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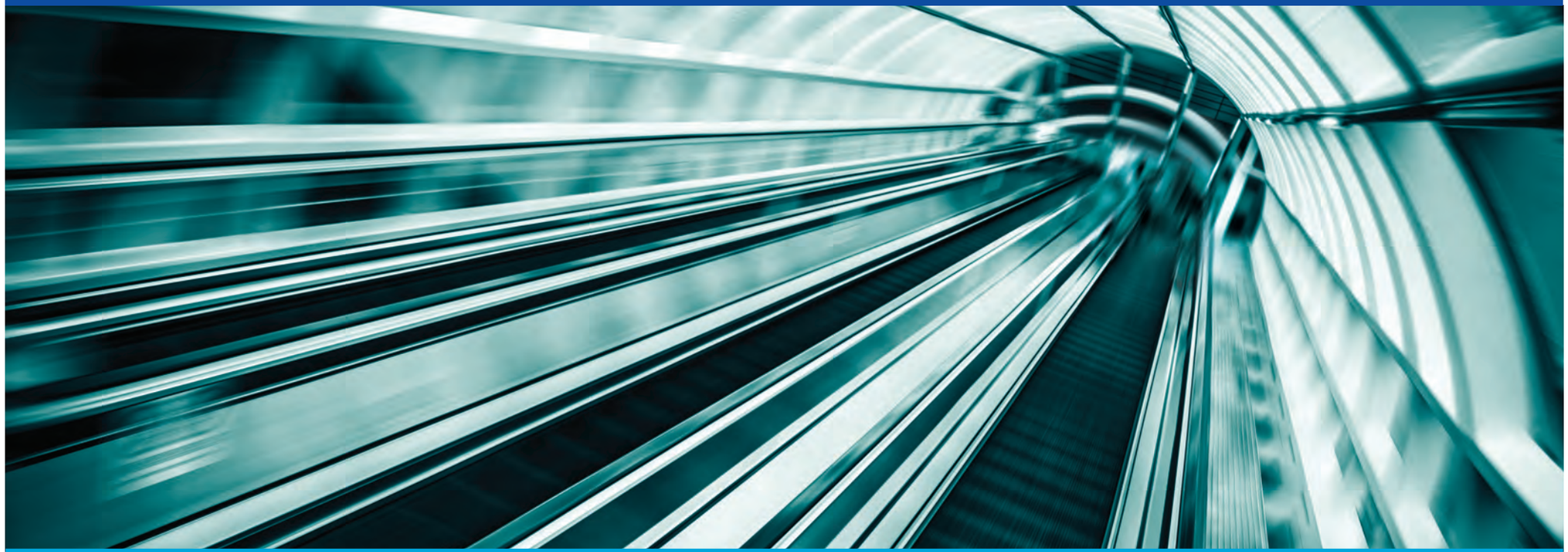


2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

Queen Mary University of London

SIA School of International Arbitration

The dynamic and party-driven nature of international arbitration allows for dispute resolution processes that its users can tailor to their ever-changing needs. Stakeholders have proven remarkably innovative and, perhaps consequently, the system of international arbitration is constantly evolving. Collective feedback on these innovations is as indispensable as it is rare. The 2015 International Arbitration Survey aims to fill this gap by reviewing the perceived effectiveness of past innovations and testing the viability of selected future developments.

Introduction

Paul Friedland

Head of International Arbitration Practice Group, White & Case LLP

The world of international arbitration does not stand still. Marked by flexibility and party autonomy, international arbitration is a dynamic field of law which is constantly developing to meet the needs of its users. Keeping track of its ever-evolving trends is a challenge.

The 2015 International Arbitration Survey, entitled 'Improvements and Innovations in International Arbitration,' has sought to discover these trends and to identify what users of international arbitration want from the process. This edition saw the widest pool of respondents complete the survey, with 763 questionnaire responses received and 105 interviews conducted. Views were sought not only from in-house counsel, private practitioners and arbitrators, but also from academics, experts, institutional staff and third-party funders, thereby providing a diverse pool of knowledgeable respondents. The survey breaks down many of the results by role, providing rare insight into the varying views of the different stakeholders of international arbitration.

White & Case is proud once again to sponsor this survey. The School of International Arbitration has produced a first-class study of what has evolved, what has remained constant, and what changes users believe will improve the system. I am confident that this survey will be welcomed by the international arbitration community as a highly valuable empirical contribution.

We thank Professor Loukas Mistelis and Mr Rutger Metsch (White & Case Research Fellow) for their exceptional work in producing this publication, and to all those who contributed their time and knowledge to this important study.

Professor Loukas Mistelis

Director, School of International Arbitration, Centre for Commercial Law Studies

It is my great pleasure to introduce the 2015 International Arbitration Survey on Improvements and Innovations in International Arbitration. This is the sixth survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, and the third one conducted with the generous support of White & Case LLP.

2015 marks the 30th anniversary of the School of International Arbitration, and the tenth anniversary of the commencement of our engagement with empirical international arbitration surveys. We have seized this opportunity to reflect on the evolution of international arbitration by revisiting topics from previous surveys and by considering respondents' desired future developments in arbitration.

Any form of stimulated change can be considered an 'innovation'; however, positive feedback is essential for that innovation to be seen as an 'improvement'. This survey provides invaluable insight into stakeholders' perceptions of such developments in international arbitration. We sought to explore views on topics such as arbitration's best and worst characteristics; the perceived effectiveness of innovations to address time and cost issues; and ways in which different actors and entities can contribute to improvements in this field.

At times, the survey's collected feedback challenged our own expectations, signalling a transition from anecdotal to empirical knowledge. It appears from the results that some of the most hotly debated topics in arbitration do not necessarily represent the most divergent views. Respondents, for example, do not generally consider arbitration 'overregulated', and a majority even expressed a need for further regulation of specific actors. This is perhaps an indication that the arbitral community is apprehensive of further extensive 'macro-regulation' but would welcome limited corrective 'micro-regulation'.

I hope and expect that you will find the survey's findings of interest to you and your practice and that they will provide the basis of fruitful discussions and further innovations and improvements.

Contents

Executive Summary

International arbitration is constantly evolving in response to the changing needs of its users. Its adaptability and party-driven nature allow for a system and processes that can be tailored as required. Stakeholders at all levels have proven ambitious in their aspirations to improve international arbitration further. For an innovation to be considered an improvement, however, a comprehensive evaluation of its effectiveness is required. Collective feedback mechanisms, which are essential stimulants to material improvements, are rare in a field of law where confidentiality is valued and practice is both diverse and dispersed globally.

The objective of this empirical study is to collate the views of a comprehensive range of stakeholders on improvements and innovations, both past and potential, in international arbitration. The survey was conducted over a six month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase). Further information about the sample of questionnaire respondents and interviewees can be found in the Methodology section in the appendices.

The key findings from the survey are:

Views on international arbitration

- 90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%).[1]
- "Enforceability of awards" is seen as arbitration's most valuable characteristic, followed by "avoiding specific legal systems," "flexibility" and "selection of arbitrators".
- "Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".
- The majority of respondents do not favour an appeal mechanism on the merits in either commercial or investment treaty arbitration.
- A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia").

Preferred and improved seats

- The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.
- The primary factor driving the selection of a seat is its reputation and recognition.
- Respondents' preferences for certain seats are predominantly based on their appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards.
- Respondents expressed the view that the most improved arbitral seat (taken over the past five years) is Singapore, followed by Hong Kong.

Preferred and improved institutions

- The five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC and SCC.
- Respondents' preferences for certain institutions are predominantly based on an assessment of the quality of their administration and their level of 'internationalism'. Institution-specific distinguishing features are considered to be less important.
- An institution's reputation and recognition is essential to its commercial appeal. Respondents will select an institution because of its reputation and their previous experiences of that institution.
- Respondents expressed the view that the most improved arbitral institution (taken over the past five years) is the HKIAC, followed by the SIAC, ICC and LCIA.
- Respondents feel that arbitral institutions could contribute to the improvement of international arbitration by publishing data not only on the average length of their cases, but also on the time taken by individual arbitrators to issue awards. Respondents also welcome increased transparency in institutional decision-making on the appointment of, and challenges to, arbitrators.

1. Please note that due to rounding, some percentages shown in the charts may not equal 100%.

Reducing time and cost

- The procedural innovation perceived as most effective at controlling time and cost in international arbitration is a requirement for tribunals to commit to a schedule for deliberations and delivery of final awards.
- 92% of respondents favour inclusion of simplified procedures in institutional rules for claims under a certain value: 33% would have this as a mandatory feature and 59% as an optional feature.
- Few respondents have experience with emergency arbitrators and some expressed concerns about the enforceability of emergency arbitrator decisions. 46% of respondents would, at present, look to domestic courts for urgent relief before the constitution of the tribunal, versus 29% who would opt for an emergency arbitrator. Nonetheless, 93% favour the inclusion of emergency arbitrator provisions in institutional rules.
- Respondents believe that arbitration counsel could be better at working together with opposing counsel to narrow issues and limit document production, encouraging settlement (including the use of mediation) during an arbitration, and not 'overlawyering'.
- When arbitration and mediation are used in conjunction, it appears that a minimal overlap between the two processes is preferred.
- It is inconclusive what effect conventions on enforcement of mediation agreements and settlement agreements resulting from mediations might have in practice, particularly in terms of encouraging the use of mediation.

Soft law and guidelines

- Respondents generally have a positive perception of guidelines and soft law instruments in international arbitration. These instruments are seen to supplement existing rules and laws, and to provide guidance where little or none exists.
- 70% of respondents are of the opinion that there is currently an adequate amount of regulation in international arbitration.
- Of various specific instruments put to respondents, the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest were the most widely known, the most frequently used and the most highly rated.

Role and regulation of specific actors

- A clear majority of respondents think that tribunal secretaries (68%) and third party funding (71%) are areas which require regulation.
- A small majority of respondents (55%) think that the conduct of arbitrators requires more regulation.
- Tribunal secretaries are widely used in international arbitration: 82% of respondents have either used their services or have seen them used. Most respondents (72%) believe that arbitral institutions should offer the services of tribunal secretaries. A vast majority do not consider it appropriate for tribunal secretaries to conduct substantive or merits-related tasks.
- Respondents are generally of the opinion that it should be mandatory in international arbitration for claimants to disclose any use of third party funding and the identity of the funders involved, but not the full terms of any funding agreement.

The Study

1 International Arbitration: the 'State of Play'

Summary

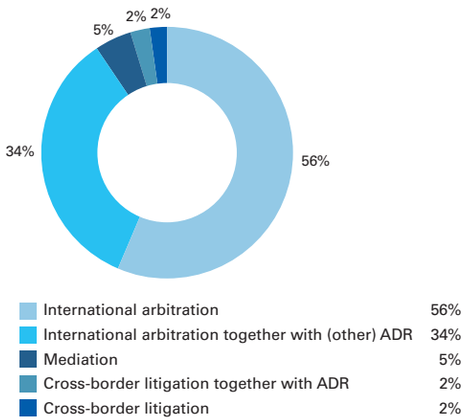
- **90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%).**
- **"Enforceability of awards" is seen as arbitration's most valuable characteristic, followed by "avoiding specific legal systems," "flexibility" and "selection of arbitrators".**
- **"Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".**
- **The majority of respondents do not favour an appeal mechanism on the merits in either commercial or investment treaty arbitration.**
- **A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia").**

Arbitration remains the preferred method of resolving cross-border disputes

Previous surveys by Queen Mary, University of London have confirmed that corporate counsel view arbitration as the premier dispute resolution mechanism for cross-border disputes.[2] The current survey is broader in scope and has sought the opinions of stakeholders at all levels in international arbitration. This wider respondent group showed a strong preference for arbitration over other options such as cross-border litigation or mediation. 90% of respondents said that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other ADR (34%).

Whilst the respondent group was composed of individuals who were predominantly active in international arbitration, the average respondent also had experience in other areas of law, business, and/or dispute resolution, and was thus able to make an informed choice about the alternatives. The strong preference for international arbitration by its users demonstrates that arbitration better meets their demands than other readily available options, such as commercial litigation.

Chart 1: What is your preferred method of resolving cross-border disputes?



2. 2013 International Arbitration Survey, p.6; 2006 International Arbitration Survey, p.5.

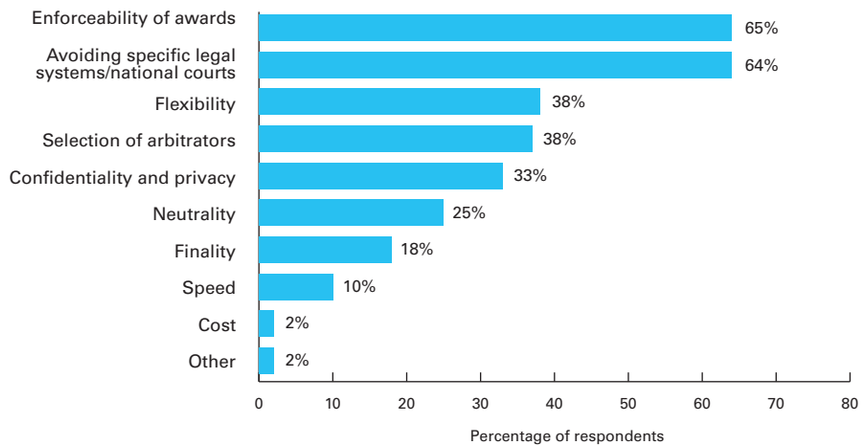
1 International Arbitration: the 'State of Play' (cont.)

The most valuable characteristics of arbitration

The popularity of arbitration may be better understood by reference to the specific characteristics of international arbitration that respondents find most valuable. Unsurprisingly, "enforceability of awards" and "avoiding specific legal systems/national courts" were most frequently chosen, followed by "flexibility" and "selection of arbitrators". Other traditional benefits attributed to international arbitration, such as "finality" and "neutrality", were chosen less often.

The outcomes are largely similar when the results are split by subgroups based on roles. There are, however, some differences that illustrate the divergence in personal and professional interests of the surveyed respondents. For the in-house counsel subgroup, for example, the second most frequently listed valuable characteristic was "confidentiality and privacy". This difference in priorities fits the subgroup's particular motives for choosing arbitration.

Chart 2: What are the three most valuable characteristics of international arbitration?



