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Disputes in the technology industry: Q&A

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This Q&A gives a high-level overview of the typical types of claims in the technology sector, who the parties to a dispute tend to be, dispute resolution methods used, costs and funding issues, settlement, judgments and remedies and any other specific dispute resolution issues. This Q&A focuses on private disputes that arise under UK law but considers certain jurisdictional issues that might arise where parties are located in different countries, and the scope for regulatory action where this may have an impact on private litigation.

Claims in the sector

Are there "typical" claims within the sector?

Disputes can include:

- Contractual disputes, for example with IT service providers.
- Disputes relating to tech investment.
- Disputes relating to tech IP including tech patent disputes.
- Cyber issues or data breaches.
- Software or data licensing audit disputes.

Given the prevalence of technology, there are a wide range of disputes that can arise. However, there are certain types of claim that practitioners often see.

Disputes between technology companies and their customers in relation to the delivery of software or other products, and related services (whether large-scale managed IT services or business transformation projects) occur relatively frequently because of the size and complexity of these projects. Disputes involving subcontractors are also common. Procurement disputes can arise where there is public sector involvement, whether relating to alleged breaches of procurement law or, for example, where there is a significant amendment to a contract that changes the scope of services that are to be provided.

Another area in which disputes are relatively common is investments in technology and technology companies (for example, disputes between founders or investors). These disputes are often similar in nature to other investment-type disputes (and may, for example, relate to warranties or earn out disputes). What a piece of technology can or cannot do, and how it is to be developed or marketed, can be key to such disputes.

Practitioners also see a large number of software licensing disputes, especially between enterprise software vendors and customers taking large-scale licences of core back-office software platforms. These usually arise in the context of an audit and tend to involve the vendor seeking to recoup revenue for over-deployed software products.

Additionally, there are an increasing number of disputes in relation to new technologies. Examples include claims in relation to the theft of cryptocurrencies or fraudulent coin offerings or in relation to companies purporting to provide some sort of product or service linked to cryptocurrencies.

New technologies have spurred patent applications. High-tech patent disputes are increasing and are expected to continue to do so. 2021 saw a hard-fought interim injunction hearing in the UK in *Autostore Technology AS v Ocado Group Plc [2021] EWCA Civ 1003*, a wide-ranging multijurisdictional patent dispute relating to robotic warehousing technology, while technologies such as electric vehicles, battery technology and AI are all leading to a raft of patent applications as tech companies look to bolster their legal armoury over the technology of the future. This is in addition to the ongoing and seemingly continuous bouts of patent litigation relating to mobile telephones and associated technologies.

Practitioners also see disputes relating to the terms offered for licensing of technology, such as FRAND (fair, reasonable and non-discriminatory) disputes (see Practice note, Standard-setting and competition law: What does FRAND mean?), as well as disputes

arising out of collaboration agreements relating to the development of new technologies, where either ownership or onward use of both data and the technology have not been sufficiently delineated in the original agreement. A further category of disputes often relating to software arises out of the movement of employees or consultants between commercial competitors, which can lead to disputes around ownership and infringement of, for example, computer code or data. These claims can also feature or be framed as breach of confidence claims (see Practice note, Protecting confidential information: overview and Standard document, Letter of claim (breach of confidence)).

Cyber issues, and claims following cyber and data security incidents, are increasingly common and may involve claims by individuals (including consumers) or companies (or both) against a corporate or government entity, or a claim by an affected company against any technology provider responsible for safe storage of data that it holds in relation to its customers or counterparties. Often, defendants can dispose of such cases by demonstrating either that they have not fallen below the standard expected by the law or that no damage has been caused by the incident. In relation to the latter point, the Supreme Court's decision in *Lloyd v Google [2021] UKSC 50* made clear that damages cannot be obtained for mere "loss of control" of data under the Data Protection Act 1998 (although this was not considered under the current UK data protection legislation) (see Practice note, UK GDPR and DPA 2018: claims for compensation: Traditional approach to damage under section 13 of the DPA 1998).

Damages for "loss of control" of information are available under the tort of misuse of private information. However, the tort requires a "misuse", which is a positive action (see Practice note, Overview of privacy law: Misuse of private information is a tort). Accordingly, claimants are unlikely to use misuse of private information following cyber and data security incidents but may well use the cause of action to challenge business models based upon unlawful processing. Practitioners are seeing an increased appetite to challenge big tech's use of data through litigation (see Practice note, UK GDPR and DPA 2018: claims for compensation: Traditional approach to damage under section 13 of the DPA 1998).

The focus so far has been to challenge whether the data controller or processor is adhering to the principles relating to the processing of personal data (under Article 5 of the UK GDPR) or has a lawful basis for processing data (under Articles 6 and 9 of the UK GDPR), but as stated above and in What is the incidence of class actions in the sector?, claimants may approach claims differently following *Lloyd v Google*.

Increasingly individuals are seeking to exercise their rights under the UK GDPR: to rectification (Article 16), to erasure (Article 17), or to restrict processing (Article 18)). See Practice note, Data subject rights (UK).

For more information on the UK data protection regime generally, see Practice note, Overview of UK GDPR.

Some practitioners anticipate the focus of individuals to move to challenging decision making by algorithm in the coming years, using articles Articles 21 and 22 of the UK GDPR as well as any new laws on Artificial Intelligence. The Taskforce on Innovation, Growth and Regulatory has proposed to remove the right to human review of automated decisions provided by Article 22 of the UK GDPR (see Legal update, ICO response to DCMS consultation on future of UK data protection regime and Article, DCMS data protection reforms: summary of consultation proposals). The extent to which the UK will diverge from Europe on data protection will be seen in the years ahead and, of course, policy decisions will impact upon the litigation landscape.

Are there any wider economic, regulatory or political factors that make disputes of any kind more or less common in the sector?

Economic, regulatory and political factors can each have a significant impact on the type of technology disputes commonly seen. As technology continues to evolve (sometimes at a rate faster than a particular project is being delivered), customers can find themselves in a position where they may be able to procure better or cheaper solutions elsewhere. This can sometimes lead customers to explore potential contractual termination options with a supplier. This is exacerbated by increasing use of AI solutions which can quickly render older products obsolete or outclassed, leading customers to seek ways out of long supply agreements for non-AI enabled technology.

Governments are some of the most significant purchasers of IT services and products, and the high-profile nature of many projects raises the potential for issues to become politicised (including, for example, the recent proposed plan for the NHS to share patient data with third parties). Questions regarding which entities should be permitted to act as suppliers in relation to critical national infrastructure and any future regulation in this regard may also give rise to disputes in the sector (see, for example, Practice note, National Security and Investment Act 2021: overview: Sectors within the mandatory notification regime).

