As Legal Business publishes its third annual Disputes Yearbook, and the second annual survey sponsored by Cornerstone Research, we scope the views of in-house counsel and private practitioners to shine a light on trends within the international disputes market.

Results from the annual trends report from Cornerstone Research indicate firstly that the appetite for large-scale commercial litigation has yet to abate in London and, furthermore, that London’s lawyers continue to be lauded as the dominant players of international disputes.

More than two thirds (69%) of private practitioners surveyed said they expect to be involved in more large-value commercial disputes, over the next two years, while more than half (52%) of in-house respondents predicted the same. Similarly 42% of in-house respondents expect their organisation’s expenditure on external legal advice over the next two years will increase.

White & Case litigation partner John Reynolds says: ‘We expect the English High Court to remain a popular forum for cross-border disputes generally, given (among other things) the prevalence of English law, our experienced and highly-respected judiciary, efficient court processes and robust appellate system.’

Where levels of financial, securities and insolvency-related litigation soared following the financial crisis, the types of commercial disputes are becoming more varied. Travers Smith litigation partner Andrew King, whose case portfolio includes advising the joint administrators of Lehman Brothers International (Europe) (in administration) in its settlement with Citigroup concerning custody of assets valued at over $2.5bn, says: ‘While the aftermath of the credit crunch lives on in the courts, we are seeing an uptick in fraud and professional negligence claims, and also follow-on damages claims arising from findings of EU competition infringements.’

Competition and antitrust-related claims are becoming of greater interest to clients, particularly since the Consumer Rights Act 2015 came into force last October. The legislation introduced an opt-out regime where claims can be brought on behalf of groups of individuals without the need to identify all claimants.

Awareness of ‘opt-out’ collective action procedures under the Act has grown dramatically among respondents since last year, from 21% to 68% of in-house respondents. Nearly a quarter (24%) said their organisation will likely face more competition-based claims while a fifth (20%) said their organisation will likely pursue more competition-based claims.
While the aftermath of the credit crunch lives on in the courts, we are seeing an uptick in fraud and professional negligence claims.

Andrew King, Travers Smith

All together

The number of respondents involved in class action disputes is also steadily growing, whereas 18% of in-house respondents said ‘yes’ when asked if they were involved in such cases last year, this has increased to 36% this year.

Herbert Smith Freehills (HSF) partner Alan Watts says: ‘Class actions are increasingly a feature of the litigation landscape in England and Wales and that’s a trend we see continuing. That includes both securities actions and so-called “class action tourism” suits against corporates based on activities of group companies abroad.’

Regulation and enforcement issues remain key features of in-house counsel agendas; with 44% of respondents expecting the number of regulatory proceedings against their organisation to increase over the next two years while half of private practitioners (50%) believe the same for their clients.

Reynolds believes regulatory investigations ‘are, and will remain’ a dominant feature of commercial life. ‘While it is to be hoped there will not be another Libor, enforcement by financial regulators will not diminish.’

Corporate crime investigations are on the increase with enforcement agencies using their wide reach to target companies and individuals outside of their territories. Late last year ICBC Standard Bank became the first to strike a deal with the UK’s Serious Fraud Office (SFO) on a deferred prosecution agreement (DPA) since the latter came into force in February 2014.

Reynolds says: ‘The UK is a far more heavily regulated market than it ever was. Regulated markets necessarily operate along largely similar lines across the globe. I expect to see a steady number of investigations and prosecutions by the SFO and other agencies, and further use of deferred prosecution agreements, as we have seen in the last year.’

It is further predicted that companies with operations in Africa and the Middle East will see an increasing number of investigations, particularly as global companies are put...
under more pressure to ensure that their local operations comply with global laws.

**The great escape**

As for Brexit-related consequences to the disputes market, those interviewed for the survey are confident London will remain the dominant hub. Clifford Chance litigation partner Simon Davis says: ‘Brexit may be seen as an opportunity by some to undermine the strengths of London as a centre of dispute resolution. I think clients will hold their nerve and remain confident in the advantages which they gain by the choice of English law and jurisdiction in their contracts.’

