



ANNUAL ARBITRATION SURVEY 2020

A right of appeal in International Arbitration
A second bite of the cherry: Sweet or Sour?

BCLP'S INTERNATIONAL ARBITRATION GROUP

Over the last 8 years we have conducted a number of surveys on issues affecting the arbitration process:

- Cyber-security in arbitration proceedings (2018)
- Unilateral arbitrator appointments (2017)
- Increasing diversity on arbitral tribunals (2016)
- The use of tribunal secretaries (2015)
- Choice of seat (2014)
- Document production (2013)
- Delay (2012)
- Conflict of interest (2010)

The report on each of those studies can be found on our International Arbitration practice page at bclplaw.com

RIGHTS OF APPEAL IN INTERNATIONAL ARBITRATION



For this year's BCLP arbitration survey we wanted to consider the question of whether parties to arbitration should have the right to appeal a tribunal's decision on the merits.

In other words, the right to seek review of the award, not because of a lack of jurisdiction, or some irregularity in the procedure followed, but simply because the decision that the tribunal has made is wrong.

We also wanted to examine whether, if a right of appeal is to be encouraged, it is better that the appeal be undertaken as part of an internal appellate process offered by arbitral institutions, rather than by way of an appeal to a national court?

We have once again canvassed the opinions of the many international arbitration practitioners and users with whom we work.

We would like to thank all those who responded to the survey.

GEORGE BURN

Head of International Arbitration

A handwritten signature in blue ink, appearing to read 'George Burn', written over a horizontal line.

THE

ISSUES

FINALITY OF THE AWARD

One of the reasons why parties choose arbitration over litigation is the principle of finality – that the decision of an arbitral tribunal on the substance of the dispute cannot be appealed.

An attack on the merits of the award (referred to in this report as an “appeal”) is generally not permitted. This principle of finality is embodied in the rules of major arbitral institutions, and recognised in the national laws of nearly all popular arbitration seats – whether by adoption of the UNCITRAL Model Law or by free-standing legislation.

In contrast, procedures for court challenge of an award at the seat of arbitration on the basis of procedural irregularity or jurisdictional error (a separate matter not addressed in this report) are widely available. The right to resist enforcement of an award in the courts of the place of enforcement (again, not addressed in this report) is also accepted, although the grounds of challenge will in nearly all cases be limited to those available under the New York Convention, again primarily concerned with jurisdiction and process.

ARGUMENTS IN FAVOUR OF A RIGHT OF APPEAL

A right of appeal against a decision made by a court is embedded in most judicial systems, and seen by many as a necessary protection. This causes some to ask why the same approach should not apply in arbitration, and to suggest that the finality of arbitration awards undermines the legitimacy of the arbitration process. If there is a mistake in the award but no right of appeal, the losing party may feel that they are left with no choice but to adopt strategies for evading performance of the award. It has also been suggested that, as the number of cases being decided by arbitration

increases, the lack of availability of an appeal against a mistake of law becomes less acceptable.

In common law systems, the precedent value of appellate court decisions also aids the development of commercial law in light of changing business practices and unforeseen events. In England – where, unusually among popular centres of arbitration, national arbitration law preserves a limited right of appeal – the restrictions on the bringing of an appeal contained in the Arbitration Act 1996 were criticised in 2016 by the (then) Lord Chief Justice as “*a danger... to the development of the common law as the framework to underpin the international markets, trade and commerce*”.

From an arbitration user’s perspective, it has been argued that there may be cases where the desire for a correct decision outweighs all other considerations. The value of the dispute may be extremely high and/or the consequences of a bad decision may be very grave. Given the consensual nature of arbitration and its intended flexibility in meeting the needs of business users, should not the arbitration process at least offer the option of an appeal? In a survey conducted in 2015 by the Queen Mary School of International Arbitration (QMSIA), among in-house counsel respondents the lack of an appeal mechanism on the merits was the third most frequently selected ‘worst characteristic’ of international arbitration.



If there is a mistake in the award but no right of appeal, the losing party may feel that they are left with no choice but to adopt strategies for evading performance of the award.



SWEET OR SOUR?

PARTY AUTONOMY

The principle of party autonomy is relied on by those on both sides of the debate.

Those against a right of appeal say that the finality of an award is part of the bargain that parties make when they select arbitration over litigation. The parties trade court procedures and the opportunity for appellate review in return for the flexibility, expedition and influence over choice of decision-maker that arbitration is said to offer.

Opponents of this position say that the argument that, because parties choose arbitration, they must accept that there is no right of appeal, is a circular one. Just as parties can agree to arbitrate, they can also agree that there should be a right of appeal. Providing a right of appeal on an “opt-out” basis actually enhances the parties’ contractual freedom, since it respects the wishes of those who want to have a right of appeal, as well as those that do not.

ARGUMENTS IN FAVOUR OF FINALITY

There are also arguments against a right of appeal on the merits.

