as a predicted dispute factor for the coming year in North America,







where the recent M&A boom has been shadowed by surging inflation.

Some respondents also anticipate increased activity in the Americas beyond the US, due to political upheaval in key Latin American economies such as Chile, Colombia, Peru and Mexico. "There have been several recent elections in the region electing left-leaning governments", said Thomas Walsh, an international arbitration partner at Freshfields in New York. "The uncertainty, and the risks posed by leftist governments, will likely lead to more disputes coming out of these countries".

2022 Dispute Drivers Point to Regional Differences

With respect to 2022, our report found that specific dispute catalysts varied significantly by region, likely due to a combination of macroeconomic influences, region-specific pain points—the Chinese property market meltdown, for example—and differing regulatory approaches.

Respondents in EMEA said the regulatory environment was a prime driver of disputes in the region, where UK and European Union agencies have been enacting stricter rules on issues including antitrust, data privacy and ESG. Nearly one-third (31%) selected the regulatory environment as a top dispute factor, compared to 21% in North America and 14% in APAC.

Jurisdictions vary in their use of legislation and the role of litigation as tools of public policy, and those divergent approaches can drive significant differences in M&A disputes volume, said Daniel Ryan, a BRG managing director and head of the firm's London office. "Currently, the regulatory focus in EMEA on competition and on data and privacy issues is leading to significant levels of dispute activity—much more so than elsewhere".

The second-ranked dispute driver in EMEA was earn-outs, which can lead to disagreements over restrictions on steps buyers may take during a certain period after a transaction closes. This is unsurprising given the drastic shift in the macroeconomic environment over the past year and earnout disputes arising from deals

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done during last year's boom could continue to increase in the year ahead.

In APAC, indemnity provisions transferring risk from one party to another led the way (33%), followed by gaps in valuations (29%). Meanwhile, in North America, respondents cited sellers' breaches of representations and warranties (R&W) as the top factor (32%), trailed closely by indemnity provisions (29%).

"The reps and warranties and indemnity cases that I have dealt with run the gamut from healthcare to sales of assets. Some involved service businesses that didn't live up to expectations during the pandemic—buyers were given projections, and the projections didn't hold up", said Travis Hunter, a trial lawyer and director at Richards, Layton & Finger in Delaware. Similar issues may arise in the current macroeconomic slowdown.

Sector Overview

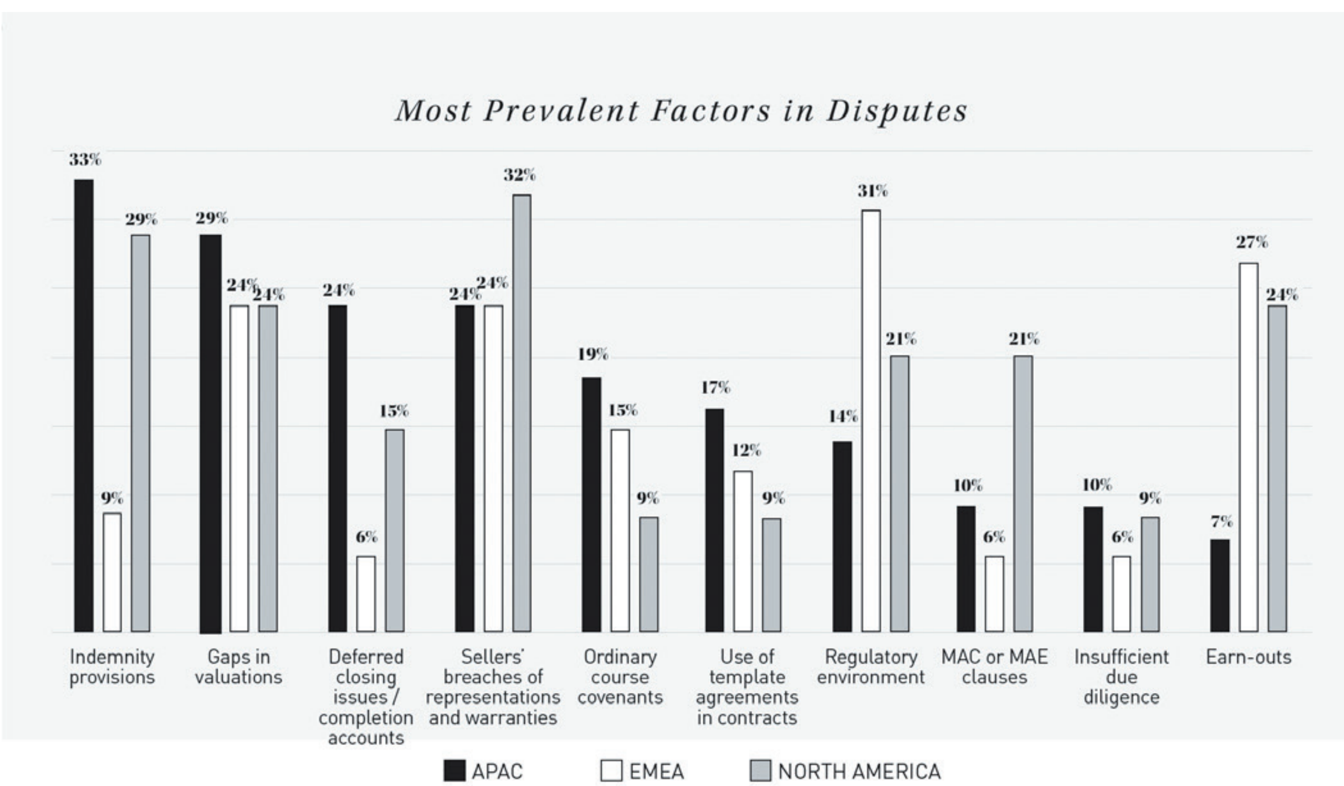
FinTech and Energy & Climate Sectors Generate Biggest Increases in Dispute Activity

