

# 2021 International Arbitration Survey: Adapting arbitration to a changing world





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# 2021 International Arbitration Survey: Adapting arbitration to a changing world

**T**he field of international arbitration is dynamic by nature. Its hallmarks of flexibility and party autonomy allow it to develop and adapt in response to the needs of its users. Recent times have seen an increased focus on drivers of change such as diversity, technology, environmental considerations and information security. The COVID-19 pandemic has also presented challenges to the way in which the international arbitration community interacts.

The 2021 International Arbitration Survey, titled 'Adapting arbitration to a changing world,' explores how international arbitration has adapted to these changing demands and circumstances. The survey investigates trends in user preferences and perceptions, and identifies opportunities for international arbitration to adapt more and better. This edition saw the widest-ever pool of respondents, with 1218 questionnaire responses received and 198 interviews conducted. Views were sought from a diverse pool of participants in the international arbitration sphere, including in-house counsel from both public and private sectors, arbitrators, private practitioners, representatives of arbitral institutions and trade associations, academics, experts and third-party funders.

White & Case is proud once again to have partnered with the School of International Arbitration. The School has produced a study which provides valuable insights into how international arbitration has adapted, and what more needs to be done by and for its diverse stakeholders. I am confident that this survey will be welcomed by the international arbitration community.

We thank Norah Gallagher and Dr Maria Fanou (White & Case Postdoctoral Research Fellow in International Arbitration) for their exceptional work, and all those who generously contributed their time and knowledge to this study.



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**Abby Cohen Smutny**  
Global Head of International  
Arbitration Practice Group,  
White & Case LLP

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**I**t is with a sense of relief that I present the 2021 International Arbitration Survey on 'Adapting arbitration to a changing world'. In fact, that is exactly what happened just after we started work on the draft questionnaire in early 2020—the world changed due to COVID-19. We could not have known at that time quite how big an impact the pandemic would have globally. In such uncertain times, we had to postpone the launch of the survey for several months. We had no way to assess how long we should wait to start and how it might impact on the survey results.

The strength of the survey is entirely based on the level of participation by the arbitration community. It was an anxious time to see whether COVID-19 would adversely impact the numbers. I was truly grateful for the support of the international arbitration community as the largest number of people ever completed the survey—more than 1,200. Dr Fanou also interviewed almost 200 candidates from 29 countries to provide nuance and context for some of the findings. We thank all of the respondents for making this survey so comprehensive—a true success despite the pandemic.

This is the 12th empirical survey conducted by the School of International Arbitration at Queen Mary University of London and the fifth in partnership with White & Case LLP. The results reflect an interesting snapshot of change in arbitral practice during a time of global upheaval. The arbitration community had to adapt quickly, and some of these changes will remain after the pandemic recedes. Virtual hearings and increased reliance on technology are clear examples of changes that will persist. It has been a challenging yet rewarding process, but we are pleased with the interesting results. This survey may also prompt further discussion on future changes to arbitral practice and procedural rules.



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# Executive summary

## International Arbitration: Current choices and future adaptations

- International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, either on a stand-alone basis (31%) or in conjunction with ADR (59%).
- The five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva.
- 'Greater support for arbitration by local courts and judiciary', 'increased neutrality and impartiality of the local legal system', and 'better track record in enforcing agreements to arbitrate and arbitral awards' are the key adaptations that would make other arbitral seats more attractive.
- The UNCITRAL Arbitration Rules are the most popular regime for ad hoc arbitration.
- The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC.
- Respondents chose 'administrative/logistical support for virtual hearings' as their top choice adaptation that would make other sets of arbitration rules or arbitral institutions more attractive, followed by 'commitment to a more diverse pool of arbitrators'.
- Arbitration users would be most willing to do without 'unlimited length of written submissions', 'oral hearings on procedural issues' and 'document production' if this would make their arbitrations cheaper or faster.

## Diversity on arbitral tribunals: What's the prognosis?

- More than half of respondents agree that progress has been made in terms of gender diversity on arbitral tribunals over the past three years. However, less than a third of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity.
- Respondents are divided as to whether there is any connection between diversity on a tribunal and their perception of the arbitrators' independence and impartiality. Just over half of the respondents (56%) stated that diversity across an arbitral tribunal has a positive effect on their perception of the arbitrators' independence and impartiality, but more than one-third (37%) took a neutral view. Others consider the enquiry redundant, on the basis that the call for more diversity does not require further justification.
- 59% of respondents emphasise the role of appointing authorities and arbitral institutions in promoting diversity, including through the adoption of express policies of suggesting and appointing diverse candidates as arbitrators. However, the significance of the role of counsel is highlighted by about half of respondents, who included 'commitment by counsel to suggesting diverse lists of arbitrators to clients' amongst their answers. In-house counsel also bear the onus of encouraging diversity through their choice of arbitrators.
- Many respondents feel that opportunities to increase the visibility of diverse candidates should be encouraged through initiatives such as 'education and promotion of arbitration in jurisdictions with less developed international arbitration networks' (38%), 'more mentorship programmes for less experienced arbitration practitioners' (36%) and 'speaking opportunities at conferences for less experienced and more diverse members of the arbitration community' (25%). Building visibility is particularly important in light of the general perception that users prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience.
- The general consensus amongst respondents is that caution should be exercised when exploring whether adaptations in arbitral practice experienced during the COVID-19 pandemic may have an impact on promotion of diversity objectives, as it can go both ways. Virtual events, meetings and hearings may facilitate participation by more diverse contributors, but this may be hindered by unequal access to technology and the challenges of building relationships remotely.

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## Use of technology: The virtual reality

- Technology continues to be widely used in international arbitration, particularly 'videoconferencing' and 'hearing room technologies', but the adoption of AI still lags behind other forms of IT.
- The increase in the use of virtual hearing rooms appears to be the result of how the practice of arbitration has adapted in response to the COVID-19 pandemic, as users have been forced to explore alternatives to in-person hearings.
- If a hearing could no longer be held in person, 79% of respondents would choose to 'proceed at the scheduled time as a virtual hearing'. Only 16% would 'postpone the hearing until it could be held in person', while 4% would proceed with a documents-only award.
- Recent (and, in many cases, new) experience of virtual hearings has offered an opportunity to gauge users' perception of this procedural adaptation. The 'potential for greater availability of dates for hearings' is seen as the greatest benefit of virtual hearings, followed closely by 'greater efficiency through use of technology' and 'greater procedural and logistical flexibility'. Aspects that gave respondents most cause for concern included the 'difficulty of accommodating multiple or disparate time zones', the impression that it is 'harder for counsel teams and clients to confer during hearing sessions' and concerns that it might be 'more difficult to control witnesses and assess their credibility'. The fallibility of technology and the phenomenon of 'screen fatigue' were also cited.
- Going forward, respondents would prefer a 'mix of in-person and virtual' formats for almost all types of interactions, including meetings and conferences. Wholly virtual formats are narrowly preferred for procedural hearings, but respondents would keep the option of in-person hearings open for substantive hearings, rather than purely remote participation.

## Sustainability and information security: Opportunities and challenges

- Respondents show a willingness to adopt paperless practices, such as production of documents in electronic rather than hard-copy form; providing submissions, evidence and correspondence in electronic format; and the use of electronic hearing bundles. Many respondents would also welcome more 'green' guidance, both from tribunals and in the form of soft law.
- While the environmental benefits of remote participation rather than in-person participation are recognised, this is not the primary motivation behind the decision as to whether interactions should be remote or in-person.
- There appears to be increasing awareness of the need to embrace 'greener' practices. However, the overall message from respondents is that the reduction of environmental impact is a welcome side-effect of their choices throughout the arbitral process, rather than a priority in and of itself.
- Even though users generally acknowledge data protection issues and regulations may have an impact on the conduct of arbitrations, the extent and full implications of that impact are not understood by all. 34% of respondents predicted that data protection issues and regulations have 'limited impact at present but [this is] likely to increase'.

- Only around a quarter of respondents said they have 'frequently' or 'always' seen cybersecurity measures being put in place in their international arbitrations. The majority (57%) encountered such measures in less than half of their cases.
- The IT security measures and tools most used or recommended by respondents include 'cloud-based platforms for sharing electronic or electronically submitted data'; 'limiting access to prescribed individuals'; 'data encryption'; and 'access controls, e.g., multi-factor authentication'. Almost half of the respondents recommended the use of 'secure/professional email addresses for arbitrators rather than web-based email providers (i.e., no Gmail, Yahoo, Hotmail, etc.)'.
- Respondents appreciate being able to rely on specialist IT support and systems to ensure robust cybersecurity protections are in place.
- Although there are encouraging signs that users are mindful of cybersecurity issues and the need to address them, there is nonetheless ample scope for more engagement on this front.



# International arbitration: Current choices and future adaptations

## International arbitration together with ADR: The winning formula

We asked respondents what their preferred method of resolving cross-border disputes would be post COVID-19. Respondents were asked to choose one of five options: 'international arbitration together with ADR', 'cross-border litigation together with ADR', 'international arbitration' as a standalone option, 'ADR only', and 'cross-border litigation' as a standalone option. We clarified that ADR would include, for example, adjudication, dispute boards, expert determination, mediation and negotiation, but exclude litigation and arbitration.

In previous surveys by Queen Mary University of London, arbitration, as either a standalone option or in conjunction with ADR, was consistently selected as the preferred dispute resolution mechanism for cross-border disputes.<sup>1</sup> This preference was confirmed again in this survey. In particular, an overwhelming majority of the respondent group (90%) showed a clear preference for arbitration as their preferred

method of resolving cross-border disputes, either as a standalone method (31%) or in conjunction with ADR (59%). Only an aggregate of 4% is equally split between 'ADR only' and 'cross-border litigation' as standalone options, while 6% indicated a preference for 'cross-border litigation together with ADR'.