Interestingly, some have suggested that, because arbitrators are in competition with each other, and are generally paid by the hour, the likelihood of them making a mistake is relatively small. Putting that view to one side, limited and exceptional control of awards by national courts has been long-accepted as an important reason for the success and development of international arbitration. Support for this view can also be found in the QMSIA surveys. In 2006, QMSIA surveyed corporate attitudes and practices among heads of legal departments, general counsel, and counsel in charge of arbitration/litigation, in corporations involved in cross-border transactions. 91% of the online respondents and an overwhelming majority of those interviewed rejected the idea of including an appeal mechanism in international arbitration. The ability to appeal was seen as making arbitration “more cumbersome” and “negat[ing] a key attribute of the arbitration process”. In the 2015 QMSIA survey, and in contrast to the views of in-house counsel mentioned earlier, 77% of all respondents (who included academics, arbitral institutions, arbitrators, in-house and external legal counsel, expert witnesses and other private practitioners with involvement in international arbitration) did not favour the inclusion of an appeal mechanism in international commercial arbitration.

For many parties, opting-out of national court jurisdiction by agreeing to arbitrate is a positive choice. They wish to have their dispute resolved in a different manner to how it might be resolved in national courts. They may want a neutral decision-maker independent of those national courts. Permitting a court to substitute its decision on the merits for that of the tribunal chosen by the parties will undermine those choices.

Appeal procedures are also time-consuming and expensive. Increasing the duration and cost of the arbitration process by permitting an appeal may operate to its detriment. As to the point that appellate decisions make better law, why should users of arbitration – a private dispute resolution process – pay to develop the law by funding appeals through national courts?

INVESTMENT ARBITRATION

Awards produced under the ICSID regime – which for reasons of transparency are generally published – give rise to very different considerations. Under the ICSID Rules, an unsuccessful party may request annulment of an award on limited grounds. As with the right to challenge an award in international commercial arbitration, annulment under the ICSID Rules is fundamentally different from an appeal – it is not concerned with whether the substance of the award is correct, but rather with the quality and

fairness of the decision-making process. During the drafting of the ICSID Convention, a proposal that grounds for annulment should include “manifestly incorrect application of the law” was expressly rejected. However, this position has contributed to two (arguably) unfortunate developments in investment arbitration. First, because many investment treaties contain provisions that are litigated over and over again, parties to a dispute will rely on earlier decisions by other tribunals on the same point. The lack of any appellate process or associated system of precedent means that there are often inconsistent decisions on the same issue. Second, in relation to annulment proceedings, there have been periods when practitioners in the field noted a growing body of cases where the ad hoc committee considering annulment applications had strayed beyond the permitted grounds for annulment into areas that touched upon the substance of the award. One eminent practitioner said that the distinction between non-application of applicable law (a permitted ground for annulment under the ICSID Rules) and erroneous application of the applicable law (not a ground for annulment) was “melting away”. It will be interesting to see how current initiatives for reform of investor-state dispute resolution develop.

While the creation of an appellate jurisdiction to review the substance of an investment award might, in the early stages, add significantly more time and costs to already very expensive investor-state claims, in the long-run development of a body of appellate decisions may make such claims more efficient. The need to argue first principles over and over again or to ‘award-

shop’ for ‘first instance’ decisions supporting particular arguments would be much reduced, and there would be a greater degree of certainty in relation to outcome that might encourage a narrowing of the issues. In the 2015 QMSIA survey, there was less resistance from respondents to the idea of an appeal mechanism in investment arbitration than to its introduction in international commercial arbitration – 61% rather than the 77 % mentioned earlier.

However, investment arbitration is a very different animal from commercial arbitration, and has very different dynamics. Inherently political, and rarely the product of individually negotiated arbitration agreements, issues around rights of appeal and an appellate jurisdiction give rise to very different considerations to those in the commercial sphere (although also the subject of strongly held views on both sides of the debate). For this reason, we chose not to include questions directly relating to investment arbitration in this year’s survey.

“Increasing the duration and cost of the arbitration process by permitting an appeal may operate to its detriment.”

EMERGING TRENDS

There appears to be an increasing appetite for use of internal appellate procedures offered by the arbitration institution under whose rules the arbitration was conducted.

Some sector-based arbitration regimes such as GAFTA and FOSFA rules have long-established two-tier regimes providing for a new hearing by a board of appeal. The Court of Arbitration for Sport permits an appeal to be filed if expressly provided for by the rules of the federation or sports-body concerned. The CPR (International Institute for Conflict Prevention and Resolution) has had an 'opt-in' Arbitration Appeal Procedure since 1999. What is interesting is that the number of arbitral bodies who offer an appeal procedure appears to be growing. For example, JAMS (formerly, Judicial Arbitration and Mediation Services), the AAA (American Arbitration Association) and the SCA (Spanish Court of Arbitration) now all have an 'opt-in' arbitration appeal procedure. The rules of the ECA (European Court of Arbitration) contain appellate procedures that will apply unless the parties 'opt-out'.

These organisations are clearly alive to the danger that the additional time to reach a final determination under the appeal mechanism may work to the detriment of the arbitral process. The relevant rules generally provide for any appeal to be filed within a very short period



The parties trade court procedures and the opportunity for appellate review in return for the flexibility, expedition and influence over choice of decision-maker that arbitration is said to offer.

after publication of the award, and a finite period for production of the appellate decision. The CPR procedure provides that the parties and the tribunal are to use best efforts to ensure that the appeal is concluded within 6 months of its commencement. The JAMS rules provide that, absent any cause for delay, the appeal is to be decided within 21 days. In the SCA the appeal decision must be rendered within 2 months of the close of the appeal proceedings. By contrast, the ECA process allows more time. It states that the appellate decision is to be issued within 6 months, or 9 months if there is an evidentiary hearing. The notes to the AAA procedure anticipate that an appellate process can be completed in about 3 months.

