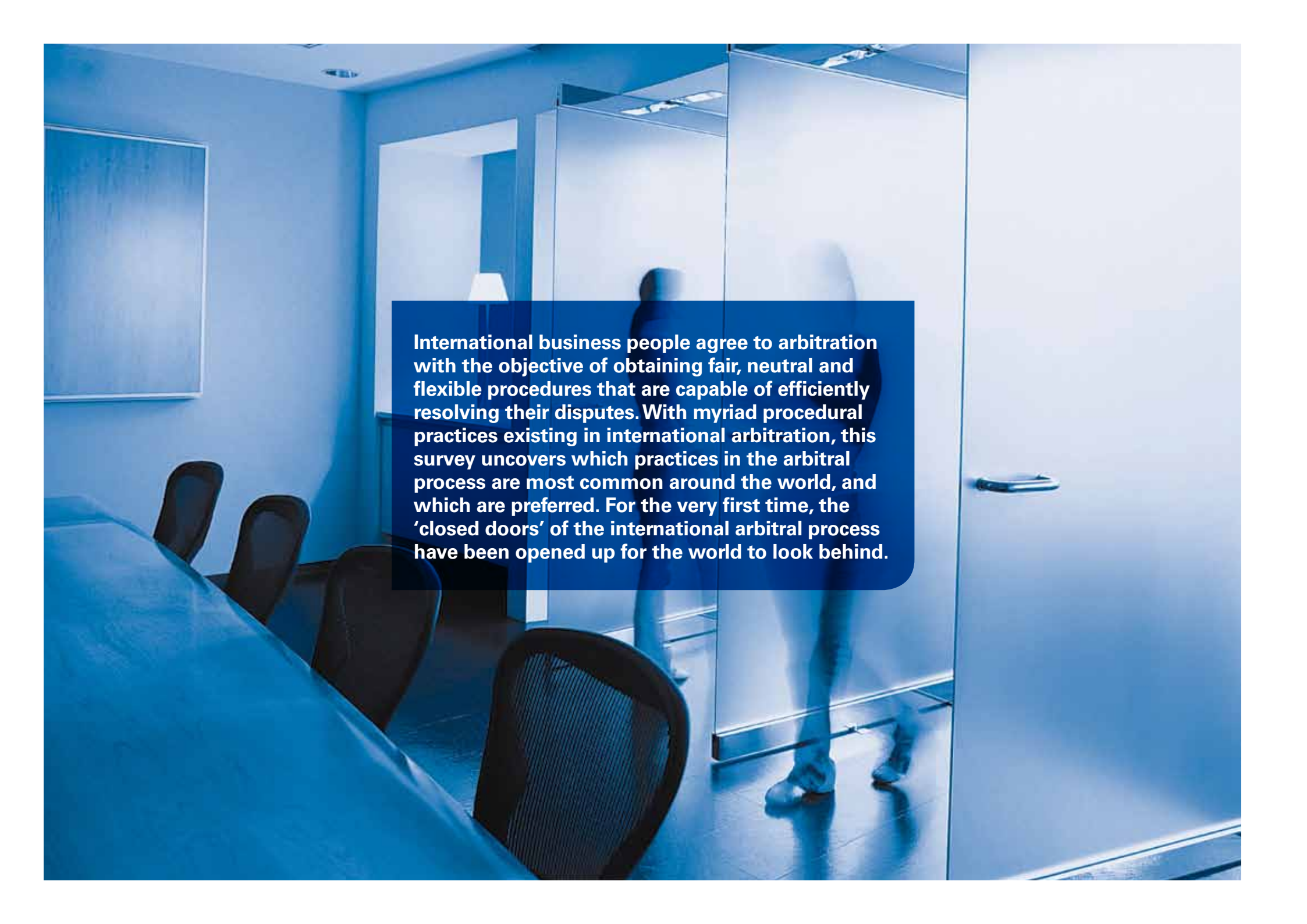




2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process



International business people agree to arbitration with the objective of obtaining fair, neutral and flexible procedures that are capable of efficiently resolving their disputes. With myriad procedural practices existing in international arbitration, this survey uncovers which practices in the arbitral process are most common around the world, and which are preferred. For the very first time, the 'closed doors' of the international arbitral process have been opened up for the world to look behind.

Introduction



Paul Friedland

Head of International Arbitration Practice Group, White & Case LLP

Despite the dominance of international arbitration as the dispute resolution method for international business, little empirical evidence exists about what goes on in this inherently private process.

The 2012 International Arbitration Survey, entitled 'Current and Preferred Practices in the Arbitral Process', closes this gap, providing empirical evidence of a quality not seen before. In a departure from previous surveys, views were sought not only from in-house counsel, but also from private practitioners and arbitrators. This provided a pool of respondents which was both highly knowledgeable of international arbitration and dramatically larger than earlier surveys. An unprecedented 710 questionnaire responses were received and 104 interviews were conducted – more than a five-fold increase from the previous survey.

This critical mass of participants provides authoritative empirical evidence as to what actually occurs in international arbitration, and also enabled us to go further than previous surveys by breaking down the results by categories of respondents, whether by different geographic regions, legal backgrounds (common v. civil lawyers) or roles (private practitioners v. arbitrators v. in-house counsel).

White & Case is proud to sponsor this survey conducted by the School of International Arbitration. The School has produced a study of the arbitral process which I am confident will serve as a reference point for the international arbitration community for years to come – not least when arguing points of procedure before arbitrators.

We thank Dr. Stavros Brekoulakis, Mr. Jure Zrilic (White & Case Research Fellow) and Professor Loukas Mistelis for their tireless work in producing this publication, as well as all those who took the time to fill out the survey and to contribute their knowledge to this study.



Dr. Stavros Brekoulakis

Senior Lecturer in International Dispute Resolution, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London

It is a great privilege to present the fourth empirical survey of the School of International Arbitration, the second sponsored by White & Case. In this survey, we explore current and preferred practices in the arbitral process under the following seven themes: selection of arbitrators, organising arbitral proceedings, interim measures and court assistance, document production, fact and expert witnesses, pleadings and hearings, and the arbitral award and costs. The sheer number of this year's questionnaire respondents and interviewees makes this survey the most comprehensive empirical study ever conducted in the field of international arbitration.

With countless procedural practices existing in international arbitration around the world, we sought to identify which of these practices are still divergent or emerging, and which are well-established. Equally importantly, we wanted to reveal whether the current procedural practices match the preferences, needs and expectations of those involved in international arbitration. This study examines these questions, with a particular emphasis on the more contentious and recently debated issues in international arbitration today.

We are very grateful to everyone who enthusiastically shared their time and energy contributing to this survey – in-house counsel, private practitioners and arbitrators alike. The findings will provide valuable insight into the arbitral process, unavailable until now, which will inform the practices and choices of all those involved in international arbitration. Given the wealth of information that the survey has generated, it will also serve as a basis for further research in the field. A more detailed analysis will be published in an academic article in the *American Review of International Arbitration*.

For the very first time, the closed doors of international arbitration – a private dispute resolution mechanism – have been opened up for the world to look behind. We now know which practices in the arbitral process are most common around the world, which are preferred, and by identifying the gaps between them we can help shape the direction of international arbitration.

We hope that you find this unique survey to be of interest.



Contents

Executive Summary	2	Appendices	43
The Study	4	Methodology	44
1 Selection of arbitrators	5	School of International Arbitration, Queen Mary, University of London	46
2 Organising arbitral proceedings	10	White & Case International Arbitration Group	47
3 Interim measures and court assistance	16	White & Case International Arbitration Partners	48
4 Document production	20	Acknowledgements	50
5 Fact and expert witnesses	24		
6 Pleadings and hearings	32		
7 The arbitral award and costs	38		

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.

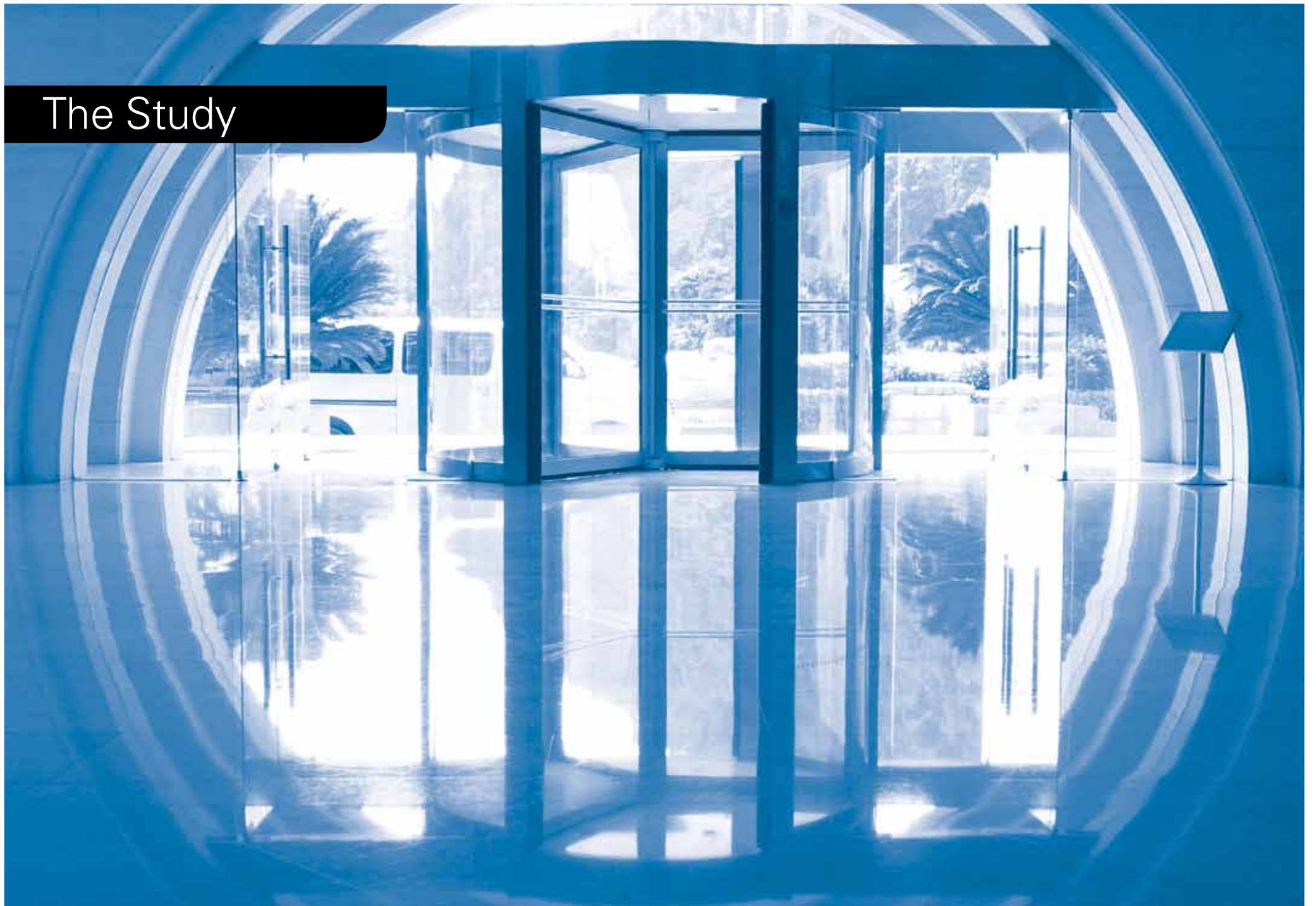
Pleadings and hearings

- 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.

The Study



1 Selection of arbitrators

Unilateral party appointments are the preferred method of selecting co-arbitrators in a three-member tribunal

Summary

- 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, 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.

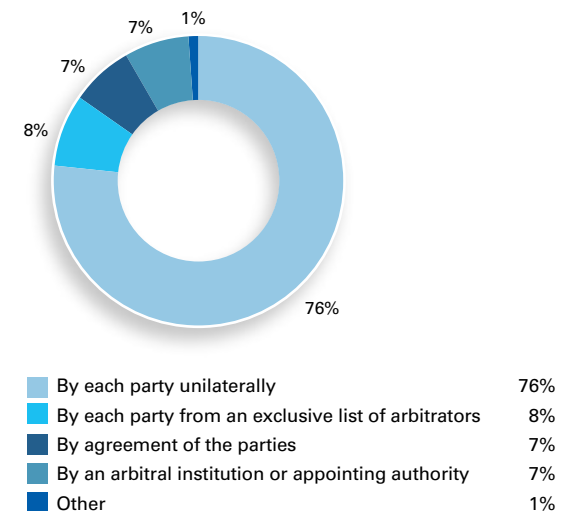
What are the preferred methods of selecting arbitrators?

In view of the current debate on the best method of selecting the arbitral tribunal, we asked respondents which methods they prefer. For three-member tribunals, a substantial majority of respondents (76%) said they prefer selection of the two co-arbitrators by each party unilaterally. This method of selection was favoured by all three categories of respondents, but notably more by private practitioners (83%) than by in-house counsel (71%) and arbitrators (66%). These figures show that there is general disapproval of the recent proposals calling for an end to unilateral party appointments.

The remaining methods of selection were evenly distributed, with 8% preferring selection of the co-arbitrators by each party from an exclusive list of arbitrators, 7% favouring selection by an arbitral institution or appointing authority and 7% in favour of selection by agreement of the parties.

Interviewees explained that they prefer unilateral party appointments of the two co-arbitrators for the following reasons: (i) it gives the parties control over the constitution of the tribunal and inspires confidence in the arbitral process, which consequently raises the legitimacy of the final award; (ii) parties are better placed to know what skills and knowledge are required for resolving the dispute; and (iii) many interviewees expressed some distrust in arbitral institutions selecting arbitrators. In particular, they were concerned about the small and static pool from which some institutions pick their arbitrators, and of the fact that not all institutions are paying sufficient attention to the availability of arbitrators.