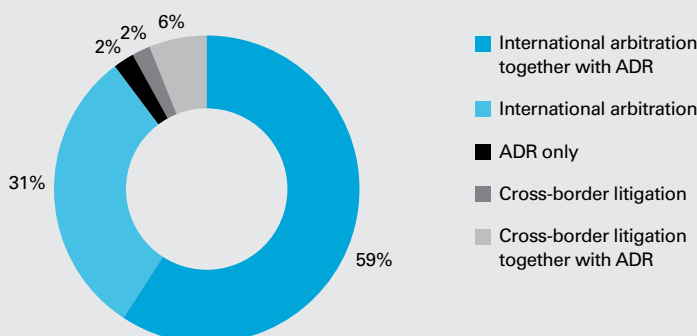
This year's findings once again reveal a noticeable increase over recent years in the overall popularity of arbitration used in conjunction with ADR: 59% of respondents expressed their preference for this combination, as opposed to 49% in 2018 and only 34% in 2015.<sup>2</sup>

These results reflect an ongoing trend, as confirmed in interviews. Although the question expressly referred to the post-COVID-19 landscape, interviewees explained that their answers were not influenced by the pandemic. The factors that influenced their choices remained largely the same. This is why they expected to continue to use the same dispute resolution options as they were using pre-pandemic. As an immediate

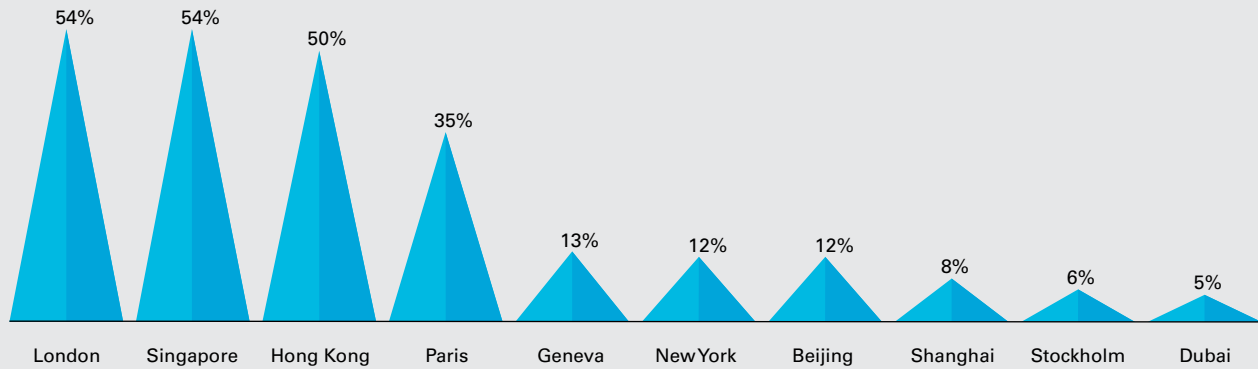
## Summary

- International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, either on a stand-alone basis (31%) or in conjunction with ADR (59%).
- The five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva.
- 'Greater support for arbitration by local courts and judiciary', 'increased neutrality and impartiality of the local legal system' and 'better track record in enforcing agreements to arbitrate and arbitral awards' are the key adaptations that would make other arbitral seats more attractive.
- The UNCITRAL Arbitration Rules are the most popular regime for ad hoc arbitration.
- The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC.
- Respondents chose 'administrative/logistical support for virtual hearings' as their top choice adaptation that would make other sets of arbitration rules or arbitral institutions more attractive, followed by 'commitment to a more diverse pool of arbitrators'.
- Arbitration users would be most willing to do without 'unlimited length of written submissions', 'oral hearings on procedural issues' and 'document production', if this would make their arbitrations cheaper or faster.

**Chart 1: Post-COVID-19, what would be your preferred method of resolving cross-border disputes?**



**Chart 2: What are your or your organisation's most preferred seats?**

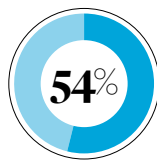


Percentage of respondents who included the seat in their answer

consequence of the pandemic, respondents referred to an initial feeling of being ‘numb’—effectively, a ‘procedural paralysis’. Only a few private practitioners observed that their clients were now exploring settlements more willingly than previously.

Generally, interviewees noted that recourse to ADR was in the hope that a swifter and more cost-efficient resolution could be found before resorting to arbitration. In many cases, there is a contractual mandate to use ADR, typically through multi-tiered escalation clauses. Even when there is no contractual requirement to do so, interviewees confirmed a willingness to explore suitable alternatives to resolve disputes. This explains opting for ‘arbitration together with ADR’ for the purposes of this question as opposed to arbitration as a stand-alone option.

In addition, in certain types of disputes, there are established practices of recourse to other means of dispute resolution; for instance, interviewees with experience in disputes in the construction industry reported positively on the use of dispute boards in that sector. They explained that dispute adjudication and dispute review boards are commonly used in construction projects. In some cases, the contract provides for dispute boards in the form of standing bodies assigned to monitor the projects. Several interviewees noted that, in many instances, they have found dispute



London and, for the first time, Singapore, were the **most preferred seats** with scores of 54%

boards to be a good, efficient and often cheaper dispute resolution option that helped their clients avoid lengthy and time-consuming arbitrations. Standing dispute boards were also reported to be a useful means of dispute prevention. However, the main concern noted was that the decisions of dispute boards are not generally enforceable. This means that if a decision is not mutually accepted, the parties ‘will be back to square one’, facing potentially duplicative and costly arbitration proceedings for the same dispute.

#### Which seats are most preferred?

Choice of arbitral seat is a key issue for users of international arbitration. We sought to identify the seats that are most preferred by respondents or their organisations, allowing them to list up to five seats in free-text boxes. Reflecting the global nature of international arbitration, respondents cited more than 90 different seats from a range of jurisdictions around the world.

Notwithstanding the number of choices available to international arbitration users, the top-five preferred seats should not come as a surprise when looking at the results from our previous surveys.<sup>3</sup> There has, however, been interesting movement within the top-five rankings. While London once again stands at the top of the charts, for the first time it shares this position with Singapore—each was included in the top-five picks of 54% of the

respondents. The rise in popularity of key Asian arbitral hubs demonstrated by Singapore’s success is mirrored by Hong Kong, which takes third place (50%). Paris comes in fourth (chosen by 35% of respondents) followed by Geneva in fifth place (13% of respondents).<sup>4</sup>

Reviewing the findings of our 2015, 2018 and current surveys, it seems that these cities have cemented a dominant position as seats of choice. This is perhaps to be expected given that each of them has a longstanding and recognised reputation as a ‘safe seat’ for international arbitration.<sup>5</sup> Indeed, based on the previous surveys, it was expected that they would continue to be popular. This has been borne out in these latest findings.

London’s continued presence at the top of the table suggests that, as was predicted by the majority of the respondents in our 2018 survey,<sup>6</sup> its popularity as a seat has not been significantly impacted (at least so far) by the UK’s withdrawal from the European Union. London retains its reputation amongst users as a reliable seat of choice.

What is more striking, however, is the significant percentage gains made by Singapore (54%) and Hong Kong (50%), as compared to our previous surveys. Singapore was the third most frequently chosen seat in 2018, selected by 39% of respondents, and it came in fourth in 2015, chosen by 19% of respondents. Hong Kong took fourth place in 2018, chosen



by 28% of respondents, and it was third in 2015, as a seat of choice for 22% of respondents. Interviewees confirmed that these seats are considered safe, obvious choices of established quality. Interestingly, some interviewees mentioned the presence of well-established arbitration institutions, such as SIAC in Singapore, as an additional factor they consider when choosing the seat.<sup>7</sup> The growth in popularity of seats in this region year-on-year<sup>8</sup> may reflect an increasing willingness by parties with commercial interests linked to that locale to also resolve disputes 'locally'. It will be interesting to see whether large-scale commercial projects, such as the Belt and Road Initiative, will continue to impact this in the future.

The increases enjoyed by these seats may also correlate with a relative reduction in the percentage of respondents who included traditionally dominant European seats, such as London, Paris and Geneva, in their answers. London was selected by 64% of respondents in 2018, making it the most selected that year, but it dropped to 54% in this edition of the survey. Paris fell even further, from its second place showing in 2018, with 53% of respondents including it in their selections, to fourth place this year, as a seat of choice for 35% of respondents. Geneva also retained its position in previous surveys as the fifth most popular seat, but with a dip in the

percentage of respondents who included it in their answers—from 26% in 2018 to 13% now.

Similarly, while the other seats rounding out the top seven in both 2015 and 2018 continue to be seen as safe choices by respondents—namely, New York and Stockholm—seats in other regions have gained in popularity. Beijing joins New York as joint sixth most popular seat, with each chosen by 12% of respondents. Shanghai comes in eighth (8%), with Stockholm dropping from the seventh place it held in previous surveys to ninth place (6%). The top ten is rounded out by Dubai, chosen by 5% of respondents.

Other cities that were each listed by 4% to 2% of respondents included: Zurich; Vienna; Washington, DC; Miami; Shenzhen; São Paulo; Frankfurt; and The Hague.

#### The regional picture

We analysed the results for respondents practising or operating in various regions,<sup>9</sup> which revealed a number of fluctuations. London, for example, topped the charts for all regions in our 2018 survey; although it continues to enjoy first place for most regions this time, it was not selected as the most preferred seat for respondents in Asia-Pacific and did not feature at all in the top picks for the Caribbean/Latin America. In Asia-Pacific, both Singapore and Hong Kong surpassed London by a significant margin (more than 20%).