Data-related regulation has had a very significant impact in this sector, developing as part of a growing emphasis

on data rights and big tech's use of collected data. Coupled with the high-profile pan-European rollout of the General Data Protection Regulation (GDPR) (now largely replicated in UK law by virtue of the UK GDPR) this has led to an increase in individuals and corporates bringing the kinds of claims noted in Are there "typical" claims within the sector? above against controllers and processors in relation to the storage and processing of their data, particularly through class actions. There is also increased scrutiny around AI regulation. The UK government is looking to regulate foreign investment in UK AI companies as part of the National Security and Investment Act 2021, recognising the strategic importance of this area to the UK, and in April 2021 the European Commission published its proposal for the Artificial Intelligence Regulation, which would seek to regulate AI applications on a risk-based model, with certain use cases banned, while other "high risk" applications are subject to extensive technical, monitoring and compliance obligations (see Practice note, Legal aspects of artificial intelligence: The EU approach).

Wider macroeconomic conditions are also important. Adverse macroeconomic conditions can lead to companies trying to cut costs by pausing or cancelling large IT projects, which can give rise to disputes. More broadly, the increase in digitisation has increased the incentives for cyber-crimes (for example hacking and ransomware). Various disputes can arise out of these cyber issues (as noted above, see Are there "typical" claims within the sector?). In addition, software audits are often seen by software vendors as a separate, standalone revenue stream, as IT departments can easily over-deploy software products over time, leading to potentially high-value claims.

The UK government has expressed a desire for the UK to be a tech-friendly jurisdiction, which supports innovation. This could lead to divergence between the UK and Europe in the future, post-Brexit. The UK's data protection regime has been recognised as "adequate" by the European Union. However, the adequacy decisions have a sunset clause, which means that the decisions will automatically expire after four years and the European Commission has stated that it will be "closely monitoring how the UK system evolves in the future" (European Commission: Press Release: Data protection: Commission adopts adequacy decisions for the UK). See Article, DCMS data protection reforms: summary of consultation proposals and Practice note, Cross-border transfers of personal data (UK): EU-UK adequacy decision and status of the UK as a third country under the EU GDPR.

Which issues give rise to the most disputes in the sector?

The types of issues in an IT dispute can vary greatly. For example, issues in a dispute relating to the delivery of a digital transformation project may be substantially different to a dispute where an innocent party is looking to obtain an order against persons unknown for the recovery of stolen cryptocurrency.

In disputes relating to IT projects, customers often bring claims alleging delay, non-compliance with requirements or issues with quality. Allegations of material breach and purported terminations for the same are common. Suppliers generally seek to rely in defence on changes to scope, missed dependencies or issues with the provision of requirements (and may themselves bring claims for late payment of invoices or for achievement of milestones). The application of contractual limitations or exclusions of liability are often important issues in such disputes.

Key to contractual disputes are, of course, the terms agreed between the parties. These can be in standalone contracts or pursuant to a master services agreement or other call-off contract and related statements of work. Establishing the relevant contractual terms may not be straightforward, as large IT contracts are often subject to significant and rapid change which may or may not have been documented clearly and sub-contracts or other related third party contracts may not have been updated on time.

In software audit disputes, common issues include the technical challenge of measuring and evidencing the actual customer deployment, which is often disputed at a technical level (especially with the move to cloud models and virtualised infrastructure), and legal issues in applying often older and sometimes standard form licence and scope of use provisions against bespoke deployments. Remedies and contractual limitation clauses also often come up, and it is not uncommon to see numerous variations and additional orders over the years which can muddy the licensing picture in terms of what the customer was allowed to do and in respect of which products.

It is also common to see disputes arise over the ownership of technology products. This can be the result of disputes between inventors, joint collaboration agreements which have become distressed, or company insolvency related issues, to name a few examples.

Another area of dispute frequently seen is when a supplier of an original platform alleges infringement against a customer who has replaced the platform and terminated the licence. These disputes usually occur where companies are looking for cost savings by replacing an incumbent supplier with high licence fees with a smaller and sometimes bespoke system or set of modules. Often the allegation is that too much reference has been made to the incumbent system when designing and building the replacement. Similarly, there

can be disputes over data use and whether the use of data sets or extraction of data from the original system to migrate onto the new platform has infringed rights or breached the contractual restrictions.

Issues which have given rise to challenges to big tech by individuals are the adtech business model and the use of children's data. The Norwegian Consumer Council's report has inspired litigation in relation to the latter (see Forbrukerradet: Out of control: How consumers are exploited by the online advertising industry (January 2020)). Concern about the use of children's data has resulted in the Information Commissioner's Office issuing detailed guidance for organisations who are processing children's personal data under the UK GDPR as well as provisions to keep children safe in the Online Safety Bill, which will also fuel claims (ICO: Children and the UK GDPR). See Practice notes, Children and the law: data protection aspects (UK), Digital marketing: an overview and Social media compliance.

Approximately what proportion of disputes between parties become the subject of dispute resolution proceedings?

It is difficult to assess the proportion of disputes which are referred to formal dispute resolution procedures, for example litigation and arbitration. Many IT contracts include detailed, tiered escalation provisions (for example, without prejudice discussions at several management levels), and provide for alternative dispute resolution (including mediation, adjudication and expert determination) as an alternative to, or before starting, binding litigation or arbitration proceedings.

Mediation is common and may be required as an express condition before legal proceedings can be initiated. A well drafted escalation or non-formal dispute process can be used frequently on large-scale IT contracts to facilitate the parties resolving disputes relatively quickly and so not disrupting the delivery of such a project. Practitioners find that, particularly in large, long-term technology contracts, many disputes are resolved at the contract management or executive level. Most disputes settle before judgment or award, although an extensive re-baselining of the contract or in some cases an exit on agreed terms (with detailed transitional arrangements) may be required.

Other than a few key example cases, such as *SAP UK Ltd v Diageo Great Britain Ltd [2017] EWHC 189 (TCC)*, most software audit disputes do settle in without prejudice negotiations, but usually after a number of rounds of formal legal correspondence and detailed argument, with the support of external law firms on both sides.

Similarly, disputes relating to ownership and infringement of software arising out of collaboration agreements or movement of employees will often resolve in ad hoc negotiations, but can also often be mediated due to the perceived potential downsides of public litigation for both parties.

For information on mediation, see Mediation toolkit, and for an example of a tiered escalation provision, see Standard clause, Multi-tiered dispute resolution procedure.

Are there any unusual time limits for starting a claim?