Chart 1: By what method do you favour selection of the two co-arbitrators in a three-member arbitral tribunal?

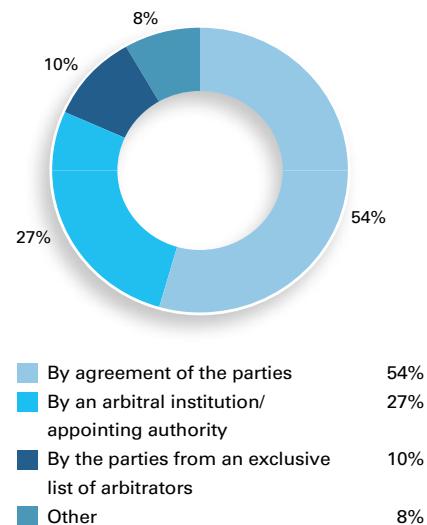


1 Selection of arbitrators (cont.)

As to the method of selecting the sole arbitrator or the chair in a three-member tribunal, 54% of respondents prefer selection by agreement of the parties, 27% prefer selection by an arbitral institution or appointing authority and 10% prefer selection by the parties from an exclusive list of arbitrators.

The fact that there is less desire for party autonomy when selecting the sole arbitrator or chair (54%) when compared to selecting the co-arbitrators (76%) may be explained by the difficulties parties can face when seeking to agree on an arbitrator with their opposing party. Interestingly, the release of party autonomy was almost entirely in favour of selection by an arbitral institution or appointing authority. This method, which was preferred by only 7% for the selection of the co-arbitrators, was preferred by 27% for the selection of the sole arbitrator or the chair.

Chart 2: By what method do you favour selection of the sole arbitrator or the chair in a three-member arbitral tribunal?

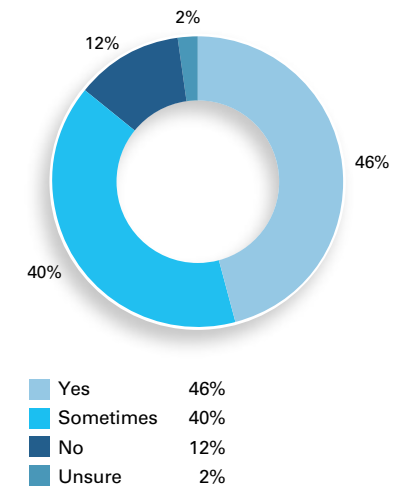


How common and appropriate are pre-appointment interviews with potential arbitrators?

There is a long-standing debate about whether pre-appointment interviews with arbitrators are appropriate. The survey reveals that two-thirds of respondents have interviewed or been interviewed as potential arbitrators. Those most experienced with pre-appointment interviews are from North America (87%), Latin America (70%) and Western Europe (67%), while those least experienced with them are from Africa and the Middle East (48%).³

Overall, 86% of respondents consider pre-appointment interviews to be either appropriate (46%) or appropriate sometimes (40%). During our interviews with survey respondents, most private practitioners and in-house counsel explained that they find pre-appointment interviews to be useful as they assist in providing a clearer picture of the candidate's availability, personality and knowledge or experience in the specific field relevant to the dispute.

Chart 3: Do you consider pre-appointment interviews with potential arbitrators appropriate?



3. All regional breakdowns of findings are based on respondents' business location.

Which topics are inappropriate for pre-appointment interviews?

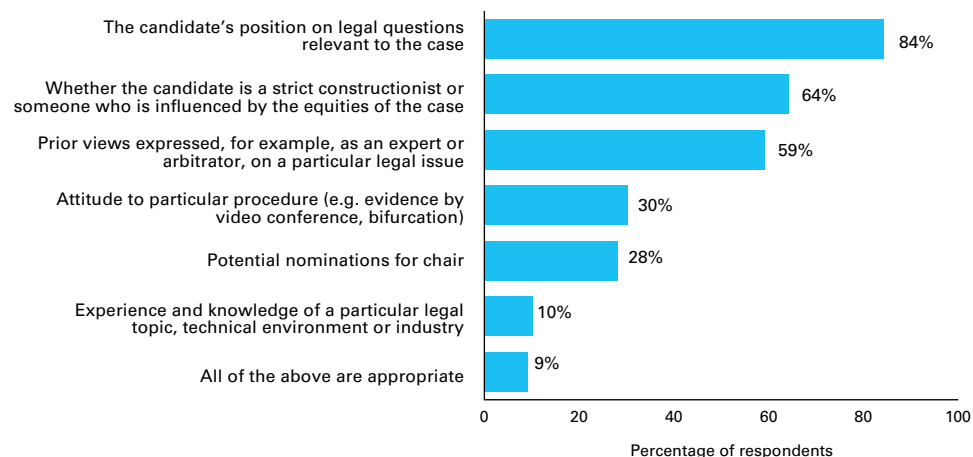
Notwithstanding the general acceptance of pre-appointment interviews, not all topics were considered to be suitable for discussion with prospective arbitrators. The following three topics were identified as the most inappropriate to be raised at pre-appointment interviews: 'the candidate's position on legal questions relevant to the case' (84%); 'whether the candidate is a strict constructionist or someone who is influenced by the equities of the case' (64%); and 'prior views expressed, for example as an expert or arbitrator, on a particular legal issue' (59%). The finding that a clear majority is against the classic 'strict constructionist v. equity' question is particularly noteworthy.

Only 9% of respondents consider that all of the topics listed in Chart 4 below are appropriate for discussion – and when this figure is broken down one can see that very few arbitrators (2%) consider that all topics are appropriate for discussion, whereas

private practitioners (9%) and in-house counsel (21%) have slightly more liberal views on which topics may be discussed.

During our survey interviews, arbitrators revealed that inappropriate questioning during pre-appointment interviews is rarely a major issue. Arbitrators explained that on the rare occasions they have been asked inappropriate questions (which have usually been by less experienced lawyers or parties), they always politely declined to answer. Many arbitrators said that they made clear in advance the limits of the interview discussion, particularly when being approached by unknown interviewers. Others also referred interviewers to the existing guidelines to clarify what the boundaries of questioning should be (e.g., the Chartered Institute of Arbitrators' guidelines on 'The Interviewing of Prospective Arbitrators').

Chart 4: Which of the following subjects are inappropriate for discussion with arbitrators at interviews?



1 Selection of arbitrators (cont.)

Should the opposing party be notified or receive notes of the pre-appointment interview?

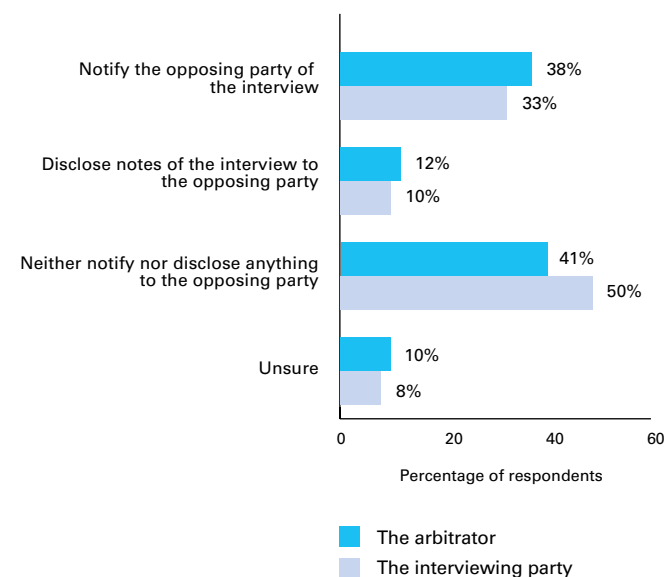
Overall, the figures show that there are divergent views on whether a party or arbitrator should notify the opposing party of a pre-appointment interview (in the event that the arbitrator is ultimately appointed). Exactly half of respondents consider that the *interviewing party* should neither notify nor disclose anything to the opposing party, and 41% believe that the *appointed arbitrator* should neither notify nor disclose anything to the opposing party.

On the flip side, 43% of respondents believe that the *interviewing party* should notify the opposing party of the interview (33% believe mere notification is appropriate, while 10% believe that the interview notes should also be disclosed), and 50% of respondents believe that the *interviewed arbitrator* should notify the opposing party of the interview (38% believe mere notification is appropriate, while 12% believe that the interview notes should also be disclosed).

Only a small minority of respondents believe that either the interviewing party (10%) or the arbitrator (12%) should disclose notes of pre-appointment interviews to the opposing party. This finding stands in stark contrast to the Chartered Institute of Arbitrators' practice guideline on 'The Interviewing of Prospective Arbitrators', which recommends that either a tape recording or a detailed arbitrator's file note should be made of the interview and disclosed to the other side, and to the appointing body, at the earliest available opportunity.⁴

When the results are broken down by region, only 34% of respondents from North America believe that the interviewing party should notify and/or disclose notes of the interview to the opposing party, while a slight majority of respondents from Asia (53%) and Africa and the Middle East (55%) believe so. In Western Europe, Eastern Europe and Latin America, the figures were 40%, 42% and 43%, respectively.

Chart 5: Do you believe the interviewing party or the arbitrator, if appointed, should:



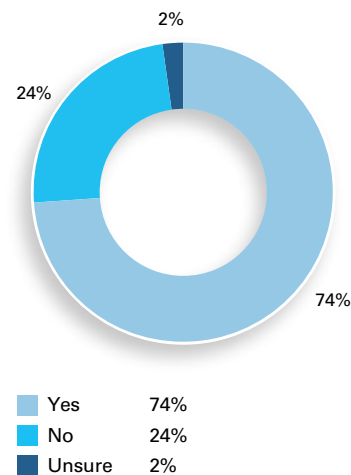
4. Chartered Institute of Arbitrators, Practice Guideline 16: The Interviewing of Prospective Arbitrators, 3.1.7.

Should parties be allowed to exchange views with their appointed arbitrators regarding the selection of the chair?

The survey confirms that communication between a party and its appointed arbitrator with respect to the choice of the chair is generally perceived to be appropriate. 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. More Western European and North American respondents (80% and 79%, respectively) than Asian and Latin American respondents (60% and 61%, respectively) consider this practice appropriate.

While most interviewees confirmed that it is appropriate for party-appointed arbitrators to hear their appointing party's views on the profile of the prospective chair, other interviewees stressed that such communication is always inappropriate as it can open the door for many improprieties and may lead to discussing the merits of the case.

Chart 6: Should a party-appointed arbitrator be allowed to exchange views with his/her appointing party regarding the selection of the chair?



2 Organising arbitral proceedings

The IBA Rules are considered to be a useful tool when conducting arbitrations, but are mostly adopted and preferred as guidelines rather than binding rules

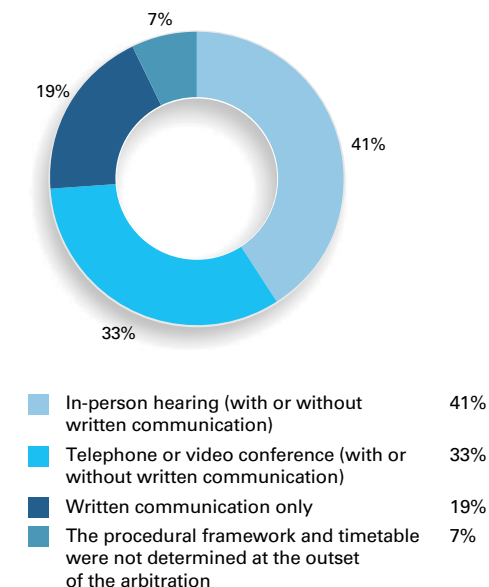
Summary

- The IBA Rules on the Taking of Evidence in International Arbitration 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%).

How are the procedural framework and timetable usually determined?

Flexibility is one of the key benefits of international arbitration, and this entails establishing an appropriate procedural framework and timetable to suit the nature of the dispute and the parties. According to the survey, in-person hearings are the most common method of determining the procedural framework and timetable at the outset of the arbitration (41%), followed by telephone or video conferences (33%), and by written communications only (19%). In only 7% of arbitrations are the procedural framework and timetable not determined at the outset of the proceedings.

Chart 7: In what % of your arbitrations were the procedural framework and timetable determined at the outset by:



Interviewees noted that the way the procedural framework is determined usually depends on the circumstances of the case: most prefer in-person hearings if the arbitration is complex and the hearing costs are not excessive. In-person hearings were recommended because they save time, the parties and counsel can get a feel for the chair's attitude towards the procedure, and it also makes it easier for the chair to control the process and to obtain the parties' agreement on disputed procedural issues. In addition, meeting at an early stage is said to increase the parties' chances of reaching an amicable settlement.

If the costs of organising an in-person hearing are too high, interviewees confirmed that a telephone or video conference can be a good substitute. On the other hand, determining the procedural framework and timetable purely by written communication is preferred only when the case is very straightforward and the arbitrators are sufficiently experienced.

One concern that was expressed by experienced practitioners during interviews was that arbitral procedure is gradually becoming too rigid and formulaic. It was said that when determining the procedural framework at the outset of proceedings, arbitrators should take parties' expectations more into consideration and tailor the procedure to the particularities of each case, rather than simply following general procedural templates.

How often are the IBA Rules adopted, and are they considered to be useful?

The IBA Rules, often believed to be widely applied in international arbitration, are adopted in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. A substantial majority of respondents (85%) consider the adoption of the IBA Rules useful, while only 5% consider them not to be.

These findings arguably uncover a discrepancy between the actual use and the perceived usefulness of the IBA Rules. While we do not attempt to speculate as to the reasons for this discrepancy, we caution counsel and parties to bear it in mind and to push for the adoption of the IBA Rules in their arbitrations if that is indeed their preferred approach.