## While the 'global powerhouse' seats continue to be popular, there are many regional seats which are growing in reputation and popularity



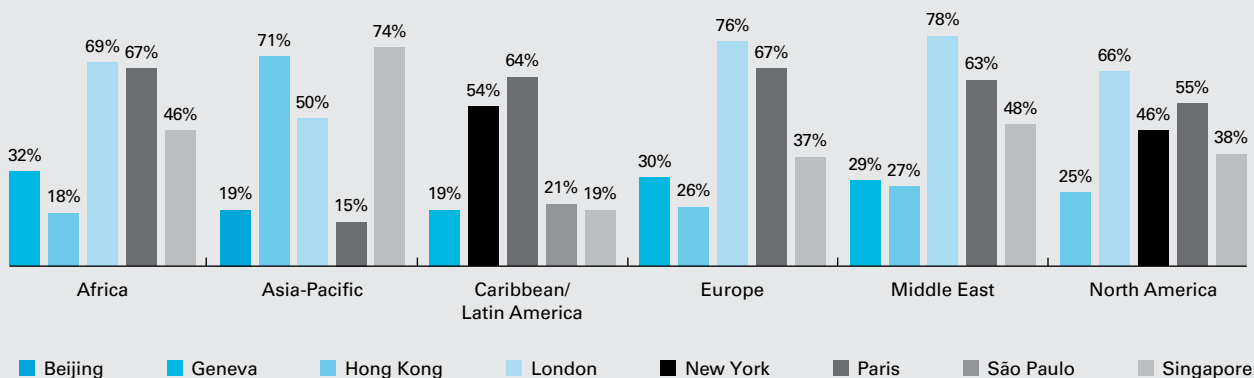
Hong Kong, Paris and Singapore were amongst the top-five preferred seats in all regions

Hong Kong, Paris and Singapore were all ranked in the top-five most preferred seats in all regions.

A number of other popular seats reached the top five in several regional subgroups; for example, Geneva was the fourth most preferred seat in Europe, Africa and the Middle East, and fifth in the Caribbean/Latin America.

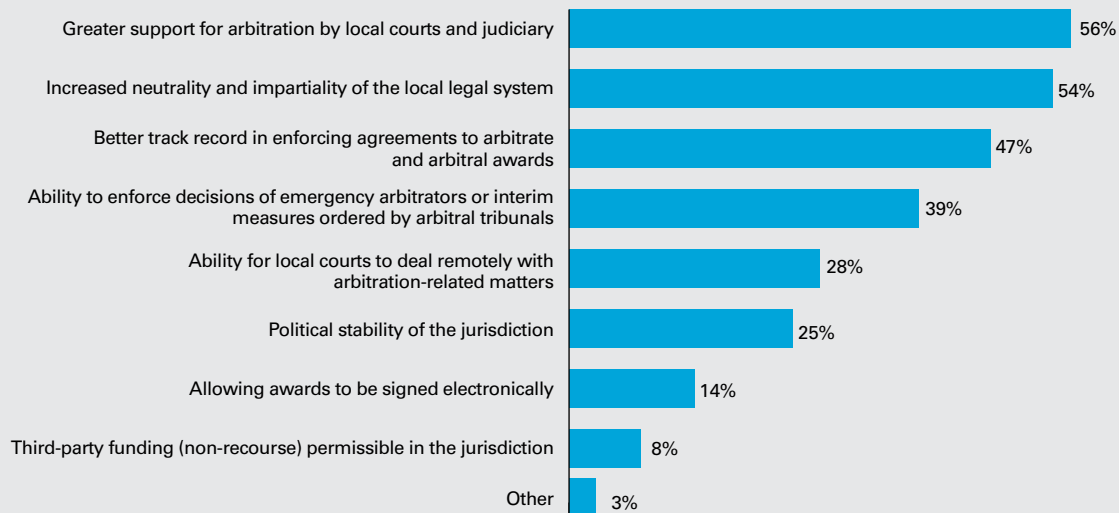
Several seats outside the global top ten did make it to the top ten in the regions in which they are located. In Africa, this was the case with Cairo (12%) and Nairobi (6%); in Asia-Pacific, Shenzhen (4%); in the Caribbean/Latin America, São Paulo (21%), Miami (15%) and Lima (6%). Madrid (5%) also made the top ten for the Caribbean/Latin America. Although it seems that the 'global powerhouse' seats will continue to be popular, there are many regional seats which are growing in reputation and popularity.

Chart 3: Top-five most preferred seats by region



Percentage of respondents who included the seat in their answer

**Chart 4: What adaptations would make other seats more attractive to users?**



Respondents were able to select up to three options

**What adaptations would make other seats more attractive?**

More than 90 different seats were mentioned in response to the previous question on seat preference. This shows that although the most popular seats enjoyed the lion's share of the votes, there is still significant scope for seats outside the top ranks to attract users. We asked respondents to indicate what adaptations would make seats more attractive other than those they say they preferred. Respondents could choose up to three options from a list of suggestions, with a free-text 'other' option.

'Greater support for arbitration by local courts and judiciary' was the most selected adaptation (56%),

closely followed by 'increased neutrality and impartiality of the local legal system' (54%) and 'better track record in enforcing agreements to arbitrate and arbitral awards' (47%). The other choices ranked as follows: 'ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitral tribunals' (39%), 'ability for local courts to deal remotely with arbitration-related matters' (28%), 'allowing awards to be signed electronically' (14%), 'political stability of the jurisdiction' (9%) and 'third-party funding (non-recourse) permissible in the jurisdiction' (8%).

These adaptations reflect what were already identified as the systemic legal traits of a seat considered to be most important



**90+**

More than 90 different seats were mentioned in response to the question on seat preference

to users.<sup>10</sup> This follows a well-trodden path of reasons identified by the respondents in our 2018 survey as the most important when choosing arbitral seats.<sup>11</sup> These criteria are seen as long-term markers of quality that determine user preference. They include unhindered access to arbitration promoted by local courts, neutrality and impartiality of the local judiciary, and an enforcement track record.

Once those features are identified in given seats, there may be other factors taken into account by respondents which influence their choice of one seat over another. In particular, there seems to be a growing wish for seats to also have the judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness (for example, local courts being able to deal remotely with arbitration-related matters). The latter, coupled with the possibility of awards being signed electronically, are issues that were given relatively little attention pre-pandemic. Presumably, in light of recent experience, users are placing more importance on them now.



**There is a growing wish for seats to also have the judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness**

**Which ad hoc procedural rules are most used?**

We asked respondents which ad hoc procedural regimes they had used most frequently in the past five years. We included a list of choices and a free-text box choice ('other'), allowing respondents to select up to three options. Pre-set choices included: 'bespoke regimes agreed by the parties', 'CPR Non-Administered Arbitration Rules', 'Grain and Feed Trade Association Arbitration Rules',<sup>12</sup> 'London Maritime Arbitrators' Association (LMAA) Terms', 'national arbitration laws', 'The Construction Industry Model Arbitration Rules', and 'UNCITRAL Arbitration Rules'.

The UNCITRAL Arbitration Rules, chosen by three-quarters (76%) of respondents, were a clear winner. They were followed by 'national arbitration laws' (28%), 'bespoke regimes agreed by the parties' (26%) and the LMAA Terms (13%). Several interviewees credited the success of the UNCITRAL Arbitration Rules to these rules being carefully designed and widely tested. Others remarked on their prevalence and level of global recognition. This may be because the UNCITRAL Arbitration Rules are used across all sectors



**Interviewees valued the procedural flexibility offered by ad hoc arbitration, which they felt enhanced party autonomy compared to institutional arbitration**



**76%**

The **UNCITRAL Arbitration Rules** were amongst the most frequently used **ad hoc regimes** by 76% of respondents

in both commercial and investment treaty arbitration.

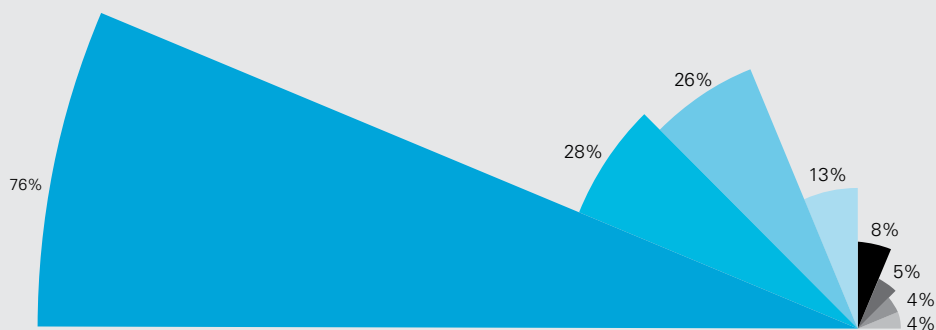
Interviewees valued the procedural flexibility offered by ad hoc arbitration, which they felt enhanced party autonomy compared to institutional arbitration. This emphasis on party autonomy throughout the arbitral process was a recurring theme in interviews. A number of interviewees also highlighted the popularity of ad hoc arbitration for resolving disputes in sectors such as the maritime industry and commodity markets. As one interviewee specialising in maritime disputes explained, parties want 'a dispute resolution mechanism that was developed by their sector, for their sector, and conducted by practitioners from their sector'.

**Which arbitral institutions are most preferred?**

We asked respondents to indicate their preferred arbitral institutions, allowing them to specify a maximum of five different entries (in free-text form). This generated a list of more than 50 institutions across the globe—a strong indication that while certain institutions are chosen time and again, users also appreciate a wide degree of choice.

Of all the nominations, the ICC stands out as the most preferred institution (57%), followed by SIAC (49%), HKIAC (44%) and the LCIA (39%). These top-four choices have been the market leaders for well over a decade.<sup>13</sup> This year, CIETAC (17%) also made it to the top-five most preferred choices for the first time. The other institutions in the

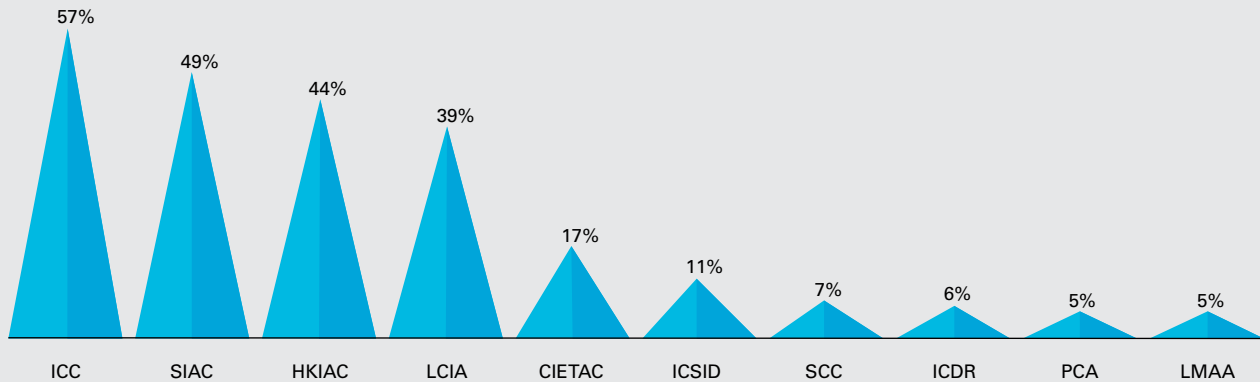
**Chart 5: If you or your organisation have selected ad hoc arbitration over the past five years, which of the following procedural regimes were used the most?**



- UNCITRAL Arbitration Rules
- National arbitration laws
- Bespoke regimes agreed by the parties
- London Maritime Arbitrators Association Terms
- Other
- The Construction Industry Model Arbitration Rules
- CPR Non-Administered Arbitration Rules
- Grain and Feed Trade Association Arbitration Rules

Respondents were able to select up to three options

**Chart 6: What are your or your organisation's most preferred arbitral institutions?**



Percentage of respondents who included the institution in their answer

global top ten were: ICSID (11%), SCC (7%), ICDR (6%), PCA (5%) and LMAA<sup>14</sup> (5%).