Grounds for appeal also vary, but all involve a review on the merits, and in some cases provide that the review may extend to issues of fact. For example, the CPR rules cite "a material or prejudicial error of law"

but go on to refer to a situation where the award "is clearly unsupported by material on the record". The AAA rules encompass "an error of law that is material and prejudicial or determination of facts that are clearly erroneous". The SCA rules say that an appeal may be on the basis of findings of fact or law. In some cases the appeal is by way of re-hearing (ECA) and/or the admission of new evidence may be permitted (SCA).

Some of those responsible for drafting these rules have grappled with the question of what may be done with the original award in the meantime. Under the JAMS rules, once an appeal is commenced the award is no longer considered final for the purposes of seeking judicial enforcement. The AAA and CPR rules contain similar provision, but go on to say that any time periods for commencement of judicial enforcement proceedings are tolled for the duration of the appeal. Under the ECA rules, a party is permitted to take any essential steps to meet applicable court time limits for issuing applications, but must follow up those steps with a request for a stay of the proceedings until the appellate arbitral proceedings are heard. The SCA rules have no provisions dealing with the rights of a party to challenge or seek enforcement of an award in national courts pending conclusion of the internal appeal.

THE WAY FORWARD?

These developments raise some interesting questions. Is it time to revisit the traditional approach of discouraging appeals against arbitration awards?

It seems that it may be. Should the principle of finality yield to greater freedom of choice? If so, is it better that internal appeal mechanisms be incorporated into arbitration rules rather than having a national court intervene in the arbitration process? When should an appeal be permitted? Should an appeal mechanism be 'opt-in' or 'opt-out'? Should the facility to appeal an award be limited to cases where the value of the award is above a certain amount, or where the original tribunal was comprised of a sole arbitrator? Should this decision simply be left to the parties? Should the appeal process be completed within strict deadlines so as to avoid prolonging the dispute? What level of control should the parties have over selection of the appeal tribunal? Should appellate tribunals have fact-finding powers or should the appeal be limited to review of issues of law? How will an internal appeal mechanism sit with mandatory time limits for challenge or review of awards contained in national arbitration laws?

There is no right or wrong answer to these questions. Whether and how to recalibrate the balance between finality and quality of decision is likely to be the subject of ongoing debate in international arbitration. In the meantime, a continuing introduction of optional appeal mechanisms by arbitral bodies may result in a de facto erosion of the principle of finality in favour of individual party choice.

WHAT WE ASKED

- What direct experience did respondents have of a tribunal making an obviously wrong decision on the substance of a dispute?
- Would a right of appeal make international arbitration more or less attractive?
- What are the perceived advantages and disadvantages of a right of appeal in international arbitration?
- Should parties have the right to include in their arbitration agreement (and have recognised) an express provision for a right of appeal?
- Is an 'internal' right of appeal to a second-tier tribunal under the rules of the supervising arbitral institution preferable to a right of appeal to a national court?
- What are the features – with reference to constitution of tribunal, scope of the appeal and deadline for a decision – that it is desirable for such an 'internal' appeal process to have?

WHO WE ASKED

- Arbitrators
- In-house Counsel
- External lawyers working at law firms
- Those working at arbitral institutions
- Academics
- Expert witnesses
- Litigation Funders

The geographical regions in which our 123 respondents work include Central and South Asia (28%), North Africa (14%), Australasia (12%), East and South-East Asia (61%), the Middle East (33%), North America (20%), Latin America and the Caribbean (16%), Russia (24%), East Africa (11%), Western Europe (54%), Eastern Europe (including the CIS but excluding Russia) (24%) and West Africa (16%). 2% of respondents had other regional experience not included in the above.

KEY FINDINGS

GETTING IT WRONG

50% of respondents had direct experience of a tribunal making an obviously wrong decision on the substance of the dispute.

WHAT APPETITE IS THERE FOR A RIGHT OF APPEAL IN INTERNATIONAL ARBITRATION?

71% of respondents said that a right of appeal would make international arbitration less attractive.

However, 72% of respondents felt that rights of appeal in industry sectors that have long-established, well-developed and widely-used arbitration procedures providing or permitting appeals against an award (e.g. CAS arbitration in the sports sector and FOSFA/GAFTA in the commodities sector) should be left unchanged.

INTERNAL APPEAL PROCEDURES UNDER INSTITUTIONAL ARBITRATION RULES

Only 12% of respondents had experience of an internal appeal process under the rules of an arbitral institution. However, 48% of respondents said that an internal right of appeal to a second-tier tribunal organised by the arbitration institution under whose rules the arbitration was conducted would be preferable to a right of appeal to a national court. Support for an internal right of appeal in preference to an appeal to a national court was strongest among in-house counsel (77%), although reasonably strong among law firm respondents (54%) and arbitrators (38%).

PERCEIVED ADVANTAGES AND DISADVANTAGES OF A RIGHT OF APPEAL

62% of respondents felt that an appeal against an award to a national court is inconsistent with the parties' choice of a private dispute resolution procedure, and 37% of respondents felt that such an appeal is inconsistent with the principle of delocalisation of the arbitration process from national court systems.