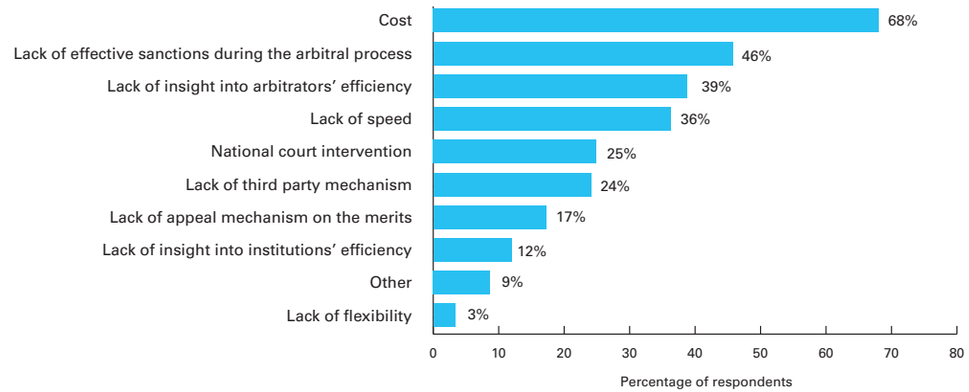
The worst characteristics of arbitration

We also asked respondents what they perceived as the worst characteristics of international arbitration. "Cost" was by far the most complained of characteristic, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed". The common denominator of these characteristics is that they relate to the internal workings of the arbitral system which can be influenced by its stakeholders. Factors such as "lack of third party mechanism" or "national court intervention", which are not within the control of stakeholders, were listed markedly less often.

Dissatisfaction with these four characteristics, particularly when encountered together, was also a recurring theme in the interviews. The lack of effective sanctions during the arbitral process was thought to fail to incentivise efficiency by counsel, whilst the desire to appoint productive arbitrators was hindered by lack of insight into arbitrators' efficiency. Interviewees often stated that these two characteristics caused delay, which in turn resulted in increased cost.

A desire for more transparency regarding arbitrator performance to allow for informed appointments by parties was also articulated in the 2010 Survey.[3] Whilst a number of institutions have introduced feedback mechanisms on both institution and arbitrator performance, the results of the current survey suggest that this concern has yet to be addressed sufficiently.

Chart 3: What are the three worst characteristics of international arbitration?



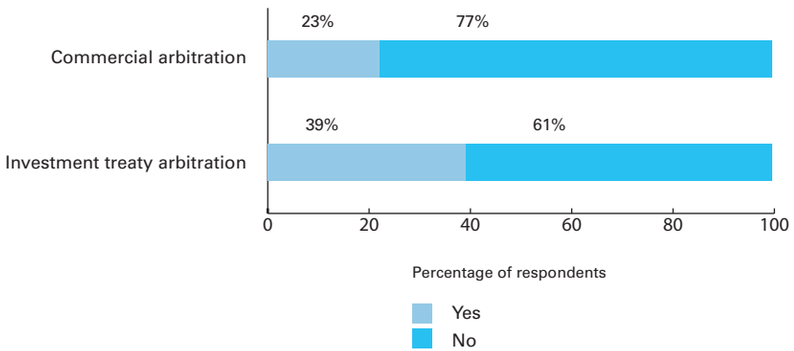
3. 2010 International Arbitration Survey, p.27.

1 International Arbitration: the ‘State of Play’ (cont.)

Should there be appeals in international arbitration?

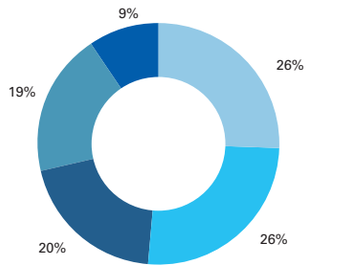
For the in-house counsel subgroup, the lack of an appeal mechanism on the merits was the third most frequently selected worst characteristic of international arbitration. The respondent group as a whole, however, did not share this sentiment. When asked, a significant majority (77%) of respondents did not favour the inclusion of such a mechanism in commercial arbitration. When the same question was asked about investment treaty arbitration, a smaller majority (61%) was against the proposition. There is still widespread preference for arbitration being run as a ‘one stop shop’.

Chart 4: Should there be an appeal mechanism on the merits for arbitral awards in international arbitration?



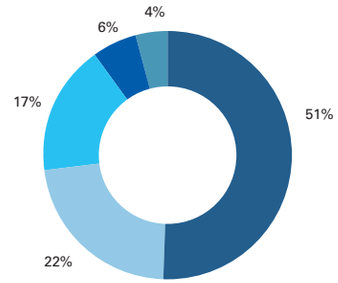
We also asked how a potential appeal mechanism might be structured. Just over half of the respondents (52%) think that an appeal mechanism in commercial arbitration should be implemented within the system of international arbitration, rather than via an external forum such as domestic courts or an international court. 26% of respondents selected another arbitral tribunal as the designated appellate body, whilst another 26% favour appeals being handled by the relevant arbitral institution. By contrast, in investment treaty arbitration, half of the respondents (51%) prefer external appellate supervision by an international court.

Chart 5: How should a potential appeal mechanism in commercial arbitration be structured?



Another arbitral tribunal	26%
Arbitral institution (if applicable)	26%
International court	20%
Domestic court	19%
Other	9%

Chart 6: How should a potential appeal mechanism in investment treaty arbitration be structured?



International court	51%
Another arbitral tribunal	22%
Arbitral institution (if applicable)	17%
Other	6%
Domestic court	4%

1 International Arbitration: the 'State of Play' (cont.)

If users could have any improvement made to international arbitration, what would it be?

Overall, despite certain characteristics of international arbitration being regarded as unsatisfactory, respondents appear to find that its benefits outweigh its flaws. As one interviewee summarised it (paraphrasing Churchill's famous quote on democracy): "Arbitration is the worst form of international dispute resolution, except for all those other forms that have been tried from time to time".

There is strong support for certain fundamental characteristics, such as its 'one stop shop' nature, to remain unchanged. However, there is also a call for improvements and innovations to address issues concerning, most of all, the cost and speed of arbitrating. Respondents were therefore invited to contribute freely to the survey's overarching theme. The open question "if you could have any improvement made to international arbitration, what would it be?" prompted myriad answers.

Many respondents raised issues that were also addressed elsewhere in the survey, including, for example, appeals on the merits; procedural innovations to control time and cost; publication of awards; electronic case management; and soft law regulation. Other notable suggestions included amending the New York Convention to narrow the grounds for non-enforcement of arbitral awards; broadening the pool of arbitrators in number as well as in ethnic and gender diversity; and feedback mechanisms on arbitrators.

One issue that merits special attention is the phenomenon that an interviewee dubbed "due process paranoia". This issue was repeatedly raised in responses, including in nearly all the personal interviews. "Due process paranoia" describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. Many interviewees described situations where deadlines were repeatedly extended, fresh evidence was admitted late in the process, or other disruptive behaviour by counsel was condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge. Notably, even arbitrators identified this phenomenon as both problematic and commonplace. Indeed, many revealed in interviews that this concern has influenced decisions they have made when sitting as arbitrator.

Interviewees were generally sympathetic to the reasons behind tribunals' caution. However, they often expressed the view that some of arbitration's more prevalent problems, such as lack of speed and increased cost, are partly rooted in this due process paranoia. Some believed that this phenomenon was innate to international arbitration, as a dispute resolution mechanism originating in, and shaped by, party autonomy. As such, they believed that it would be difficult to combat. Others felt that, in practice, the risk of successful challenges to arbitral awards was insufficient to justify tribunals' overly cautious behaviour; consequently, arbitrators should be willing to decisively manage proceedings. This observation is consistent with a finding in the 2010 Survey that arbitrators with a proactive case management style are preferred to those with a reactive style.[4]

Some interviewees commented that most institutional rules offer the mechanisms for arbitrators to be firm and decisive, but that these tools are often not used effectively. It was therefore suggested that rather than there being a "lack of effective sanctions during the arbitral process", the issue is more a "lack of effective *use* of sanctions" by arbitrators.

4. 2010 International Arbitration Survey, p.25.

2 The Evolution of Seats and Institutions

Summary

Seats

- **The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.**
- **The primary factor driving the selection of a seat is its reputation and recognition.**
- **Respondents' preferences for certain seats are predominantly based on their appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards.**
- **Respondents expressed the view that the most improved arbitral seat (taken over the past five years) is Singapore, followed by Hong Kong.**

Institutions

- **The five most preferred arbitral institutions are the ICC, LCIA, HKIAC, SIAC, and SCC.**
- **Respondents' preferences for certain institutions are predominantly based on an assessment of the quality of their administration and their level of 'internationalism'. Institution-specific distinguishing features are considered to be less important.**
- **An institution's reputation and recognition is essential to its commercial appeal. Respondents will select an institution because of its reputation and their previous experiences of that institution.**
- **Respondents expressed the view that the most improved arbitral institution (taken over the past five years) is the HKIAC, followed by the SIAC, ICC and LCIA.**
- **Respondents feel that arbitral institutions could contribute to the improvement of international arbitration by publishing data not only on the average length of their cases, but also on the time taken by individual arbitrators to issue awards. Respondents also welcome increased transparency in institutional decision-making on the appointment of, and challenges to, arbitrators.**

Which seats are preferred and why?

The importance of selecting a suitable seat for an international arbitration cannot be overstated. The choice of seat impacts arbitral proceedings in various ways, such as the level and nature of the supervisory jurisdiction of the domestic courts of the seat. We endeavoured to gain more insight into the motivations behind users' selection of a seat.

First, we asked respondents which seats they or their organisations had used the most over the past five years. Then, we asked respondents to list their or their organisation's three preferred seats.

The top seven results were the same for both questions, albeit with different percentages. This data suggests that it is unlikely that the dominance of these seats will be seriously challenged in the near future.[5]

5. London, Geneva, Paris, Singapore and New York were also among the most preferred seats in the 2010 International Arbitration Survey (p.19).

2 The Evolution of Seats and Institutions (cont.)

The traditional arbitration hubs of London and Paris are both the most widely used and preferred seats; Geneva,[6] New York and Stockholm each also represent a significant share of the market.

The greatest momentum is perhaps shown by Hong Kong and Singapore, which were the third and fourth most popular seats respectively. This momentum is indicated by the fact that, in both cases, the percentage of respondents who preferred those seats exceeded the percentage of respondents who have used them the most over the past five years (by 8% for Hong Kong and 5% for Singapore). This is a greater difference in percentage than for any of the other seats in the top seven, which suggests that both seats may attract users in greater numbers in the future.

Chart 7: Over the past five years, which seats have you or your organisation used the most?

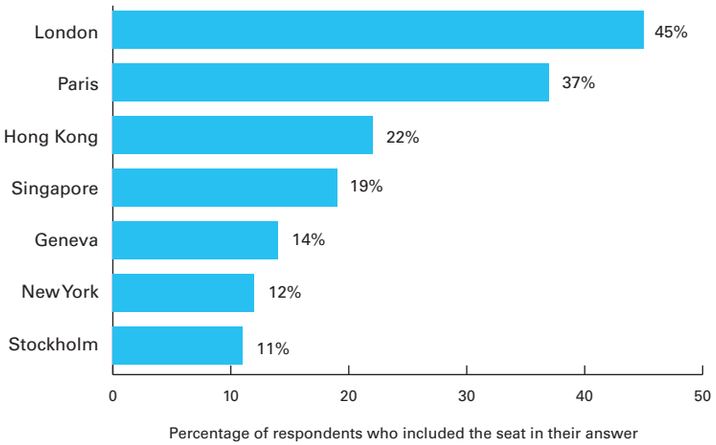
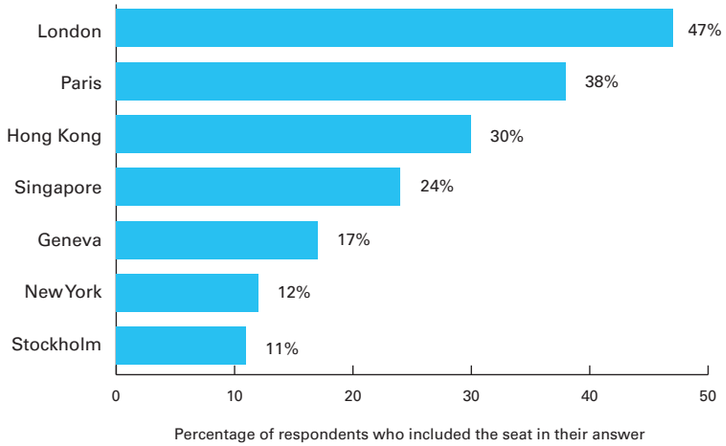


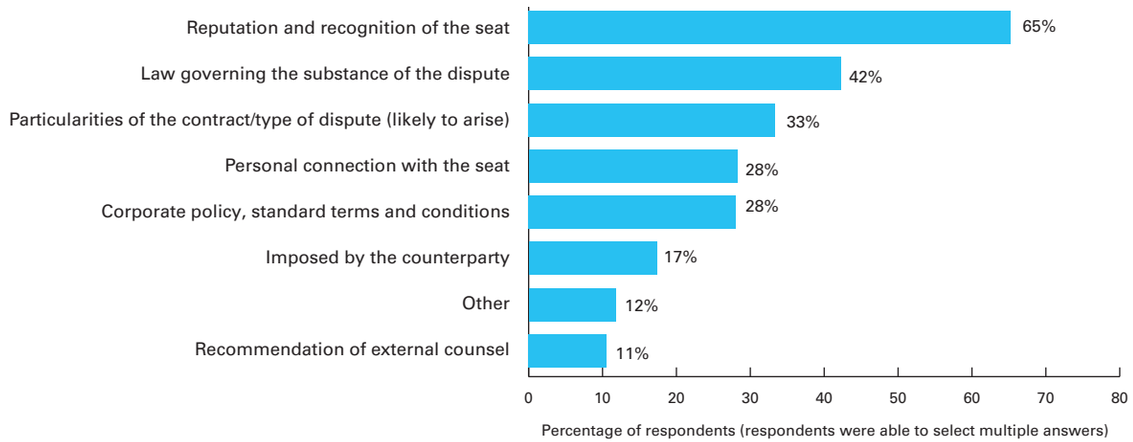
Chart 8: What are your or your organisation's three preferred seats (if any)?



6. Notably, 19% of respondents mentioned at least one Swiss city in their answers, indicating the popularity of Switzerland as a jurisdiction. Zurich was the second most popular after Geneva, listed as among the most used seats by 7% of respondents.

Respondents were asked why certain seats were used the most. The reason most frequently selected was "reputation and recognition of the seat" (65%), followed at a marked distance by "law governing the substance of the dispute" (42%). Taking into account the identical results of the most used and most preferred seats, this finding on the importance of reputation and recognition prompts a question: are those seats preferred because they are most commonly used, or are they most commonly used because they are preferred?

Chart 9: Why were these seats selected the most?