In general, normal time limits apply to claims in relation to technology disputes (for example, in contractual disputes, six years from the date of breach). However, time limits may be impacted by the inclusion of a time bar clause or a condition precedent in any contract which prescribes a certain period to notify a claim for a breach.

Any party considering a claim for breach of procurement law needs to pay close attention to applicable time limits. For example, the limitation period for commencing a claim for breach of the Public Contracts Regulations 2015 is just 30 days.

A claim for compensation under the UK GDPR and DPA 2018 is subject to a six-year limitation period from the date the cause of action accrued (section *2, Limitation Act 1980*). Similarly, a claim for copyright or patent infringement will also be subject to a six-year limitation period from the date the cause of action arose (see Practice note, Limitation periods in intellectual property claims: Application of LA 1980 to IP claims).

For information on limitation periods under the Limitation Act 1980, see Practice note, Limitation periods: an overview.

Parties to a dispute

Who are typically the opposing parties in such disputes in the sector?

Different types of technology disputes involve different parties. Disputes in relation to large IT projects generally involve large commercial entities or public bodies. Claims in relation to these projects are usually relatively straightforward from a jurisdiction perspective, as large IT suppliers will frequently contract with their customers through local entities (although the position may be more complex in relation to smaller companies or subcontractors, which may be based in different jurisdictions). Where different jurisdictions are relevant,

arbitration may be the preferred dispute resolution mechanism for reasons of perceived neutrality or enforcement (although the opportunity to avoid public litigation is often the primary driver for selecting arbitration as a dispute resolution process).

Other types of technology dispute will involve different types of parties and are frequently multijurisdictional. Disputes in relation to cryptocurrencies often involve individuals or sometimes companies, and, in the case of fraud, persons unknown. Additionally, practitioners have seen examples of individuals looking to bring claims against crypto-exchanges and other intermediaries who have been contracted either to hold such crypto-assets or to facilitate their exchange. Given the nature of the asset (in particular that they are usually hosted on distributed ledger technologies) and that these disputes can have multijurisdictional parties, complex jurisdictional issues often arise. More generally, practitioners have seen an increase around the world in regulators looking to scrutinise such assets and the various financial intermediaries who transact in them.

High-tech patent disputes can involve a range of different parties. Media attention often focuses on the global wars of attrition between technology corporations, most commonly in the mobile telephone space; however, some practitioners expect this to move out to areas such the automotive industry as technology becomes ever more integrated into the cars of the future. A number of high-tech patent disputes arise from prior collaboration arrangements gone sour, with the inventors falling out or seeking to enforce their patents against former commercial collaborators. These disputes can involve smaller parties, and lead to "David and Goliath" situations. The Intellectual Property and Enterprise Court (IPEC) has provided a forum for smaller parties to bring such disputes without the same cost risks they would face in other courts. The same issue of differing party size or bargaining power also arises in more general copyright and database rights, software disputes between owners and third parties.

It is also not uncommon to see disputes between investors and the recipients of investment. This arises especially in the context of start-ups, which often change substantially in a short period of time if the business takes off, at which point previously agreed obligations and restrictions may appear less attractive, or investors may look to enhance their return.

Audit disputes, or infringement disputes arising out of the replacement of software or platforms, usually involve large enterprise vendors and customers of any size and description, but the larger disputes typically involve large corporate deployments of back-office or specific technical functionality. These disputes can also involve copyright and database right infringement allegations as well as contractual arguments.

Data claims are often between the data subject, on the one hand, and the controller or processor on the other, but as the landscape becomes increasingly contentious practitioners think there may be a greater volume of claims between controllers and processors. In addition, there is considerable scope for growth in class actions concerning the use of data in the UK, particularly where an issue affects a large number of individuals (see What is the incidence of class actions in the sector? below).

The ICO's use of its enforcement powers under the UK GDPR and Data Protection Act 2018 will fuel some litigation. Practitioners have seen claimants "cut and paste" ICO's findings into claim forms and particulars of claim. Recent examples of instances in which the ICO criticised organisations' cyber and data security provision include the fines in relation to Marriott International Inc, British Airways and Ticketmaster (see Article, BA, Marriott and Ticketmaster: an analysis of the issues and questions arising from the headline ICO fines of 2020). See also ICO civil penalties: tracker and Practice note, UK GDPR and DPA 2018: enforcement, sanctions and remedies (UK). Any criticism of an organisation's cyber "hard basics" will be used by claimants.

The Network and Information Systems Regulations 2018 (SI 2018/506) (NIS Regulations) apply to Operators of Essential Services (OES) and relevant digital service providers (RDSPs). The NIS Regulations do not give rise to private liabilities, but regulators (sector-specific for OES, the ICO in the case of RDSPs) can enact fines on a tiered scale up to £17million for a material contravention, which the relevant enforcement authority determines has caused, or could cause, an incident resulting in an immediate threat to life or significant adverse impact on the UK economy. Where enforcement findings criticise an organisations data or systems security, and personal data is at issue, this may fuel further data claims, as above. Regulatory enforcement in relation to lapse cyber security standards in other sectors may have the same effect (see Practice note, Cybersecurity in regulated sectors, cybersecurity guidance and standards).

Are parties usually balanced in terms of bargaining power and financial circumstances?

It is difficult to generalise as to where the balance of power in a dispute would usually lie. As a preliminary point, technology providers can be small (sometimes no-more than one person with a franchise to sell software) or as large as the Silicon Valley giants.

In the context of disputes between IT service providers and their customers, in relation to the delivery of products or services, there is often an imbalance in power between the parties, depending on the facts. Certain large providers of IT services have significant bargaining

power in technology disputes with their customers and, sometimes, subcontractors. However, the larger the customer, the more likely it is that there will be a balance of power between the parties and, consequently, greater scope to negotiate. Indeed, the spending power of certain customers (including government agencies) may give them significant power in stipulating the terms of any contract. That said, there is often a degree of bargaining power held by a supplier or vendor, because the customer is usually, at least in the short to medium term, dependent on the supplier's continued service or, at least, co-operation around transition and exit. For example, in the context of an audit dispute, it is usually of great concern to the customer that the vendor might suspend access to critical embedded software tools which the customer cannot quickly replace.

Where disputes arise around ownership of tech, software or data, the balance of bargaining power will depend on which parties have been involved. However, where large corporates have acquired material sourced from an individual or smaller team, then any claims are not likely to be balanced in terms of bargaining power or funding. This can also be true in respect of high-tech patent disputes, as noted above, and the IPEC's cost capping regime has facilitated these sorts of disputes between unequal parties (and such claims are often supported with after the event (ATE) insurance for the remaining cost risk they would otherwise face). Litigation funding is also sometimes seen in patent disputes, which again can help level the playing field.