However, 51% of respondents felt that in some cases the consequences of an incorrect decision are so serious as to make the lack of an appeal mechanism unacceptable. 47% of respondents felt that permitting appeals to national courts on the merits of a dispute may aid development of the law.

66% of law firm respondents, 69% of arbitrators and 38% of in-house counsel felt that a right of appeal would make the arbitration process too long. A similar percentage from each group felt that a right of appeal would make the process too expensive.

Only 8% of in-house counsel respondents felt that a losing party who cannot appeal an incorrect award may feel that they are justified in not complying with the award.

WHAT APPETITE IS THERE FOR A RIGHT

OF APPEAL IN INTERNATIONAL ARBITRATION?

QUESTION

Would a right of appeal make arbitration more or less attractive?



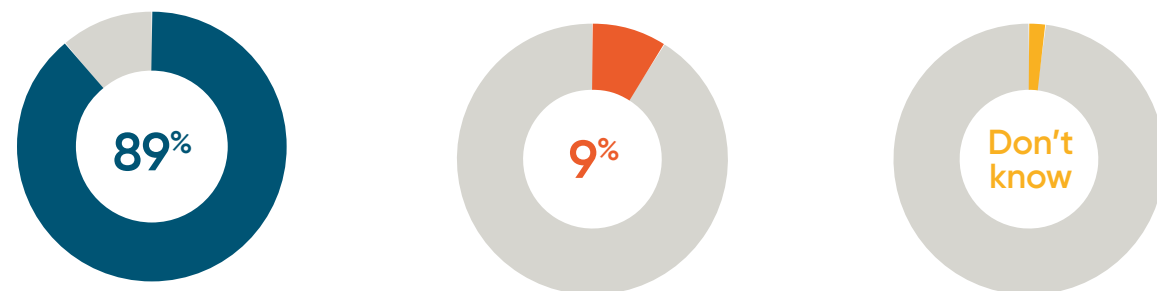
71% said that a right of appeal would make international arbitration less attractive.

24% said that a right of appeal would make international arbitration more attractive. Interestingly, 46% of in-house counsel fell into this group compared with only 15% of law firm respondents, and 19% who sit as arbitrator.

5% don't know.

QUESTION

If a right of appeal is adopted, should it be broad or narrow in scope?



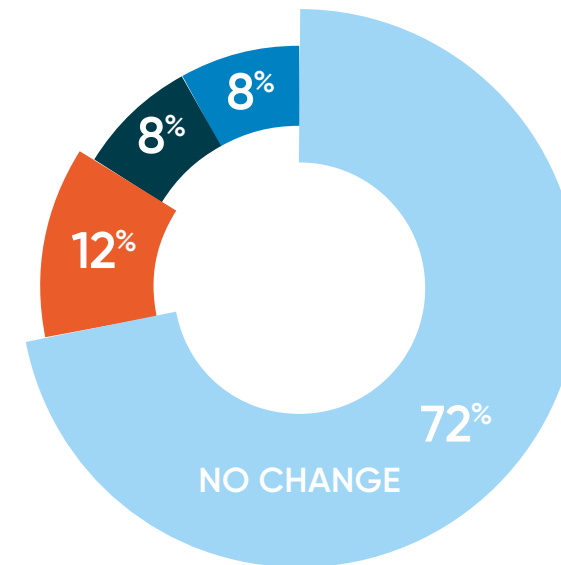
89% said that, if a right of appeal were adopted, the right of appeal should be limited in scope.

Only 9% said that, if a right of appeal were adopted, the right of appeal should be unfettered in scope.

2% don't know.

QUESTION

Should arbitration in industry sectors with long-established arbitration procedures (such as under CAS and FOSFA/GAFTA) that provide or permit appeals be left unchanged?



72% said that there should be no interference with such industry and sector practices.

Only 8% said that removal of any right of appeal is desirable in all sectors, even where appeal procedures are well-established and widely-used.

12% did not agree with either of the above statements.

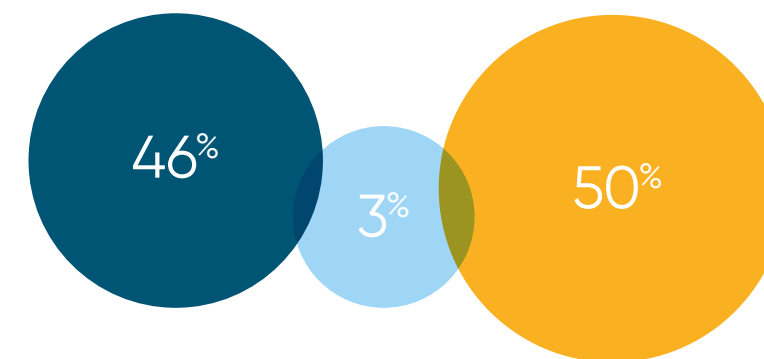
8% don't know.

TRIBUNAL GETTING

IT WRONG

QUESTION

Did respondents have direct experience of an arbitral tribunal making a decision on the substance of the dispute that was obviously wrong?



46% had direct experience in 1 to 5 cases of a tribunal making an obviously wrong decision.

3% had direct experience in 5 to 10 cases of a tribunal making an obviously wrong decision. Only 1% had direct experience in more than 10 cases of a tribunal making an obviously wrong decision.

50% had no experience of a tribunal making an obviously wrong decision.