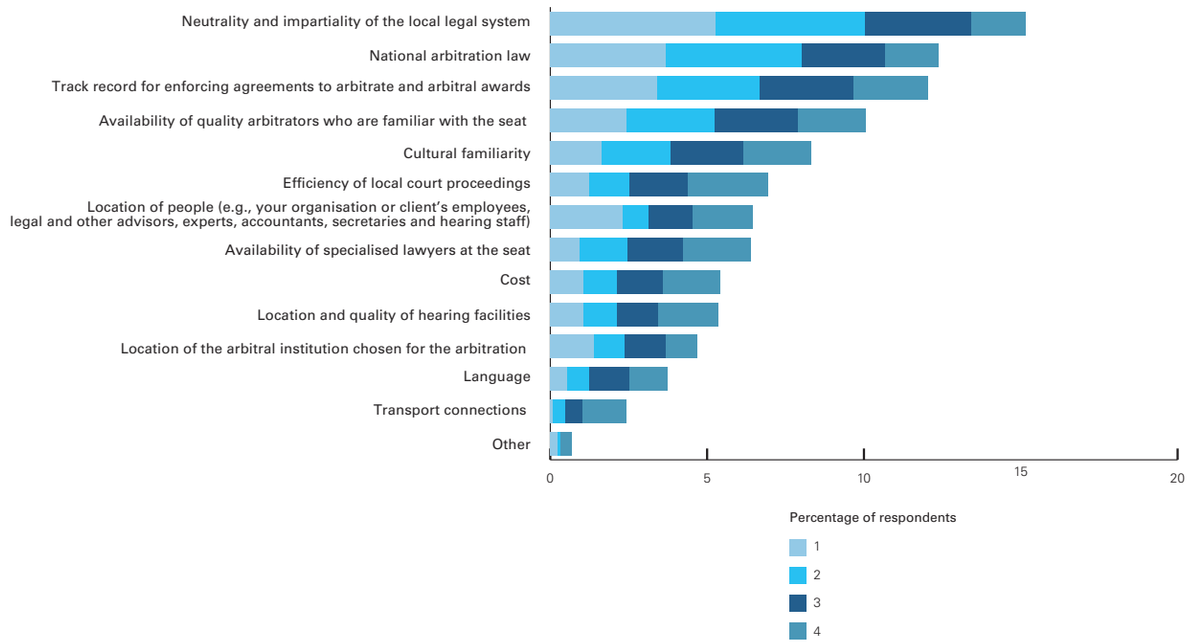


2 The Evolution of Seats and Institutions (cont.)

The responses to another question provide some insight. We asked respondents to list the four reasons why they prefer certain seats to others, and to rank these four reasons in order of importance.

In line with similar findings in the 2010 Survey,[7] the three paramount factors relate to the 'formal legal infrastructure' of a seat: (1) neutrality and impartiality of the local legal system; (2) national arbitration law; and (3) track record for enforcing agreements to arbitrate and arbitral awards. The fourth reason ("availability of quality arbitrators who are familiar with the seat") is arguably a strong secondary factor supporting the formal legal infrastructure.

Chart 10: What are the four most important reasons for your preference for certain seats?
Respondents were asked to rank their selected reasons, with "1" being the most important reason and "4" being the least important.



7. 2010 International Arbitration Survey, p.17.

This data suggests that the preference for certain seats is based on intrinsic legal features of those seats. Factors of personal convenience, such as "cultural familiarity" or "location of the arbitral institution chosen for the arbitration", were ranked considerably lower.

This outcome contextualises the finding that reputation and recognition are decisive factors when selecting a seat. The quality of formal legal infrastructure is more likely to be firmly established in seats with a good reputation, thereby mitigating certain risks.

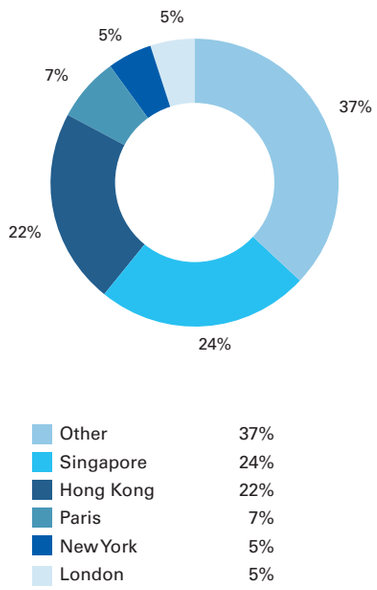
Thus, to answer the question posed above: it is possible that these seats were first preferred because of the quality of their formal legal infrastructure, and that their popularity is perpetuated because of their resulting reputation and recognition.

Which seats have improved the most over the past five years?

Reputation is not static; it can be built upon and enhanced. Respondents were asked which seats, in their view, had improved the most over the past five years.

Singapore and Hong Kong again showed a strong momentum, taking first and second place with 24% and 22% respectively. This may be seen as a testament to their increased stature in international arbitration.

Chart 11: Which seat has improved the most over the past five years?



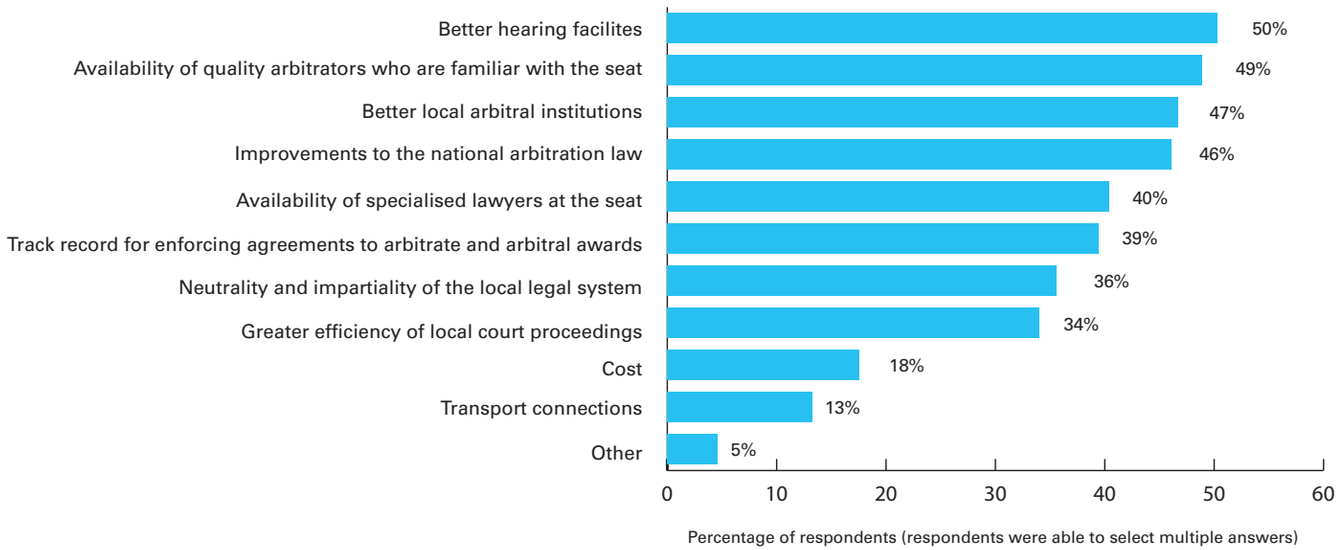
2 The Evolution of Seats and Institutions (cont.)

We also asked respondents why they thought their selected seat had improved the most. The elements that were listed most often were: (1) better hearing facilities; (2) availability of quality arbitrators who are familiar with the seat; (3) better local arbitral institutions; and (4) improvements to the national arbitration law.

Whereas the reasons for a preference for certain seats centred on the seat's legal infrastructure, the ways in which seats were considered to have improved revolved more around elements of convenience. Only one of the four most frequently listed reasons ("improvements to the national arbitration law") directly relates to the formal legal infrastructure.

Based on this data and comments by interviewees, it appears that factors of convenience become more important to stakeholders after a seat's formal legal infrastructure reaches a certain threshold of quality. Factors that were shown in

Chart 12: In what ways has this seat improved?



the previous section to be secondary considerations, such as quality of hearing facilities, can increase the attractiveness of the seat once this threshold is achieved. The two most improved seats (Singapore and Hong Kong) appear to fit this model, being seats that were already well-established five years ago and which have built upon that foundation, rather than new locales that have experienced a drastic transformation.

Which arbitral institutions are preferred and why?

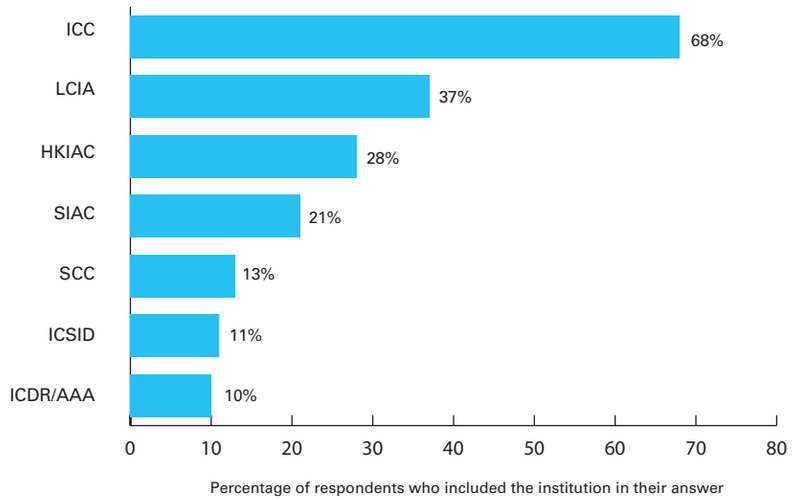
The choice of arbitral institution can have a significant impact on the structure of the arbitration proceedings and is often relevant for decisive issues such as the appointment of, and challenges to, arbitrators. We therefore sought to gain an insight into respondents' considerations when making this important choice. The pertinence of this enquiry is highlighted by the percentage of arbitrations that are administered by institutions: 79% of respondents' arbitrations over the past five years. This is consistent with findings in previous surveys of 73% (2006) and 86% (2008) of arbitrations being institutional rather than *ad hoc*.

Respondents were asked to list their or their organisation's three preferred institutions.

The ICC and LCIA respectively rank first and second as preferred institutions, just as in the 2006 and 2010 Surveys.[8] These institutions appear to have remained leaders in their field for at least ten years.[9]

The ICC again tops the chart by a significant margin. When asked about its dominant position, interviewees stressed the internationalism of the ICC and said it offers high-quality services in most jurisdictions. Interviewees often expressed a preference for an institution in the region in which they were based, but commented that the ICC would also be agreeable to both them and their counterparties.

Chart 13: What are your or your organisation's three preferred institutions (if any)?



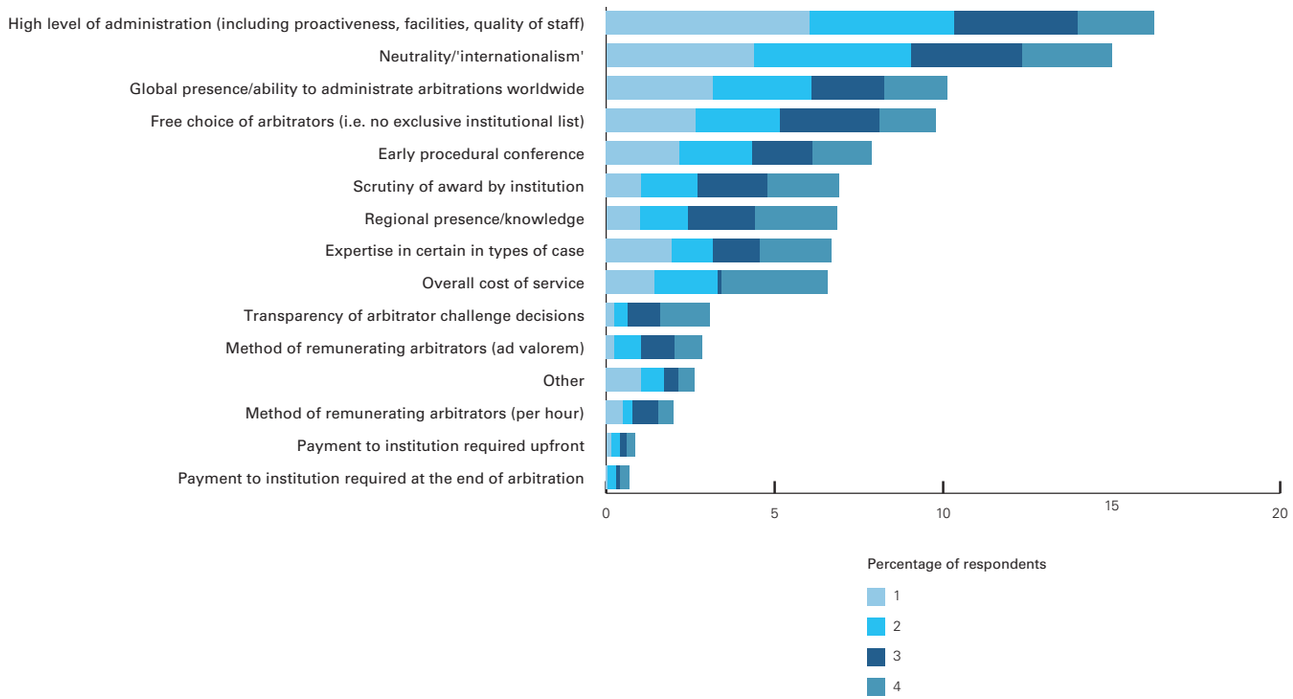
8. 2006 International Arbitration Survey, p.12; 2010 International Arbitration Survey, p.23.
9. The research for the 2006 International Arbitration Survey was conducted in 2005.

2 The Evolution of Seats and Institutions (cont.)

We also asked respondents to list the four reasons why they prefer certain institutions to others, and to rank those four reasons in order of importance.

The top three reasons are all fairly generic performance indicators rather than objectively distinguishable institutional features. Interviewees explained that the top reason ("high level of administration") related to the proactiveness and responsiveness of the institution's staff. The second ("neutrality/ 'internationalism'") and third ("global presence/ability to administer arbitrations worldwide") highest ranked reasons confirm respondents' appreciation of a proven (or perceived) track record of international practice.

Chart 14: What are the four most important reasons for your preference for certain institutions?
Respondents were asked to rank their selected reasons, with "1" being the most important reason and "4" being the least important.



It is notable that institution-specific distinguishing features are a less relevant consideration for the preference for certain institutions than these general performance indicators. The reason ranked fourth by respondents ("free choice of arbitrators") is a distinguishing element where institutions objectively differ in approach. However, other variable elements, such as "transparency of arbitrator challenge decisions" or "method of remunerating arbitrators", were ranked substantially lower.