The majority of interviewees explained that they prefer adopting the IBA Rules as guidelines rather than binding rules because this provides for more flexibility. This is consistent with the findings of the 2006 International Arbitration Survey, where procedural flexibility was identified as 'the most widely recognised advantage' of international arbitration.⁵ Some experienced interviewees, however, pointed out that in practice there is little difference between the adoption of the IBA Rules as guidelines or binding rules because, even when adopted as binding rules, they provide enough leeway for arbitrators to depart from them.

How often are tribunal secretaries used?

The use of tribunal secretaries, and specifically what tasks they should perform, has long been a subject of discussion among arbitration practitioners. Some are firmly against tribunal secretaries, believing that all duties should rest with the tribunal members alone, while others think that tribunal secretaries increase the efficiency of the proceedings and allow arbitrators to focus on the most important aspect of their role – determining the merits of the dispute.

The survey reveals that tribunal secretaries are used in only 35% of arbitrations, although they are used more frequently in civil lawyers' arbitrations (46%) than common lawyers' arbitrations (24%). From a regional perspective, the use of tribunal secretaries is most common in arbitrations of Latin American respondents (62%), while least common in arbitrations of respondents from North America (23%) and Asia (26%).

5. 2006 International Arbitration Survey, page 6.

2 Organising arbitral proceedings (cont.)

What tasks do and should tribunal secretaries perform?

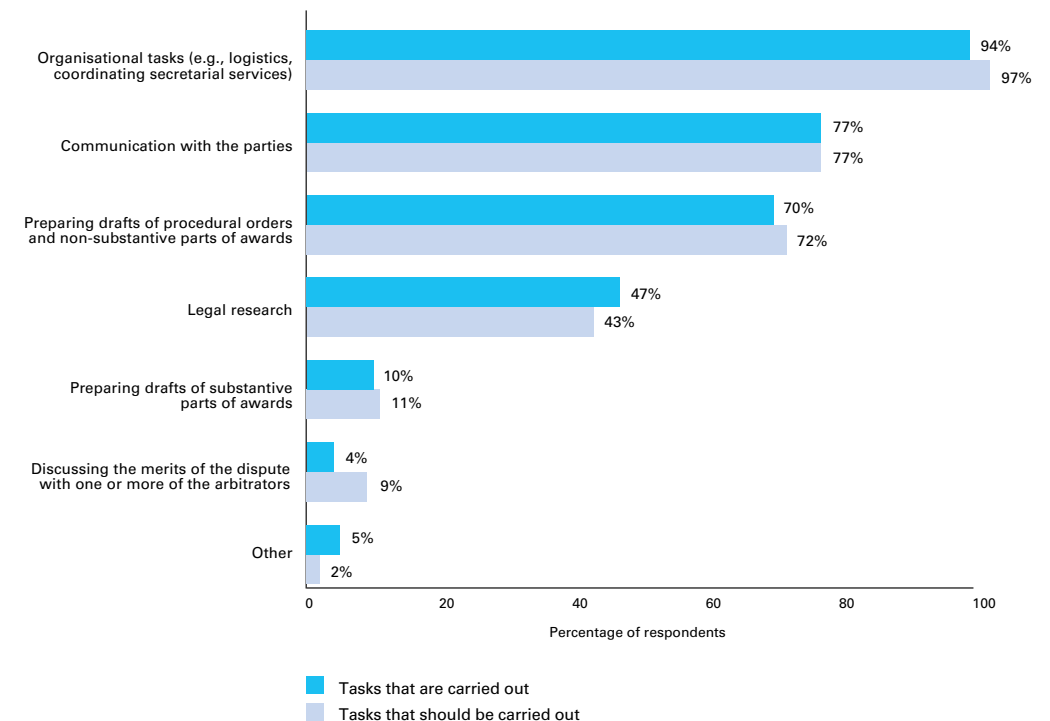
We asked arbitrators to identify the tasks typically performed by tribunal secretaries, and all other respondents to identify the tasks tribunal secretaries should carry out. There were very few differences between the two sets of findings, as shown in Chart 8. Interestingly, the survey shows that the concerns which are often raised regarding tribunal secretaries are generally unjustified: 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.

These findings generally confirm the approach adopted in the ICC's recently revised 'Note on the Appointment, Duties and Remuneration of Administrative Secretaries', which states that administrative

secretaries may perform organisational and administrative tasks such as transmitting documents and communications on behalf of the arbitral tribunal, organising hearings and meetings, taking notes or minutes, conducting research, and proofreading and checking citations, dates and cross-references in procedural orders and awards.⁶

However, in contrast to the Note which states that the arbitral tribunal should under no circumstances delegate 'its duty personally to review the file and/or to draft any decision',⁷ 70% of arbitrators said that tribunal secretaries, when appointed, prepared 'drafts of procedural orders and non-substantive parts of awards'. To put it another way, the views of respondents are more liberal on this practice: a notable majority (72%) believe that tribunal secretaries should be allowed to prepare such non-substantive drafts.

Chart 8: Tasks that are / should be carried out by the tribunal secretary:



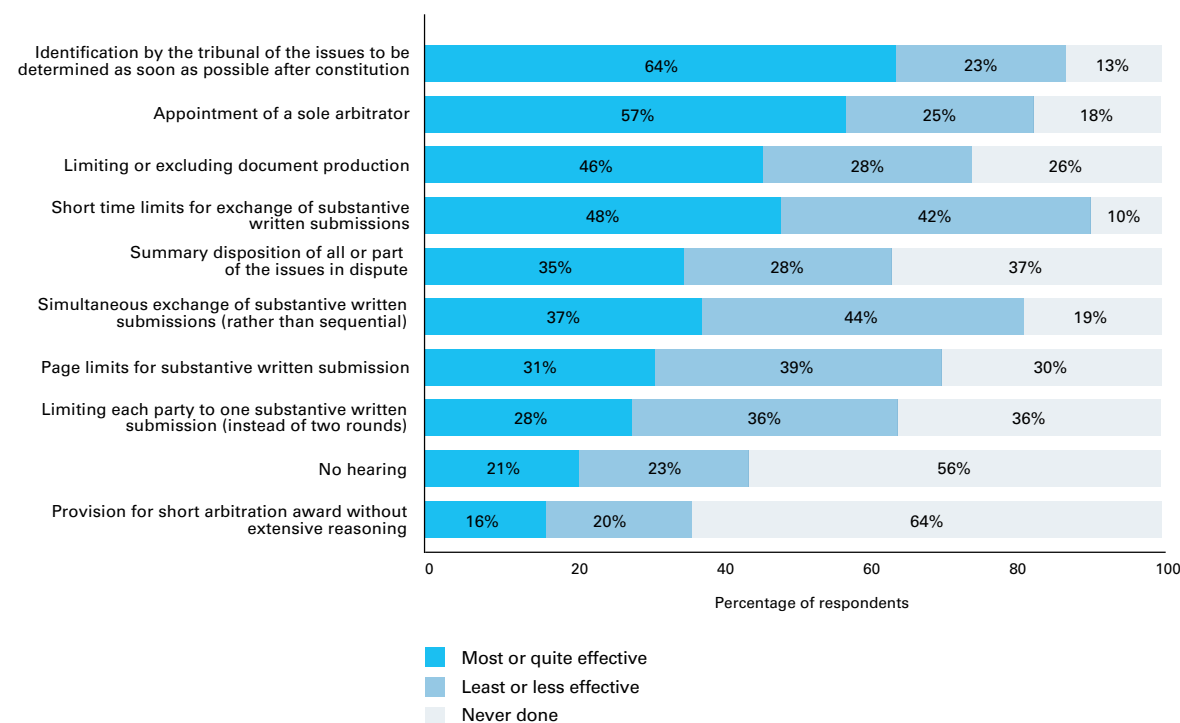
6. International Court of Arbitration (ICC), Note on the Appointment, Duties and Remuneration of Administrative Secretaries, 1 August 2012.

7. 'A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.'

What are the most effective methods of expediting arbitral proceedings?

The time that arbitration takes from filing a request for arbitration to rendering an award has increasingly been a major criticism levelled against international arbitration. It was also identified as the second most commonly expressed disadvantage of international arbitration by corporate counsel in the 2006 International Arbitration Survey (after expense).⁸ In this survey, we therefore sought to uncover the effectiveness of various methods of expediting arbitral proceedings by inviting respondents to rate their effectiveness.

Chart 9: Rate the following methods for their effectiveness in expediting arbitral proceedings in your arbitrations over the past 5 years:



8. 2006 International Arbitration Survey, page 6.

2 Organising arbitral proceedings (cont.)

An analysis of the overall results in Chart 9 reveals that 'identification by the tribunal of the issues to be determined as soon as possible after constitution' was identified as the most effective method of expediting proceedings (64% of respondents find it 'the most effective' or 'quite effective'), followed by 'appointment of a sole arbitrator' (57%), and 'limiting or excluding document production' (46%). Overall, the least effective method identified was 'simultaneous exchange of substantive written submissions' (44% of respondents find it 'the least effective' or 'less effective'), followed by 'page limits for substantive written submissions' (39%).

There is clear disagreement among respondents on the effectiveness of setting short time limits for the exchange of substantive written submissions: 48% find it effective, while 42% do not.

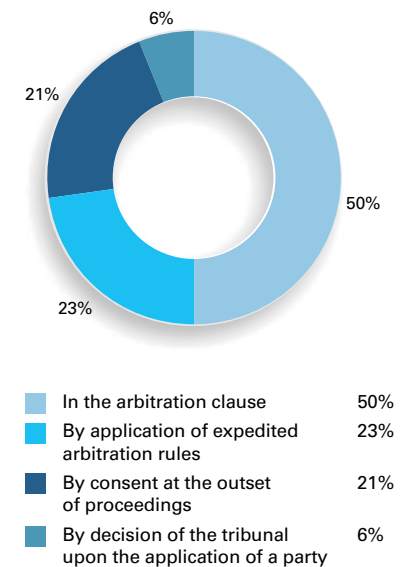
Less than half of respondents had experience of completing an arbitration without a hearing, or having a 'provision for a short arbitration award without extensive reasoning', making it difficult to draw strong conclusions about their effectiveness.

How common are fast-track arbitrations and how do they usually arise?

Despite its increasing publicity in recent years, fast-track arbitration is still rare: over half of respondents (54%) had no experience of fast-track arbitration over the past 5 years, 41% were involved in a small number of fast-track arbitrations (between 1-5), and only 5% were involved in a substantial number of fast-track arbitrations (6 or more).

Exactly half of fast-track arbitrations arise from the arbitration clause, 23% arise from the application of expedited rules and 21% arise from the consent of the parties at the outset of proceedings.

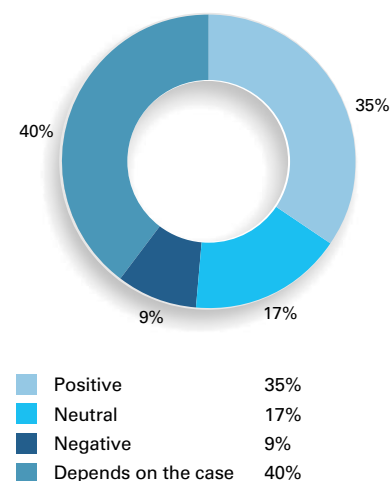
Chart 10: How do fast-track arbitrations come about?



What are respondents' experiences and views of fast-track arbitration?

35% of respondents said their experience with fast-track arbitration when compared to regular arbitration was 'positive', 17% said it was 'neutral', 9% said it was 'negative' and 40% said that it depends on the case. Interviewees who had experience with fast-track arbitration explained that it worked well in simple cases, but was inappropriate for complex arbitrations. In the latter cases, they often believed it jeopardised the quality of the award.

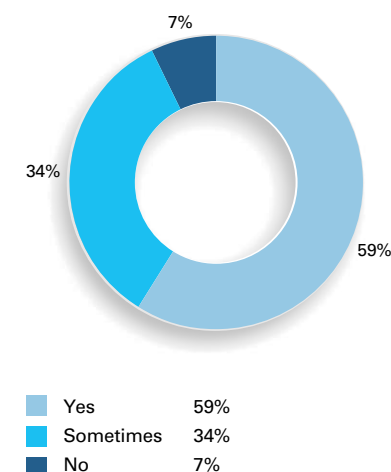
Chart 11: How was your experience with fast-track arbitration, when compared to a 'regular' arbitration?



Leaving aside any adverse effects on the quality of the award, does fast-track arbitration actually result in significantly faster proceedings? The vast majority of respondents (93%) said that shortened time limits in fast-track arbitrations were either generally complied with (59%) or complied with sometimes (34%). More common lawyers (68%) than civil lawyers (50%) indicated that shortened time limits were generally complied with.

In contrast to respondents' modest experience with fast-track arbitrations, the survey shows that almost two-thirds of respondents are willing to consider fast-track clauses for future contracts: 60% of respondents said that they would favour fast-track clauses for certain contracts (depending on the contract) and another 5% said they generally favour fast-track clauses for future contracts, while only 21% do not favour fast-track clauses for any contract. Many interviewees explained that they favour having a fast-track arbitration clause when it is possible to anticipate that the potential dispute would be simple and of small value.

Chart 12: Were the shortened time limits generally complied with?