Claims between individuals and big tech companies are inherently David and Goliath type disputes. The playing field may be levelled if litigation funders support claims using the routes for challenge outlined *Lloyd v Google* (under data protection statute and the tort of misuse of private information) and claimants make increased used of the Competition and Markets Authority's powers.

For information on ATE insurance, see Practice note, After the event insurance (for policies taken out from 1 April 2013) and for information on litigation funding, see Practice note, Third party litigation funding in England and Wales: an overview.

Dispute resolution methods: how are disputes typically resolved in this sector?

Which courts, arbitral bodies or other organisations commonly deal with disputes?

In the High Court, general technology disputes are usually dealt with by the Technology and Construction Court (TCC). The TCC is now well-established and has judges with significant expertise in technology related disputes. Of course, just because a dispute relates to a technology contract does not necessarily mean the TCC is the most appropriate place for it to be determined and, where for example the dispute is between investors or is purely in relation to a disagreement as to the terms of a contract, then the Commercial Court may be an equally (or more) suitable forum.

For high value IP related claims, such as those around ownership or infringement of rights, technology disputes can be brought in the High Court, general intellectual property list (or Patents Court if patent-related) or in the Intellectual Property and Enterprise Court (IPEC), although the latter is generally used for lower value claims due to the £500,000 damages cap.

The Media and Communications List (MCL) deals with many data protection claims involving the media and publication. The MCL was established so that media cases in the Queen's Bench Division (whether involving defamation, misuse of private information, a claim in data protection law or a claim for harassment by publication) can be dealt with in one List. Part 53.1(3)(b) of the Civil Procedure Rules provides that a High Court claim must be issued in the MCL if it is or includes a claim in data protection law. However, this does not prevent claims being issued in, or transferred to, the County Court (see Practice Direction 53A: transferring proceedings to and from the Media and Communications List) and the court may consider it a procedural abuse to bring a claim in the High Court where modest damages would be dwarfed by costs, see Practice note, Recovery of costs: overview and *Johnson v Eastlight Community Homes Ltd [2021] EWHC 3069 (QB)*.

Further, in *Mevinsky and others v Associated News [2018] EWHC 1261 (Ch)*, a claim brought for misuse of private information and breach of the data protection legislation, Chief Master Marsh refused an application to transfer from the Business List in the Chancery division to the MCL. He noted that the MCL had "no extra-divisional effect", adding "[t]he court hearing an application for transfer must be careful to avoid parochialism. The interests of justice and the provisions of the overriding objective require the court to transfer a claim if that is likely to be the benefit of the parties".

Outside of litigation, technology disputes also often come before the major arbitration institutions (using any number of institutional rules) and arbitration is particularly common where the dispute has cross-border elements or the parties have concerns regarding the public nature of litigation. Dispute resolution clauses may also provide for binding or non-binding expert determination (particularly in respect of specific technical or financial issues), or adjudication (which is

usually non-binding) for more complex disputes. Both of these procedures can be useful in particular when a project is already underway (as they can sometimes minimise the impact of any dispute on the underlying agreement to provide services/products). Mediation is a more conciliatory process which is very common (and often used to good effect), and can sometimes be a requirement if the contract features a tiered dispute resolution clause (see for example Standard Clause, Multi-tiered dispute resolution procedure).

For information on dispute resolution procedures, see Practice notes:

- Expert determination.
- Mediation: overview (UK).
- Adjudication toolkit.
- How to start a civil claim toolkit.
- The arbitration toolkit.

For information on litigating in various courts, see Practice notes:

- Intellectual Property Enterprise Court: overview.
- Technology and Construction Court (TCC).
- A guide to litigating in the Commercial Court.

What factors are most likely to influence the choice of dispute resolution method?

A range of factors will influence the choice of dispute resolution method for parties.

Practitioners often find that the key reason why parties choose arbitration is privacy, as the reputational risks associated with large technology disputes can be significant. However, for the same reason some parties, in particular customers, are happy to have disputes in public, judging that this will increase the pressure on the other side to settle. A party's approach to agreeing how a dispute is resolved can often be based on their experiences (good and bad) of different dispute resolution mechanisms.

Large IT contracts often contain multitiered dispute resolution clauses. These provide for the parties to follow certain steps in relation to the escalation of any dispute (for example requiring the parties to attempt alternative dispute resolution (ADR) before commencing proceedings, see Standard clause, Multi-tiered dispute resolution procedure). Parties may also choose alternative dispute resolution methods such as mediation and adjudication in order to preserve commercial relationships, particularly where there is scope for ongoing supply opportunities.

IP disputes by their nature are tortious and therefore there will not be a contracted dispute resolution method in place unless there is a related contractual dispute. Sometimes the parties will have no contractual relationship whatsoever. IP disputes therefore tend to be litigated in the courts unless there is a related contract specifying arbitration or another means of ADR. Further, for many IP disputes the key remedy sought is an injunction to stop the infringement, including, potentially, interim injunctive relief, and this is generally only available from the court. In general, to the extent that ADR is used, it tends to take the form of commercial negotiations or mediation between the parties with other forms of ADR being less common.

For information on injunctive relief, see Practice note, Injunctions: an overview.

For a more detailed compare and contrast on dispute resolution mechanisms commonly used for IT disputes, see Practice note, Dispute resolution mechanisms for IT disputes.

What are the most commonly used alternative dispute resolution (ADR) methods (adjudication, mediation, ENE, expert determination, dispute boards)?

Practitioners have found that the most commonly used ADR methods in IT contract disputes are expert determination and mediation. However, that is not to say that they are the only methods used. For example, one mechanism that is sometimes discussed (usually at the start of a project when the contractual arrangements are being negotiated) is the inclusion of an appointed dispute board in the arrangements. Dispute boards are (usually) project-specific panels of a number of independent experts appointed at the outset of large projects, who become familiar with the project, serve as a forum for discussion of contentious issues and can provide opinions, advice and non- or interim-binding determinations. While this is a sound idea in principle, there are few, if any, examples of parties agreeing to use such a mechanism in a tech context.

Similarly, in tech disputes relating to ownership and infringement of IP, mediation is the most used ADR method, but it is less commonly used where there is no contractual or ongoing relationship between the parties.

Expert determination is useful as a relatively quick, inexpensive and informal way of having an expert in the relevant field resolve specific factual or technical issues through binding or non-binding determinations. It cannot, however, be used for extensive factual or legal disputes because the procedure and process does not facilitate this. Mediation identifies issues in dispute and facilitates a potential agreed resolution between the parties and is particularly helpful for preserving valuable ongoing business relationships. However, it requires

good faith and willingness to compromise on behalf of the parties involved.