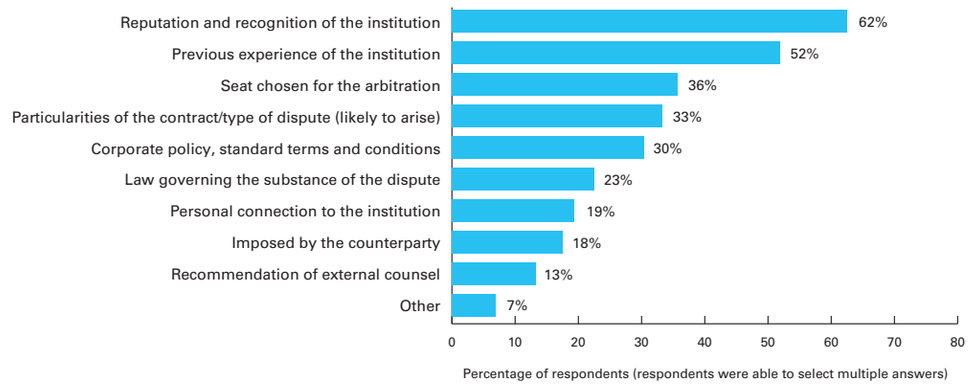
The feedback was relatively consistent across different subgroups of respondents, with some interesting differences. Arbitrators ranked "scrutiny of awards" as the fourth most important reason why certain institutions are preferred. Private practitioners, on the other hand, were more likely to take "overall cost of service" into account. The second most important consideration for in-house counsel was "expertise in certain types of case".

We also asked respondents why certain institutions are selected the most.

The top two considerations are "reputation and recognition" and "previous experience of the institution", which were chosen by 62% and 52% of respondents respectively. These elements are clearly connected, as continued positive user experience enhances reputation, and a solid reputation increases the likelihood of a suggested institution being agreeable to both parties when negotiating an arbitration clause.

The third most often selected reason ("seat chosen for the arbitration") suggests that some institutions may benefit from their perceived connection to a given seat. In contrast, "location of the chosen arbitral institution" only ranked 11th out of 13 options for why certain seats were preferred. This may imply that the calibre of a seat may have a strong effect on the popularity of a locally based institution, but the quality of that institution is a less determinative factor for the popularity of a seat.

Chart 15: Why are certain institutions selected the most?



2 The Evolution of Seats and Institutions (cont.)

This data suggests that it may be difficult for less established institutions to attain a significant market share. Effectively, reputation and recognition attracts users, and a positive user experience in turn encourages more frequent use of the institution. The overall popularity of a seat has been shown to stimulate this process. For institutions that are not based in a relatively popular seat and have not yet attained a certain level of reputation and recognition, this process can be difficult to initiate.

Furthermore, an aspect that might be a selling point for less established institutions ("regional presence/knowledge") did not score highly (8 out of 14) amongst the reasons for selecting an institution. Whilst the number of institutions worldwide is increasing, each of the seven institutions most preferred by the respondents is well established and has a strong track record. Consequently, there is tough competition for new entrants.

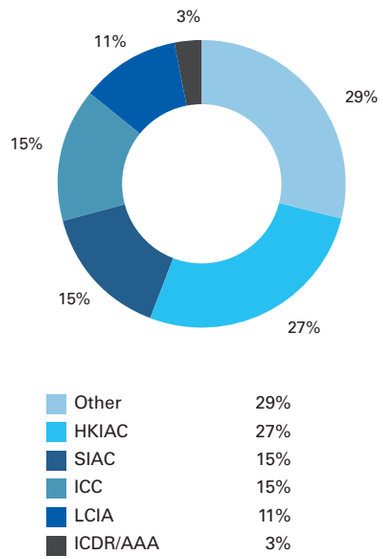
Which arbitral institutions have improved the most over the past five years?

We asked respondents which institution has improved the most over the past five years and in what ways.

The HKIAC was found to have improved the most (by 27% of respondents), followed by the SIAC and the ICC (15% each), and the LCIA (11%).

Unsurprisingly, the key grounds why institutions are most widely used and preferred were also dominant factors for respondents when assessing how institutions have improved: "reputation and recognition" and "high level of administration" were ranked first and third respectively. "Greater efficiency" was considered the second most important point of improvement.

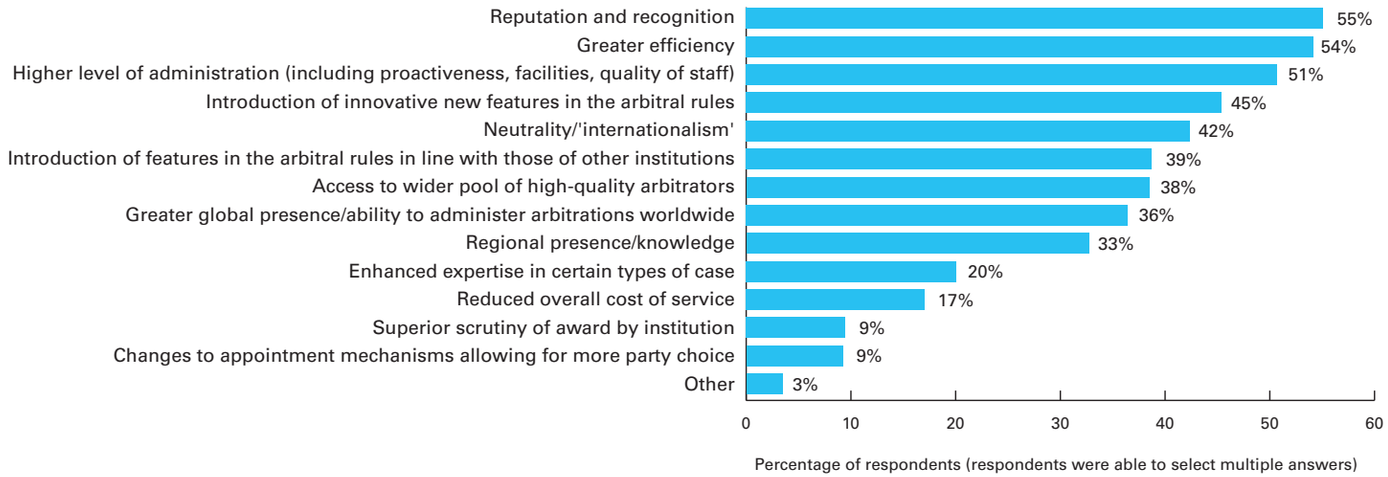
Chart 16: Which institution has improved the most over the past five years?



With regard to reputation and recognition, it was noted by interviewees that an institution has to achieve a certain level of credibility before parties will consider using the institution's services for their disputes, especially if one party advocates the use of the institution to a hesitant counterparty.

Stand-alone innovations were appreciated but did not garner as much support: "introduction of innovative new features in the arbitral rules" ranked fourth of the grounds for an institution's perceived improvement. However, options relating to changes in arbitral rules would clearly not be relevant if the institution being assessed had not made any such changes over the five year time frame.

Chart 17: In what ways has this institution improved?



2 The Evolution of Seats and Institutions (cont.)

What could arbitral institutions do to improve international arbitration?

Arbitral institutions are key actors within the framework of international arbitration. Interviewees often commented on the unique position institutions are in to steer the direction of developments in arbitration. In light of user appetite for greater transparency and information, we asked respondents what institutions could do to improve international arbitration.

A recurring theme throughout the interviews was users' discontent with the lack of insight provided into institutions' efficiency and arbitrator performance, and the lack of transparency in institutional decision-making in relation to the appointment of, and challenges to, arbitrators.

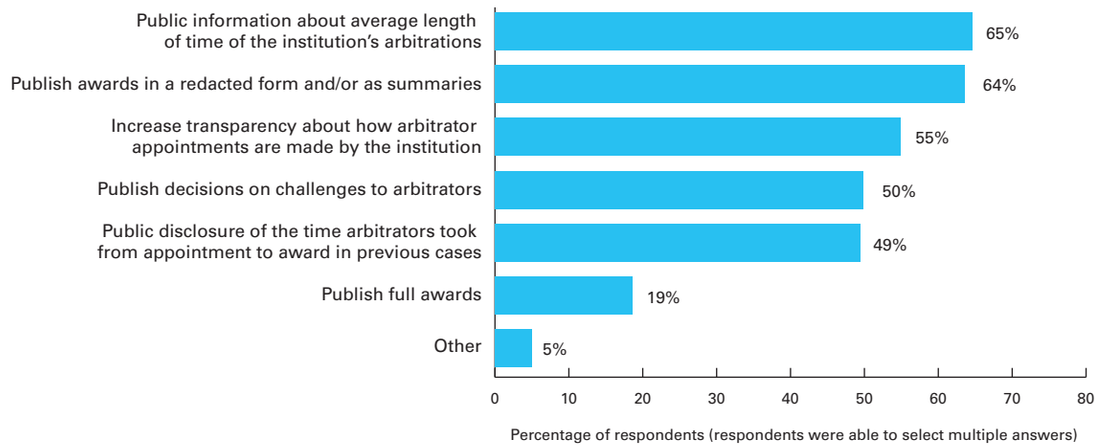
Interviewees felt that more information about the average length of time of institutions' cases would allow them to make more informed choices. They acknowledged, however, that such statistics are difficult to standardise because of the different variables involved and the lack of clear yardsticks in terms of measuring points. For the same reasons, interviewees were concerned that this data might be open to manipulation, although that could be mitigated by the data being collated by an independent organisation.

Similar concerns were articulated regarding the suggestion that institutions should publish the time arbitrators took from their appointment to the rendering of the award in previous cases at that institution. Nonetheless, due to the perceived lack of insight into arbitrators' performance, interviewees expressed the need for a higher degree of accountability of arbitrators. They argued that institutions were generally in the best position to provide the necessary information to create this accountability. The suggestion that institutions should publish awards in a redacted form (and/or as summaries) was accordingly not only favoured for its academic value and usefulness when arguing a case, but also often named as a method to gain more insight into arbitrator performance and to encourage arbitrators to write high-quality awards.

Respondents generally consider that increased transparency in institutional decision-making would be a positive development. In particular, they would appreciate the publication of reasoned decisions on arbitrator challenges and more insight into the drivers behind arbitrator selection by institutions. Interviewees suggested that institutions could inform parties of the selection criteria they used when selecting an arbitrator. Published reasoned disqualification decisions would, it was thought, give parties due process comfort because they would know that their application had been properly considered. There would also be a benefit for the arbitral community as a whole because this would provide insight into the circumstances on which meritorious challenges might be founded.

These issues were also discussed in personal interviews with respondents who worked (or had worked) for arbitral institutions. They generally showed the same appreciation for these suggestions as the respondent group as a whole. When asked why these innovations have not yet materialised in practice, interviewees indicated that a lack of resources prevented institutions from pursuing many options that they would otherwise consider developing.

Chart 18: What could institutions do to improve international arbitration?



3 Reducing Time and Cost

Summary

- **The procedural innovation perceived as most effective at controlling time and cost in international arbitration is a requirement for tribunals to commit to a schedule for deliberations and delivery of final awards.**
- **92% of respondents favour inclusion of simplified procedures in institutional rules for claims under a certain value: 33% would have this as a mandatory feature and 59% as an optional feature.**
- **Few respondents have experience with emergency arbitrators and some expressed concerns about the enforceability of emergency arbitrator decisions. 46% of respondents would, at present, look to domestic courts for urgent relief before the constitution of the tribunal, versus 29% who would opt for an emergency arbitrator. Nonetheless, 93% favour the inclusion of emergency arbitrator provisions in institutional rules.**
- **Respondents believe that arbitration counsel could be better at working together with opposing counsel to narrow issues and limit document production, encouraging settlement (including the use of mediation) during an arbitration, and not 'overlawyering'.**
- **When arbitration and mediation are used in conjunction, it appears that a minimal overlap between the two processes is preferred.**
- **It is inconclusive what effect conventions on enforcement of mediation agreements and settlement agreements resulting from mediations might have in practice, particularly in terms of encouraging the use of mediation.**

Cost and lack of speed were both ranked by respondents as amongst the worst characteristics of international arbitration. To investigate how these issues might be tackled, we scrutinised several factors that could help to address time and cost issues: potential innovations that could be included in arbitral rules and procedures; how arbitration counsel can improve international arbitration; and the use of mediation in combination with arbitration.

Innovations to control time and cost

We compiled a list of potentially time and cost-saving procedural innovations and invited respondents to rate their perceived effectiveness according to a grading system from 1 (not effective) to 5 (very effective).

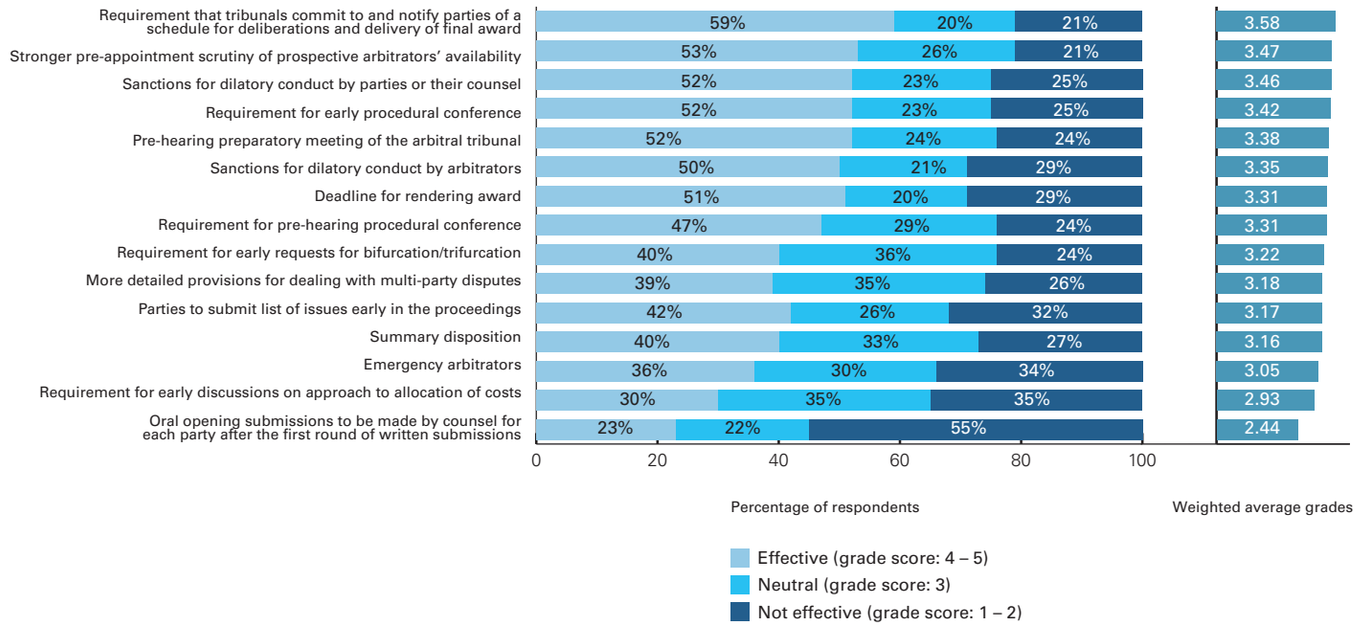
Overall, reactions to the proposed innovations largely ranged from neutral to positive. Notably, however, no particular innovation received overwhelming support.