Our 2015 and 2018 surveys highlighted a noticeable growth in the percentage of respondents selecting SIAC.<sup>15</sup> This trend was clearly confirmed in this survey, with SIAC taking second place overall. There was also a significant increase in the percentage of respondents selecting HKIAC, which took third place.<sup>16</sup>

The increases enjoyed by SIAC and HKIAC may correlate with a relative reduction in the percentages of the LCIA and the ICC. The LCIA, although it remains amongst the most popular institutions, dropped to fourth place from second place in 2018. The ICC's overall percentage dropped considerably from 77% in 2018 to 57% today.

Interviews confirmed the principal drivers behind choice of institution include the general reputation of the institution and the respondent's previous experience of that institution.<sup>17</sup> However, interviewees revealed that in particular circumstances they would widen the list of institutions they might consider. For example, depending on the potential value of a given dispute, practitioners reported that they would be willing to consider less well-known institutions offering competitive fees. The depth and breadth of the pool of arbitrators that might be recommended by an institution was also a factor highlighted by interviewees, as



**50+**

More than 50 arbitral institutions across the globe were mentioned by respondents

discussed further at pp.11 – 12 below. Some interviewees also mentioned that their perception of the quality and consistency of institutional staff and counsel teams can influence their opinion when considering institutions. While none of these considerations in and of themselves displace the general factors of reputation and recognition of an institution, they suggest that there are multiple distinguishing features which influence the choice of one institution over another.

#### The regional response

An analysis of the subgroups based on the regions where respondents principally practise or operate revealed that the top-three preferred institutions globally also rank highly across most of these regions. The ICC ranks first in all regions except for Asia-Pacific, where it is outranked by the SIAC,

which in its turn is also ranked among the first-five choices in all regions. The LCIA ranks second in all regions except for Asia-Pacific.

More regionally based variations can be noticed outside the top-five ranks. ICSID and the PCA both enjoyed a consistent showing, appearing in the top-ten rankings of all subgroups. Several other institutions made it to the top ten either in all subgroups (e.g., the SCC) or in almost all subgroups (e.g., the LMAA<sup>18</sup>). There were also a number of institutions that did not make the top-ten list globally, but that were ranked amongst the top-ten most preferred institutions in the regions in which they were based. These include, for example, VIAC and DIS in Europe, JAMS and the AAA/ICDR in North America, DIAC in the Middle East and the Lagos Court of Arbitration in Africa.<sup>19</sup>



**The general reputation of the institution and the respondent's previous experience of that institution are the principal drivers behind choice of arbitral institution**



## Administrative/logistical support for virtual hearings is the most important adaptation that would make other arbitral institutions more attractive

### What adaptations would make other institutions or arbitral rules more attractive to users?

We asked respondents to indicate what adaptations would make other arbitral institutions or sets of arbitration rules more attractive. A list of indicative choices was offered, together with a free-text 'other' option, from which respondents could choose up to three options. Some of the suggested adaptations related to provisions in arbitral rules (whether used in administered or non-administered arbitrations). Other suggested adaptations concerned the service offered by arbitral institutions and appointing or administering authorities.

Noticeably, but perhaps unsurprisingly given the pandemic, the top-ranked choice (38%) was 'administrative/logistical support for virtual hearings'. It was followed by 'commitment to a more diverse

pool of arbitrators' (32%) and 'transparency of administrative processes and decisions, such as selection of and challenges to arbitrators' (29%). Other options chosen by 25% to 20% of respondents included: 'provision of expedited procedures', 'more tailored procedures for complex and multi-party arbitrations', 'provision for arbitrators to order both virtual and in-person hearings', 'cost sanctions for delay by arbitrators', 'rules giving extensive case management powers to arbitrators including robust sanctions in relation to the behaviour of parties and counsel', and 'provision of secure electronic filing and document-sharing platforms'.

In our 2018 survey, when we asked respondents to indicate the four most important reasons why they prefer given institutions, the results showcased a tendency for users to adopt a 'macro-perspective'.



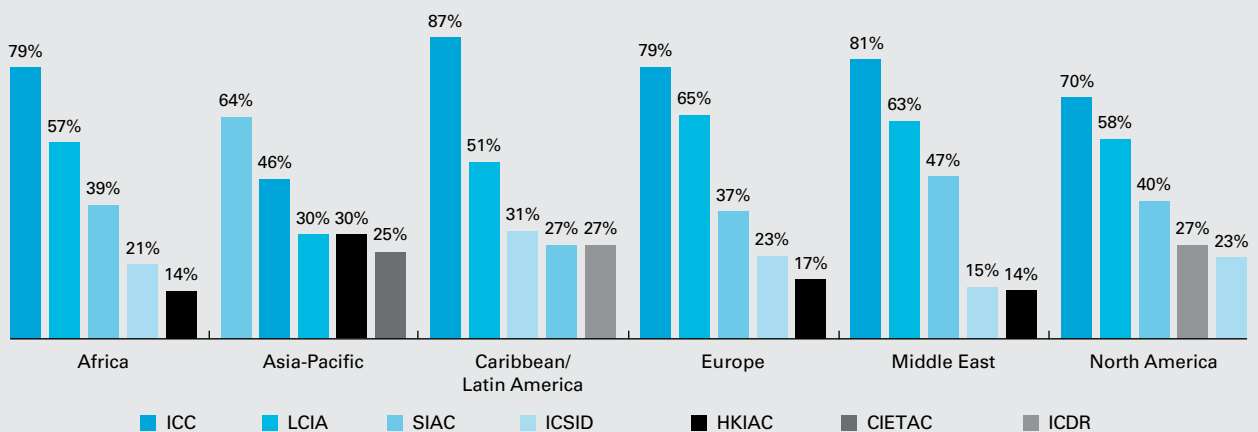
**32%**  
of in-house counsel would like **administrative/logistical support for virtual hearings**

This macro-perspective reflects the main factors that respondents to our 2018 survey identified as the ones that most determine their preference for one institution over another, namely the 'general reputation and recognition' of the institution, its 'high level of administration' and users' 'previous experience of the institution'.<sup>20</sup> These factors were more important to users than specific aspects of either the administration of cases by the institutions or their respective rules. The first choice for our current survey ('administrative/logistical support for virtual hearings') is clearly an indication of an emerging need of users due to the pandemic. The need for adaptation in response to changing circumstances is further underlined by the fact that there was also a demand for rules to include a 'provision for arbitrators to order both virtual and in-person hearings' (23%).<sup>21</sup>

'Commitment to a more diverse pool of arbitrators' (32%) ranked second across the whole respondent pool, but was the joint highest ranked choice of the in-house counsel subgroup. This shows the importance of institutions or appointing authorities in providing a more diverse pool of proficient arbitrators.<sup>22</sup>

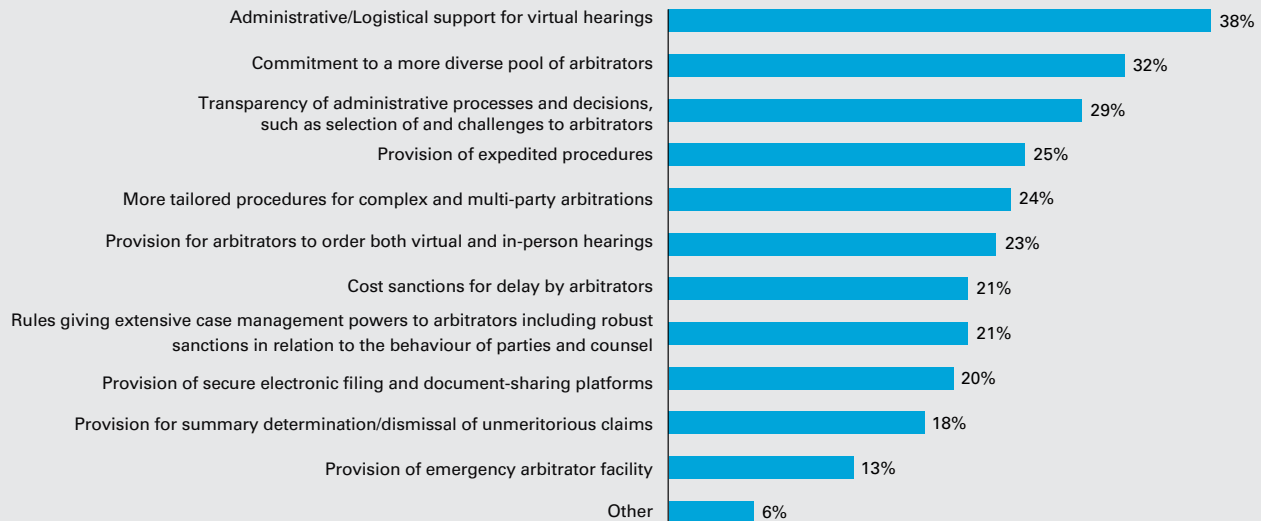
Interestingly, several interviewees highlighted that, depending on the nature and the value of the dispute, they might be

Chart 7: Top-five most preferred arbitral institutions by region



Percentage of respondents who included the institution in their answer

**Chart 8: What adaptations would make other institutions or rules more attractive to users?**



Respondents were able to select up to three options

willing to use less widely known institutions (such as institutions based in jurisdictions that are emerging as arbitration hubs) or even new entrants to the market. They explained that trusting in such institutions can be an effective means of encouraging greater diversity, particularly when those institutions may be in a position to suggest a different pool of arbitrators. This could include arbitrators who may not as yet enjoy high visibility globally, but who have particular experience of a region, applicable law or industry relevant for a given dispute.