3 Interim measures and court assistance

Requests for interim measures to arbitral tribunals are not common, and requests for interim measures to courts are rare

Summary

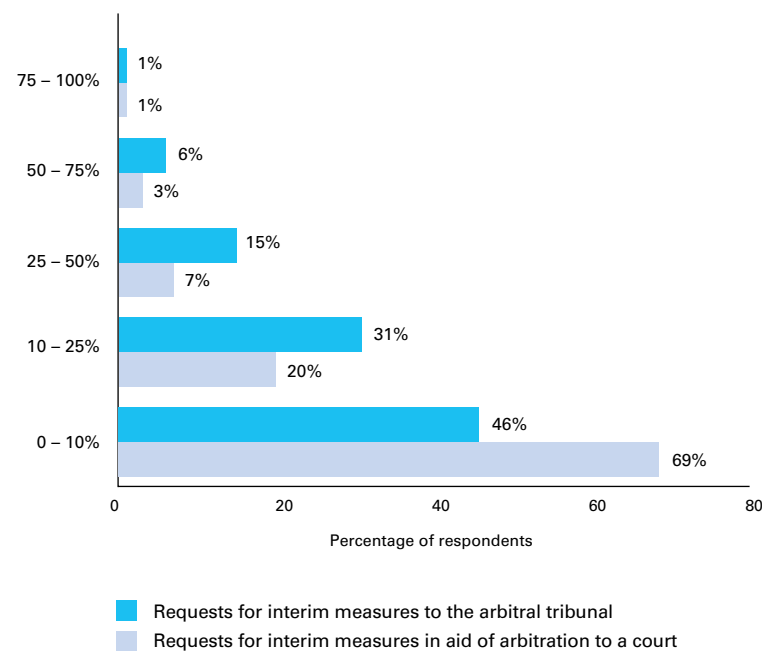
- Despite being the subject of significant legal commentary, requests for interim measures to arbitral tribunals are relatively uncommon: 77% of respondents said they had experience with such requests in only one-quarter or less of their arbitrations. Even rarer are requests for interim measures in aid 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).

How common are requests for interim measures?

While much ink has been spilled on discussing the use and effectiveness of interim measures in international arbitration, the survey reveals that such measures are in fact relatively uncommon: 77% of respondents said they had experience with such requests to arbitral tribunals 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.

To put it another way, only 7% and 4% of respondents had experience with such requests to arbitral tribunals and to courts, respectively, in at least half of their arbitrations.

Chart 13: What % of your arbitrations involved requests for interim measures to the arbitral tribunal (including the arbitral institution or an emergency arbitrator), and what % involved interim measures in aid of arbitration to a court?

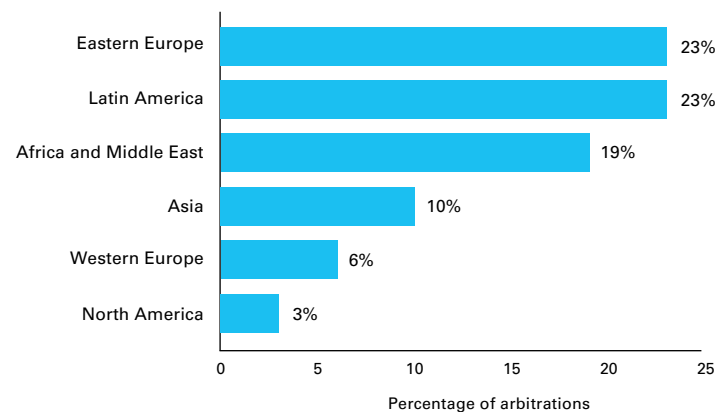


How often do arbitral tribunals grant interim measures and how often are they complied with voluntarily?

On average, only 35% of all interim measures applications addressed to the arbitral tribunal are granted – and of those applications which are granted, the majority are complied with voluntarily (62%). By region, the rate of voluntary compliance is highest in North America and Western Europe (both 68%) and lowest in Eastern Europe (39%).

On average, parties seek enforcement by a court in only 10% of interim measures applications which are granted by the arbitral tribunal. However, the results vary significantly by region. Respondents from Eastern Europe and Latin America seek enforcement in courts most often (both 23%), whereas respondents from North America do so least often (3%).

Chart 14: In what % of arbitrations did a party seek enforcement by a court of tribunal-ordered interim measures?

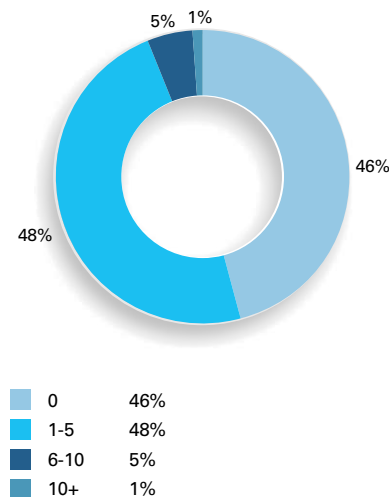


3 Interim measures and court assistance (cont.)

How common are applications for security for costs?

The survey also confirmed that applications for security for costs in arbitration are rare, and the granting of those applications even rarer. The vast majority of respondents (94%) either had no experience (46%) or very limited experience (1-5 arbitrations) (48%) with such applications. When security for costs is requested, tribunals grant it in whole or in part in only one-quarter of all applications.

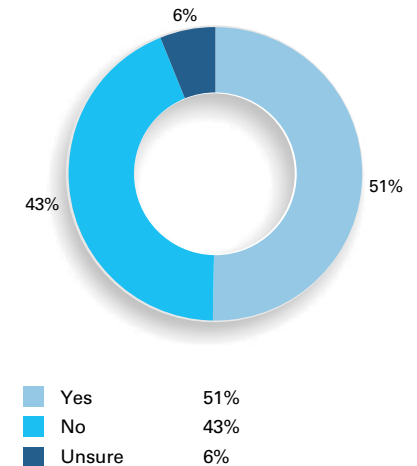
Chart 15: Over the past 5 years, how many of your arbitrations have involved an application for security for costs?



Should arbitrators have the power to order interim measures *ex parte*?

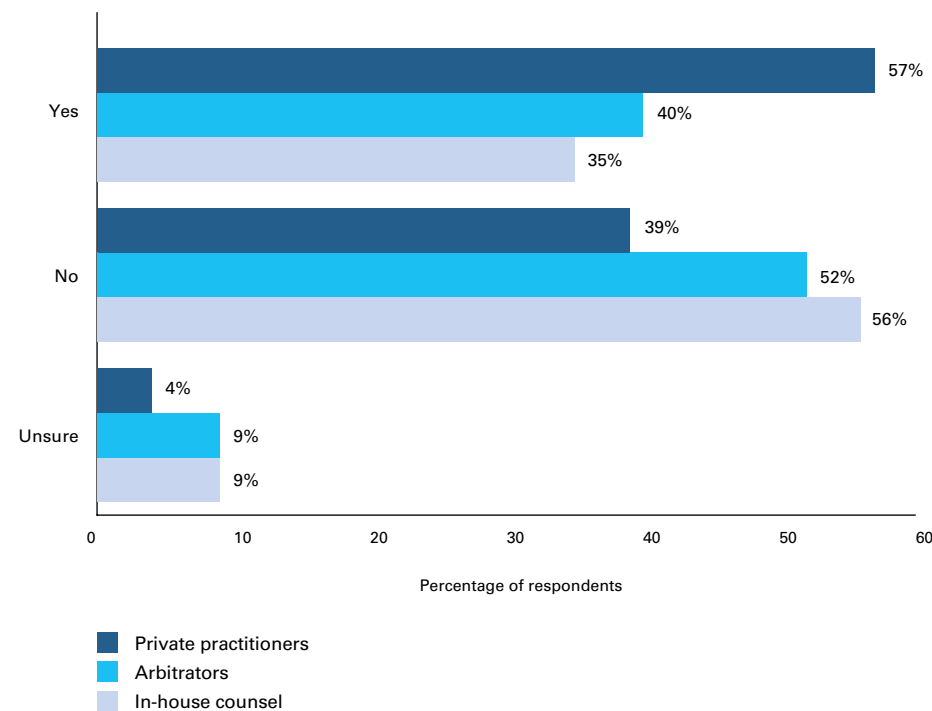
One of the more contentious 'hot topics' of international arbitration is whether arbitrators should have the power to order interim measures *ex parte* (i.e., without notice to the party against whom the measure is directed). The survey reveals a slight preference in favour of arbitrators having such a power: while just over half of respondents believe that arbitrators should have such a power, 43% believe they should not.

Chart 16: Should arbitrators in certain circumstances have the power to order interim measures *ex parte*?



When the results are broken down by legal background, the majority of civil lawyers (56%) are in favour of tribunals having the power to order interim measures *ex parte*, whereas 38% are against it. In contrast, common lawyers are more divided on this issue: 46% of them are in favour of such power, whereas 48% are against it. The contrast is even starker when the results are broken down by respondents' role: 57% of private practitioners are in favour of *ex parte* interim measures, compared to 40% of arbitrators and only 35% of in-house counsel.

Chart 17: Should arbitrators in certain circumstances have the power to order interim measures *ex parte*? Private practitioners v. arbitrators v. in-house counsel perspectives:



4 Document production

The standard for document production contained in Article 3 of the IBA Rules is considered to be the most appropriate in international arbitration

Summary

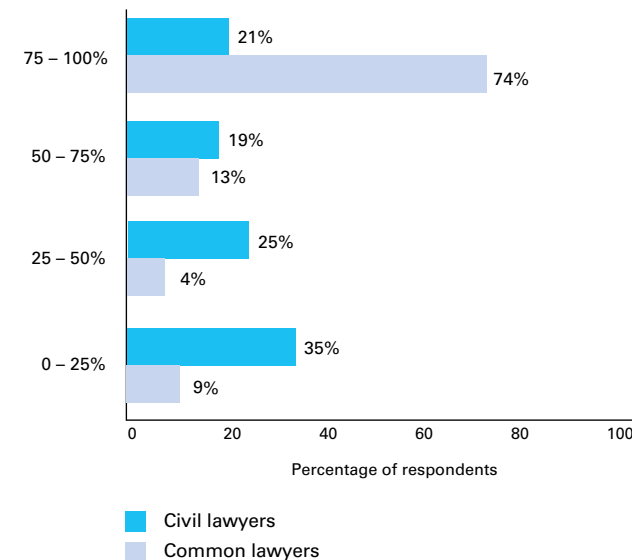
- Requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved such requests.
- The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common 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.

How common are requests for document production?

It is often said that the best evidence is documentary evidence. However, the document production process is also the most time-consuming and costly stage of the arbitration.⁹ The survey confirms that requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved requests for document disclosure, while only 22% said that less than one-quarter of their arbitrations involved such requests.

Document production is often considered an area of international arbitration where the views and experiences of civil and common lawyers clash the most. The survey confirms the widely held view that requests for document disclosure occur more frequently in the common law world: 74% of common lawyers compared to only 21% of civil lawyers said that three-quarters or more of their arbitrations involved such requests.

Chart 18: Over the past 5 years, what % of your arbitrations involved requests for document production by one or more of the parties?



9. 2010 International Arbitration Survey, page 32.

How often do tribunals explicitly draw adverse inferences?

The survey reveals that tribunals rarely explicitly draw adverse inferences from a party's failure to produce documents. A significant majority of respondents (86%) said that tribunals have explicitly drawn adverse inferences in a very limited number of arbitrations (0-2). Interviewees confirmed that arbitrators are very hesitant to draw adverse inferences explicitly since they are afraid that this may be a ground for challenging the award. This begs the question whether the sanction of 'drawing adverse inferences' for a party's failure to produce documents stipulated in Article 9.5 of the IBA Rules has much teeth at all. Many private practitioners said during the interviews that arbitrators should make use of this power more often, as long as they give appropriate warnings to the parties in advance of doing so.

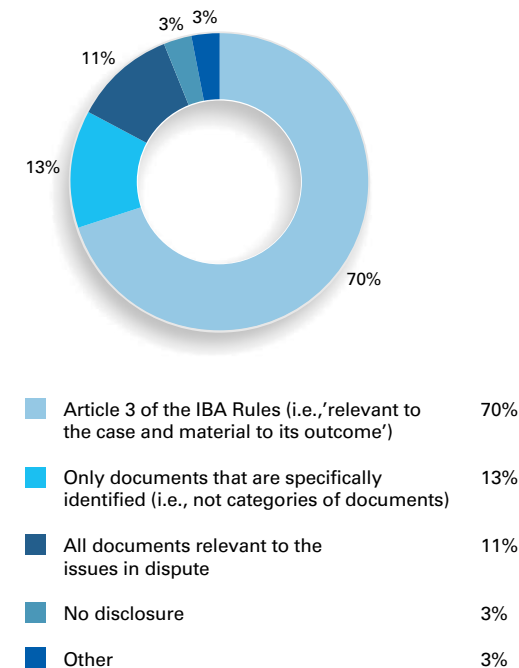
What standard should generally apply for document production in international arbitration?

As international arbitration spans the civil and common law worlds and their differing traditional approaches to document production, the scope of document production in international arbitration is a regularly discussed topic. Despite certain differences in the views of common and civil lawyers, the survey reveals that there is broad consensus within the arbitration community as to what the standard for document production should be. The majority of respondents (70%) believe that the standard contained in Article 3 of the IBA Rules should apply.¹⁰

On either side of this majority, 11% consider that all documents relevant to the issue in dispute should be disclosed, while 13% believe that only specifically identified documents should be disclosed and 3% believe there should be no disclosure at all.

More common lawyers (77%) than civil lawyers (63%) believe that the standard under the IBA Rules should apply. In contrast, more civil lawyers (20%) than common lawyers (5%) believe that the stricter standard of disclosing only specifically identified documents should apply.

Chart 19: What standard should generally apply for document production in international arbitration?



¹⁰ Article 3.3 states:

'A Request to Produce shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

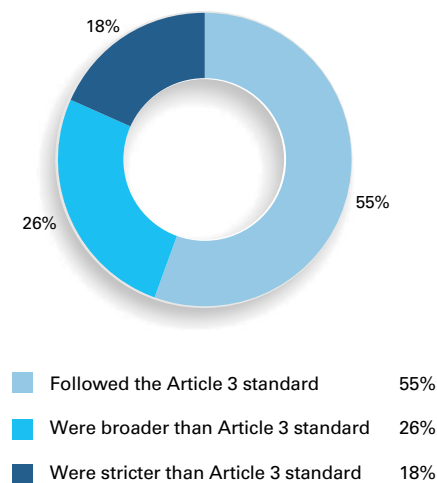
(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.'