The interviews shed light on a common pattern of responses: interviewees were often negatively predisposed to a small number of different suggestions; expressed a strong preference for a small number of other innovations, often ones they already favoured; and had no particular views on the others, sometimes commenting that they had not given those suggestions much thought. This pattern can be seen in the lack of clear polarisation in the results.

The suggestion that was met with the most positive, and the least negative, response was the "requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award" (weighted average grade 3.58 out of 5). Interviewees thought that this could incentivise arbitrators to render awards in a timely fashion. Interviewees also indicated that they were often kept in the dark about when awards would be rendered, and would welcome being better informed. Private practitioners particularly noted that this proposal could alleviate some of their clients' frustrations with the length and uncertainty of the award process.

The suggestion that was met with the least positive, and the most negative, response was "oral opening submissions to be made by counsel for each party after the first round of written submissions" (weighted average grade 2.44 out of 5). Interviewees generally found this "extra hurdle" too expensive on a cost-benefit analysis. Some, however, thought this mechanism could be beneficial in complex cases.

Chart 19: How effective are each of the following innovations that could be included in arbitral rules and procedures to help control time and cost?



3 Reducing Time and Cost (cont.)

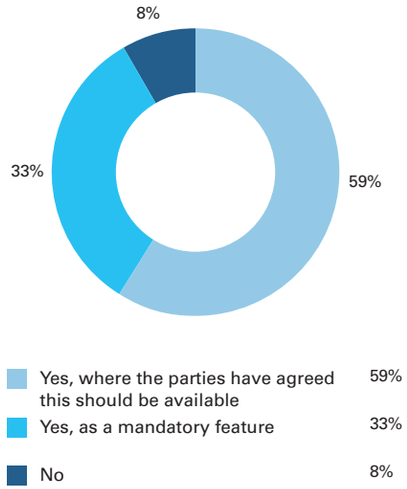
Simplified procedures for smaller claims?

Respondents were also asked whether they would favour the inclusion in institutional rules of simplified procedures for claims under a certain value.

A striking 92% of respondents would like simplified procedures to be included in institutional rules: 33% as a mandatory feature and 59% as an optional feature.

Some interviewees who did not favour the proposition cautioned that the value of a dispute does not necessarily correlate with its complexity. Others countered that, even if the dispute is complex in nature, the cost-benefit ratio of standard proceedings is not favourable for disputes under a certain value.

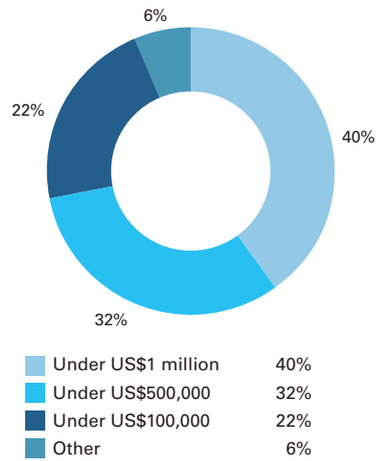
Chart 20: Would you favour the inclusion in institutional rules of simplified procedures for claims under a certain value?



As for the dispute value threshold at which simplified procedures would be suitable, at least 94% of respondents believe that disputes exceeding US$1 million should fall outside the provision, a significant number of whom feel that the threshold value should be even lower. A few respondents commented that the cut-off value should be whatever the parties agree rather than an institutionally determined default.

In answer to a follow-up question, only 11% of respondents indicated that the majority (50%+) of their disputes were each valued under US$1 million. For 61% of respondents, fewer than 10% of their disputes would fall under this suggested threshold. Nonetheless, the survey reveals that the overwhelming majority of respondents would like to have the option of simplified procedures made available.

Chart 21: If yes, what value?



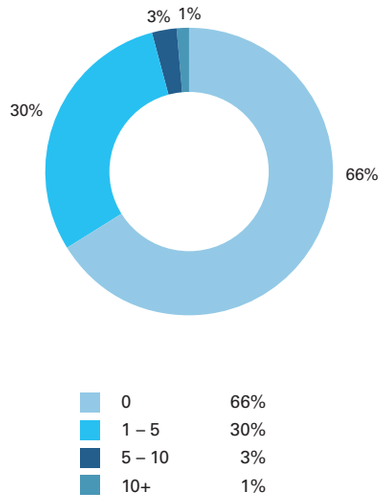
Emergency arbitrators: perceptions, practice and prospects

The section of the questionnaire dealing with the effectiveness of suggested innovations to control time and cost revealed a lukewarm response to emergency arbitrators, with scores of 35% "not effective", 30% "neutral", and 36% "effective". We probed these views further.

Respondents were asked how many of their arbitrations over the past five years had involved a request for appointment of an emergency arbitrator.

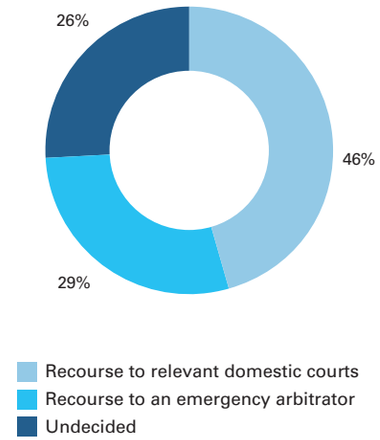
The earlier findings on effectiveness may be better understood in light of the fact that respondents revealed that their experience in practice with emergency arbitrators was generally limited. Only 34% reported requests for emergency arbitrators in their arbitrations, of whom 88% had encountered this in fewer than five matters.

Chart 22: Over the past five years, how many of your or your organisation's arbitrations have involved a request for appointment of an emergency arbitrator?



We also explored what forum respondents prefer when seeking urgent relief before the constitution of the arbitral tribunal. A mere 29% of respondents would generally prefer to seek urgent relief from an emergency arbitrator, with almost half (46%) opting instead for relevant domestic courts. Significantly, a quarter of respondents (26%) were undecided.

Chart 23: If you need to seek urgent relief before the constitution of the arbitral tribunal, which of the following options would generally be your preferred course (assuming that the same relief will be available in each case)?

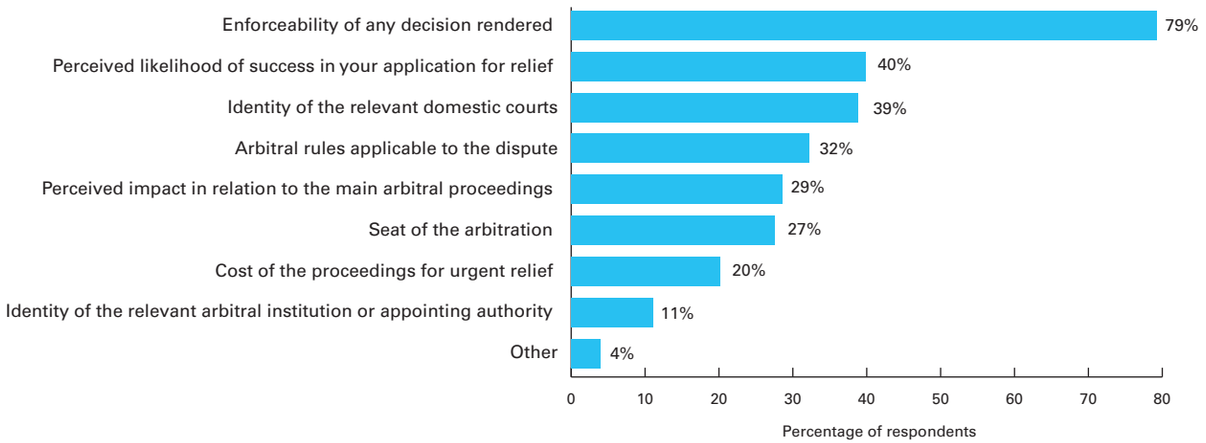


3 Reducing Time and Cost (cont.)

We examined which factors influenced the choice between the given options. 79% of respondents point to concerns about the enforceability of emergency arbitrator decisions as one of the most important factors influencing their choice.

Some interviewees noted that the prospect of successfully enforcing emergency arbitrator decisions varies between jurisdictions. In certain jurisdictions, enforcement is seen as time-consuming and unpredictable. The use of emergency arbitrators was seen as an unnecessary extra in other jurisdictions because of the perceived effectiveness of the national courts compared to the uncertainty of enforcing an emergency arbitrator's decision.

Chart 24: What would generally be the three most important factors influencing your choice?

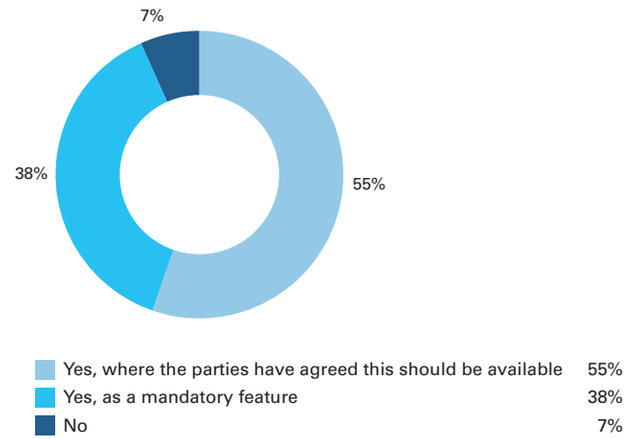


In light of these findings regarding the importance of enforceability, it is unsurprising that, when asked, a substantial majority of respondents (78%) were in favour of decisions rendered by emergency arbitrators being enforceable in the same way as arbitral awards.

Despite the expressed general preference for recourse to domestic courts when seeking urgent relief, the overwhelming majority of respondents (93%) nonetheless favour the inclusion of provisions on emergency arbitrators in institutional rules. 38% favour this as a mandatory feature, whilst 55% think it should be included only where the parties have agreed it should be available.

This strong preference for provisions on emergency arbitrators in institutional rules, combined with the fact that 26% of respondents indicated that they were "undecided" as to whether they would go to a domestic court or an emergency arbitrator, may signal that the use of emergency arbitrators might become more widespread in the future. At the very least, respondents wish to have the option available even if they do not presently use it.

Chart 25: Do you favour provisions in institutional rules for recourse to emergency arbitrators?



3 Reducing Time and Cost (cont.)

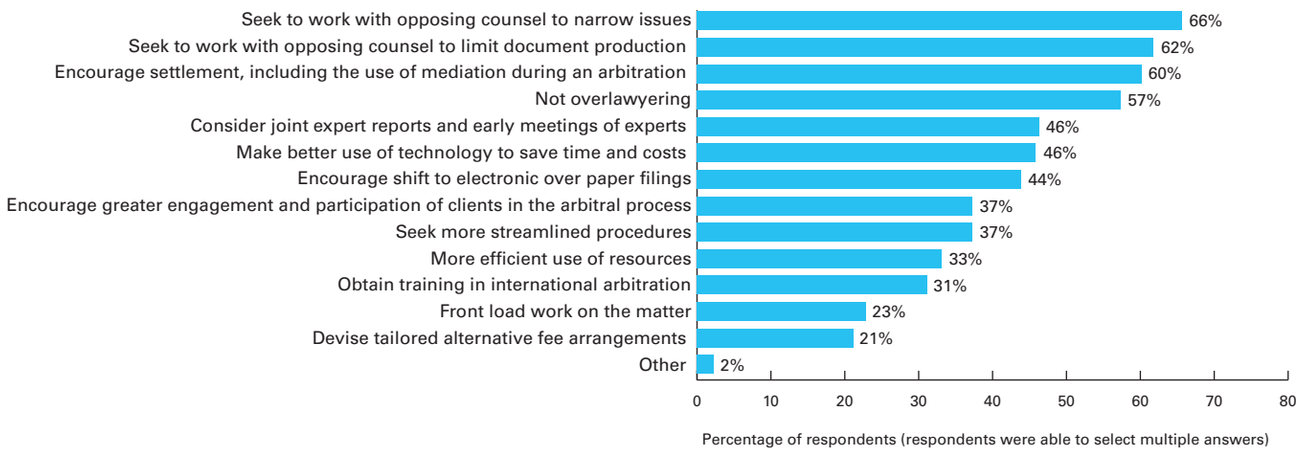
What could arbitration counsel do better?

In an earlier part of the questionnaire, "sanctions for dilatory conduct by parties or their counsel" was rated as the third most effective innovation that could be included in arbitral rules and procedures to help decrease time and cost. The survey also sought to explore what users thought arbitration counsel could do more or better.

In answer to our question, four options were each chosen by more than half of the respondents: "seek to work with opposing counsel to narrow issues" (66%); "seek to work with opposing counsel to limit document production" (62%); "encourage settlement, including the use of mediation during an arbitration" (60%); and "not overlawyering" (57%).

The first three options relate to greater cooperation between counsel. Some interviewees noted that arbitrations increasingly involve extensive lists of issues and requests for documents, even where these might not be necessary to resolve the dispute. Greater cooperation by

Chart 26: What could arbitration counsel do more or better?



opposing counsel could reduce this. Part of the onus, as seen by interviewees, also rests on the tribunal who could proactively steer proceedings to resolve disputes more efficiently, rather than simply relying on 'default' structures and procedures.

The term 'overlawyering' can be interpreted in various ways, including the disproportionate use of resources in the conduct of matters, for example by excessively engaging in procedural skirmishes or by overstaffing. Many interviewees found that (quite literally) there were often very large teams on cases, which increased cost exponentially.

Some interviewees mentioned that they had seen improvements with respect to the use of technology in arbitration over the past five years, and expressed the hope that this trend would continue in the future. This sentiment is reflected in the results: 46% of respondents think counsel should make better use of technology to save time and cost, and 44% think counsel should encourage a shift to electronic over paper filings.

Arbitration and mediation: the best of both worlds?

One aspect of respondents' focus on greater cooperation by arbitration counsel was encouraging settlement, including the use of mediation during an arbitration. This was respondents' third most selected improvement for arbitration counsel, and the number one option selected by the in-house counsel subgroup.

When we explored this in more detail, only half of the respondents (51%) said they would be in favour of having an arbitration run concurrently with a separate mediation for the same dispute. Respondents significantly preferred (78%) the idea of staying an arbitration so that a mediation could be attempted without prejudice to the arbitral proceedings. When arbitration and mediation are used in conjunction, it appears that a minimal overlap between the two processes is preferred.