'Cost sanctions for delay by arbitrators' and 'rules giving extensive case management powers to arbitrators including robust sanctions in relation to the behaviour of parties and counsel' were each selected by 21% of respondents and reflect, as expanded on in interviews, the desire for faster arbitration proceedings and more flexibility. In relation to the ability of arbitrators to sanction parties and their counsel, several respondents felt that arbitrators are still overly cautious when it comes to 'due process paranoia'.<sup>23</sup> As one interviewee stressed, this 'timid' approach leaves clients with a negative perception of arbitration. Others



**32%**

of in-house counsel want commitment by institutions to a **more diverse pool of arbitrators**

referred to instances of arbitrators failing to adequately address 'guerrilla tactics' by opposing counsel and parties. It appears from this that the real concern is not so much a lack of powers provided for in arbitral rules, but a perceived reluctance by arbitrators to exercise those powers.<sup>24</sup> On a related note, one interviewee emphasised the role that institutions can play in improving the quality of arbitrator performance, especially in terms of procedural delay. This can be achieved, the respondent opined, by more transparency as to arbitrators' availability and making available data such as the average time taken to render awards.

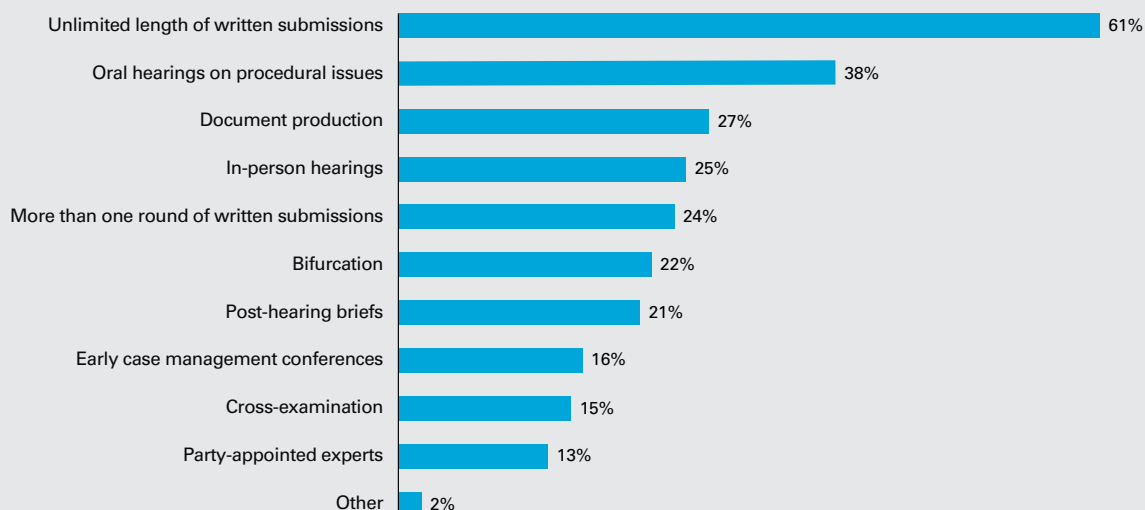
Other interesting questions concerned the nature and extent of the services that respondents would like administering entities and institutions to offer. On one hand, respondents have called for more active support in the practical conduct of arbitrations, such as 'administrative/logistical support for virtual hearings' and 'provision of secure electronic filing and document sharing platforms'. On the other hand, several interviewees, many of whom practise as full-time arbitrators, expressed their dissatisfaction with the way in which, in their view, some arbitral



**The use of less widely known institutions or even new entrants to the market can be an effective means of encouraging greater diversity, particularly when those institutions can suggest a different pool of arbitrators**

institutions have become 'too prescriptive'. Interviewees cited by way of example instances where they considered arbitral institutions to have adopted strong views on matters that are not clearly regulated under their rules, an approach which these respondents considered to be counterproductive to the flexibility of the arbitral proceedings.

**Chart 9: If you were a party or counsel, which of the following procedural options would you be willing to do without if this would make your arbitration cheaper or faster?**



Respondents were able to select up to three options

**Making arbitrations cheaper and faster: Which procedural options are we really ready to forgo?**

Time and cost are perennially acknowledged as the biggest concerns for arbitration users.<sup>25</sup> We asked respondents to assume the role of a party or counsel and consider, in that context, which of a list of different procedural options they would be willing to forgo if this would make their arbitration cheaper or faster. Respondents could select up to three options from the list, in no order of preference.

With a clear margin of more than 20% over other options, the first choice was ‘unlimited length of written submissions’ (61%). Interviewees agreed that this was the option that they would feel most comfortable foregoing, as they saw it as a ‘safe’ choice regardless of the type or profile of the dispute at stake. Interviewees further explained that, in their experience, it has become common practice for parties to submit unnecessarily long briefs. Imposition of page limits was thought most appropriate for certain types of submissions, predominantly post-hearing briefs (as discussed further below). Interestingly, some interviewees felt it is not only the parties who should curb their tendencies in this regard, suggesting that page

limits should also be set for arbitral awards, particularly in the context of investor-state disputes.

In a related vein, 21% of the respondents would be willing to do without ‘post-hearing briefs’. Interviewees revealed a more nuanced view of post-hearing briefs: some explained that they do find post-hearing briefs useful, especially when an oral closing has not taken place during a hearing, but that they work best where the tribunal provides some guidance as to content and imposes page limits. Indeed, imposing page limits on post-hearing briefs was almost unanimously deemed by interviewees as a means to save time and costs. As several respondents noted, counsel should resist the temptation to restate their entire case again when preparing their post-hearing briefs. It was suggested that post-hearing briefs should not simply function as an executive summary of the party’s previous submissions, but should instead contain reflections on what has come out of a hearing and offer a roadmap to the tribunal for writing the award. On a similar theme of streamlining written arguments, respondents also indicated a willingness to relinquish ‘more than one round of written submissions’ (24%).



**60%**  
of arbitrators  
and

**51%**  
of in-house  
counsel favour  
**limiting the  
length of written  
submissions**



**31%**  
of in-house  
counsel are  
willing to exclude  
**document  
production**

‘Oral hearings on procedural issues’ (38%) was the second most popular option that respondents would be willing to forgo. Respondents pointed out that, as procedural issues can arise frequently throughout an arbitration, parties and tribunals should prudently seek to avoid the additional expense and time commitment that oral hearings on procedural issues entail. Fewer respondents would be willing to forgo ‘early case management conferences’ (16%). Interviewees explained that, in many instances, early case management conferences are useful for resolving procedural issues early on.

‘Document production’ (27%) was also a popular option to sacrifice. Many interviewees emphasised that document production can be a very costly and time-consuming process. The time and cost involved is often disproportionate to the benefits that a party might hope to derive from the exercise. Others pointed out that although document production makes sense in some cases, in others, it can be tactically misused. Several interviewees also underlined the different expectations that parties from different legal traditions have when it comes to document production. While it might be expected that counsel from civil law



## Respondents stressed the importance of flexibility as a means to aid efficiency and reduce costs

traditions would be more inclined to do without document production, it is interesting that many interviewees from common law backgrounds also expressed a willingness to limit document production.

A quarter of respondents (25%) included 'in-person hearings' as a feature they would be prepared to forgo. This seems to reflect, to some extent, the increased level of comfort users have acquired with remote hearings in recent times, and particularly as a result of logistical difficulties for in-person hearings resulting from the COVID-19 pandemic.<sup>26</sup> However, interviews revealed that respondents were more likely to elect this option for hearings on procedural issues, rather than substantive hearings.<sup>27</sup>

A slightly less frequently chosen option was 'bifurcation', which less than a quarter of respondents (22%) would elect to eliminate. Interviewees felt that whether bifurcation is a means to enhance efficiency or, conversely, whether it leads to more costs and delays depends significantly on the specific circumstances of the case. As such, they were less inclined to agree to exclude the possibility of bifurcation from the outset.

Only a relatively small percentage of respondents (15%) indicated that they would be willing to do without 'cross-examination'. In interviews, respondents expressed a preference for a more nuanced approach to this—for example, they would be more amenable to forgo cross-examination in cases with less complex factual backgrounds and in relation to 'non-key' witnesses. Some respondents thought that a user's legal culture may influence their view, suggesting that civil lawyers might be more willing to forgo cross-examination in certain circumstances.



**40%**

of arbitrators would forgo **oral hearings on procedural issues**

'Party-appointed experts' was also chosen by a small percentage (13%). There was a split amongst interviewees performing different roles. Some arbitrators took the view that party-appointed experts are sometimes used as 'hired guns' by parties, which is undesirable. On the other hand, several counsel mentioned the also undesirable risk of a tribunal-appointed expert becoming a de facto fourth arbitrator.

A recurring theme in interviews was the sense that arbitration is becoming increasingly over-formalistic, at the expense of efficiency. Interestingly, this view was articulated by arbitrators themselves; as one arbitrator put it, they have seen the development over the years of what they referred to as 'a kind of arbitration-formality' which, taken too far, can amount to 'depriving the parties of the efficiencies they hoped for when they signed the arbitration clause'. One example of this 'arbitration-formality' that several respondents warned against is an excessive tendency to 'mimic court processes'. Respondents stressed the importance of flexibility as a means to aid efficiency and reduce costs by tailoring procedures to the needs of the dispute in question, rather than adopting rigid or excessively formalistic procedures. As one respondent pithily noted, arbitration should stop 'taking itself so seriously'! Closer monitoring of costs may also encourage greater efficiency—one respondent suggested that institutions should introduce costs budgeting rules to help parties and their funders monitor and plan for their potential costs exposure.