4 Document production (cont.)

Do tribunals follow the standard under Article 3 of the IBA Rules?

In cases where Article 3 of the IBA Rules applied, 55% of respondents found that the tribunal followed that standard (i.e., the tribunal ordered production of documents that were not only 'relevant to the case' but also 'material to its outcome'), 26% found that the tribunals' orders were broader, and 18% found that their orders were narrower.

Chart 20: In your cases where Article 3 of the IBA Rules applied, did you find that document production orders usually:



How common is the use of the 'Redfern schedule' and how efficient is it?

The 'Redfern schedule', originally devised by English arbitrator Alan Redfern, is a table containing four columns which set out (i) a description of the documents requested; (ii) the requesting party's justification for the request; (iii) the opposing party's reasons for refusing the request; and (iv) the tribunal's decision on each request.

On average, 37% of arbitrations involve the use of the Redfern schedule as a method of managing the document production process. Perhaps not surprisingly given its English origins, the Redfern schedule is used slightly more frequently in common lawyers' arbitrations (43%) than civil lawyers' arbitrations (30%).

Overall, most respondents who have experience using the Redfern schedule find it to be an efficient method of managing the document production process. The most revealing statistic is that 46% of respondents believe that the Redfern schedule is better than any alternative for managing the document production process, compared to only 4% who think it is an inefficient method (34% think this depends on the case and 16% have no view).

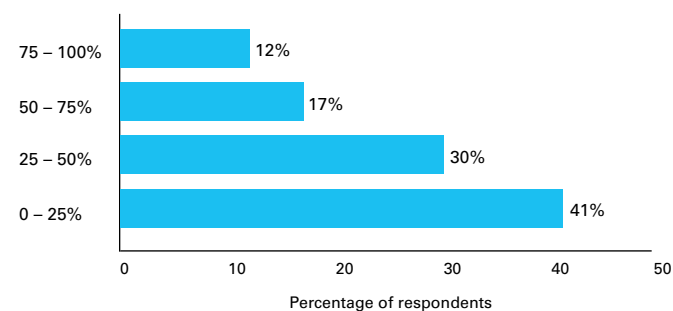
How often do documents obtained through document production materially affect the outcome of the case?

A majority of respondents (59%) believe that documents obtained through document production materially affected the outcome in at least one-quarter of their arbitrations, and 29% of these respondents believe this happened in at least half of their arbitrations.

These findings show that documents obtained through document production are crucial to a statistically significant percentage of arbitrations. The survey thus confirms that, despite being the most costly element of an international arbitration (see page 20 above), document production can be a worthwhile step in the arbitral process given its potential to affect the outcome of the case.

The belief that documents obtained through document production materially affected the outcome of the case is significantly higher among common lawyers than civil lawyers: 40% of common lawyers, as opposed to only 17% of civil lawyers, believe this occurred in at least half of their arbitrations. This divergence may result from differing perceptions on the usefulness of document production, and/or from the fact that, as discussed on page 20 above, common lawyers engage more often in document production in international arbitration than civil lawyers.

Chart 21: Over the past 5 years, in what % of your arbitrations do you believe that documents obtained through document production materially affected the outcome of the case?



5 Fact and expert witnesses

Cross-examination is considered to be a highly effective form of testing fact and expert witness evidence

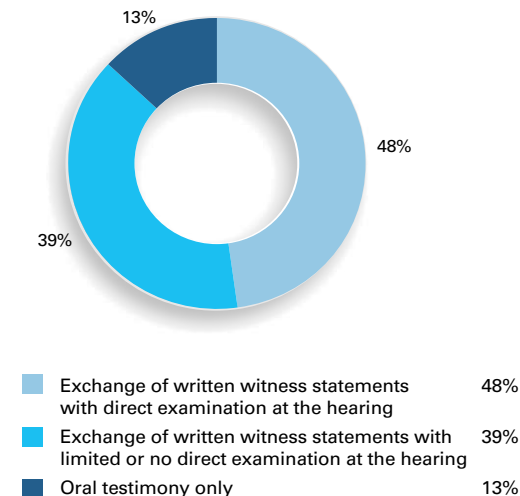
Summary

- 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.

How is fact witness evidence usually presented?

The survey sought to explore the practices and preferences relating to the presentation of witness evidence. In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of written witness statements – together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). In contrast, fact witness evidence is offered solely by oral testimony in only 13% of arbitrations. The presentation of fact witness evidence by oral testimony only is more common in civil lawyers' arbitrations (21%) than in common lawyers' arbitrations (6%).

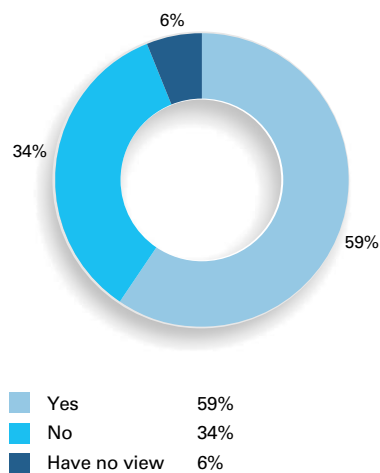
Chart 22: Over the past 5 years, in what % of your arbitrations was fact witness evidence offered by:



Is the use of written fact witness statements as a substitute for direct examination at the hearing effective?

Overall, 59% of respondents answered 'yes' to this question. However, when broken down by categories of respondents, the results vary significantly. The majority of North American respondents (73%), common lawyers (71%), arbitrators (69%) and private practitioners (60%) believe that the use of written fact witness statements as a substitute for direct examination at the hearing is effective, whereas fewer civil lawyers (51%), in-house counsel (40%) and Latin American respondents (35%) have the same view.

Chart 23: Is the use of written fact witness statements as a substitute for oral direct examination at the hearing generally effective?



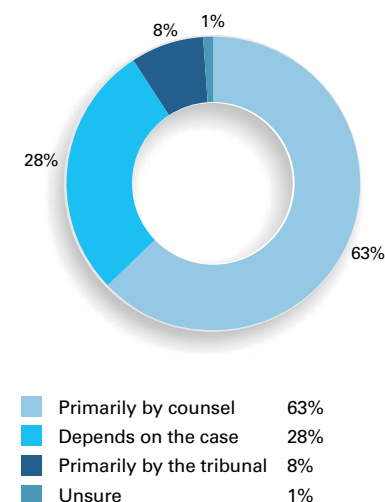
Interviewees commented that written fact witness statements are effective because they save time, avoid 'trial by ambush' and help provide counsel with a clearer overview of the opposing party's case. This facilitates a more focused cross-examination. Most interviewees, however, would still like to keep a limited direct examination (e.g., 5-10 minutes) to allow the witness to settle in and to discuss any issues that arose after the witness statement was submitted. Those interviewees who disliked the idea of substituting direct examination with written fact witness statements explained that this is because such statements are mostly written by lawyers and can often be repetitive of the pleadings. They also pointed out that arbitrators should have the opportunity to assess a witness's credibility before he or she gets 'crushed' by an experienced cross-examiner.

Who usually questions witnesses and which method of questioning is preferred?

In most arbitrations, witnesses are questioned primarily by counsel (83%) rather than by the tribunal (17%). Not surprisingly, however, questioning of witnesses primarily by the tribunal occurs more frequently in arbitrations of civil lawyers (24%) than in arbitrations of common lawyers (10%).

Consistent with the above practice, the majority of respondents (63%) also prefer witnesses to be questioned primarily by counsel, while only 8% prefer questioning primarily by the tribunal (28% said it depends on the case). More common lawyers (75%) than civil lawyers (52%) prefer witnesses to be questioned primarily by counsel.

Chart 24: Which method of witness questioning do you prefer?



5 Fact and expert witnesses (cont.)

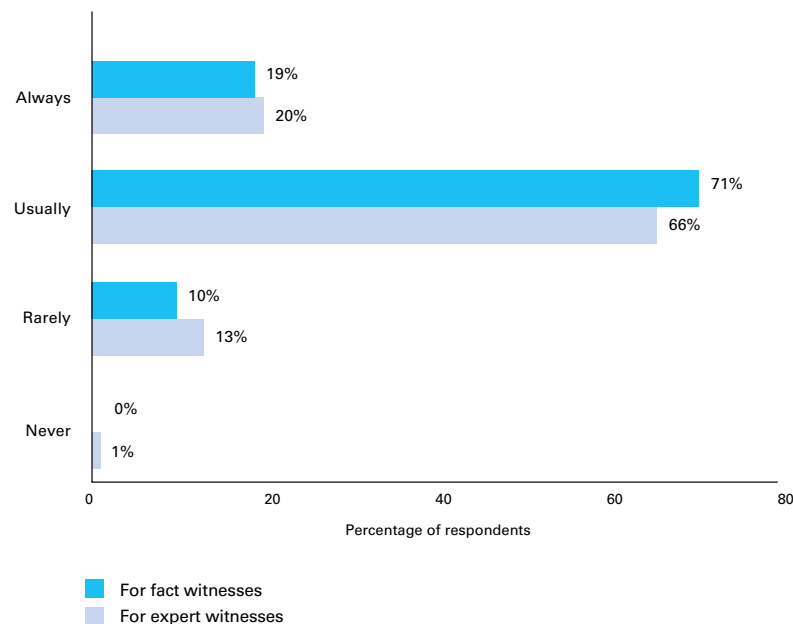
Is cross-examination an effective form of testing witness evidence?

There is very strong support for the use of cross-examination in international arbitration to test witness evidence. The vast majority of respondents said that cross-examination was either always or usually an effective form of testing the evidence of fact witnesses (90%) and expert witnesses (86%). Similarly, only 1% and 0% of respondents thought it was 'never' an effective form of testing expert and fact witness evidence, respectively.

How common is mock cross-examination of witnesses and is it considered appropriate?

The preparation of witnesses prior to their appearance at a hearing has long been a subject of controversy due to the varying approaches and rules across different

Chart 25: Do you believe that cross-examination is generally an effective form of testing witness evidence?

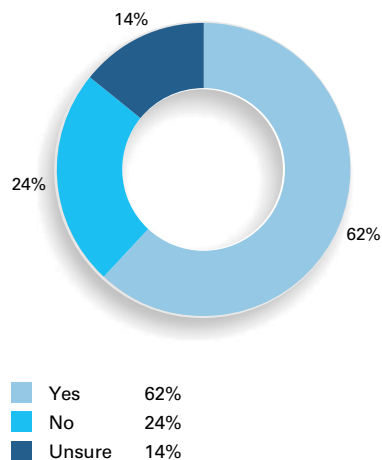


jurisdictions and cultures. Just over half of respondents (55%) said that mock cross-examination (i.e., simulated cross-examination on the facts of the present case) had been done in their arbitrations at some stage. Of those respondents who had some experience of mock-cross examination, they said it occurred in 66% of their arbitrations, although this was more frequent in common lawyers' arbitrations (70%) than civil lawyers' arbitrations (62%).

As to perceptions, 62% of respondents consider mock cross-examination of witnesses to be appropriate, and only a small minority (24%) considers it inappropriate (14% were unsure).

North American respondents were most experienced with mock cross-examination (72%), and consider it most appropriate (81%), whereas respondents from Africa and the Middle East were least experienced with mock cross-examination (36%) and consider it least appropriate (48%).

Chart 26: Is mock cross-examination of witnesses prior to their appearance at a hearing generally appropriate?



Several interviewees said that conducting mock cross-examination helps witnesses to get comfortable with the process of cross-examination, and to gain confidence and control over it. As a result, this may minimise the risk of surprise and confusion and thus prevent inaccurate or incomplete answers. On the other hand, those interviewees who found mock cross-examination inappropriate and unethical stated that witnesses should only be provided with an explanation of the examination process and general advice for testifying. It was also pointed out that arbitrators dislike coached responses and can easily detect them. As one interviewed practitioner put it: 'An overly prepared witness is the worst witness one can have'.

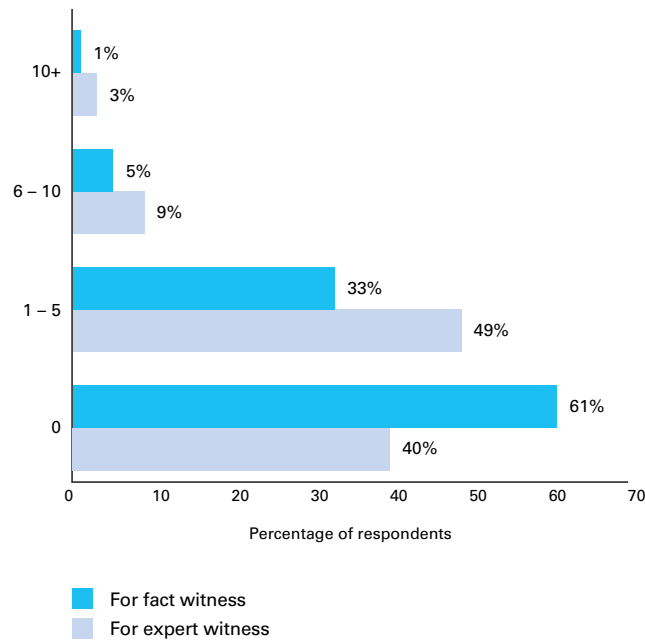
How common is witness conferencing?

Witness conferencing is a technique in which fact or expert witnesses presented by two or more parties are questioned together on a particular issue by the arbitral tribunal and sometimes by counsel. The process is said to reduce the time needed to take evidence in complex arbitrations involving many fact or expert witnesses.