Respondents from the survey share this perspective, with around half (47%) in private practice that do not think Brexit will negatively impact the UK’s position as a global centre for litigation and arbitration, while in-house respondents seemed more uncertain, with a near split of 41% and 42% respectively responding ‘yes’ and ‘not sure’. Nearly two thirds of private practice respondents (63%) believe that when it comes to drafting litigation and arbitration clauses, Brexit will have no impact on individual preference for English jurisdiction and here, more than half (52%) of in-house respondents agreed. A further 24% said it will increase the attractiveness of English jurisdiction while the same percentage of respondents said other jurisdictions will benefit to the detriment of the UK.

While there are contracts to which Britain’s membership of the EU is integral, it is expected that the issues arising from the majority of those will be negotiated away during the protracted exit period. Reynolds suggests: ‘The greater significance of Brexit is the market uncertainty that it brings and it will be the economic conditions arising from this uncertainty, rather than a particular feature of our exit from the EU, that are likely to lead
‘The increasing breadth and complexity of disputes is leading to growing demand for sophisticated economic and financial analysis.’

Boaz Moselle, Cornerstone Research

‘The larger number of commercial disputes and contentious restructurings. The majority of our English law cases concern contracts or parties outside the UK or EU and these should be unaffected by Brexit.’

Watts adds: ‘We may also start to see more Brexit-related litigation as parties start to test the effect of the new economic and political landscape on their contractual obligations – though it may still be some time before disputes of that sort really kick off.’

At the time of going to press, British politicians were mulling ways to extricate the UK from the EU while several separate challenges to the government over the triggering of article 50 were in the pipeline. Remain supporters had also crowdfunded £32,000 in legal fees to mount a High Court challenge in a bid to delay article 50.

Under the spotlight
International arbitration continues to be an attractive prospect due to its transferability to overseas jurisdictions. Forty-three

Private practice: Which external services are of most value to your firm when handling a dispute?

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<th>Service</th>
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<td>Valuation metrics</td>
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<td>Regulatory consulting</td>
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Sponsored survey
percent of private practice respondents expect their firm to be engaged in settling more commercial disputes by arbitration over the next two years.

“These findings match our own experience at Cornerstone Research, with the increasing breadth and complexity of disputes leading to growing demand for sophisticated economic and financial analysis,” says Boaz Moselle, senior vice president in the London office of Cornerstone Research.

In early spring, however, arbitration took a public bashing from the then Lord Chief Justice of England and Wales, who said in a lecture that English law took ‘a wrong turning’ in favouring the use of international arbitration to resolve commercial disputes. Lord Thomas said ‘the time is right to look again at the balance’ between disputes heard in private international arbitrations compared to public court proceedings, arguing that the rise of international arbitration is ‘a serious impediment to the development of the common law’. He outlined several options, some of which will worry City arbitration practitioners reliant on the system’s independence from the local court system for its competitiveness against early pioneer Paris, to prevent the behind-closed-doors disputes systems from ‘retarding public understanding of the law, and public debate over its application’.

Fearing that the growth of arbitration has ‘undermined’ the development of English law, particularly in the construction, engineering, shipping, insurance and commodities industries where corporates have shifted from litigation to arbitration as a means of resolving disputes, Lord Thomas said ‘there is a real concern… at the lack of case law on standard form contracts and on changes in commercial practice’.

Paul Friedland, arbitration partner at White & Case’s New York office, remains positive of the prospects of healthy levels of arbitration, and says: ‘In the past two years or so, international arbitration – especially the investor-state type – has attracted much media attention, owing in large part to contentious negotiations around free trade agreements. While some have spoken of an impending “backlash”, I have no doubt that

In-house: Do you think Brexit will negatively impact the UK’s position as a global centre for litigation/arbitration?

Private practice: Do you think Brexit will negatively impact the UK’s position as a global centre for litigation/arbitration?

‘We may start to see more Brexit-related litigation as parties start to test the effect of the new economic and political landscape on their contractual obligations.’

Alan Watts, Herbert Smith Freehills
**In-house**: When it comes to drafting litigation and arbitration clauses, how will Brexit impact the preference for English jurisdiction?