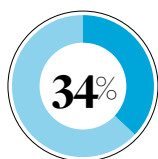
# Diversity on arbitral tribunals: What's the prognosis?

## The many faces of diversity: How much progress has been made?

Few, if any, would disagree that promoting diversity at all levels, including in the practice of international arbitration, is a positive thing. Calls for greater diversity, especially in relation to the appointment of arbitrators, have been prevalent for some time in the international arbitration community. The extent of progress towards this goal is a matter of debate. Respondents were therefore asked whether, and to what extent, they agreed or disagreed with the proposition that progress has been made in the past five years with regard to various aspects of diversity (i.e., gender, geography, age, culture and ethnicity) in terms of arbitral appointments.

Very few respondents expressed either strong agreement or disagreement with the central proposition in relation to any of the five listed aspects of diversity. While it is encouraging that the majority of respondents (61%) agreed that some progress has been made in relation to gender diversity, this contrasts sharply with the position for the other featured aspects of diversity. In relation to geographic, age, cultural and ethnic diversity, less than a third of respondents positively agreed in each case that progress has been made in recent years. Finally, for all aspects of diversity, a significant percentage of respondents (ranging from 21% to 35%) took a neutral stance, i.e., they neither agreed nor disagreed that progress has or has not been made.

Perhaps most revealing of all, these findings almost mirror the results for the same question posed in our 2018 survey.<sup>28</sup> Despite the increased amount of focus

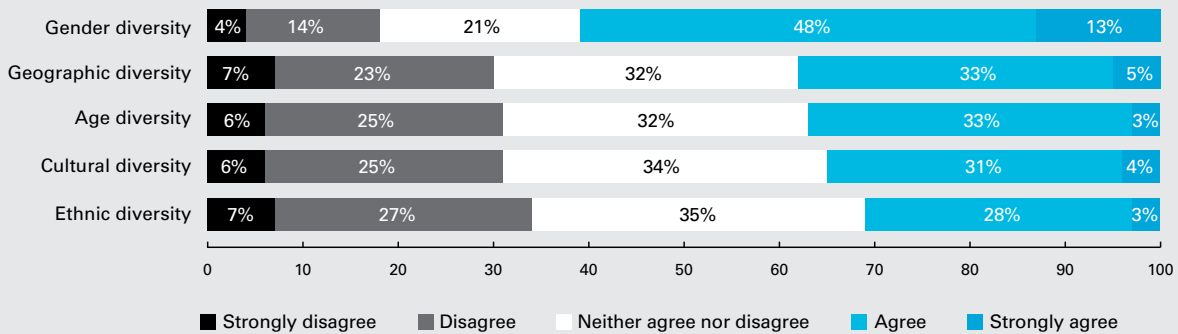


of respondents disagree that progress has been made in recent years in relation to **ethnic diversity**

## Summary

- More than half of respondents agree that progress has been made in terms of gender diversity on arbitral tribunals over the past three years. However, less than a third of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity.
- Respondents are divided as to whether there is any connection between diversity on a tribunal and their perception of the arbitrators' independence and impartiality. Just over half of the respondents (56%) stated that diversity across an arbitral tribunal has a positive effect on their perception of the arbitrators' independence and impartiality, but more than one third (37%) took a neutral view. Others consider the enquiry redundant, on the basis that the call for more diversity does not require further justification.
- 59% of respondents continue to emphasise the role of appointing authorities and arbitral institutions in promoting diversity, including through the adoption of express policies of suggesting and appointing diverse candidates as arbitrators. However, the significance of the role of counsel is highlighted by about half of respondents, who included 'commitment by counsel to suggesting diverse lists of arbitrators to clients' amongst their answers. In-house counsel also bear the onus of encouraging diversity through their choice of arbitrators.
- Many respondents feel that opportunities to increase the visibility of diverse candidates should be encouraged through initiatives such as 'education and promotion of arbitration in jurisdictions with less developed international arbitration networks' (38%), 'more mentorship programmes for less experienced arbitration practitioners' (36%) and 'speaking opportunities at conferences for less experienced and more diverse members of the arbitration community' (25%). Building visibility is particularly important in light of the perception that users prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience.
- The general consensus amongst respondents is that caution should be exercised when exploring whether adaptations in arbitral practice experienced during the COVID-19 pandemic may have an impact on promotion of diversity objectives, as it can go both ways. Virtual events, meetings and hearings may facilitate participation by more diverse contributors, but this may be hindered by unequal access to technology and the challenges of building relationships remotely.

**Chart 10: Do you agree with the statement that progress has been made in the following aspects of diversity on arbitral tribunals over the past three years?**



on, and awareness of, diversity issues and initiatives since then, respondents clearly feel that this has not as yet translated into actual or sufficient positive change.

One difficulty identified by interviewees who were generally neutral on whether advances have been made is that it is hard to measure progress in this context. Although the publication by institutions and appointing authorities of diversity-related statistics for arbitral appointments is to be welcomed in terms of providing some degree of verified information, it was noted that these statistics represent limited data sets. On a similar note, respondents mentioned the difficulty in defining different aspects of diversity. For example, interviewees questioned how age diversity can be statistically measured in the absence of agreement as to how to define it in the first place.

Ethnic diversity, in particular, continues to be an area where respondents feel there is a distinct need for improvement. As in our 2018 survey, the statement that recent progress has been made in relation to ethnic diversity had the least agreement among the five listed aspects of diversity, with only 31% of respondents agreeing.<sup>29</sup> Some interviewees expressed their frustration and dismay at the lack of progress in this area. One perception was that, unless there is a level playing field in terms of opportunities



## Ethnic diversity continues to be an area where respondents feel there is a distinct need for improvement

for engagement and visibility within the arbitration community, it is difficult to see how greater diversity can be achieved in arbitral appointments. One interviewee, for example, tellingly recounted attending an arbitration conference focusing on arbitration in Africa where none of the invited speakers were from Africa themselves. Similar ‘pipeline’ issues were also raised in relation to other aspects of diversity.<sup>30</sup>

While the question posed to respondents lists only a small selection of aspects of diversity, interviewees raised other aspects of diversity which they felt should also be given greater consideration. In particular, some interviewees focusing on arbitration in specific industries felt that the demands of certain types of disputes would be better served by less ‘legalistic’ arbitration procedures. They noted

in this context that there is room for more diversity in terms of arbitrator ‘background’, i.e., welcoming more arbitrators who come from relevant industries and who are not necessarily qualified lawyers, but who have training in international arbitration procedure.

### Diversity, independence and impartiality: Is there a connection?

We then explored whether there is any correlation between diversity on a panel of arbitrators and users’ perception of the arbitrators’ independence and impartiality.

Responses were divided and no single viewpoint attracted a significant majority of support. Just over half of the respondents (57%) stated that diversity has either ‘the most positive effect’ (36%) or ‘positive effect’ (21%) on their perception of the arbitrators’ independence and impartiality. Only 6% said that it has a ‘negative’ (5%) or ‘the most negative effect’ (1%). More than a third of respondents (37%), however, said that diversity across a panel of arbitrators has no effect at all on their perception of the arbitrators’ independence and impartiality.

This outcome was replicated across those interviewed on this issue, who insisted that a nuanced approach is necessary on diversity. Many felt that the answer essentially depends on two factors: the type and particularities of a given dispute and the type of diversity in question. Put differently, the majority of interviewees felt it is not possible to

provide a 'one-size-fits-all' answer to this question—rather, one must take into account what is meant by 'diversity' in each given case. So, a respondent's choice of a positive or neutral answer to this question should not simply be taken at face value. As the interviews revealed, it is neither the case that those who replied in the positive unreservedly felt that an arbitral panel that lacks diversity would be partial as a result, nor that those who gave a neutral response felt that diversity is always irrelevant.

Additional nuances were also offered when specific aspects of diversity were considered by interviewees.

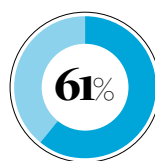
One view articulated in a number of interviews was that, when it comes to gender diversity, lack thereof has no impact on those respondents' perception of the tribunal's independence and impartiality. As one interviewee explained, gender diversity on tribunals is a laudable goal, but they would not automatically question the impartiality or independence of a panel just because its members were all female or all male. Similarly, age diversity was largely considered to be irrelevant in terms of perceptions of independence and impartiality.

Ethnic, geographic and cultural diversity were often considered to be interconnected. Some interviewees, both counsel and arbitrators, stressed that the



## While gender diversity on tribunals is a laudable goal, users would not automatically question the impartiality or independence of a panel just because its members were all female or all male

impact of ethnic, geographic and cultural diversity on perceptions of impartiality and independence of arbitrators can depend, in part, on the nature of a given dispute. This is particularly the case in investor-state arbitration, where they felt diversity or the lack thereof could be viewed as having an impact on both party and public perceptions of the legitimacy of the process. Another example from interviewees is where an arbitral panel is composed entirely of arbitrators who have no relationship with or understanding of a specific country or culture central to a dispute. This could lead parties to feel that the arbitrators might fail fully to appreciate cultural differences and (perhaps subconsciously) favour parties from areas or cultures with which the arbitrators are more familiar. This concern arose particularly in relation to arbitrators from North America



61% of respondents agree that progress has been made in recent years in relation to gender diversity

and Western Europe when dealing with disputes involving legal or cultural mores from other parts of the world.

Finally, a significant number of interviewees rejected the entire premise of the question, expressing that it is simply unnecessary, in this day and age, to seek to draw any correlation between diversity and arbitrators' independence and impartiality in order to justify calls for increased diversity. It should suffice that having more diverse pools of arbitrators is the right thing. The real question for them is how to encourage more diversity in practice.