The survey confirms that expert witness conferencing is more common than fact witness conferencing, although witness conferencing in general remains relatively uncommon. Only 39% of respondents have experienced fact witness conferencing, whereas 60% of respondents have experienced expert witness conferencing. In both cases, most respondents experienced witness conferencing in only a small number of cases: 33% of respondents experienced fact witness conferencing in only 1-5 cases, and 49% experienced expert witness conferencing in only 1-5 cases.

5 Fact and expert witnesses (cont.)

Chart 27: Over the past 5 years, in how many of your arbitrations was there witness conferencing ('hot-tubbing')?

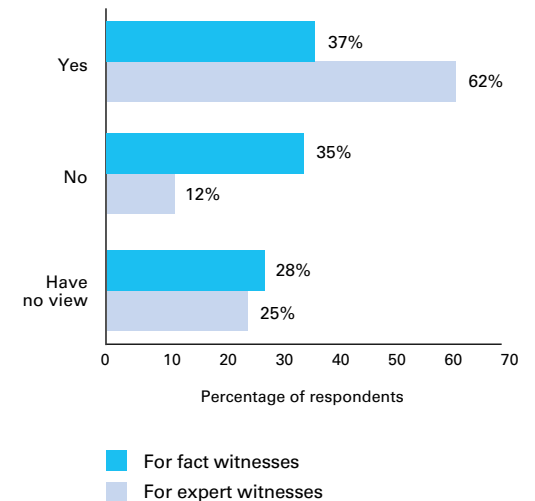


Should witness conferencing take place more often?

Reflecting current practices, the majority of respondents (62%) believe that expert witness conferencing should take place more often, while only a minority (37%) believe that fact witness conferencing should take place more often. Most interviewees explained that fact witness conferencing does not work well in practice, because fact witnesses testify to their subjective knowledge (i.e., recollection of facts) and their views can be reconciled only if they change their stories. Due to personal interests in the case (e.g., relationship with a party), fact witness conferencing can also become emotional and difficult to control.

In contrast, 'hot-tubbing' of expert witnesses is often effective as the expert witnesses discuss only their professional views. The peer pressure and debate which typically results from opposing experts sitting at the same table can also help with rephrasing incorrect or exaggerated previous statements and consequently reducing the number of issues on which experts disagree.

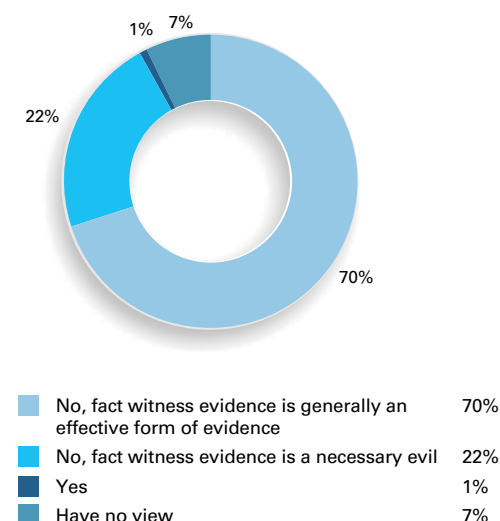
Chart 28: Do you believe witness conferencing should be done more often?



Should fact witness evidence be eliminated as a form of evidence?

The vast majority of respondents (92%) believe that fact witness evidence should not be eliminated as a form of evidence in international arbitration – because either it is ‘generally an effective form of evidence’ (70%) or it is ‘a necessary evil’ (22%). Only 1% of respondents would eliminate fact witness evidence (7% have no view). More common lawyers (78%) than civil lawyers (61%) think that fact witness evidence is an effective form of evidence.

Chart 29: Should fact witness evidence be eliminated as a form of evidence in international arbitration?



How common are expert witnesses and who should appoint them?

On average, expert witnesses are involved in two-thirds of arbitrations. They are appointed more regularly in common lawyers' arbitrations (77%) than civil lawyers' arbitrations (57%). 46% of respondents said financial/accounting experts are used most frequently, followed by technical (35%) and industry specific experts (17%), while legal experts are used least frequently (13%).

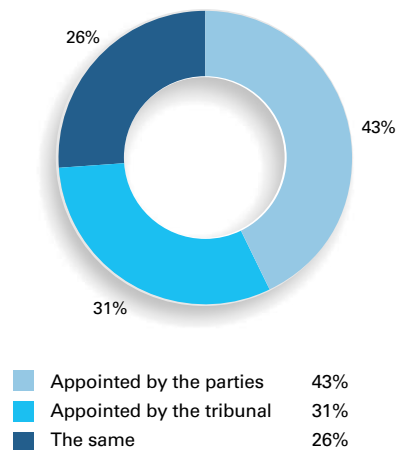
Expert witnesses are appointed by the parties in 90% of arbitrations and by the tribunal in 10% of arbitrations. These results are surprising in view of the continued debate on which method is more effective. Respondents' preferences are in fact more balanced: 43%

find expert witnesses more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective. Consistent with domestic litigation practice and culture, more civil lawyers (43%) than common lawyers (19%) find tribunal-appointed experts more effective.

Those interviewees who preferred tribunal-appointed experts said that party-appointed experts often act as partisan advocates for the party who appointed them, which regularly leads to the appointment of a third expert. According to them, a system whereby an expert witness is appointed by the tribunal from the outset would bring a more neutral expert opinion, as well as save time and money.

5 Fact and expert witnesses (cont.)

Chart 30: Do you consider the use of expert witnesses to be more effective when they are:



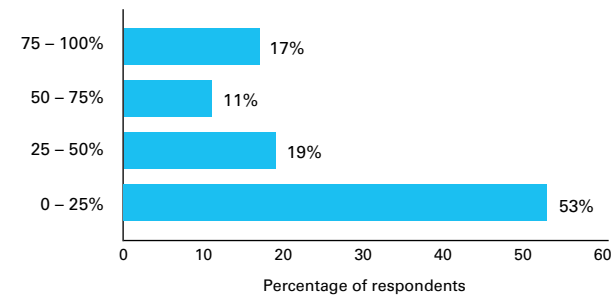
How often are experts directed to confer in advance of the hearing?

As Chart 31 illustrates, expert witnesses are rarely directed to confer in advance of the hearing in order to identify the issues on which they agree/disagree. Over half of respondents said that this happened in only 0-25% of their arbitrations.

Conferring of expert witnesses happens more often in common lawyers' arbitrations than in civil lawyers' arbitrations – 42% of common lawyers compared to only 16% of civil lawyers said it occurred in 50-100% of their arbitrations. Looking closer into the common lawyers' findings reveals that this practice occurs significantly more often in the United Kingdom than in the United States: 70% of UK respondents compared to only 16% of US respondents said it occurred in 50-100% of their arbitrations (reflecting the widely accepted practice in the English courts).

This practice is also common in construction arbitration: 46% of respondents working in the construction industry said it was used in 50-100% of their arbitrations.

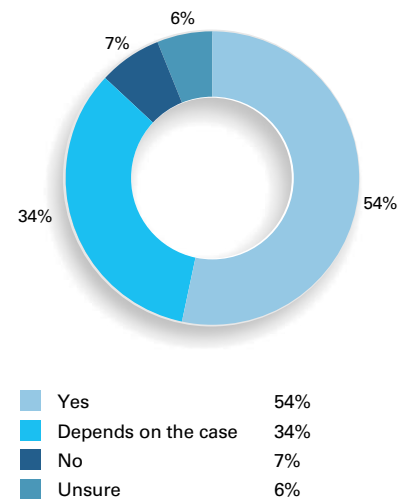
Chart 31: Over the past 5 years, in what % of your arbitrations were the expert witnesses directed to confer in advance of the hearing in order to identify the issues on which they agree/disagree?



In contrast to the above results, over half of respondents (54%) find the practice of experts conferring in advance of the hearing to be useful, compared to only 7% who do not (34% said it depends on the case). In line with the current practice, common lawyers (63%) are more convinced of the usefulness of experts conferring in advance of the hearing than civil lawyers (47%).

These results illustrate a disconnect between the 'current' and 'preferred' practices, suggesting that arbitrators should direct expert witnesses to confer in advance of the hearing more often than is currently done.

Chart 32: In your view, is the procedure of directing expert witnesses to confer in advance of the hearing useful?



6 Pleadings and hearings

There is a strong preference for sequential exchange of substantive written submissions over simultaneous exchange

Summary

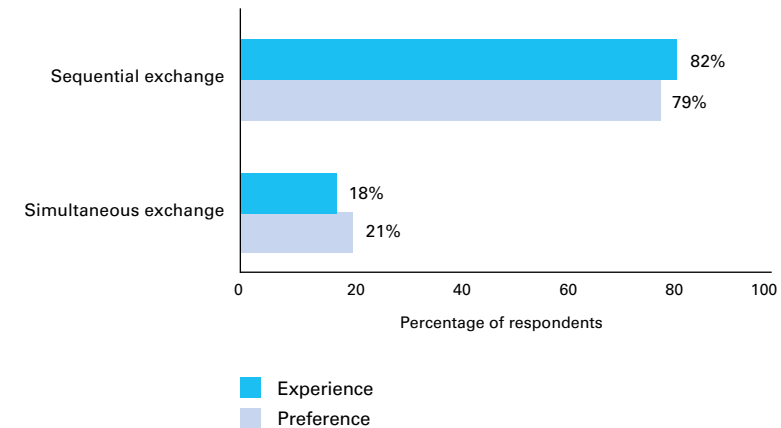
- Not only does sequential exchange of substantive written submissions occur much more regularly (82%) than simultaneous exchange (18%), there is also a strong preference for this type of exchange (79%).
- The survey reveals that only a small minority (15%) of merits hearings are held outside the seat 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).

How are substantive written submissions usually submitted? What are the preferred methods of submission?

Once the tribunal has been appointed and the procedural framework established, the next step is usually the exchange of substantive written submissions between the parties. Two methods are sequential exchange of written submissions and simultaneous exchange. The vast majority of respondents (82%) said that substantive written submissions are most commonly exchanged sequentially.

Reflective of current practices, there is also a strong preference for sequential exchange of substantive written submissions (79%). Interviewees explained that sequential exchange allows parties to address points raised in the opposing party's pleadings and to engage in a dialogue, unlike simultaneous exchange where parties' pleadings have been described as 'two ships passing in the night'. On the other hand, some interviewees who expressed a preference for simultaneous exchange said this is because they save time and costs.

Chart 33: What is the most common order of submission of substantive written submissions in your experience, and which do you prefer?

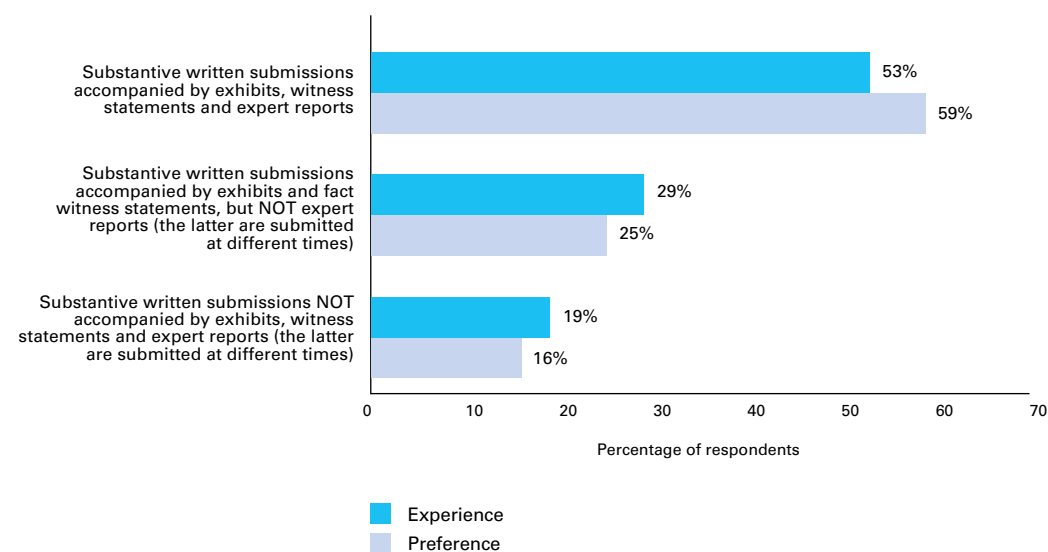


Substantive written submissions accompanied by exhibits, witness statements and expert reports are more common (53%) than substantive written submissions accompanied by exhibits and fact witness statements, but not expert reports (29%), or substantive written submissions filed alone (19%).

The method of filing substantive written submissions alone is more frequent in common lawyers' arbitrations (31%) than in civil lawyers' arbitrations (9%). Drilling down further, the higher percentage in common lawyers' arbitrations is primarily due to the prevalence of this approach in arbitrations of UK respondents (44%), compared to arbitrations of US respondents (17%).

As illustrated in Chart 34, the preferred practices once again closely resemble the current practices.

Chart 34: In your experience, which submission method is more common and which do you prefer?