Binding ADR outcomes are useful in situations where reaching a resolution is time-sensitive, such as in the context of a large ongoing project where protracted challenges can cause severe delays and cost overruns. However, parties may prefer non-binding ADR if they wish to retain full control of the outcome of ADR processes and ultimately resolve issues by agreement.

For more detailed information on the various ADR mechanisms, see Practice note, Overview and comparison of ADR processes.

Are there any requirements in the sector for a particular type of dispute resolution regime?

Parties are strongly encouraged by the courts to explore ADR and to attempt settlement both in pre-action and at all stages of litigation. The TCC guide notes that ADR can lead to a significant saving of cost and may result in a settlement which is satisfactory to all parties and failure to consider ADR may lead to adverse cost consequences (see Technology and Construction Court Guide). The Patents Court guide (Courts and Tribunals Judiciary: CPR, Guides and Forms) contains similar notes.

If the data claim is a Queen's Bench Division claim and the Pre-action protocol for Media and Communications Claims applies, the parties will need to consider Part 3.8 of the protocol, which covers settlement and ADR. The options cited at Part 3.9 include without prejudice discussions and negotiations, mediation, reference to a press regulator and early neutral evaluation (Ministry of Justice: Pre-action Protocol for Media and Communications Claims). Early neutral evaluation (ENE) involves a third party giving an informed opinion on the dispute (for example, this is used very commonly in defamation cases where the meaning to be attributed to the words complained of is key). Meaning of the words complained of will also be an issue in data protection claims concerning accuracy of personal data, meaning that ENE may be appropriate in some cases (for more information, see Practice note, Early neutral evaluation: overview.

IP claims are not subject to any mandatory alternative dispute resolution, although it is encouraged. In some situations, the cost capping regime of the IPEC can hinder such mechanisms, as it limits the costs risk of the parties. For claimants, when their adverse costs are limited to £50,000, and especially if supported by ATE insurance and possibly some form of small scale litigation funding or CFA arrangement with their solicitors, there can be little reason to compromise, while defendants can rely on the adverse costs caps and the maximum recoverable damages limit of £500,000 to limit their own exposure (although the threat of an injunction may have significant impact). For more information, see Practice note, Intellectual Property Enterprise Court: overview.

Are there sector-specific procedural rules that apply to any of these dispute resolution regimes?

The TCC Court guide (HM Courts & Tribunals Service: Guidance: Technology and Construction Court guide) sets out the procedural rules which are likely to be relevant in IT service contract disputes. The Pre-Action Protocol for Media and Communications Claims (Ministry of Justice: Pre-action Protocol for Media and Communication Claims) also sets out the pre-action requirements which must be followed before issuing data protection disputes.

There is no specific pre-action protocol for IP claims, but there are lengthy specific CPR sections dealing with IP disputes with additional procedural rules contained in the Patents Court and IPEC guides (HMCTS: Intellectual Property Enterprise Court guide).

There is a Pre-Action Protocol which applies to cases within the scope of CPR Part 53.1, including cases involving data protection law (see Which courts, arbitral bodies or other organisations commonly deal with disputes? above).

Litigation, arbitration or ADR

Whatever the method of dispute resolution, to what extent do the parties expect to be able to control the procedure and timetable for disputes in the sector? How quick is the process?

As noted in What factors are most likely to influence the choice of dispute resolution method? above, large IT contracts often include tiered dispute resolution provisions. These dispute resolution clauses often prescribe deadlines, for example, requiring the respective contract managers to attempt negotiations two weeks before escalating to more senior executives, potentially to be followed by mandatory mediation.

Contractual ADR mechanisms, such as expert determination or adjudication will often specify agreed timetables. Beyond that, it is difficult to generalise in respect of the timetable for disputes.

Once a dispute has been referred to litigation or arbitration, the timing will always be affected by

considerations out of the parties' control, not least court or arbitrator availability. The timing will also inevitably depend on the complexity of the dispute and the amount of evidence required to resolve the issues.

Where a project is in flight, the length of time that a court or arbitral process may take to resolve, with the attendant cost and management time and further potential delay to the delivery of a project or damage to a commercial relationship, will encourage parties to seek to resolve the matter through alternative means. These considerations may be less relevant if a contract has terminated and the argument is about recouping significant losses.

In tech disputes, there are often vendor side financial imperatives (for example, end of quarter revenue targets) which can impact vendor approaches to settlement.

In many data protection cases, prompt action to minimise harm to the data subject will act as a mitigating factor and accordingly act as a driver for prompt dispute resolution.

How common are interim applications (such as applications for interim injunctions) and without notice applications?

As in litigation generally, interim applications are common in tech litigation; for example, applications for disclosure of key information, documents or code, particularly where these are not initially held by both parties. Interim applications are used alongside other tools for efficient case management, such as split hearings or identification of preliminary issues. Depending on the size and nature of the parties, security for costs applications may also be relevant.

Interim injunctions specifically are relatively uncommon in disputes in relation to large IT projects, although they (or potentially declaratory relief) may be sought in relation to specific performance in exit provisions in certain contracts. This may arise, for example, where there is a gap between the end of the previous supplier's coverage and the provision of service by a new supplier, or where certain deliverables have to be achieved in order to affect an orderly handover to a new supplier. For an example of when an interim injunction was refused in relation to a software development dispute, see Legal update, Interim injunction refused in software development contract dispute (TCC).

By comparison, interim injunctions are very common in disputes regarding the misappropriation of cryptocurrencies and other digital assets. Claimants will often apply for freezing injunctions to deal with the risk that the asset in question is dissipated to prevent enforcement.

It is not uncommon to see threats of interim injunctive applications from customers in the context of audit disputes or other software disputes where there is a risk or threat that the supplier will turn off the customer's access to the critical software product. Such applications are not generally needed, but they are in some cases.

This is equally the case in IP disputes relating to software and in cases of ongoing infringement. In a dispute concerning breach of confidence or copyright in respect of source code, it is not uncommon for claimants to seek interlocutory injunctive relief, for example, to prevent the launch of a competing product alleged to infringe. Where there are issues around ownership or copying of, for example, computer code, a party may be concerned that evidence may be destroyed if the opposing party is tipped off. Then the concerned party may make an application for a search and seizure order (such as in *Anton Piller*), to seek access to a copy of the code which is alleged to infringe copyright. However, this is relatively rare given the high level of detail required in the application evidence (for information on search and seizure orders, see Practice note, Search orders: an overview).