Use of mediation: a 'conventional' improvement?

In an earlier question on experience of different types of ADR, fewer than half of the respondents (44%) indicated that they have used mediation to resolve cross-border disputes. Some interviewees believed that a lack of understanding of the benefits of mediation is the cause of its limited use and suggested that demystification of "mediation voodoo" could increase its popularity.

We considered whether certain innovations might be likely to increase the use of mediation. First, we asked respondents whether a convention on the enforcement of agreements to mediate would encourage them to use mediation more often. Only 45% answered "yes". Then, we asked whether a convention on the enforcement of settlement agreements resulting from a mediation would encourage them to use mediation more often. Respondents were slightly more in favour of this option, with 54% answering "yes".

In the interviews, proponents of both suggested conventions favoured harmonisation of formal standards in a manner and form similar to the New York Convention for arbitration agreements and arbitral awards. Some believed that any initiative that would give mediation more "teeth" would increase its popularity amongst users. Others, though, expressed that because they were already strong proponents of mediation, such conventions would not encourage them to mediate "more often than they already do". Others yet either resisted the idea of enforcement of mediation agreements in general, or were simply not in favour of using mediation at all.

3 Reducing Time and Cost (cont.)

As some interviewees put it, the proposed conventions would be "solutions looking for a problem". This perception can, to a certain extent, also be seen from the data. We asked respondents whether, over the past five years, they had experienced difficulties enforcing agreements to mediate. Only 15% answered "yes", 29% said "no", and 56% responded "not applicable". We then asked whether, over the past five years, they had experienced difficulties enforcing settlement agreements resulting from a mediation. Only 8% responded "yes", 36% answered "no", and 56% said "not applicable".

In light of the considerable number of respondents who answered "not applicable" to these questions, it is inconclusive what effect such conventions might have in practice, particularly in terms of encouraging the use of mediation.

Chart 27: Over the past five years, have you experienced difficulties enforcing agreements to mediate?

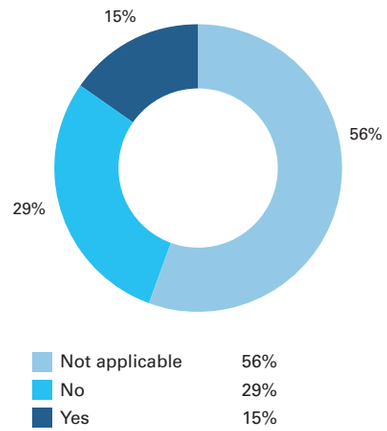
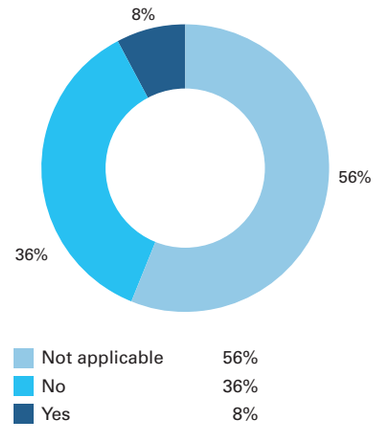


Chart 28: Over the past five years, have you experienced difficulties enforcing settlement agreements resulting from a mediation?



4 Soft Law and Guidelines

Summary

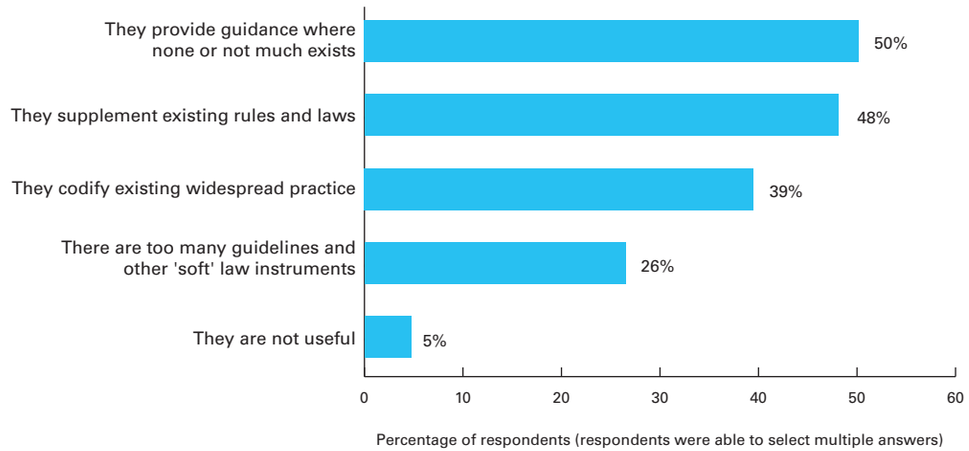
- **Respondents generally have a positive perception of guidelines and soft law instruments in international arbitration. These instruments are seen to supplement existing rules and laws, and to provide guidance where little or none exists.**
- **70% of respondents are of the opinion that there is currently an adequate amount of regulation in international arbitration.**
- **Of various specific instruments put to respondents, the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest were the most widely known, the most frequently used and the most highly rated.**

Is arbitration overregulated?

The use and effectiveness of soft law and guidelines has been a controversial topic within the arbitral community. Various organisations have developed instruments addressing 'best practices' with respect to elements of the arbitral process, or the behaviour of specific actors. Some stakeholders have questioned the practicality of these instruments, criticising them as self-promoting or inhibiting independent thinking. International arbitration has also been accused of being 'overregulated'. In light of this debate, we asked respondents for their views on the use of guidelines and other soft law instruments in international arbitration.

Overall, respondents had a positive perception of guidelines and soft law instruments. They were asked to choose between different statements expressing a range of views. The statements with a positive connotation were selected more often than the statements with a negative connotation. For example, the 'positive' statement "they provide guidance where none or not much exists" was selected

Chart 29: What is your view on the use of guidelines and other 'soft' law instruments in international arbitration?



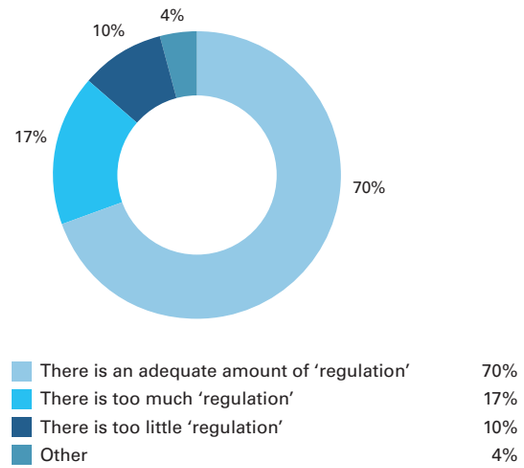
4 Soft Law and Guidelines (cont.)

by 50% of respondents. The 'negative' statements "there are too many guidelines and other soft law instruments" and "they are not useful" were selected by only 26% and 5% of respondents respectively.

We also addressed the underlying debate directly by asking whether arbitration is currently overregulated.

A clear majority (70%) expressed that international arbitration currently enjoys an adequate amount of regulation, thereby indicating a preference for the status quo. Whilst only 17% of respondents consider there is too much 'regulation' in arbitration, interviews often revealed how passionately views are held on this topic. Some felt that regulation restricts the flexibility of the arbitral process, and that guidelines stifle independent thought by stakeholders. Others were concerned by what they saw as a tendency by tribunals to apply guidelines and soft laws rigidly, as 'hard' regulations. However, given the clear majority that favours the status quo, it seems unlikely that the existing level of regulation will diminish.

Chart 30: In your opinion, is arbitration overregulated?



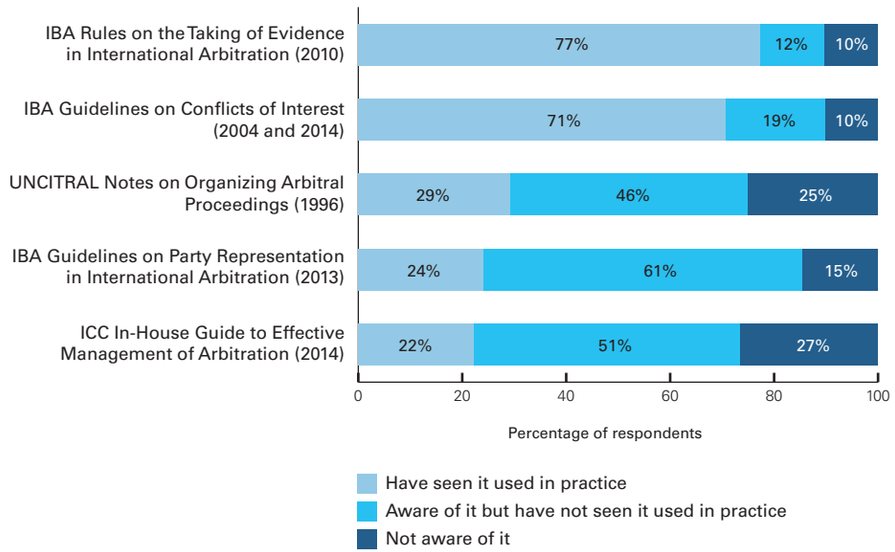
Use and perceptions of specific soft law instruments

A common thread that emerged from the interviews was that respondents' views on individual soft law instruments varied considerably. This could also be seen when respondents selected both 'positive' and 'negative' statements to express their views on the use of guidelines and soft law generally.

The questionnaire solicited views on five specific instruments. We asked respondents how familiar they were with the instruments and, for each instrument with which they were familiar, how effective they thought it was.

The IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest were by far the most widely known and the most frequently used instruments on the list.

Chart 31: How familiar are you with each of these instruments?

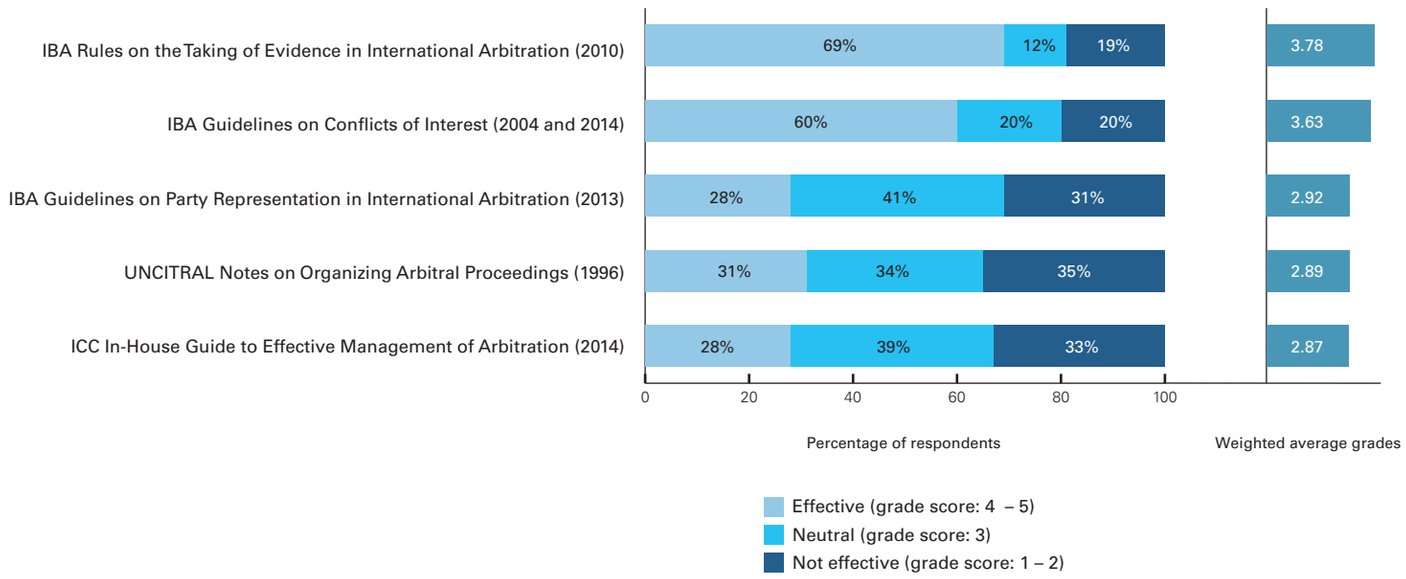


4 Soft Law and Guidelines (cont.)

The data on the IBA Rules on the Taking of Evidence is consistent with the finding of the 2012 Survey that this instrument is used in 60% of arbitrations.[10] Both these instruments were also awarded the highest effectiveness ratings by respondents: 69% for the IBA Rules on the Taking of Evidence and 60% for the IBA Guidelines on Conflicts of Interest.

The other three instruments were all considered "neutral" or "not effective" more often than they were perceived as "effective". Notably, respondents were also significantly less familiar with the use of these instruments in practice. Whilst we cannot draw any firm conclusions from this, it is possible that the perception of their effectiveness may increase with greater use. Whether the use of any one of these other instruments is likely to increase is a separate question outside the scope of our data.

Chart 32: How do you perceive the effectiveness of each instrument with which you are familiar?



10. 2012 International Arbitration Survey, p.11.

5 Role and Regulation of Specific Actors

Summary

- **A clear majority of respondents think that tribunal secretaries (68%) and third party funding (71%) are areas which require regulation.**
- **A small majority of respondents (55%) think that the conduct of arbitrators requires more regulation.**
- **Tribunal secretaries are widely used in international arbitration: 82% of respondents have either used their services or have seen them used. Most respondents (72%) believe that arbitral institutions should offer the services of tribunal secretaries. A vast majority do not consider it appropriate for tribunal secretaries to conduct substantive or merits-related tasks.**
- **Respondents are generally of the opinion that it should be mandatory in international arbitration for claimants to disclose any use of third party funding and the identity of the funders involved, but not the full terms of any funding agreement.**

We asked respondents whether specific actors or practices in international arbitration should be regulated, or regulated more: arbitrators; party representatives; tribunal secretaries; and third party funding.