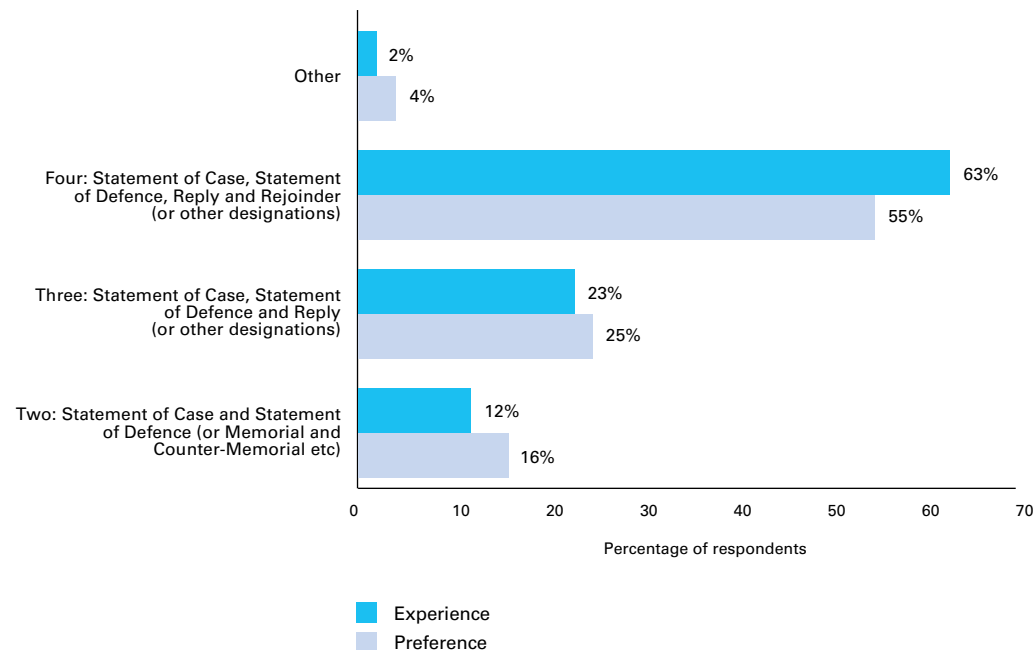
6 Pleadings and hearings (cont.)

How many written submissions are usually exchanged?

The majority of respondents (63%) said that the most common number of substantive written submissions that are exchanged between the parties is four: a Statement of Case, Statement of Defence, Reply and Rejoinder (or similar designations). Three substantive written submissions is relatively uncommon (23%), and two is rare (12%).

Once again, the preferred practices closely follow the current practices. A majority of respondents (55%) prefer the exchange of four substantive written submissions between the parties, although this number is significantly more favoured by civil lawyers (65%) than common lawyers (45%).

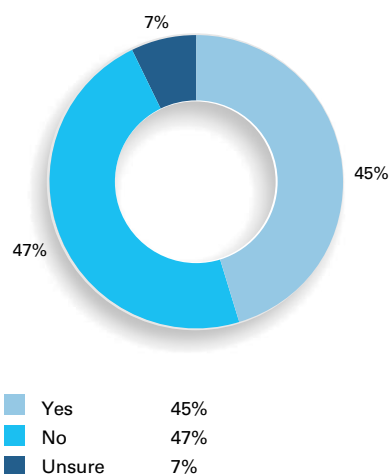
Chart 35: In your experience, what is the most common number of substantive written submissions, and what number do you prefer?



Should the length of substantive written submissions be limited?

The views of respondents are evenly divided on whether the length of substantive written submissions should generally be limited: 47% said they should not be limited, while 45% said they should. More common lawyers (52%) than civil lawyers (39%) think there should be a limit, as do more in-house counsel (57%) than private practitioners (48%) and arbitrators (40%).

Chart 36: Do you think the length of substantive written submissions should generally be limited?



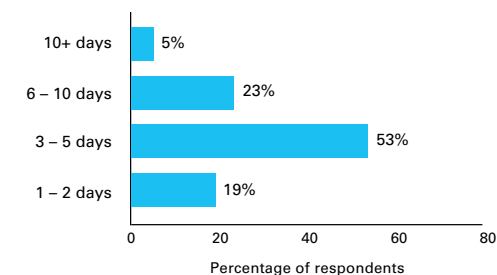
While some interviewees said that a limit on the length of substantive written submissions may lead to more efficient proceedings, many pointed out that it is difficult for arbitrators to set mandatory limits at the outset of the proceedings when they do not know how complex the case will be. Interviewees also noted that artificially imposed page limits do not work well in practice, as parties can often find ways to obviate them (e.g., by adopting smaller fonts and margins). Instead, it was stated that the length of substantive written submissions should be left to the self-censorship of lawyers who should endeavour to keep their pleadings concise in order to hold the reader's attention.

How are merits hearings usually organised and what is their average duration?

Most arbitral rules allow the tribunal to conduct merits hearings at a location other than the 'seat' of the arbitration, or even by telephone or video conference, if the circumstances of the case make it appropriate to do so. However, the survey reveals that only a small minority (15%) of merits hearings are held outside the seat of arbitration and only 4% take place primarily by means of telephone or video conference (compared to 41% of procedural hearings).

Just over half of respondents said that the average duration of the final merits hearings was 3-5 days. Civil lawyers have traditionally claimed that their hearings are shorter than common lawyers' hearings – the survey confirms this to be true: 31% of civil lawyers said the average duration of their hearings was 1-2 days, compared to only 9% of common lawyers. Similarly, 34% of common lawyers, compared to only 12% of civil lawyers, said the average duration was 6-10 days.

Chart 37: What has been the average duration of the final merits hearings in your arbitrations over the past 5 years?

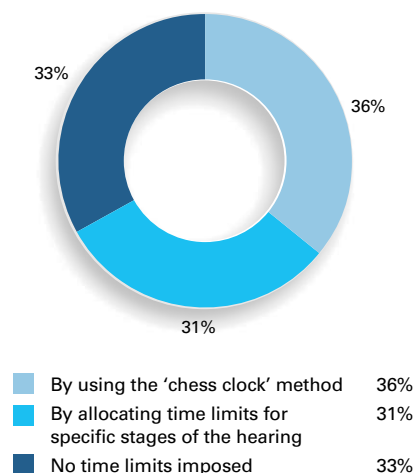


6 Pleadings and hearings (cont.)

How are time limits imposed at hearings and what is the preferred method?

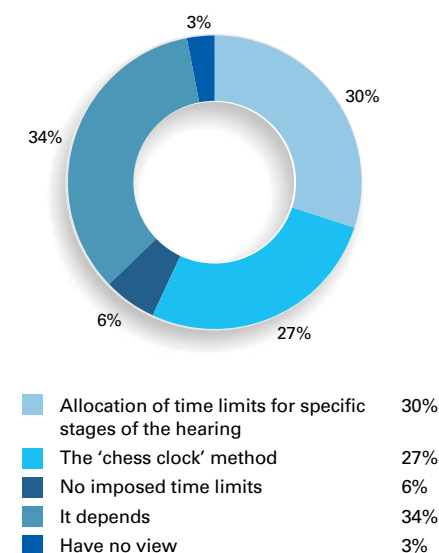
Hearings can be time-consuming and expensive. One way to reduce the time and costs of proceedings is to impose time limits on oral submissions and examination of witnesses at hearings. The survey reveals that these methods are employed in two-thirds of arbitration hearings: 36% by using the 'chess clock' method (i.e., parties have an overall allocation of time at the hearing which they may use as they please), and 31% by allocating time limits for specific stages of the hearing. The use of the chess clock method is more customary for common lawyers (44%) than civil lawyers (27%), while allocating time limits for specific stages in hearings is more customary for civil lawyers (38%) than common lawyers (22%).

Chart 38: In what % of your hearings were specific time limits imposed for oral submissions and/or examination of witnesses:



Although just over one-third of respondents said that their preferred method of imposed time limits depends on the case, most respondents prefer some form of time limits (57%), with the imposition of time limits for specific stages of the hearing (30%) being slightly more popular than the chess clock method (27%). Only 6% of respondents prefer the absence of any time limits.

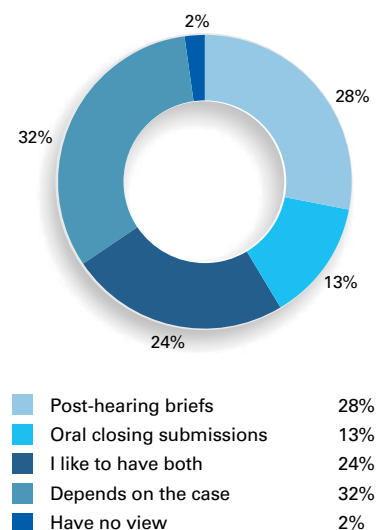
Chart 39: Which method of imposing time limits do you generally consider to be the most useful?



How common are oral closing submissions and post-hearing briefs? Which is more effective?

At the conclusion of merits hearings, the parties' lawyers are often given an opportunity to make oral closing statements and/or to submit post-hearing briefs in order to summarise the main points that emerged in evidence and argument. We asked respondents how common post-hearing briefs and oral closing submissions were in their arbitrations, and which they find more effective. The survey shows that post-hearing briefs (66%) are more common than oral closing submissions (53%). This proportion is broadly reflective of respondents' preferences: 28% find post-hearing briefs more effective while 13% find oral closing submissions more effective (32% said their preference depends on the case and 24% like to have both).

Chart 40: Which do you generally find more effective: oral closing submissions or post-hearing briefs?



Most interviewees explained that their preference for post-hearing briefs over oral closing submissions depends on the complexity of the case, the length of the hearing, and whether they feel they are winning or losing the case. If the hearing is long, includes many witness examinations and introduces new facts, then it is often preferable for counsel to take some time to go through the transcripts, analyse new facts and submit a focused post-hearing brief. According to many arbitrators, post-hearing briefs which include references to exhibits and the hearing transcript can be a very helpful resource when writing the award. To avoid repetition in post-hearing briefs, many other interviewees suggested that arbitrators should limit the issues which counsel may address and the number of pages.

On the other hand, oral closing submissions were praised for saving time and money, and allowing arbitrators to seek clarifications and to proceed immediately to deliberations while their recollection of the hearing is still fresh. Oral closings are particularly preferred by counsel when they believe they are winning the case, as they want to conclude the arbitration as quickly as possible before the other side has the opportunity to raise strong points in rebuttal in its post-hearing briefs.

7 The arbitral award and costs

Costs should be allocated according to the result on the merits and improper conduct by parties and their counsel should be taken into account by arbitrators when allocating costs

Summary

- 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.

How common are partial or interim awards and separate dissenting opinions?

To complete the picture regarding the arbitral process, our final topic concerned the arbitral award and costs. Before issuing a final award, arbitral tribunals are sometimes asked to make awards that determine only certain issues between the parties. According to the survey, partial or interim awards are issued in one-third of arbitrations.

While ideally the arbitral tribunal would render awards unanimously, in reality this is not always the case. An arbitrator who disagrees with the rest of the tribunal usually has the option of rendering a dissenting opinion. The survey reveals that separate dissenting opinions are issued in only 8% of arbitrations.

Most interviewees agreed that separate dissenting opinions have limited value and should only be issued in exceptional cases, such as when an arbitrator feels that an egregious error was made. Many criticised dissenting opinions for weakening the authority of the award and providing the losing party with a roadmap for challenging the award. On the other hand, some experienced arbitrators said that separate dissenting opinions can be useful as they force arbitrators to deliberate longer and to discuss their reasoning in greater depth. Most interviewees also confirmed that it is more common to have dissents embedded in the award without stating who the dissenting arbitrator is (e.g., 'the majority decided...').

How often do tribunals 'split the baby'?

A common criticism of arbitration is that tribunals unnecessarily 'split the baby' – in other words, they are unwilling to rule strongly in favour of one party. Is this a myth or does it really happen in practice?

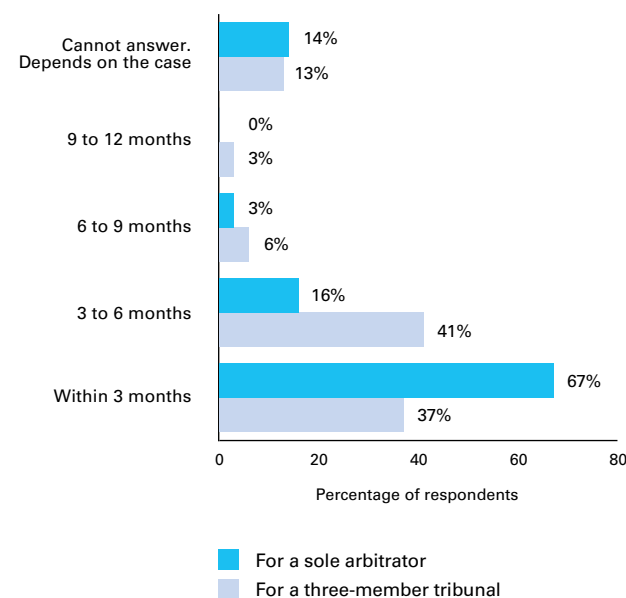
The best category of respondents to ask is arguably those making the rulings – the arbitrators – and they said this occurs in only 5% of their cases. However, the perception that this occurs is higher among the other categories of respondents: in-house counsel and private practitioners believe tribunals have unnecessarily 'split the baby' (i.e., courts in the same dispute would not likely have done so) in 18% and 20% of their cases, respectively. Overall, respondents consider that tribunals unnecessarily 'split the baby' in 17% of their cases.

What is an appropriate length of time for rendering an award?

Another common criticism of arbitration is that tribunals take too long to render awards. According to respondents, tribunals took unjustifiably long to render awards in 28% of arbitrations. Unsurprisingly, arbitrators believe this happened in only 12% of their arbitrations, whereas private practitioners and in-house counsel think this happened in 32% and 33% of their arbitrations, respectively.

Naturally, there are different expectations for sole arbitrators and three-member tribunals with respect to the appropriate length of time for rendering an award. For sole arbitrators, two-thirds (67%) of respondents believe that the award should be rendered within 3 months after the close of proceedings.

Chart 41: What do you generally consider to be an appropriate length of time to issue an award after the close of proceedings?



For three-member tribunals, over three-quarters of respondents (78%) believe that the award should be rendered either within 3 months (37%) or in 3 to 6 months (41%). Interestingly, when the three-member tribunal results are broken down by respondent type, 47% of arbitrators think that the appropriate time for rendering an award is within 3 months, whereas 45% of private practitioners and 50% of in-house counsel think the appropriate time is longer – 3 to 6 months.

