Executive Summary

One of the hallmarks of international arbitration is its procedural flexibility, and its ability to adapt to the differing needs and expectations of parties from diverse legal backgrounds and cultures. This has allowed for the development of myriad practices and procedures throughout many parts of the world.

However, as international arbitration has grown and flourished in recent decades, and cross-fertilisation of these practices and procedures has occurred, to what extent are truly harmonised practices emerging in international arbitration? And if such practices are emerging, do they reflect the preferred practices of the international arbitration community?

To answer these questions, we have sought to identify both the current and preferred practices in the international arbitral process. In so doing, we have highlighted the gaps between them and have compared the results from different categories of respondents (i.e., by their legal background, role, geographic location and industry sector).[1] We sought views not only from in-house counsel, but also from private practitioners and arbitrators – thereby creating a much larger pool of respondents to give empirical weight to our findings.

The results of the study are set out under seven thematic chapters.

Selection of arbitrators

- A significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally. This shows that the arbitration community generally disapproves of the recent proposals calling for an end to unilateral party appointments.
- There has been a long-standing debate about whether pre-appointment interviews with arbitrators are appropriate. The survey reveals that two-thirds of respondents have been involved in them,[2] and only 12% find them inappropriate. The chief disagreement is not on whether such interviews are appropriate, but on the topics that may properly be discussed.
- Almost three-quarters of respondents (74%) believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair.

Organising arbitral proceedings

- The IBA Rules on the Taking of Evidence in International Arbitration ('the IBA Rules') are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirm that they find the IBA Rules useful.
- Tribunal secretaries are appointed in 35% of cases. Only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, and only 4% said tribunal secretaries discussed the merits of the dispute with them.
- The most effective methods of expediting arbitral proceedings are (in order) 'identification by the tribunal of the issues to be determined as soon as possible after constitution', 'appointment of a sole arbitrator', and 'limiting or excluding document production'.
- The survey reveals that, even though fast-track arbitration is regularly cited as a prime method of cost control, in practice it is not commonly used. The vast majority of respondents (95%) either had no experience with fast-track arbitration (54%) or were involved in only 1-5 fast-track arbitrations (41%). However, 65% of respondents are either willing to use fast-track clauses for future contracts (5%) or willing to do so depending on the contract (60%).

Interim measures and court assistance

- Despite being the subject of significant legal commentary, requests for interim measures to arbitral tribunals are relatively uncommon: 77% of respondents said they had experience with such requests in only one-quarter or less of their arbitrations. Even rarer are requests for interim measures in aid of arbitration to courts: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.
- Only 35% of all interim measures applications addressed to the arbitral tribunal are granted. Of those applications which are granted, the majority are complied with voluntarily (62%) and parties seek their enforcement by a court in only 10% of cases.
- There is no consensus on whether arbitrators should have the power to order interim measures *ex parte* in certain circumstances. Just over half of respondents (51%) believe that arbitrators should have such a power, while 43% believe they should not (6% were unsure).

1. Results are broken down by category of respondents only where major differences (>10%) exist between them.
2. All findings in this survey regarding respondents' experiences in international arbitration refer to their experiences over the past 5 years. Please note that due to rounding, some percentages shown in the charts may not equal 100%.

Document production

- Requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved such requests.
- The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common lawyers, compared to only 21% of civil lawyers, said that 75-100% of their arbitrations involved such requests.
- Notwithstanding the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that Article 3 of the IBA Rules ('relevant to the case and material to its outcome') should be the applicable standard for document production in international arbitration.
- How important are disclosed documents to the outcome of the case? The survey shows that they are crucial in a statistically significant percentage of arbitrations: a majority of respondents (59%) stated that documents obtained through document production materially affected the outcome of at least one-quarter of their arbitrations.

Fact and expert witnesses

- In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements, together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). 59% of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective.
- The vast majority of respondents believe that cross-examination is either always or usually an effective form of testing fact (90%) and expert witness evidence (86%).
- While mock cross-examination of witnesses prior to their appearance at a hearing is considered unethical in some legal cultures, the survey reveals that it is commonly done and often considered acceptable in international arbitration. 55% of respondents reported that there was mock cross-examination of witnesses in their arbitrations, and 62% of them (civil and common lawyers alike) find it appropriate.
- In the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%). However, respondents' preferences are less stark: only 43% find expert witnesses more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective.

Pleadings and hearings

- Not only does sequential exchange of substantive written submissions occur much more regularly (82%) than simultaneous exchange (18%), there is also a strong preference for this type of exchange (79%).
- The survey reveals that only a small minority (15%) of merits hearings are held outside the seat of arbitration.
- The most common duration of a final merits hearing is 3-5 days (53%), followed by 6-10 days (23%), 1-2 days (19%) and 10+ days (5%).
- Civil lawyers have traditionally claimed that their hearings are shorter than those of common lawyers – the survey confirms this to be true. 31% of civil lawyers said the average duration of their merits hearings was 1-2 days, compared to only 9% of common lawyers.
- Time limits are imposed for oral submissions and/or examination of witnesses in two-thirds of arbitration hearings. Most respondents prefer some form of time limits (57%), while only 6% prefer no time limits at all (34% said it depends on the case).

The arbitral award and costs

- How long should a tribunal take to render an award? For sole arbitrators, two-thirds of respondents believe that the award should be rendered within 3 months after the close of proceedings. For three-member tribunals, 78% of respondents believe that the award should be rendered either within 3 months (37%) or within 3 to 6 months (41%).
- A common criticism of arbitration is that tribunals unnecessarily 'split the baby'. Overall, respondents believe this has happened in 17% of their arbitrations, while those actually making the rulings – the arbitrators – said this occurs in only 5% of their arbitrations.
- Tribunals allocate costs according to the result in 80% of arbitrations, and leave parties to bear their own costs and half the arbitration costs in 20% of arbitrations. However, only 5% prefer this latter approach, which shows there is a desire for tribunals to allocate costs according to the result more frequently than they are currently doing.
- An overwhelming majority of respondents (96%) believe that improper conduct by a party or its counsel during the proceedings should be taken into account by the tribunal when allocating costs. This sends a strong message to arbitrators that they are expected to penalise improper conduct when allocating costs.