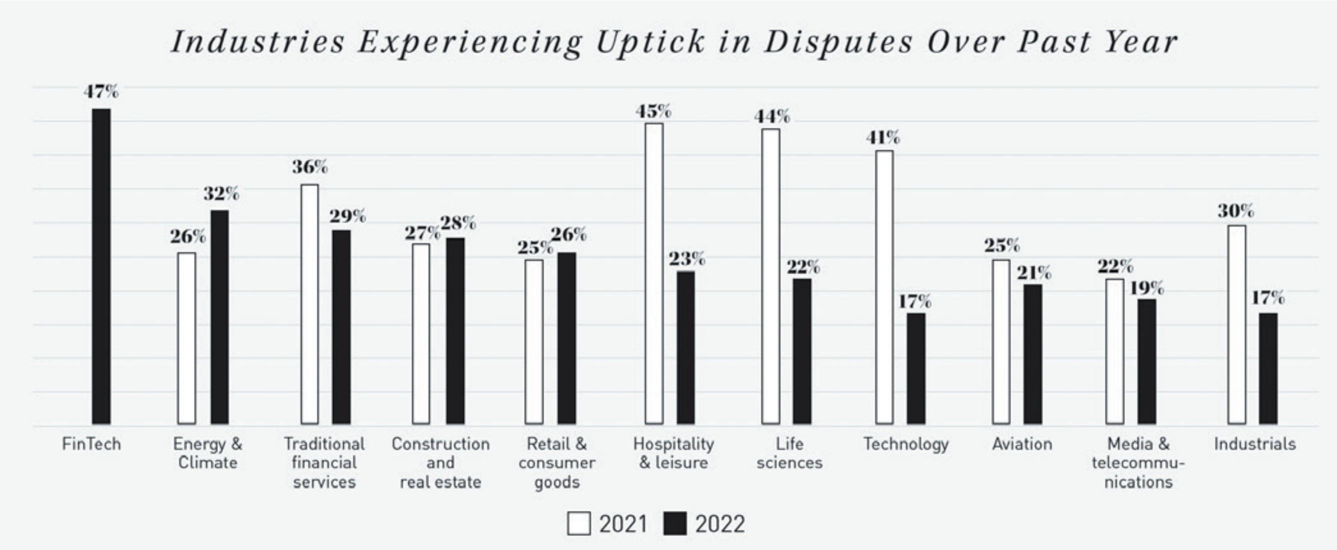
This year we introduced FinTech as a separate sector in our survey, and respondents reacted in force—FinTech was the top-ranked sector for dispute activity growth in 2022, as cryptocurrency's implosion, regulatory challenges and a slowdown in available capital drove setbacks in the industry. Energy & Climate was the second-most active area for M&A disputes, followed by Traditional Financial Services. Those results mark a shift from 2021, when Hospitality & Leisure and Life Sciences held the top spots.

"The sudden huge jumps—and of course, sudden falls— in the value of crypto assets have generated disputes", said Jern-Fei Ng KC, a barrister and arbitrator.