Applications for pre-action disclosure and for disclosure by non-parties (including using the Norwich Pharmacal procedure) are common in data cases with claimants seeking detail regarding the defendant's data processing or information regarding who is responsible for unlawful data processing (for information on Norwich Pharmacal orders, see Practice note, Norwich Pharmacal orders: a practical guide). Applications for interim injunctions are also common (including using the rights to rectification, erasure and restriction of processing under Articles 16, 17 and 18 of the UK GDPR), although claimants have to exercise care with applications that may be perceived as an attempt to stifle freedom of expression protected under the Human Rights Act 1998.

For more information on interim applications, see Practice note, Interim applications under the CPR: an overview and for information on specific performance, see Practice note, Specific performance.

Are expert witnesses used in the sector?

Expert witnesses are used heavily. In many disputes, expert evidence may be of more probative value than factual witnesses and disclosed documents. In respect of technology disputes before the TCC, the TCC guide encourages effective and proportionate use of experts at an early stage. Often multiple areas of expertise are required (in relation both to very specialist technical

matters and to the quantum of any damages claim), even when the dispute is concerned with relatively small sums. Identifying individuals with the right expertise can be challenging in very specialist or new areas but is essential.

It is not uncommon for experts on the effect and consequences of delay in large IT projects to give expert evidence in respect of damages. Experts are also common in technology related IP disputes, where they can assist the court in various ways, such as comparison of computer code or data to establish ownership or infringement.

Expert evidence is common in data cases because what may have happened to data is often an issue, as are data flows within and between organisations.

For information on expert evidence for use in hearings and trials in the TCC, see Practice note, Technology and Construction Court: witness evidence. For information on expert evidence generally, see Practice note, Expert evidence: an overview and for information on expert evidence in international arbitration, see Practice note, Evidence in international arbitration.

Are appeals possible and common in the sector?

It depends on the type of dispute, the contractual terms (including the terms of any dispute resolution procedure) and the value of the dispute. Disputes in relation to large IT projects are often fact and expert heavy, which may make it less likely (though not impossible) that they will be appealed. Where a dispute turns on the correct contractual interpretation of a contract, or where the application of a limitation or exclusion clause is key, then there is a much higher likelihood of an appeal.

Appeals are relatively common in IP related disputes, due to the complexity of the legal tests that apply to different IP rights. This is especially true for technology disputes as new technologies such as AI and cryptocurrency raise difficult questions in terms of the application of legislation often written for a different era, or involve relatively untested legislative provisions such as the computer program exceptions of sections 28A, 50A, 50B and 50C of the Copyright, Designs and Patents Act 1988.

Appeals are common in data cases. Historically there has been very little data protection litigation (other related causes of action being preferred by claimants) and, accordingly, the interpretation of data protection law (before 2018 the Data Protection Act 1998 (based on Directive 95/46EC), after May 2018 and before Brexit, the GDPR and the Data Protection Act 2018, and after Brexit, the UK GDPR and the Data Protection Act 2018) are having to be built out on a case-by-case basis. Prominent examples include *WM Morrison Supermarkets Plc v Various Claimants [2020] UKSC 12* and *Google LLC v Lloyd [2021] UKSC 50*, which have both been determined in the Supreme Court. See Practice note, UK GDPR and DPA 2018: claims for compensation.

Where disputes have been referred to ADR mechanisms, a party's ability to appeal depends on the mechanism employed. Challenges of arbitral awards are limited and are usually based on a lack of jurisdiction or serious irregularity affecting the tribunal, the proceedings or the award. Adjudication is normally only binding on an interim basis until the issue is referred to litigation, arbitration or resolved by agreement, though parties can contractually agree that the outcome of adjudication will be finally binding. Expert determination can be binding or non-binding depending on the contractual provision, which may also specify any potential routes of appeal.

For more information on appeals, see Practice notes, Appeals: an overview and Challenging the award under section 69 of the English Arbitration Act 1996: appeal on a point of law.

Costs and funding

Is it common in the sector for disputes to receive third party funding?

Third party funding is uncommon in relation to contractual disputes regarding large IT projects. Third party funders generally fund cases which have a high chance of success and it is often difficult to reach this level of certainty in relation to large IT project disputes due to their complexity and technical nature (or at least not until the case is at a fairly advanced stage). However, given the increasing amounts of money available to such funders, and their increasing tolerance for risk and complexity, there is a chance that they will begin to look at more diverse types of dispute.

It is becoming more common to see IP disputes in the technology space receive third party funding, but usually in the context of a rights owner suing an infringer, rather than in the context of customer-supplier disputes. It is especially common in cases involving smaller IP-owning companies, or developer-funded vehicles, pursuing claims against large corporates. Sometimes, especially in the case of patent claims, claims are funded through arrangements with non-practising (or "patent assertion") entities which will provide funding, sometimes by taking ownership of the patent in a specially created vehicle, on the basis that proceeds recovered are split between the entity and the relevant inventor or original owner of the patent.

Litigation funders are very keen to support data claims brought on the representative action basis. The Supreme Court's decision in *Google v Lloyd* means that there will be no opening of floodgates for class actions brought on an "opt out" basis (that is, with no need to identify individual claimants). However, the *Google v Lloyd* decision has left open the possibility of a form of "bifurcated" proceedings, whereby the representative action procedure could be used to determine common issues, with individual issues dealt with subsequently. Data claims brought on the group litigation order basis often do not meet the metrics required by litigation funders.

For more information on litigation funding and group litigation, see Practice notes, Third party litigation funding in England and Wales: an overview and Group litigation and group litigation orders.

Who typically pays the costs of any proceedings in the sector?

For most disputes in the sector, the normal approach to costs applies in that the "loser" pays for the costs of the proceedings, with the usual caveat that a winning party should not expect to recover 100% of its costs. However, it is common in cases with lots of issues (including for example disputes between suppliers and customer in relation to large IT projects) for there to be a more granular assessment rather than an "all or nothing" approach, with costs awarded on the basis of which party won on each issue and the costs occasioned by that issue.

However, if an IP case is brought in the IPEC, the capped costs regime of the IPEC will apply. This limits recoverable costs in the vast majority of cases to £50,000 in liability proceedings and £25,000 in damages inquiry proceedings, with further scale caps within these maximum values for each stage of the proceedings, meaning that awards tend to be even lower.

If a dispute has been referred to arbitration, it is generally possible to recover a higher proportion of costs than in litigation.

For more information, see Practice notes, Costs: an overview and Costs in international arbitration: overview.

Settlement

Is it common in the sector for disputes that are the subject of proceedings to settle? Why is this?

Practitioners have found that disputes in relation to large IT contracts frequently settle due to:

- The complexity and cost of proceedings.
- To avoid negative publicity for both customer and supplier.
- The chance of preserving the commercial relationship.