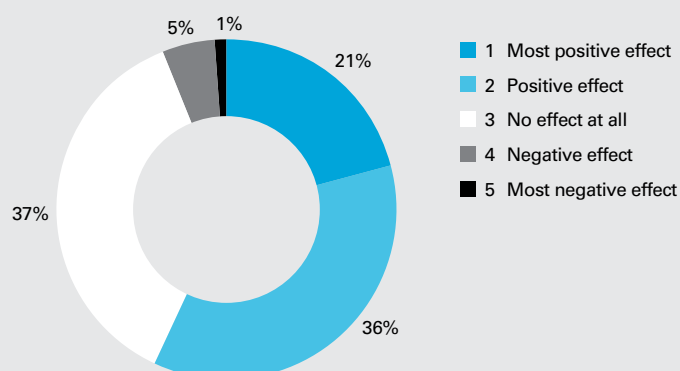
### Encouraging greater diversity: Yes, but how?

Respondents were asked which initiatives they considered to be most effective in encouraging greater diversity in terms of arbitral appointments. Respondents were asked to choose up to three options from a list of suggestions, to which they could also elect to add suggestions of their own.

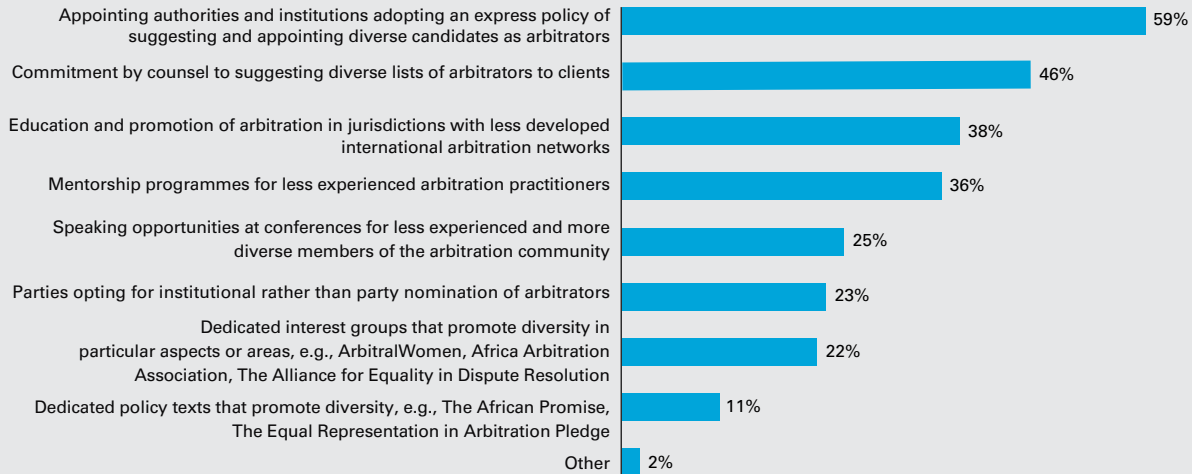
'Appointing authorities and institutions adopting an express policy of suggesting and appointing diverse candidates as arbitrators' was the most chosen option (59%). This reflects a preference for the institutions to be proactive in this regard. It also confirms the prevailing perception of arbitration users as to which participants in the international arbitration community wield the most influence on the promotion of diversity.<sup>31</sup>

This perspective was confirmed by an overwhelming majority of interviewees. As some explained, arbitral institutions (and, by extension, other appointing authorities) can exercise this influence when they are called upon

**Chart 11: What effect does diversity across a panel of arbitrators have on your perception of their independence and impartiality?**



**Chart 12: Which of the following initiatives do you consider to be most effective in encouraging greater diversity in terms of arbitral appointments?**



Respondents were able to select up to three options

by parties to select tribunal members or presiding arbitrators, either from the outset or when the parties or co-arbitrators have been unable to reach an agreement on appointments. Several interviewees opined that institutions and appointing authorities were also likely to maintain or have access to databases reflecting a larger pool of candidates for tribunals than parties or their counsel might otherwise consider. Representatives of various arbitral institutions confirmed that increasing diversity across tribunals is high on their agenda when appointing arbitrators. As discussed at pp.11 – 12 above, interviewees also saw an opportunity presented by the growing presence of regional and less widely known arbitral institutions and the role they could play in promoting diversity objectives, including by suggesting and appointing diverse arbitrator candidates.

However, while appointing authorities and institutions undoubtedly play a major role in arbitral appointments, it was generally agreed that the larger proportion of candidates are nominated by parties and their counsel.<sup>32</sup> The significance of the role of counsel was highlighted by 46% of respondents, who included ‘commitment by counsel to suggesting diverse lists of arbitrators to clients’ amongst their answers.



## Ultimately, it is always the demands of the case that determine choice of arbitrators

The prevailing sentiment amongst interviewees, however, was that this is often easier said than done. Some private practitioners admitted that they do not necessarily suggest as diverse a spread of candidates as they could when proposing lists of potential arbitrators to clients. Several interviewees reported that they encounter resistance from their clients when they do suggest candidates with whom the clients are relatively unfamiliar; similarly, clients are often not willing to trust suggested names who have less experience as arbitrators. The vast majority of interviewees emphatically pointed out that, ultimately, it is always the demands of the case that determine their choice of arbitrators. One interviewee noted it is not always easy for counsel to persuade

clients to consider a wider range of arbitrators. However, this does not absolve them of the responsibility to carry out the necessary due diligence and propose and promote diverse choices to their clients. Interviewees also emphasised that in-house counsel have the ultimate power to choose between potential arbitrator candidates and so the onus is on them to encourage diversity by their choices.

This theme of responsibility of both external and in-house counsel and, in particular, of more senior members of the arbitration community in promoting diversity was emphasised by several interviewees. Notably, this included both arbitrators and in-house counsel. One point that was repeatedly made is that, even

though it is undoubtedly important to promote diversity across arbitral panels, the reality is that a lot of work remains to be done in promoting diversity across counsel teams. Drawing attention to this ‘pipeline’ issue, one interviewee noted that ‘today’s counsel may be tomorrow’s arbitrators’.

The third most cited suggestion (38%) was ‘education and promotion of arbitration in jurisdictions with less developed international arbitration networks’. ‘More mentorship programmes for less experienced arbitration practitioners’ ranked fourth (36%). In addition, a quarter of respondents (25%) included ‘speaking opportunities at conferences for less experienced and more diverse members of the arbitration community’ as a way to encourage greater diversity. As explained in the interviews, these events help increase the visibility of newer entrants to the arbitration field. Organisers of such events are urged to make sure that their lists of speakers and moderators reflect diversity of all kinds. Building visibility is particularly important, because users tend to prefer arbitrator candidates about whom they have some knowledge or with whom they have previous experience.

A number of respondents also opted for ‘dedicated interest



**46%**

of respondents encourage **commitment by counsel** to suggesting diverse lists of arbitrators to clients

groups that promote diversity in particular aspects or areas, e.g., ArbitralWomen, Africa Arbitration Association, The Alliance for Equality in Dispute Resolution’ (22%) and ‘dedicated policy texts that promote diversity, e.g., The African Promise, The Equal Representation in Arbitration Pledge’ (11%). However, a number of interviewees expressed scepticism with regard to the proliferation of groups promoting particular aspects of diversity relative to their tangible contribution.

#### **Diversity and the pandemic: A blessing, a curse or irrelevant?**

The arbitration community has had to adapt in many ways in response to the COVID-19 pandemic. We sought interviewees’ views on any potential correlation between the pandemic, the necessary adaptations in the practice of arbitration and the promotion of diversity objectives. The general consensus was that it can go both ways.

On the positive side was that there might be new opportunities to increase the visibility of practitioners from groups that are underrepresented or who are based in jurisdictions which are not amongst the best-known hubs for international arbitration. For instance, the shift from in-person

to online conferences and events has opened up participation to wider audiences worldwide. This also offers the opportunity for speakers at those events to introduce themselves to members of the arbitration community with whom they may not otherwise have been able to connect. Remote working could facilitate access to the arbitration community for people who may have been unable to travel.<sup>33</sup> Several interviewees also thought increased use of IT could encourage inclusion of younger arbitrators who are more familiar with new technologies.

Cautious notes were also sounded on how much impact there may be on diversity objectives. Some interviewees, including arbitrators, speculated if the lack of in-person meetings between members of a tribunal would push those selecting arbitrators to prefer a more well-known candidate with existing relationships with other tribunal members. They attributed this to a fear that it may be more difficult for newer candidates to establish those relationships of trust and confidence remotely.<sup>34</sup> Unequal access to reliable and affordable technology required for remote participation in hearings, meetings and community events was also flagged by many as a challenge.



**While it is undoubtedly important to promote diversity across arbitral panels, the reality is that a lot of work remains to be done in promoting diversity across counsel teams, too**

# Use of technology: The virtual reality

The use of technology to support the practice of international arbitration has become increasingly commonplace. In particular, the arbitration community has shown a desire to embrace technology that boosts efficiency, identifying the wish for 'increased efficiency, including through technology' as the factor most expected to influence the future evolution of international arbitration.<sup>35</sup> The COVID-19 pandemic has presented challenges for the international arbitration community, but information technology tools have allowed practices to be adapted to new circumstances. We explored the impact of the use of technology in arbitration: how it has changed in recent years; which technology-supported changes may continue to be favoured by users in the future; and whether adaptations in practice highlighted during the pandemic represent a natural, continuing evolution rather than a crisis-driven revolution.

## Increased use of IT, but AI remains science fiction

Firstly, we set out to investigate current usage of certain forms of information technology (IT) and measure this against the level of usage reported by respondents to our 2018 survey.<sup>36</sup> Respondents were asked to indicate how often they have used the following forms of IT in international arbitrations: 'videoconferencing', 'hearing room technologies (e.g., multimedia presentations, real-time electronic transcripts)', 'cloud-based storage (e.g., FTP sites, cloud-based storage)', 'artificial intelligence (e.g., data analytics, technology-assisted document review)' (AI) and 'virtual hearing rooms'.