Crypto and digital assets are subject to the same macroeconomic pressures as equities, bonds and other risk-on assets, but they add "a unique flavor of disorder stemming from failed experimentation around algorithmic stablecoins, and the resulting contagion to large, centralised exchanges", said Kevin Hamilton, a BRG managing director and leader of the firm's Global Applied Technology practice. Hamilton said the current "crypto winter"—i.e. an extended period of depressed cryptocurrency asset prices— could last well into next year, "with increased disputes from failed projects and companies attempting to hang on until the next bull cycle".

Matthew Townsend, an international arbitration partner at Reed Smith in London, said he is seeing increasing numbers of disputes involving a crypto element. This includes claims arising from investments in crypto projects and





platforms. It also includes disputes between centralised exchanges and third-parties such as liquidity providers, or oracle services delivering real world data to smart contracts. He is also seeing a wave of claims by users of decentralised finance (DeFi) against project founders or other participants.

The energy sector has likewise been in turmoil this year, including the unprecedented clampdown on European natural-gas supplies tied to the Russia–Ukraine dispute. Disputes lawyers noted that boom times for energy companies can foster disputes, and that increased activity around renewable energy investing could also portend future disagreements arising out of M&Abased growth.

Sector Expectations for 2023

Looking ahead, respondents expected Construction & Real Estate to garner the most disputes in the coming year. That likely reflects upheaval in in the Chinese property market and pressures on the US housing and construction sectors amid rising inflation and ongoing hikes in the cost of supplies and labour.

However, BRG Managing Director Anamaria Popescu, who specialises in commercial construction claims, expects disputes in the sector to stay at current levels for the moment. "Owners and contractors are very risk averse now and need to save every penny they have", she said. "So they will not be spending money in 2023 on lawyers and consultants for litigation or arbitration and will be trying to resolve disputes internally".

That said, in the US, a wave of new infrastructure and energy projects tied to the 2021 Infrastructure Investment and Jobs Act and this year's Inflation Reduction Act could generate additional disputes in the coming years, Popescu said. "Large infrastructure projects take several years to design and build, so claims and disputes will lag behind them. Maybe in 2024 we will start to see an increase in infrastructure disputes".

ESG Pressures Expected to Drive Energy-Sector Disputes

Energy & Climate and FinTech were tied for second place for industries expected to see a bump in disputes in the coming year, followed by Traditional Financial Services. "Regulatory and market-based activities are leading to increased ESG disclosures, with disputes simultaneously emerging as ESG performance and outcomes fail to match up with projects", said BRG Managing Director Neal Brody.

Moving forward, experts expect ESG could factor strongly into disputes on the energy front as regulations take shape and businesses strive to meet evolving investor expectations. Respondents agreed that deal activity in the sector will be driven by ESG factors (86%) and that a lack of firm metrics will lead to disputes (78%). "The legislative landscape is hardening around disclosures and targets. As a consequence, I think you will see more clauses in contracts to deal with this", said Quinn Emanuel's Hughes-Jennett. "Inevitably, you will then see a rise in ESG disputes".

ESG decarbonisation targets could also give rise to energy-sector disputes over the financial burden of stranded assets such as coal-fired power plants, as well as government-related disputes triggered by ESG issues that involve

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sagging commodity prices, BRG's Webb said.

Short-term uncertainty and increased political risk are also expected to fuel disputes in the mining and extractive industries. "While materials such as lithium, cobalt and copper are still benefiting from strong demand tied to electric vehicle production and the cleanenergy transition, softening demand from China, the US and Europe for other mined commodities is leading to cutbacks in production of steel, pigments and other products", Webb said. "That will have a knock-on effect on commodity supply", potentially leading to disputes over pricing and supply contracts.