Getting a troubled project back on track, and the wish to avoid the management and witness time of formal proceedings may be key drivers to seeking a settlement.

This is also the case in respect of the majority of software audit and licensing disputes, where both parties will recognise the litigation risk involved in court scrutiny of terms and conditions, and operational deployment procedures. In addition, software audit and licensing disputes always act as a burden on the customer company, requiring management to spend time on litigation, rather than the core business. This is often a significant factor in settlement.

Sometimes the use of third party funding can act as a barrier to settlement in IP cases. Once funding has been committed, claimants can be less willing to agree to settlements even when the prospects of their case diminish prior to trial.

Some data class actions have not settled possibly owing to the desire of parties and litigation funders to obtain judicial decisions on key points such as the availability of so-called "loss of control" or "user" damages or quantum. This replicates what happened when the law on misuse of private of information was built out on a case by case basis.

For more information on settling a dispute by negotiation, see Practice note, Settlement: an overview.

Judgment and remedies

What remedies are generally awarded in the sector?

In large IT contractual disputes, the most common remedy is damages. However, as noted above, it is possible that injunctive or declaratory relief will be granted where, for example, an exiting supplier has failed to comply with any obligations in relation to the handover or transfer of the exited services.

In audit cases, the remedy sought by the vendor would usually be damages in the form of lost licensing revenue. There is often a dispute between the parties as to how such damages would be assessed (for example, should the vendor's list price apply, or commonly offered discounted rates).

In IP cases, the most common form of damages is the notional licence fee, although claimants can alternatively seek an account of profits. As IP cases

typically have split liability and damages trials, it is rare for damages assessments to take place as parties will usually settle should the claimant prevail at the liability stage. The introduction of the IPEC, and capped costs for the damages stage, has increased the number of damages assessments which are heard in smaller scale disputes.

In data cases the remedies sought include rectification of the data, erasure of the data and restriction of processing, as well as general damages and in some instances special damages. See Practice notes, UK GDPR and DPA 2018: claims for compensation and Data subject rights (UK).

For guidance on the law of damages for breach of contract, see Practice note, Damages for breach of contract: an overview and for guidance on the assessment of damages in tort, see Practice note, Damages in tort: an overview.

How are judgments generally enforced in the sector?

The enforcement of judgments largely depends on the type of dispute. Claims in relation to IT projects generally involve large, sophisticated parties who ordinarily are able to pay damages awarded in any judgment against them. In addition, it is relatively common for parent companies of large technology companies to provide a guarantee on a subsidiary's behalf in relation to its performance of a contract (and similarly, sometimes such guarantees are requested from parent or holding companies of a customer). It may be possible to enforce any judgment pursuant to such guarantees.

Enforcement in other types of disputes, such as claims relating to the theft of cryptocurrencies or fraudulent offerings, will often be more complex given the sometimes unknown nature or identity of these parties (including where they are domiciled, as extra jurisdictional enforcement can often be difficult, especially in certain jurisdictions). Added to that, even if you can identify the relevant person or entity, there is often a practical challenge in seeking to litigate against them (given the criminal nature of their activities) and further, they may not have the means, or at least traceable assets, to meet damages and costs awards in any event.

In IP-related tech disputes, judgments will often involve declarations as to ownership or infringement which will require the losing party to deliver up or destroy any materials to which it has no rights. Compliance with such court orders is usually required within a short time of the judgment and enforcement action is rarely required due to the direct nature of the order.

Defendants in data cases may often be based overseas, particularly in the US given US companies' dominance of big tech. US courts will grant extraterritorial effect to valid judgments of foreign courts under the legal doctrine of comity. However, the US court will have to be satisfied that the foreign court properly had jurisdiction over the matter and that the judgment was not contrary to public policy. The First Amendment to the United States Constitution gives high protection to freedom of expression which can create difficulties with enforcement in some data cases.

For information on enforcement, see Practice notes:

- Enforcing a money judgment.
- Enforcement of English judgments in other jurisdictions.
- Judgments and orders: frequently asked questions.

To what extent is forum shopping likely to be relevant following the end of the Brexit transition period?

Generally, contracts for large IT projects provide for claims to be brought in the jurisdiction where the work is done (for example, claims in relation to an IT transformation project in England will be brought in England). The end of the Brexit transition period is unlikely to affect this.

For IP claims involving pan-European rights such as Community designs and EU trade marks, there are Community-level courts designated in each EU jurisdiction, but a certain amount of forum shopping between these is possible. These courts may grant pan-European injunctions but these injunctions will no longer cover the UK post-Brexit. EU courts cannot grant injunctions impacting the UK market. However, the Unified Patent Court (UPC) system may well be in operation by the end of 2022 and, if so, pan-European injunctions in relation to European patent rights will be available from this court, enforceable in all participating states (likely to be 24 of the EU member states, with Spain, Poland and Croatia still not taking part). Multijurisdictional patent litigation across Europe will however remain very much a reality, with these three states being outside the UPC's jurisdiction, plus the UK and other non-EU European Patent Convention (EPC) states such as Norway and Switzerland. Further, many patentees may choose to opt their patents out of the new court's jurisdiction, again confirming the continued multijurisdictional nature of patent litigation in Europe. There will be a wealth of jurisdictional and forum shopping issues when the UPC commences as it will have dual jurisdiction over non-opted out European

Patents (EPs) with national courts for a transitional period of seven years (which can be extended). There may also be jurisdictional disputes within the UPC itself in terms of which first instance court can hear an action.

Forum is likely to be a significant factor in data cases given that divergence between the UK and EU regulatory and legal frameworks for data protection is likely to occur, with the UK likely to become a more "tech friendly" jurisdiction than the EU. See Article, DCMS data protection reforms: summary of consultation proposals.

The European Commission has deemed the UK an adequate country for the purposes of data protection. It adopted two adequacy decisions for the UK, one under the GDPR and the other for the Law Enforcement Directive, on 28th June 2021, acknowledging that UK standards for the protection of personal data are sufficiently high for data to continue to flow between it and the EU, with the decisions containing a "sunset clause" limiting the duration of adequacy to four years. See Practice note, Cross-border transfers of personal data (UK): EU-UK adequacy decision and status of the UK as a third country under the EU GDPR.

The UK government has been highly critical of the GDPR. In its report dated May 2021, setting out a new regulatory framework for the UK, the Prime Ministerial Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) described the regime the GDPR creates as "too prescriptive, too inflexible, too burdensome and with too many "onerous compliance requirements" (see PMO: Taskforce on Innovation, Growth and Regulatory Reform independent report (May 2021)).