57%

Looking at law firm respondents only, 57% had at least one direct experience of a tribunal making an obviously wrong decision. That percentage fell to 46% among in-house counsel. 38% of expert witnesses had direct experience of an obviously wrong decision in 1 to 5 cases.

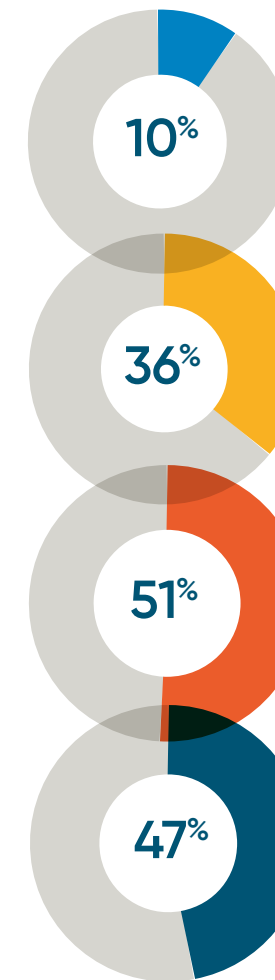
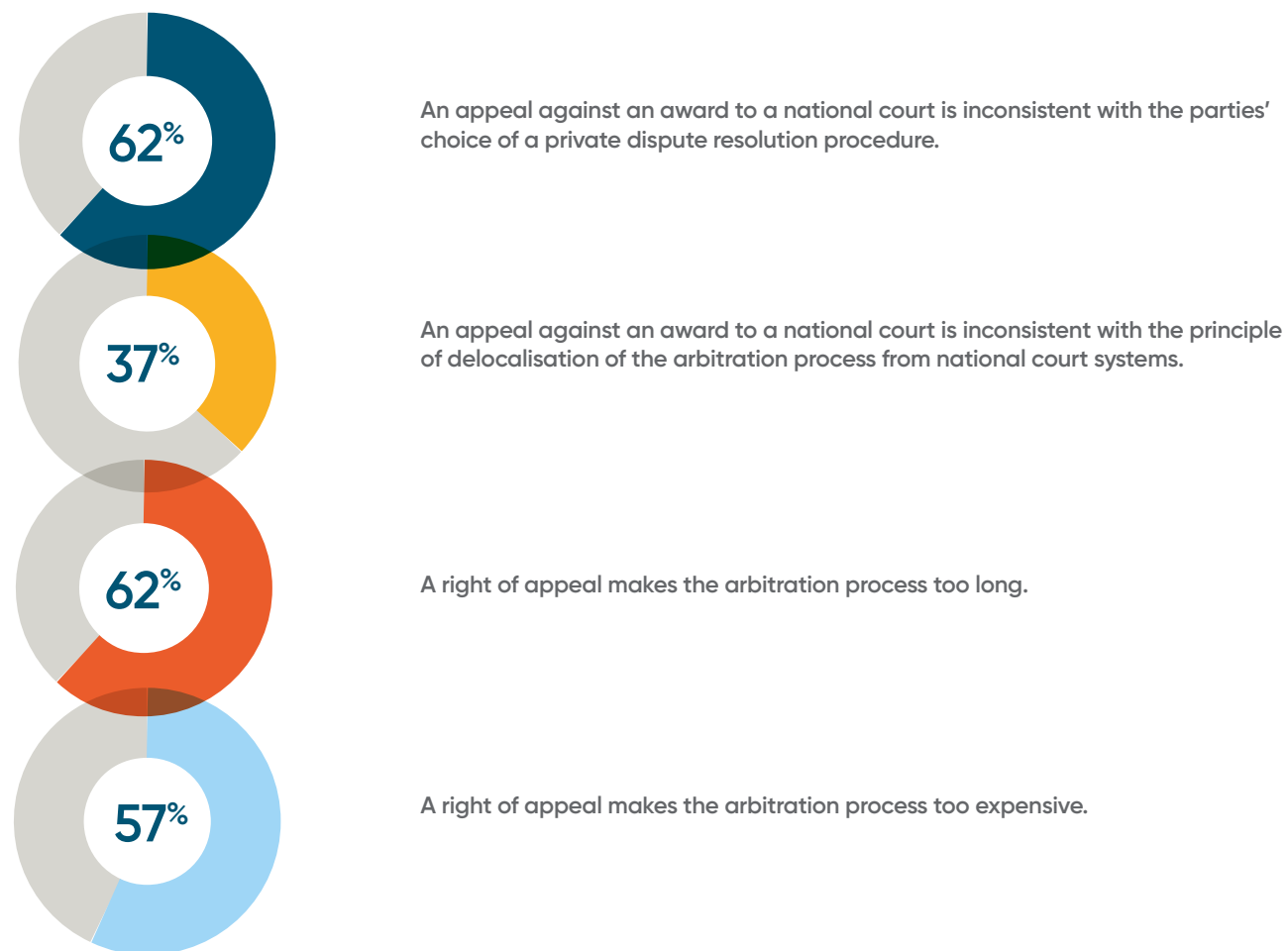
PERCEIVED ADVANTAGES AND

DISADVANTAGES OF A RIGHT OF APPEAL

QUESTION

We asked respondents if they agreed or disagreed with a number of statements describing the possible implications of the existence or lack of a right of appeal.

The percentage of respondents who agreed with each of the statements is set out below:



Arbitral Tribunals are less likely than national courts to make mistakes.