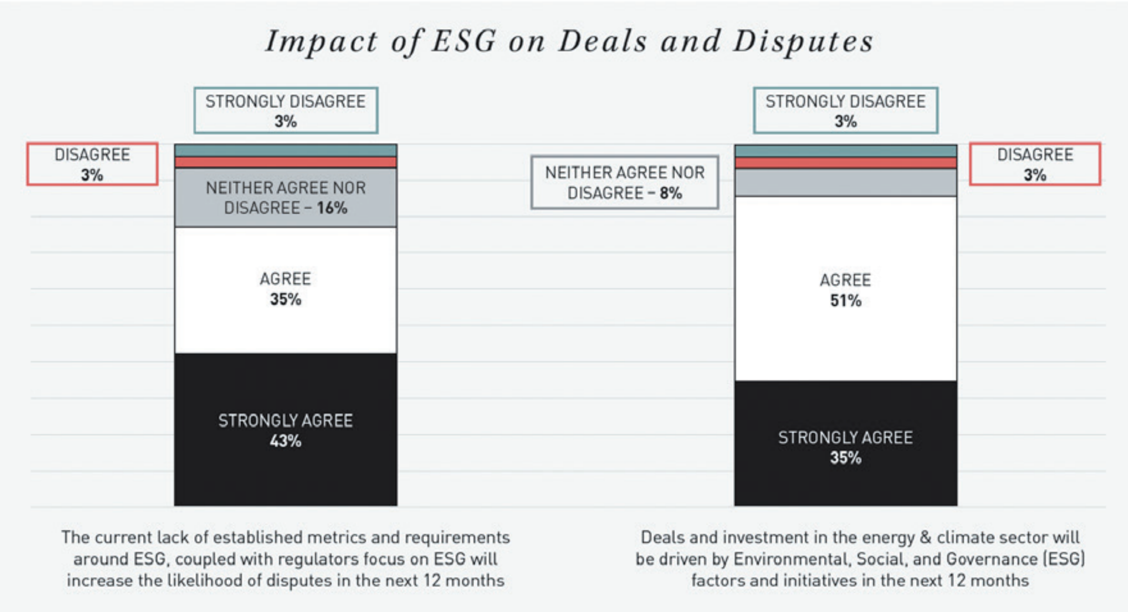
Critical Steps to Mitigating M&A Disputes

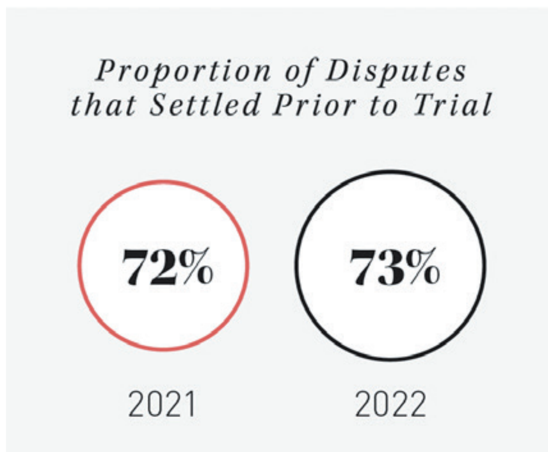
Last year, our research identified key steps that dealmakers could take to mitigate the risk of a dispute—like conducting enhanced due diligence, undergoing pre-litigation counselling and investing in litigation preparedness tools (e.g. establishing a document-retention policy). In 2022, even more lawyers are counselling their clients to take such preventive actions. This year, for instance, half of attorneys representing buyers and 62% of lawyers representing sellers advised their clients to conduct enhanced due diligence, up from 40% and 49%, respectively, in 2021.

In this turbulent environment, "We are seeing a clear payoff for market participants that have taken a more tailored approach to their M&A processes and agreements—for instance, by incorporating deal-specific provisions while adhering to often tight transaction timelines", said BRG Managing Director Vincent Biemans. "Although that does not necessarily eliminate disputes, we are seeing an important benefit materialise that counts in today's environment: narrower and more defined disputes, despite the real issues faced by the target businesses".

Marina Boterashvili, an international litigation and arbitration senior associate at Quinn Emanuel in London, said that a few of her recent cases have stemmed from M&A deals "which were done on a very fast timetable and with the mentality of 'sign now, fix later' due to the perception of a hot market and high levels of competition for investment opportunities".

As the economic slowdown heightens pressure on dealmakers, counsel to buyers are advising actions ranging from retaining rights to information, to undergoing pre-litigation counselling and maintaining flexibility in clauses. "We've seen disputes arising from significant mismatches in management styles, investors'





outlooks for the business, their exit strategy and so on", Boterashvili said. "It really brings to light the importance of proper due diligence, in terms of both the business you are investing in and whom you are doing it with".

Private-equity involvement in M&A deals can also increase the likelihood of post-closing disputes, corporate finance attorneys and advisors said. That could be a function of a higher tolerance for risk compared to corporate dealmakers. While some private equity professionals we surveyed said their firms typically engage in multiple actions aimed at avoiding postclosing legal disputes—including due diligence and legal policy review—others said they are doing "nothing".