Arbitrators: conduct and conflicts

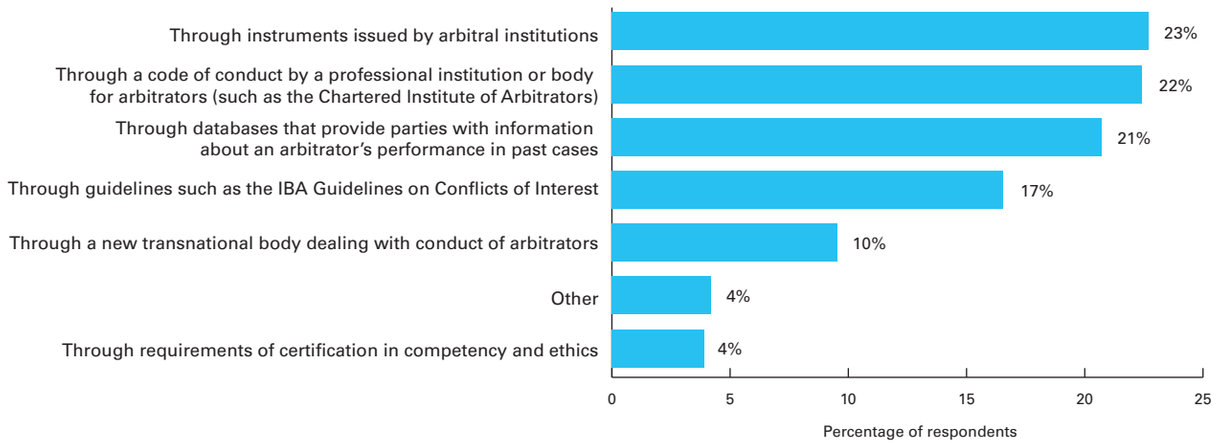
A small majority (55%) feel that the conduct of arbitrators should be regulated more. The results differ when the respondents are split into subgroups by role: 33% of arbitrators think that the conduct of arbitrators should be regulated more, compared to 62% of private practitioners. The subgroup "arbitrator and counsel in equal proportion" displays the same balance of views (55% in favour) as the complete respondent group.

5 Role and Regulation of Specific Actors (cont.)

When asked about the most effective way to regulate arbitrator conduct, responses were mixed. No single option was favoured by a clear majority. Respondents showed a slight preference for instruments issued by arbitral institutions (23%), but a code of conduct by a professional body (22%) and databases providing information about arbitrator performance (21%) received similar feedback.

In other parts of the survey, respondents voiced their frustration with the lack of insight into arbitrator performance. When asked why there was not greater support here for databases providing information on arbitrator performance, some interviewees noted that such databases would be welcome, but would not necessarily be the "most effective way" to regulate arbitrators. Rather, databases were considered to be better used in conjunction with other methods.

Chart 33: What would be the most effective way to 'regulate' arbitrator conduct?

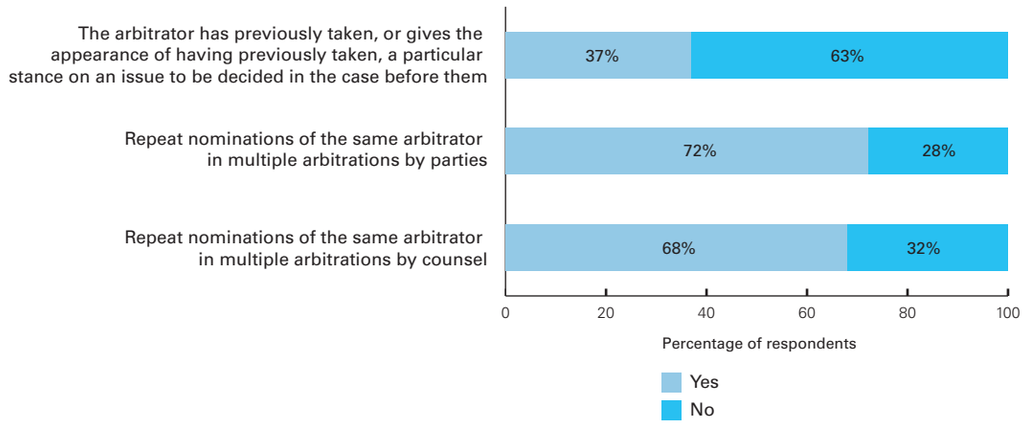


In light of the growing debate on arbitrator challenges based on conflicts of interest, we also asked respondents whether so called 'issue conflicts' and repeat appointments should be specifically regulated in international arbitration. The question was posed separately in respect of commercial arbitration and investment treaty arbitration.

These results lead to several observations.

First, issue conflicts are not seen as requiring specific regulation in commercial arbitration by 63% of respondents. By contrast, in investment treaty arbitration the opinion is almost equally divided: 49% answered "yes", whilst 51% said "no". Opinions expressed in interviews ranged from confidence in the ability of arbitrators to detach themselves from any perceived preconceptions, to the view that even if there is no actual bias, the mere perception of bias can taint the arbitral process.

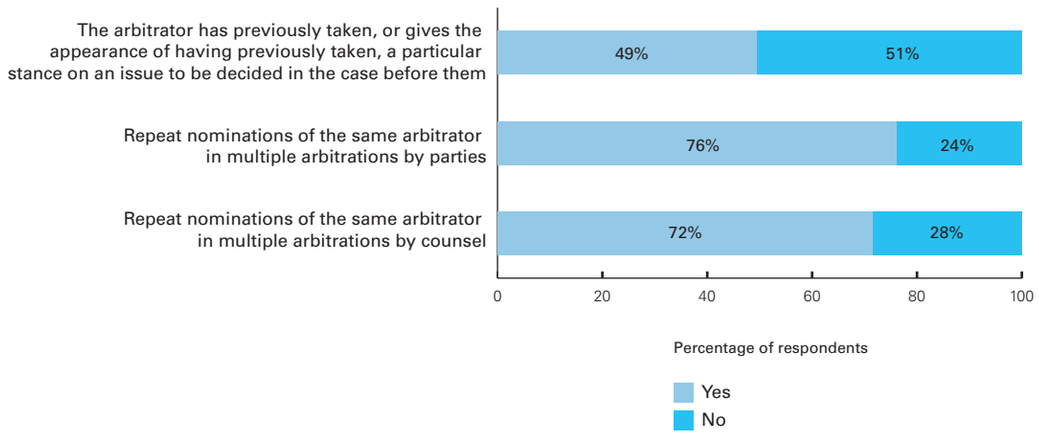
Chart 34: Should each of the following issues be specifically 'regulated' in the context of commercial arbitration?



Secondly, repeat appointments are considered problematic by decisive majorities in the context of both investment treaty and commercial arbitration, regardless of whether the appointments are made by parties or by counsel. Interviewees generally felt that current instruments (in particular the IBA Guidelines on Conflicts of Interest) offer sufficient guidance to deal with this issue; further regulation was therefore seen to be unnecessary.

Finally, interviews revealed that respondents often attach greater weight to potential conflicts of interest in investment treaty arbitration than in commercial arbitration. The data reflects this most clearly in relation to issue conflicts. Interviewees suggested that this may be due to the public interest factor in relation to investment treaty arbitration.

Chart 35: Should each of the following issues be specifically 'regulated' in the context of investment treaty arbitration?



Regulation of party representatives

Just under half of the respondents (46%) feel that the conduct of party representatives should be regulated more. Interestingly, the in-house counsel subgroup deviate from the general trend: 68% of them favour greater regulation of party representative conduct.

Interviewees expressed that the best way to address issues concerning party representative conduct was not through more regulation, but through tribunals' effective use of the sanctions that are currently available. This view is, to some extent, echoed in the data: if more regulation was to be put in place, the most popular option (35%) was for this to be achieved through institutional rules. This again suggests that issues related to the conduct of party representatives could be dealt with through effective use by tribunals of powers conferred upon them by procedural rules, rather than via a mechanism or entity outside the arbitral process.

Chart 36: What would be the most effective way to 'regulate' the conduct of party representatives?

5 Role and Regulation of Specific Actors (cont.)

Tribunal secretaries: benefits and risks

The survey reveals that the use of tribunal secretaries is common in international arbitration. An overwhelming majority (97%) of respondents are aware of the function. Moreover, 82% of respondents have directly been involved in cases involving a tribunal secretary: 53% have actually used a tribunal secretary and 29% have seen it used.

Respondents were invited to rate the perceived usefulness of tribunal secretaries on a scale of 1 (not useful) to 5 (very useful). Overall, the respondent group had a positive perception of tribunal secretaries with a weighted average grade of 3.96 out of 5. Only 9% of respondents felt they were not useful. Interviewees commented that the use of tribunal secretaries enhances the efficiency of arbitral proceedings and presents a unique opportunity to train the next generation of potential arbitrators.

Chart 37: How familiar are you with the use of tribunal secretaries?

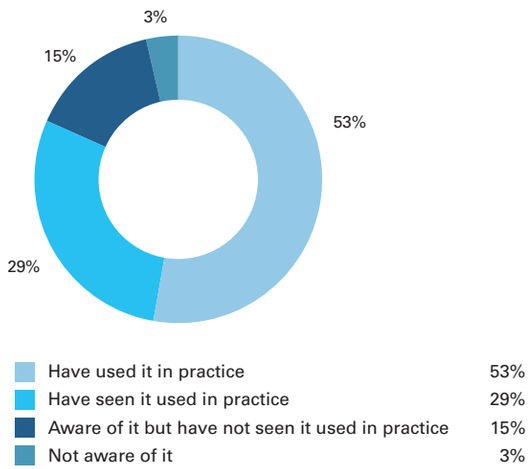
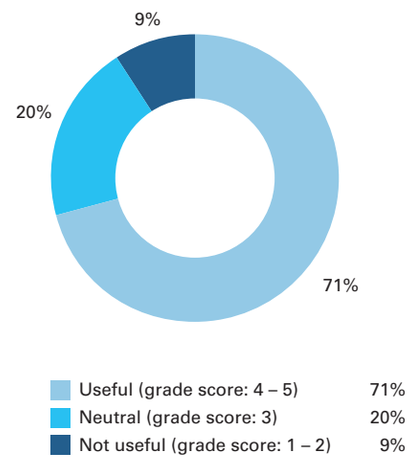


Chart 38: What is your perception of how useful tribunal secretaries are in arbitration?



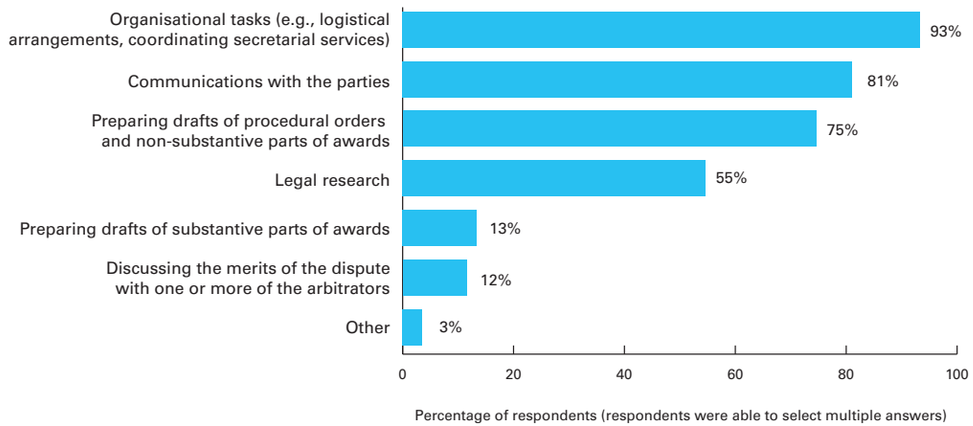
A number of organisations and institutions have issued guidance on the use of tribunal secretaries. We asked respondents which tasks they felt a tribunal secretary should perform. Three particular tasks were highlighted by a notable majority as appropriate for tribunal secretaries to undertake: organisational tasks (93%); communications with the parties (81%); and preparing drafts of procedural orders and non-substantive parts of awards (75%).

The views on tribunal secretaries conducting legal research were mixed, with a slim majority of respondents (55%) believing they should do this. Indeed, the conduct by tribunal secretaries of substantive or merits-related tasks received significantly less support. This included preparing drafts of substantive parts of awards (13%) and discussing the merits of the dispute with one or more of the arbitrators (12%).

These results are strikingly similar to the findings of the 2012 Survey, which also explored this topic.[11] In both surveys, most respondents showed a strong preference for tribunal secretaries undertaking only those tasks that are neither substantive nor related to the merits of the dispute. Some interviewees saw it as improper to delegate tasks that are material to the service that is offered by arbitrators as service providers.

The arbitrators subgroup as a whole shares this opinion: 89% of arbitrators consider that tribunal secretaries should not be allowed to prepare drafts of substantive parts of awards and 92% think that the secretary should not discuss the merits of the dispute with the arbitrators. Nonetheless, a corollary of this data is that approximately one out of every ten arbitrators does not consider it improper to delegate these particular tasks.

Chart 39: What tasks do you think tribunal secretaries should perform?



11. 2012 International Arbitration Survey, p.12.

5 Role and Regulation of Specific Actors (cont.)

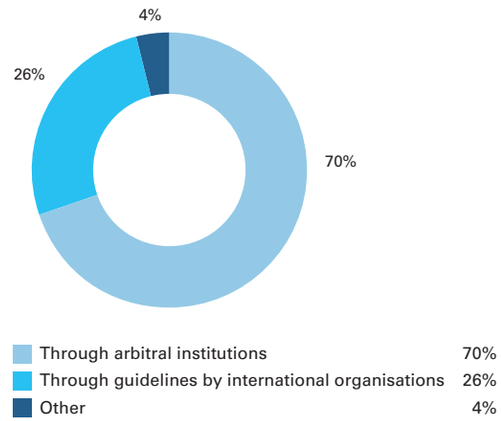
We also asked respondents whether the use and function of tribunal secretaries ought to be regulated. A clear majority (68%) answered "yes". When asked what the most effective way to regulate this area would be, 70% chose regulation through arbitral institutions.

A significant majority (72%) also think that arbitral institutions should offer the services of tribunal secretaries. In interviews, respondents who took the minority view explained that they felt it would undermine the effectiveness of the tribunal secretary if their services were offered through an arbitral institution. In particular, they considered that the secretary must be a person whom the arbitrator likes to work with and trusts; this could not be guaranteed if the secretary was chosen for, rather than by, the arbitrator.

Other interviewees, who were in favour of the services of tribunal secretaries being offered by arbitral institutions, thought that the secretary's connection to the arbitral institution would ensure that the arbitrator would be less likely to delegate merits-related tasks.

Interestingly, an issue raised by several interviewees related to a lack of visibility of the tasks entrusted to tribunal secretaries. Perhaps unsurprisingly, many of these comments came from private practitioners. Notably, the same complaint was also made by arbitrators, who commented that, when sitting as co-arbitrators, they were not always aware of what responsibilities were delegated to the tribunal secretary by the presiding arbitrator.

Chart 40: What would be the most effective way to 'regulate' the use and functions of tribunal secretaries?

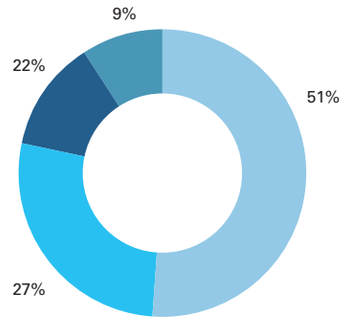


It is unclear the extent to which the desire for regulation is linked to concerns over the scope and appropriateness of tasks undertaken by tribunal secretaries. However, since the majority of respondents considered arbitral institutions to be the most effective means through which to regulate the use of tribunal secretaries, it appears that offering the service themselves may be one way for arbitral institutions to have oversight over what tribunal secretaries actually do.