A losing party who cannot appeal an incorrect award may feel that they are justified in not complying with the award.

In some cases the consequences of an incorrect decision are so serious as to make the lack of an appeal mechanism unacceptable.

Permitting appeals to national courts on the legal merits of a dispute may aid development of the law.

There was some interesting variation between categories of respondent in relation to some of the statements proposed.

66% of law firm respondents and **69%** of arbitrators felt that a right of appeal would make the process too long, compared with only **38%** of in-house counsel. Law firm respondents and arbitrators also appeared to feel more strongly on the issue of cost. **56%** of law firm respondents and **62%** of arbitrators felt that a right of appeal would make the process too expensive, compared with only **38%** of in-house counsel.

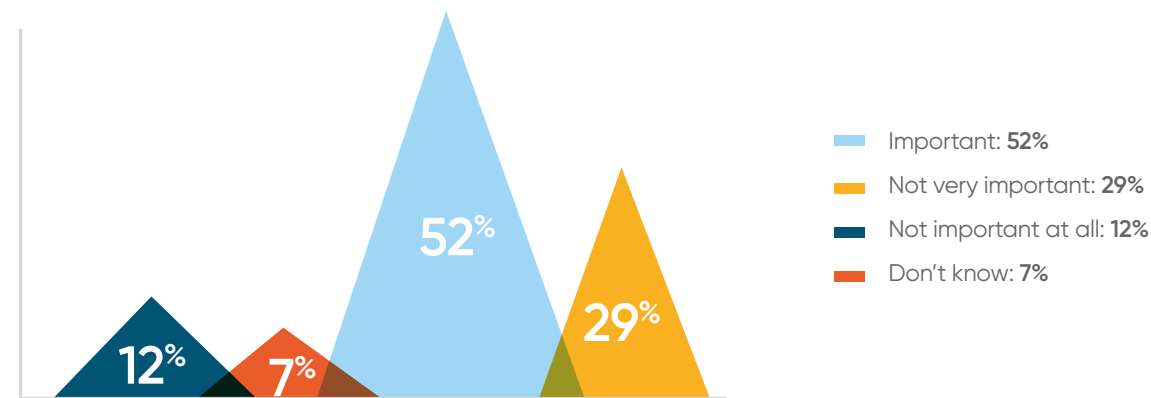
Interestingly, only **8%** of in-house counsel respondents felt that a losing party who cannot appeal an incorrect award may feel that they are justified in not complying with the award, compared with **39%** of law firm respondents and **33%** of respondents who sit as arbitrators. Likewise, fewer in-house counsel felt that an appeal to national courts on the legal merits of a dispute may aid development of the law - **31%** compared with **49%** of law firm respondents and **45%** of those who sat as arbitrators.

THE IMPORTANCE OF

PARTY AUTONOMY

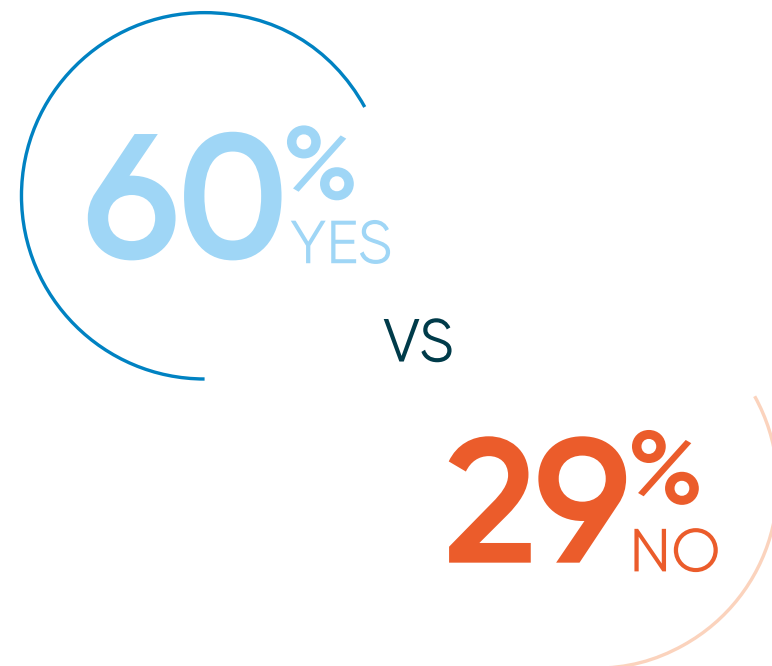
QUESTION

How important is it that parties to an international arbitration agreement have the right to include express provision for a right of appeal against an award?



QUESTION

Should national arbitration laws permit an appeal at the seat of arbitration in every case where parties have agreed a right of appeal against an award?



11% don't know.

INTERNAL APPEAL PROCEDURES

OFFERED BY ARBITRAL INSTITUTIONS

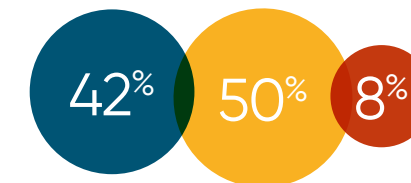
We wanted to find out what respondents thought about internal appeal procedures offered by arbitral institutions.

QUESTION

Have you had direct experience of an internal appeal process carried out under the rules of an arbitral institution. If so, how did you find the process?