However, even as M&A disputes increased in 2022, most are still settled before trial. Ng said that for those parties that opt to keep fighting, the choice may be driven more by changing economic circumstances than by genuine

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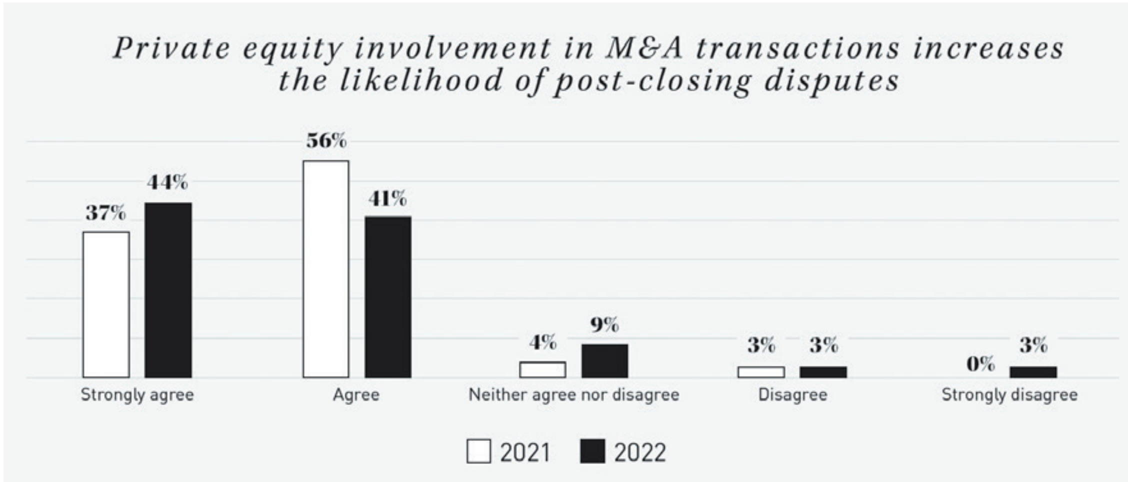
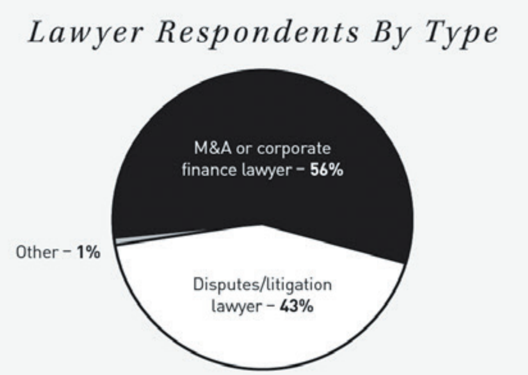


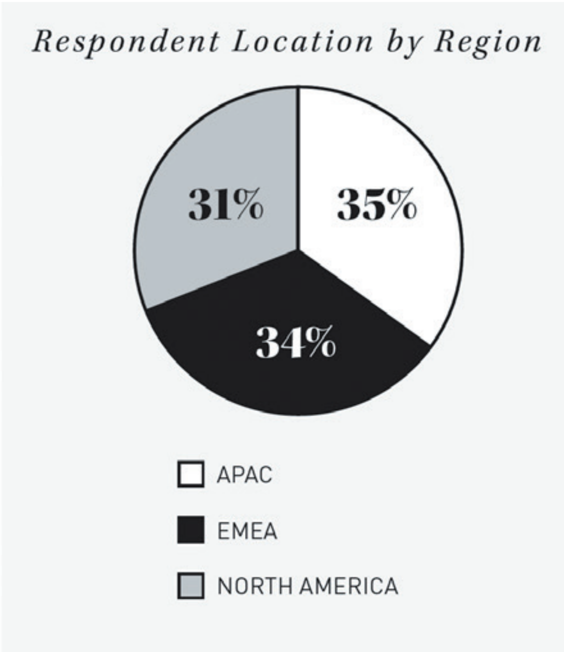
disagreement between two sides of a transaction. "One party could suddenly find themselves saddled with a contract whose terms they don't much like", he said. "There are a number of bet-the-company cases, where the macroeconomic circumstances have changed so fundamentally that some parties simply cannot afford to lose—so they fight the cases to the bitter end".

Methodology

BRG's 2022 M&A Disputes research initiative was conducted in two major phases: in-depth qualitative interviews and a quantitative online survey. The interviews took place from 25 July through 5 August and resulted in strong verbatim input from 12 interviewees across the globe. The survey was distributed in August and open for responses from 29 August until 9 September.

A total of 181 respondents completed the survey, which included 75 lawyers (private practice or in-house), 58 private equity professionals and 48 corporate finance advisors. The panel was split mostly evenly in terms of geographic representation, with 63 respondents based in APAC, 61 in EMEA and 57 in North America. Full demographic breakdowns are included below.





REGIONS	NUMBER
APAC	63
EMEA	61
North America	57
Total	**181**

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