Regulation and disclosure of third party funding

Another phenomenon which has attracted a great deal of attention across the arbitration community is third party funding. We asked how familiar respondents were with third party funding of claimants in international arbitration. 39% of the respondent group have encountered third party funding in practice: 12% have used it themselves and 27% have seen it used. This data suggests that its use is relatively widespread compared to, for example, insurance products for respondents in international arbitration. Only 15% of the respondent group have encountered such insurance products in practice: 3% have used them and 12% have seen them used.

Chart 41: How familiar are you with third party funding of claimants in international arbitration?



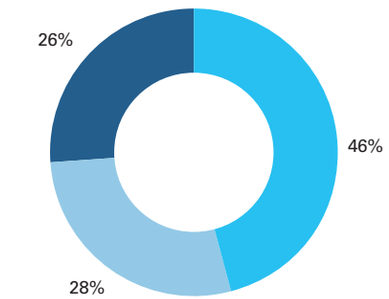
Aware of it but have not seen it used in practice	51%
Have seen it used in practice	27%
Have used it in practice	12%
Not aware of it	9%

5 Role and Regulation of Specific Actors (cont.)

Respondents were asked to rate their perception of third party funding of claimants on a scale of 1 (negative) to 5 (positive). The response was somewhat muted: around half of the respondents (46%) had a 'neutral' perception of third party funding, whilst the respondents with a 'positive' perception (28%) only slightly outnumbered those with a 'negative' perception (26%).

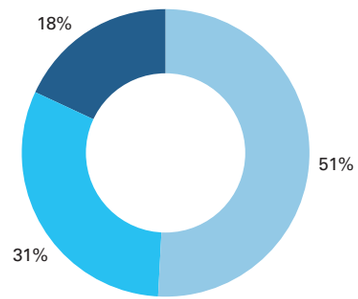
Interestingly, the subgroup of respondents who had actually used third party funding in practice generally had a significantly more positive view. 51% of those respondents had a positive perception of third party funding, 31% took a neutral view, and 18% had a negative perception. The weighted

Chart 42: What is your perception of third party funding of claimants in arbitration?



Neutral (grade score: 3)	46%
Positive (grade score: 4 – 5)	28%
Negative (grade score: 1 – 2)	26%

Chart 43: Perception of third party funding by respondents who have used it



Positive (grade score: 3)	51%
Neutral (grade score: 4 – 5)	31%
Negative (grade score: 1 – 2)	18%

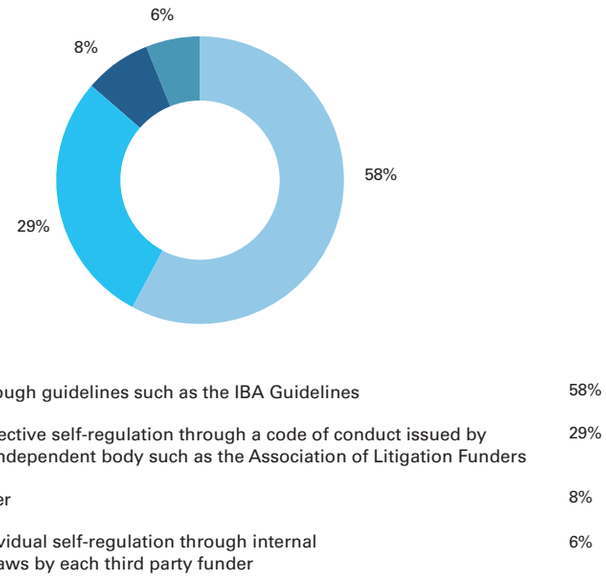
average grade given by this subgroup was 3.42 out of 5 as opposed to the weighted average grade of 2.91 given by the converse subgroup of respondents who had not used third party funding in practice. This data may suggest that, to some extent, positive perception may be influenced by a greater degree of familiarity.

Even though the majority of the respondent group expressed a neutral view of third party funding, respondents nonetheless decisively (71%) indicate a desire for this area to be regulated. The subgroup of respondents with experience of third party funding in practice are less enthusiastic: barely half (49%) believe that third party funding needs regulation.

We also asked respondents for their views on the most effective way to regulate this area. 58% were of the opinion that the best way to do so was through guidelines such as the IBA Guidelines. Collective self-regulation through a code of conduct by an independent body was markedly less popular (29%). Individual self-regulation through a funder's internal by-laws received even less support (6%).

A point made in a number of interviews was that regulation should mainly focus on disclosure rather than on the creation of a prescriptive, substantive regime. These interviewees felt that this would enable tribunals to handle potential issues on a more nuanced, case-by-case basis.

Chart 44: What would be the most effective way to 'regulate' third party funding?

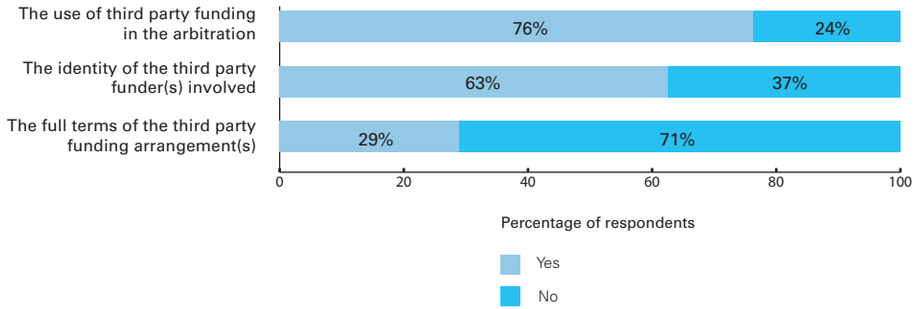


5 Role and Regulation of Specific Actors (cont.)

We asked which aspect of the use of third party funding should be subject to mandatory disclosure by claimants. Respondents showed widespread support for disclosure of the use of third party funding (76%) and the identity of the funder (63%). Interviewees commented that the resulting transparency would help check for conflicts of interest and provide the tribunal with context as to the financial position of the parties.

By contrast, 71% of respondents felt that mandatory disclosure of the full terms of the funding arrangements was undesirable. Some interviewees, who took the minority view, asserted that the full terms should be disclosed in order to reveal the extent of the influence funders may have as a result of the terms of their arrangement with a party. Others, who were opposed to the proposition, commented that such disclosure would be irrelevant to the effective management of the arbitral process.

Chart 45: Should it be mandatory for a claimant to make disclosure of each of the following?



Regulation, quo vadis?

The results on the use and perception of regulation in arbitration are, perhaps unsurprisingly, conflicting in some respects. Even though 70% of respondents expressed that there is currently an adequate amount of regulation in international arbitration, the views on the desirability of regulation of specific actors contradict this general position. Tribunal secretaries and third party funding were both identified as areas requiring regulation. A majority of the respondents were also in favour of further regulation of the conduct of arbitrators. Only the conduct of party representatives was not seen by the majority as needing additional regulation.

These results suggest that when respondents turned their minds to specific areas for regulation, they were more inclined to consider regulation, or more regulation, necessary than when they considered the topic of regulation in international arbitration in general. Alternatively, it can be argued that whilst further 'macro-regulation' is not desired, corrective 'micro-regulation' is generally welcomed in some areas.

Appendices

Methodology

The research for this study was conducted from February to July 2015 by Mr Rutger Metsch, LLB (hons, Groningen), LLM (distinction, London), White & Case Research Fellow in International Arbitration, School of International Arbitration, Queen Mary, University of London, together with Professor Loukas Mistelis, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration, and Director, School of International Arbitration, Queen Mary, University of London. The other academic members of the School of International Arbitration have provided generous support through feedback on the questionnaire design.

An external focus group comprising senior in-house counsel, senior representatives of arbitral institutions, academics and arbitrators provided comments on the draft questionnaire.

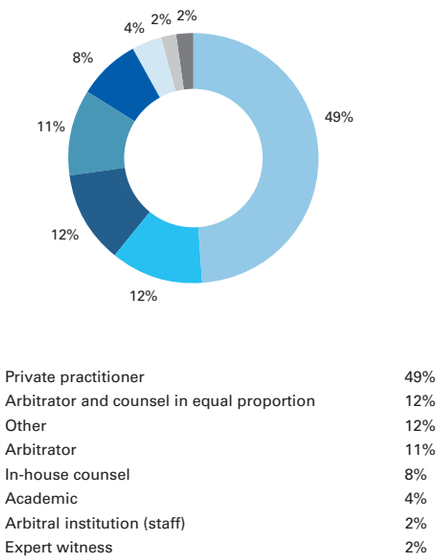
The research was conducted in two phases: the first quantitative and the second qualitative.

- **Phase 1:** an online questionnaire of 80 questions was completed by 763 respondents between 11 March 2015 and 1 June 2015. The survey sought the views of a wide variety of stakeholders in international arbitration. 70% of respondents (and 81% of the organisations they represent or with which they are connected) have been involved in more than five international arbitrations over the past five years. The respondent group consisted of academics (4%), arbitral institutions (staff) (2%), arbitrators (11%), "arbitrator and counsel in equal proportion" (12%), expert witnesses (2%), in-house counsel (8%) and private practitioners (49%). 12% were categorised as "other".[12] As expected, not every question was applicable to every respondent; a substantive question was on average answered by 540 respondents (median 562).[13] A reference to "respondents" in the report refers to those respondents who answered that particular question. The questionnaire responses were analysed to produce the statistical data presented in this report.

- **Phase 2:** 105 face-to-face or telephone interviews, ranging from 15 to 120 minutes long, were conducted between 24 April 2015 and 3 July 2015. Interviewees were drawn from a diverse group based on seniority, gender and experience in international arbitration. Respondents from all continents (excluding Antarctica) were interviewed. The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, to contextualise and explain the findings and to cast further light on particular issues raised by the survey.

The following charts illustrate the composition of respondents by: position, geographic location, legal background and experience in international arbitration.

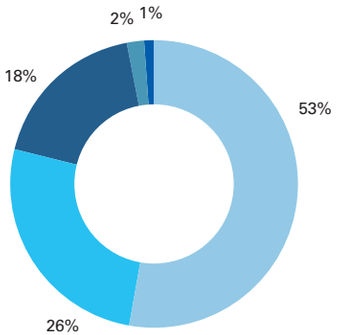
Chart 46: What is your primary role?



12. This included, for example, judges, third party funders, mediators, government officials and respondents who did not specify their position. The "other" category also included respondents whose descriptions of their roles fell within the scope of the categories "arbitrator", "private practitioner", or "in-house counsel". However, and for the avoidance of doubt, as these respondents had not self-identified under those specific categories, they were not included in the dataset for those specific subgroups of respondents.
13. This number includes conditional follow-up questions ("if yes") and excludes general questions (e.g., personal details).

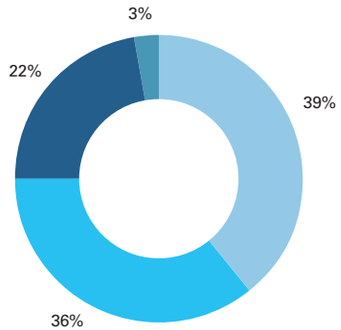
Methodology (cont.)

Chart 47: Where are you based?



Europe	53%
Asia	26%
The Americas	18%
Africa	2%
Oceania	1%

Chart 48: What is your legal background?



Civil law	39%
Common law	36%
Both civil and common law	22%
Other	3%

Chart 49: Over the past five years, approximately how many international arbitrations have you been involved in?

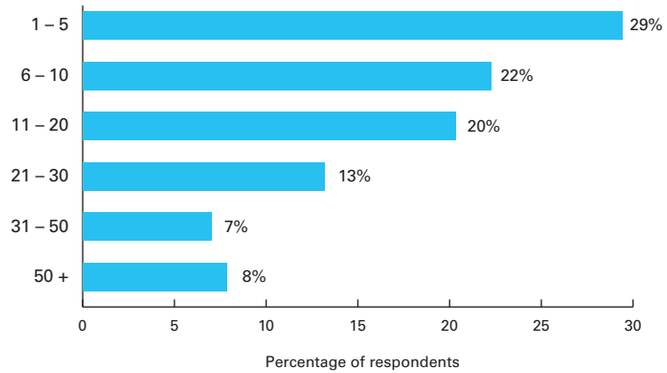


Chart 50: Over the past five years, approximately how many international arbitrations has your organisation been involved in?

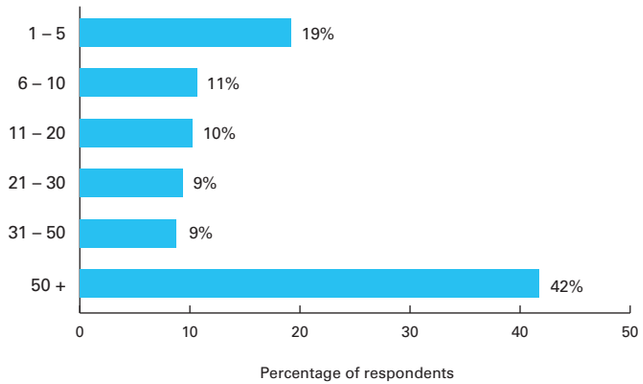
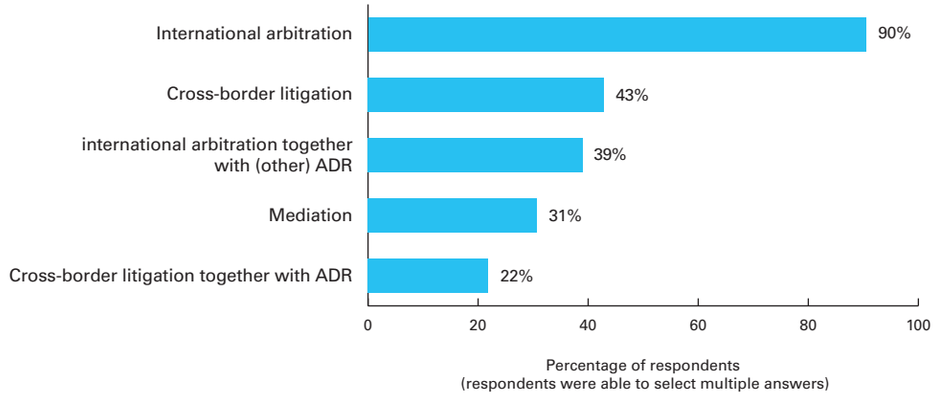


Chart 51: Over the past five years, what types of dispute resolution methods have you used for cross-border disputes?



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