Only 12% had experience of an internal appeal process under the rules of an arbitral institution.



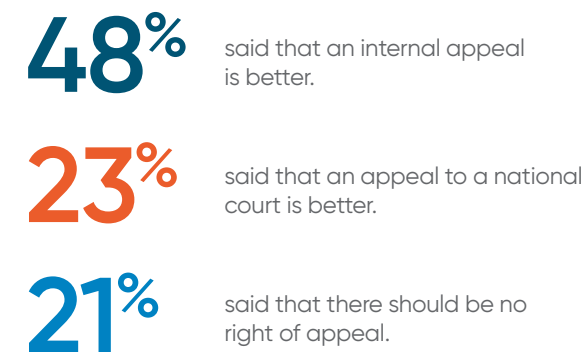
When this 12% of respondents were asked how they had found the process:

- 42% said it was a positive experience.
- 50% said it was a negative experience.
- 8% don't know.

QUESTION

Which is preferable:

An appeal to a second-tier tribunal organised by the arbitration institution under whose rules the arbitration was conducted, **OR** an appeal to the national courts at the seat of arbitration – or should there be no right of appeal at all?



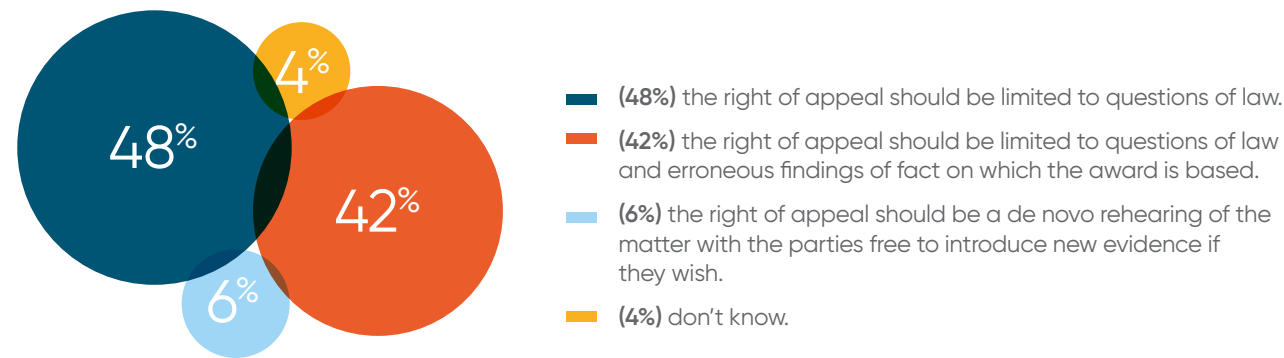
* The remaining respondents don't know.

Support for an internal right of appeal in preference to an appeal to a national court was significantly stronger among in-house counsel (77%), although reasonably strong among law firm respondents (54%) and arbitrators (38%).

The view that there should be no right of appeal by either route was highest among arbitrators and academics (both 33%), compared to 18% of law firm respondents and 8% of in-house counsel.

QUESTION

We asked what should be the nature of an internal appeal offered by an arbitral institution?



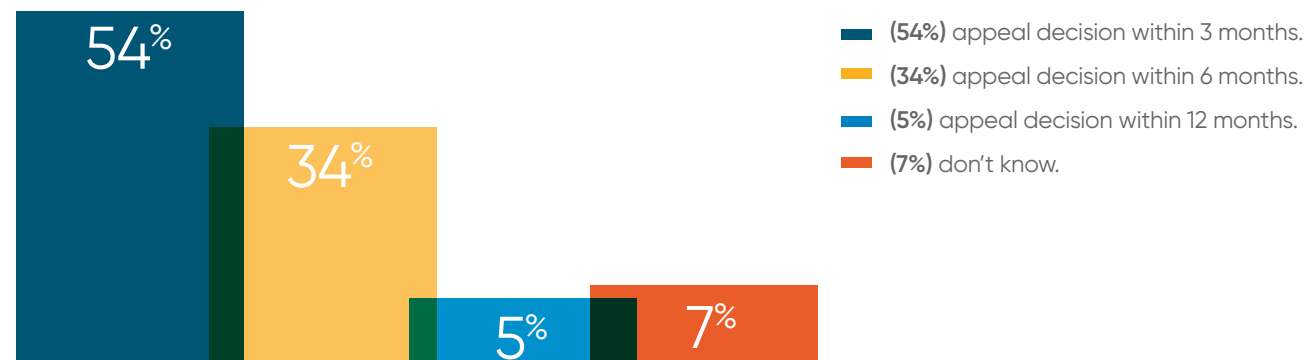
56% of common law lawyers felt that the appeal should be limited to questions of law, compared with only 35% of civil law lawyers. This position was reversed when they were asked if the appeal should extend both to questions of law and erroneous findings of fact.

50% of civil law lawyers favoured this approach, compared with only 36% of common law lawyers. When dual qualified lawyers were included, the percentages were 51%/29% and 40%/57% respectively.