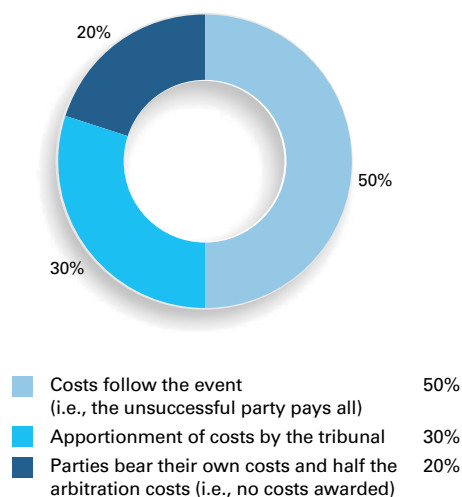
7 The arbitral award and costs (cont.)

How are costs usually allocated?

Arbitrators can allocate costs in a number of different ways. The survey shows that tribunals allocate costs according to the result in a significant majority of arbitrations (80%), on the basis of either 'costs follow the event' (i.e., the unsuccessful party pays all) (50%) or 'apportionment of costs by the tribunal' (30%). In only 20% of arbitrations do tribunals not allocate costs according to the result, instead leaving parties 'to bear their own costs and half the arbitration costs'.

From a regional perspective, the most common method of costs allocation for Asian, Western European and Eastern European respondents was 'costs follow the event' (57%, 54% and 53%, respectively), while the findings from all other regions were more evenly balanced amongst the choices.

Chart 42: Over the past 5 years, in what % of your arbitrations did the tribunal order costs on the basis of:



What is the preferred method of costs allocation?

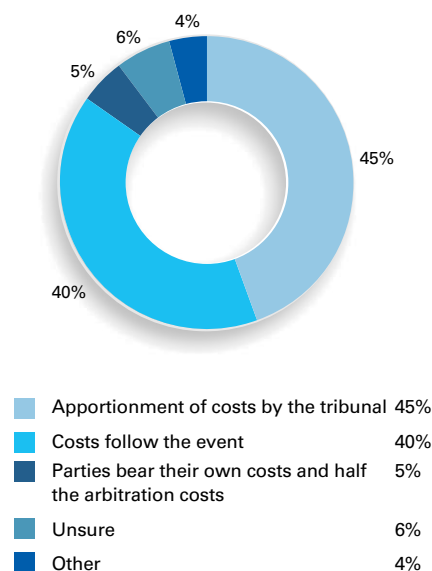
The survey shows that the high number of cases in which costs are allocated according to the result (80%) is in line with respondents' preferences: this approach is favoured by 85% of respondents. Respondents, however, have a slight preference for 'apportionment of costs' (45%) over 'costs follow the event' (40%), whereas in practice the latter method is more common (50%) than the former method (30%).

A much greater divergence exists between current and preferred practices with respect to the method of not allocating costs according to the result. While the survey reveals that tribunals do not allocate costs according to the result in 20% of arbitrations, only 5% of respondents prefer this approach.

From a regional perspective, the most popular method of costs allocation for respondents from North America, Eastern Europe, Africa and the Middle East and Latin America is 'apportionment of costs by the tribunal' (55%, 46%, 42% and 36%, respectively), while Asian and Western European respondents most prefer 'costs follow the event' (52% and 46%, respectively).

Based on the survey, one can thus conclude that tribunals should allocate costs according to the result even more often than is presently done, and that there is a slight preference for allocation according to the parties' relative degree of success on the merits over a 'winner takes all' approach.

Chart 43: What type of costs allocation do you prefer?



Should improper conduct by a party or its counsel be taken into account when allocating costs?

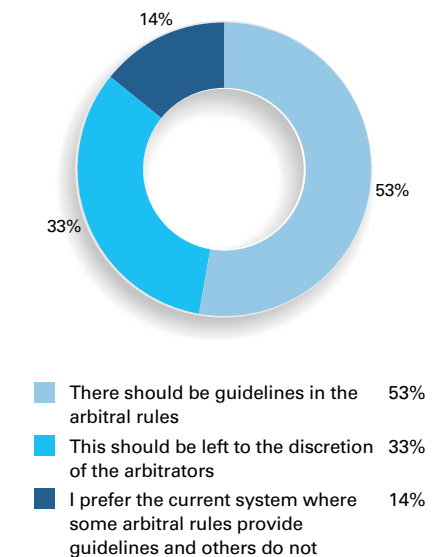
The survey indicates that there is significant support for the use of costs allocation as a tool for encouraging efficient and proper conduct of the proceedings. An overwhelming majority of respondents (96%) believe that improper conduct by a party or its counsel during the arbitral proceedings should be taken into account by the arbitral tribunal when allocating costs. This sends a strong message to arbitrators that they are expected to penalise improper conduct by parties and their counsel when allocating costs.

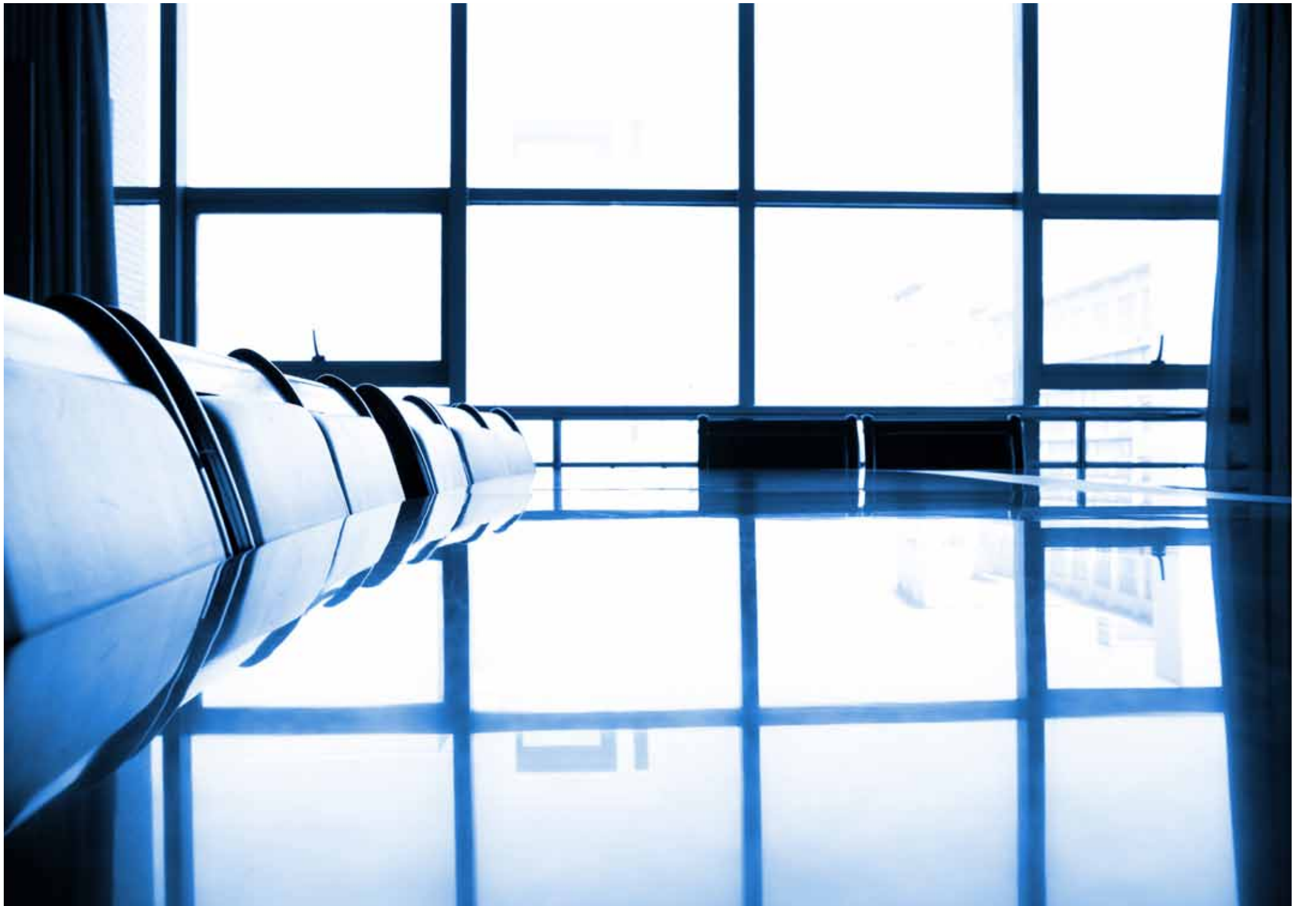
Should arbitral rules provide guidelines on the factors that arbitrators should take into account when determining costs?

Over half of respondents (53%) think that arbitral rules should provide guidelines on the factors that arbitrators should take into account when determining costs, while approximately one-third believe this should be left to the discretion of the arbitrators and 14% would maintain the current system (where some arbitral rules provide guidelines and others do not). This shows that greater predictability is sought than is currently provided by the various arbitral rules.

Unsurprisingly, in-house counsel are the strongest proponents, and arbitrators the most wary, of increased predictability. 75% of in-house counsel believe that there should be guidelines in the arbitral rules. By comparison, 55% of private practitioners and only 37% of arbitrators think such guidelines should exist.

Chart 44: Should arbitral rules provide guidelines on the factors that arbitrators should take into account when deciding on costs, or should this be left to the discretion of the arbitrators?





Appendices

Methodology	44
School of International Arbitration, Queen Mary, University of London	46
White & Case International Arbitration Group	47
White & Case International Arbitration Partners	48
Acknowledgements	50

The research for this study was conducted from January to August 2012 by Mr. Jure Zrilic, LLB, LLM (cum laude), White & Case Research Fellow in International Arbitration, together with Dr. Stavros Brekoulakis, LLB (Athens), LLM (London), PhD (London), Senior Lecturer in International Dispute Resolution and attorney-at-law, School of International Arbitration, Queen Mary, University of London. They were assisted by Professor Loukas Mistelis, LLB (Hons, Athens), MLE (magna cum laude), Dr. Iuris (summa cum laude, Hannover), MCI Arb, Advocate, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration; Director, School of International Arbitration, Queen Mary, University of London. An external group consisting of arbitrators, private practitioners and academics provided valuable comments on the draft questionnaire and the draft report.

The research comprised two phases: the first quantitative and the second qualitative.

Phase 1: An online questionnaire comprising 100 questions was completed by 710 respondents from March to July 2012. Respondents were primarily private practitioners (53%), arbitrators (26%), in-house counsel (10%), as well as counsel from arbitral institutions, academics and expert witnesses (together, 11%). The majority of respondents (71%) were involved in more than 5 international arbitrations in the past 5 years, and most of them (57%) worked for organisations that were involved in more than 20 arbitrations in the past 5 years. The questionnaire responses were analysed to produce the statistical data presented in this report.

Phase 2: 104 telephone interviews were conducted from May to July 2012. Interviews were based on a set of guideline questions and lasted on average for 15 minutes. Almost all interviewees completed the questionnaire prior to the interview. 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 some of the issues raised by the survey.

The following charts illustrate the composition of respondents by primary role, legal background, geographic location and geographic scope of their organisation.

Chart 45: Primary role

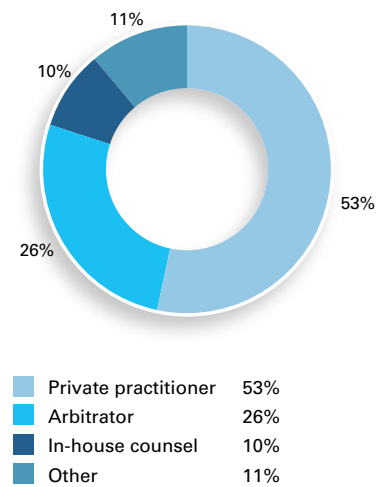


Chart 46: Legal background

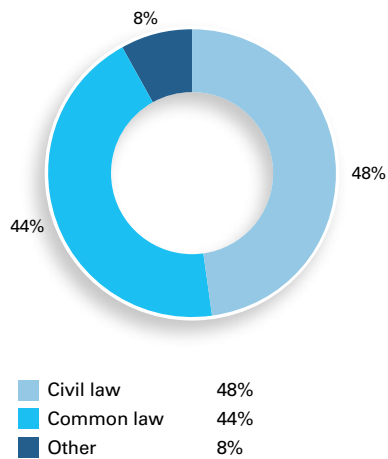


Chart 47: Geographic location

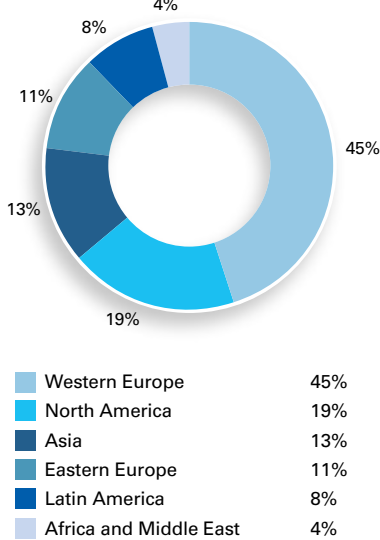
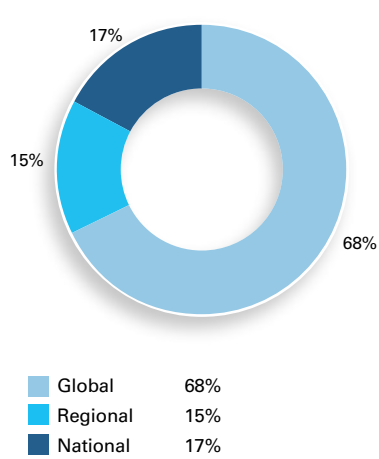


Chart 48: Geographic scope of respondent's organisation



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The School of International Arbitration (SIA) is a centre of excellence in research and teaching of international arbitration and is part of the Centre for Commercial Law Studies (CCLS) at Queen Mary, University of London.

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