Trends in the sector

Is there a shift in the sector away from more "traditional" methods of dispute resolution towards more collaborative ADR techniques?

As noted in What factors are most likely to influence the choice of dispute resolution method? above, in large IT contracts dispute resolution mechanisms are usually bespoke and often provide for a detailed escalation process with tiers and different ADR options.

A number of bodies have looked to set up alternative methods of resolving technology disputes, including, for example, the Society for Computers and Law's adjudication scheme for tech disputes, which was launched in 2019 (see Practice note, Dispute resolution mechanisms for IT disputes: Society for Computers and Law Adjudication Scheme (SCLA)). In addition, the UK's new Digital Dispute Resolution Rules were announced at the end of April 2021. These aim to enable faster and more efficient dispute resolution for disputes relating to novel technologies such as crypto, smart contracts, blockchain, fintech and promote arbitration and expert determination (see Practice note, Dispute resolution mechanisms for IT disputes: Digital Dispute Resolution Rules). For information on online dispute resolution, see Practice note, Online dispute resolution and the development of the online court.

Trends suggest that data claims and IP registrations are increasing at pace, pointing to the growing importance of intellectual capital as tech permeates more and more sectors of the economy. According to UK government data, the number of patent applications to the IPO increased by 7.3% between 2019 and 2020, trade mark applications increased by 27.4% to record levels of 137,035 applications in 2020, and design applications also increased by 8.9% between 2019 and 2020. Grants similarly increased over the same period, suggesting that IP disputes may see similar growth rates in the future (see Intellectual Property Office: Official Statistics: Facts and figures: patent, trade mark, design and hearing data: 2020).

Data claims have been increasing. The TIGRR report advocates a common law approach, which may indicate a greater volume of data cases in future, subject, of course, to claimants being able to obtain litigation funding, which is why the funders' response to the *Lloyd v Google* decision will be so important.

What is the incidence of class actions in the sector?

There is considerable scope for growth in class actions concerning the use of data in the UK, particularly where an issue affects a large number of individuals. The case of *Google v Lloyd* provides an example of a challenge to a business model via class action.

Following the subsequent Supreme Court's decision in *Google LLC v Lloyd [2021] UKSC 50*, actions may be brought to establish liability under data protection statute (UK GDPR and the Data Protection Act 2018) using the representative action procedure, with quantum being decided later (most likely by settlement).

Challenges to business model type data claims are likely to be brought using the tort of misuse of private information with the Supreme Court providing a road map for how this might be done in *Google v Lloyd* (although it must be remembered that what is said about misuse of private information is obiter dicta).

Practitioners are also likely to see such claims brought before the Competition and Markets Authority alleging that individuals have been charged an "unfair price" for the use of their data.

The Supreme Court's decision in *Google v Lloyd* shows that the representative class action procedure cannot be used for claims for "loss of control" of data under the Data Protection Act 1998. The Supreme Court did not expressly address whether the position would be the same under UK GDPR, a point which a claimant may take in due course.

For information on multiparty litigation generally, see Practice note, Multi-party litigation: overview.

Are there likely to be any significant developments in the near future that will impact upon disputes in the sector?

Technology is clearly an area where there are frequently significant developments, many of which have the potential to lead to disputes in the future.

Practitioners anticipate that smart legal contracts will become increasingly common as more and more companies digitise their legal processes and adopt these contracts as standard. While much of the drive to use smart legal contracts is based on the additional certainty they provide, it is likely that there will continue to be disputes under such contracts, in particular in relation to the correct construction of the terms of the contract (as is often the case now) and the operation of the automatic performance under those contracts.

More generally, as companies further integrate technology into their wider strategic agendas, including, for example, in relation to decarbonisation and ESG strategies, failure or poor performance of this technology risks jeopardising achievements in these areas and could also present opportunities for disputes. This risk may particularly arise where the technology is untested and it is not clear who takes the risk for the technology not performing as anticipated.

Similarly, increased digitisation will also lead to greater risk of cybersecurity incidents, which give rise to losses on the part of individuals. Given the amount of data which many companies now hold and the importance of this data, claims by consumers and other interested parties relating to such incidents are likely to become significant. Claimants will have to show that a defendant fell below the standard expected in relation to cyber and data security, and that such failure caused loss to them.

Additionally, the increased penetration of cryptocurrencies (and other digital assets, such as non-fungible tokens) into the portfolios of mainstream financial institutions and retail investors will increase the potential for disputes in this area to arise.

Where there is more collaboration on developing tech and its applications across different sectors, then there is the potential for increased disputes around the ownership of trade secrets and rights to use, on the one hand, and infringement on the other. This includes increasing difficulties for companies around controlling their internal ownership of IP generated by their employees and contractors, with the results that disputes with former workers around ownership of source code and other digital assets may become increasingly common. Such trends are likely to be exacerbated by increased working from home.

Similarly, the continued adoption of standards in the tech space and the need for interoperability is likely to lead to further FRAND disputes.

AI is likely to lead to more disputes as deep, unresolved questions remain around how AI interacts with existing IP systems. For example, who owns material developed by AI, and who is responsible when AI systems infringe the IP rights of others? Equally, there is a lot of patenting activity in this area which is likely to lead to disputes in the future.

A further potential area for IP related disputes arises from the continued push for responsibility for internet content to be put onto service provider platforms, which is being driven at least in the EU by the provisions of the Digital Copyright Directive. This may lead to actions by rights owners or by free speech advocates (or both) against the service provider platforms, and similarly may lead to actions against those tech providers who are developing means to assist with the automatic screening of material.

As indicated above there are significant public policy decisions that need to be made regarding the UK's approach to data claims and the role of litigation in relation to data. Privacy campaigners in the UK have expressed concerns about access to justice in such claims. (See Are parties usually balanced in terms of bargaining power and financial circumstances? for how the playing field between claimants and defendants might be levelled.)

Of particular concern (given the importance of individuals being able to challenge decisions made by algorithm or AI) is the UK government's proposal that Article 22 of the UK GDPR be scrapped on the grounds that it is "burdensome, costly and impractical". Article 22 gives a data subject the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her). It is proposed it be replaced by a "legitimate or public interest test". For more information, see:

- Practice note, UK GDPR and Data Protection Act 2018: data subject rights in the workplace: Rights regarding automated processing (including profiling).

- Practice note, UK GDPR and DPA 2018: profiling and automated decision-making.
- Article, DCMS data protection reforms: summary of consultation proposals: Automated decision-making and data rights.

Specific issues in the sector

Are there any other specific issues of note when dealing with disputes in the sector?

There are no other points to note other than those covered above.