QUESTION

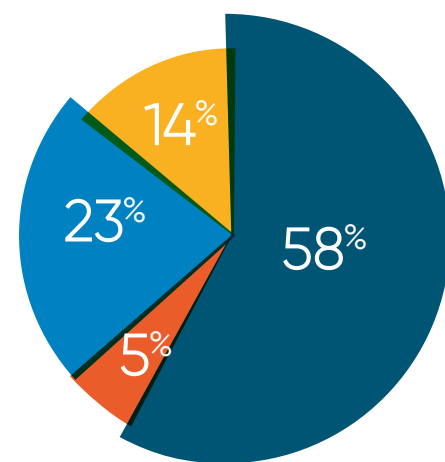
What are your views on the duration of an 'internal' appeal process and how the appellate tribunal should be constituted?

Permitted duration of the Appeal Process:



Method of Constitution of the Tribunal:

- (58%) all members of the appeal tribunal should be appointed by the arbitral institution.
- (14%) the parties should be permitted to agree the identity of the appeal tribunal.
- (23%) the arbitral institution should appoint members of the appeal tribunal with input from the parties.
- (5%) don't know.



61% of law firm respondents felt that all members of the appeal tribunal should be appointed by the relevant arbitral institution.

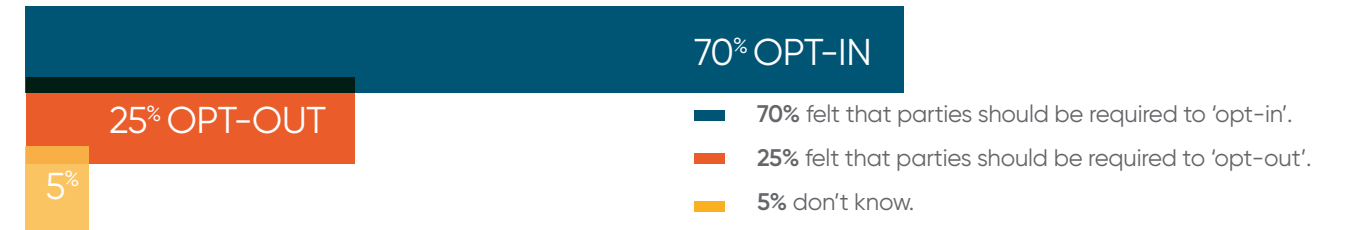
Only 10% of law firm respondents felt that the parties should agree the identity of tribunal members, while 25%

felt that the arbitral institution should appoint with input from the parties.

Support for party agreement on tribunal members was much stronger among in-house counsel respondents (23%) and arbitrators (21%).

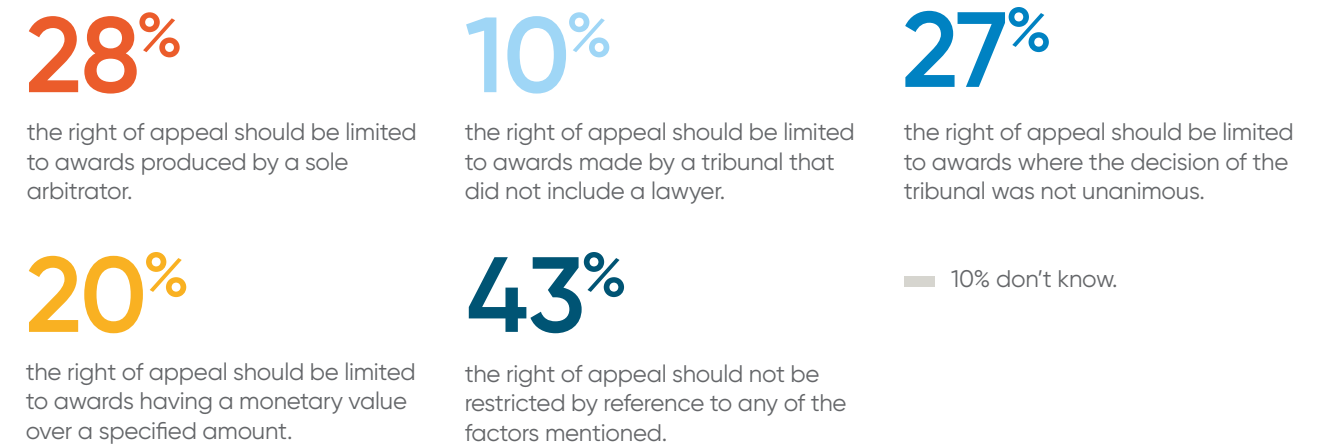
QUESTION

Where an arbitral institution offers a second-tier appeal procedure, is it better that parties be required to 'opt-in' or to 'opt-out' of that right of appeal?



QUESTION

We asked respondents to express a view on whether a right of appeal to an 'internal' second-tier tribunal should be limited to one or more of a number of stated circumstances:



WHAT HAVE

WE LEARNED?

The divergent views of respondents on the issue of appeal reflect the lively debate that this topic generates among participants in international arbitration. However, with the possible exception of certain industry sectors with tried and tested routes to an appeal that it was felt should be preserved, there was significant consensus among respondents that a right of appeal makes international arbitration less attractive (71%), too long (62%) and too expensive (57%). On the other hand, over half of respondents (51%) felt that in some cases the

consequences of an incorrect decision can be so serious as to make the absence of an appeal mechanism unacceptable. The answer to this conundrum may lie with the arbitral institutions. Although respondents' experience of second-tier appellate procedures under institutional rules was limited, 48% of respondents felt that this would be preferable to an appeal to a national court. We will have to watch and wait to see if more institutions move to include appellate procedures, and whether users are happy to make use of them.

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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