**Private practice**: When it comes to drafting litigation and arbitration clauses, how will Brexit impact the preference for English jurisdiction?

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**Respondent data – methodology**

This year’s research conducted by *Legal Business* for the second annual survey from Cornerstone Research involved canvassing the views of 175 participants via an online questionnaire, of which 104 were private practice and 71 were in-house counsel.

In private practice, more than two thirds of respondents (64%) were at partner level while associates counted for 19% of the vote, and the remaining came under senior partner (7%), team head (5%), managing partner (1%), regional managing partner (1%), chairman (1%), executive chairman (1%), and other (1%).

Most respondents’ firms were headquartered in the UK (66%) while the remainder were spread across the US with 19%, Europe with 12% and 1% each across Australia and Russia and the CIS.

In-house respondents made up a mixture of roles, including general counsel accounting for 23%, legal director and legal counsel both accounting for 10% respectively, counsel for 9%, and head of legal services and company solicitor for 4% and 3% respectively. Again, more than half (56%) were headquartered in the UK, and the remaining across Europe (24%), the US (10%), Russia and the CIS for 3%, Australia for 3%, and Asia for 3%. One percent listed their location as ‘other’.

Nearly a third (28%) of respondents cited ‘other’ as their industry sector, however a total of 17% operate within financial services, while 6% of respondents work within retail and consumer services. Automotive, oil and gas, utilities, healthcare, mining, and telecoms each saw 4% of respondents while real estate had 3% of votes, and tourism saw 1% of votes.

‘It will be the economic conditions arising from the market uncertainty Brexit brings that are likely to lead to the larger number of commercial disputes and contentious restructurings.’

*John Reynolds, White & Case*
international arbitration will continue to grow as the preferred form of dispute resolution for international business disputes. In recent years, Asian and African parties have fully embraced the process, a trend which has contributed to the emergence of serious competitors to the traditional arbitral seats of Paris, London and New York."

**Fight club**
The undoubted rise to prominence of contentious skills will remain a key objective for elite City firms. Where the most seasoned litigators and heavyweight arbitration specialists will be rewarded for their expertise by clients, a selection of core criteria was cited by in-house respondents as most relevant when choosing counsel. Most popular was reputation in handling contested matters with 63% of the vote, while past experience of working with a firm, lawyer or expert in similar matters came second with 44%. Nearly two fifths (38%) said expertise in facing contested matters was important, while 37% cited a recommendation from a third party. That a firm, lawyer or expert is based in the same jurisdiction as the governing law of the contract took 30%, while directory rankings were considered relevant too, with 23% of votes.

Those external services that add most value when clients face a dispute include skill at preparatory work and evidence gathering (41%), expertise in valuation metrics (39%), sourcing and preparing experts (38%), research and analysis (25%), data collection (23%), regulatory consultants and economic consultants with 18% and 13% respectively, and discovery review with 7%.

HSF’s Watts expects that technology-assisted review (known as predictive coding) will become a major fixture in the dispute player’s handbook when tackling large-scale disputes for clients. 'We would also expect it will become a more regular and trusted feature of e-disclosure in large-scale litigation. This method uses a combination of technology and manual document review to prioritise relevant documents, and can dramatically reduce with precision and accuracy the pool of relevant documents to be manually reviewed. Its recent endorsement by the English High Court may lead to greater uptake, streamlining or impacting upon the nature of the disclosure phase which is traditionally time-consuming and costly'.

'The research shows that demand for class actions, litigation and international arbitration will continue to grow in the next couple of years,’ says Jamie Meehan, senior vice president and head of the Cornerstone Research London office.

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**About Cornerstone Research**
Cornerstone Research provides economic and financial consulting and expert testimony in all phases of complex litigation and regulatory proceedings. The firm works with an extensive network of prominent faculty and industry practitioners to identify the best-qualified expert for each assignment. Cornerstone Research has earned a reputation for consistent high quality and effectiveness by delivering rigorous, state-of-the-art analysis for over 25 years. The firm has 600 staff and offices in Boston, Chicago, London, Los Angeles, New York, San Francisco, Silicon Valley, and Washington DC.

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