'Videoconferencing' and 'hearing room technologies' were the most commonly used forms of



72%

of respondents sometimes, frequently or always use **virtual hearing rooms**

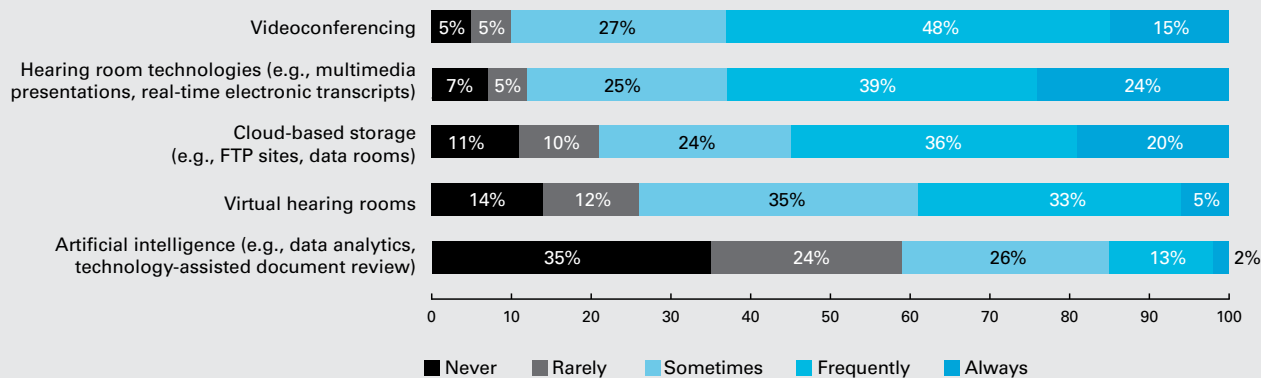
## Summary

- Technology continues to be widely used in international arbitration, particularly 'videoconferencing' and 'hearing room technologies', but the adoption of AI still lags behind other forms of IT.
- The increase in the use of virtual hearing rooms appears to be the result of how the practice of arbitration has adapted in response to the COVID-19 pandemic, as users have been forced to explore alternatives to in-person hearings.
- If a hearing could no longer be held in person, 79% of respondents would choose to 'proceed at the scheduled time as a virtual hearing'. Only 16% would 'postpone the hearing until it could be held in person', while 4% would proceed with a documents-only award.
- Recent (and, in many cases, new) experience of virtual hearings has offered an opportunity to gauge users' perception of this procedural adaptation. The 'potential for greater availability of dates for hearings' is seen as the greatest benefit of virtual hearings, followed closely by 'greater efficiency through use of technology' and 'greater procedural and logistical flexibility'. Aspects that gave respondents most cause for concern included the 'difficulty of accommodating multiple or disparate time zones', the impression that it is 'harder for counsel teams and clients to confer during hearing sessions' and concerns that it might be 'more difficult to control witnesses and assess their credibility'. The fallibility of technology and the phenomenon of 'screen fatigue' were also cited.
- Going forward, respondents would prefer a 'mix of in-person and virtual' formats for almost all types of interactions, including meetings and conferences. Wholly virtual formats are narrowly preferred for procedural hearings, but respondents would keep the option of in-person hearings open for substantive hearings rather than purely remote participation.



**Arbitration users should be forward-looking and prepared to deal with transformative technologies**

**Chart 13: How often have you used the following forms of information technology in an international arbitration?**



technology, with 63% of users claiming that they ‘always’ or ‘frequently’ use these aids, and a further 27% and 25% respectively saying they ‘sometimes’ utilise them. More than half of respondents ‘always’ or ‘frequently’ use ‘cloud-based storage’ (56%), with another quarter of respondents (24%) ‘sometimes’ using this form of IT. Respondents also avail themselves of ‘virtual hearing rooms’—38% of respondents ‘always’ or ‘frequently’ use this aid, while a further 35% ‘sometimes’ make use of these platforms. Again, proportionately fewer respondents have ‘never’ or ‘rarely’ made use of these aids.<sup>37</sup>

When compared to the results of the same enquiry posed in our 2018 survey, the use of hearing room technologies, videoconferencing and cloud-based storage has remained relatively consistent.<sup>38</sup> This is perhaps surprising, given the expectations articulated by respondents to our 2018 survey, an overwhelming majority of whom expressed the view that ‘videoconferencing’ (89%), ‘cloud-based storage’ (91%) and ‘hearing room technologies’ (98%) are tools that arbitration users should make use of more often.<sup>39</sup> One might have also expected the changing circumstances resulting from the COVID-19 pandemic to have hastened the adoption of these tools.

One possible explanation for the lack of movement in this regard may be that those who

were already using those forms of IT previously have continued to do so. However, those who were infrequent or occasional users have not since had sufficient reason to significantly change their practices, notwithstanding the effect of the pandemic. For example, if hearing room technology is thought to be unnecessary or disproportionately expensive for a given dispute, this cost-benefit analysis might not automatically be affected by the pandemic. It may even be that parties would be under greater pressure than before to reduce costs or logistical complexity. Nor would a switch from an in-person to a virtual hearing necessarily in and of itself impact the decision whether to use tools such as real-time transcription or multimedia presentations. In a similar vein, interviewees pointed out that arbitrations in particular sectors are frequently determined without oral hearings. The pandemic would have comparatively less effect on the practical conduct of documents-only arbitrations, so those involved in them would be correspondingly unlikely to have significantly increased their usage of certain forms of IT.

By contrast, there appears to have been an explosion in the use of virtual hearing rooms: 72% of respondents report using virtual hearing rooms at least ‘sometimes’, if not ‘frequently’ or ‘always’,<sup>40</sup> in stark contrast to our 2018 survey, when 64% of respondents said that they had ‘never’ utilised virtual



**The pandemic has served as a catalyst to hasten the wider awareness and acceptance of virtual hearing rooms**

hearing rooms and a further 14% said they had used them ‘rarely’.<sup>41</sup>

Unlike many of the other forms of IT we considered, this wholesale shift in use of virtual hearing rooms would logically appear to be the result of how the practice of arbitration has adapted in response to the COVID-19 pandemic, as users have been forced to explore alternatives to in-person hearings. The signals that the arbitration community was willing to embrace greater use of technology have been there for some time; even in 2018, the use of virtual hearing rooms was not wholly unknown. In this regard, it could be said that the pandemic has served as a catalyst to hasten the wider awareness and acceptance of an adaptation that some users of arbitration had

already begun to adopt. Whether this increased recourse to virtual hearing rooms will be sustained after the pandemic remains to be seen, as we explore further below.

On the other side of the spectrum, even though there has been a noticeable increase in the use of AI since 2018, adoption of AI continues to lag behind other forms of IT.<sup>42</sup> 35% of the respondent group stated that they have ‘never’ used AI, while 24% stated that they have used AI rarely. Only 15% declared that they used AI ‘frequently’ or ‘always’. Interviews reveal that this use of AI refers almost exclusively to technology-assisted document review. As one interviewee described it, AI has been a ‘brilliant revolution for e-discovery’, thereby enhancing procedural efficiency.

Several interviewees mentioned occasional use of other AI tools, such as data analytics. A recurring theme in these discussions was that AI tools are still considered to be relatively expensive and thus not affordable for all arbitration users. It was also noted that, even where clients are able to undertake the expense, they are not always persuaded that these tools will have an added value that will justify the high costs they entail. This is particularly the case for lower value or less complex or data-intensive disputes.

Interviews further revealed that there is a general lack of familiarity with new technologies, coupled, in some cases, with a continuing sense of mistrust. Interviewees from all groups expressed a degree of scepticism towards the potential use of AI tools and algorithms for predictive justice. They raised ethical considerations and doubts as to how much such tools can or should interfere with the adjudicative function. The vast majority of interviewees felt that AI cannot substitute for human arbitrators and counsel.

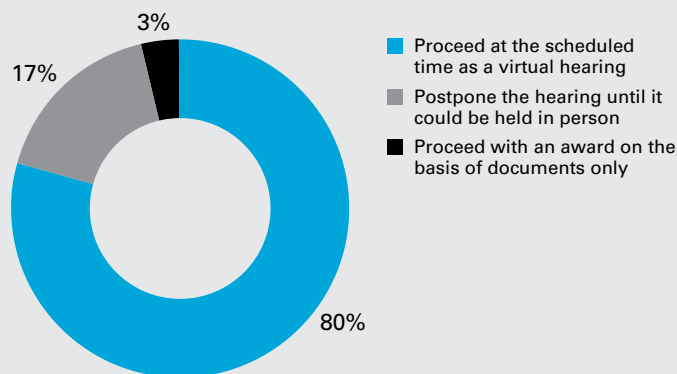
Other interviewees felt that the potential benefits of the evolving use of IT aids should not be held back by this lack of familiarity and the fear that it can engender. They emphasised that all stakeholders should adapt. This includes through training to familiarise themselves with technology and new tools that can impact the arbitration process. This would also assist stakeholders



87%

of arbitrators would prefer to hold a scheduled hearing **virtually** if it can't be held in person

**Chart 14: In general, if you had a scheduled in-person hearing that could no longer be held in person at that time, would you rather:**



in assessing potential related risks (for example, concerns as to whether use of some IT tools may lead to claims of due process violations). One interviewee noted that arbitration users not only need to be quicker to adapt to technology in the future, but must also guard against complacency or ‘self-congratulation’ for having adapted thus far to existing technologies. They urged users to be forward-looking and prepared to deal with ‘transformative technologies’. Nor did interviewees feel that use of advanced technologies is the province only of those with deep pockets. One interviewee, for example, predicted that adjudication by AI could have a potential role in the future for lower-value disputes.

Overall, interviewees are keen for progress in technology and its use in international arbitration to continue. The ‘big picture’ view, as espoused by one respondent, is that ‘arbitration should (and could) always be at the forefront of innovation [in] dispute resolution’.

**Hearings: Virtual now or in-person later?**

Hearings are the key stage for many arbitrations. We asked what the preferred course of action would generally be for participants faced with what has recently become a commonplace dilemma: a scheduled in-person hearing that can no longer be held in person at that time because of the COVID-19 pandemic. Would they rather ‘postpone the hearing until it could be held in person’, ‘proceed at the scheduled time as a virtual hearing’ or ‘proceed with an award rendered on the basis of documents only’?

A clear majority (79%) said they would rather ‘proceed at the scheduled time as a virtual hearing’, while 16% would ‘postpone the hearing until it could be held in person’ and 4% would proceed with a documents-only award.

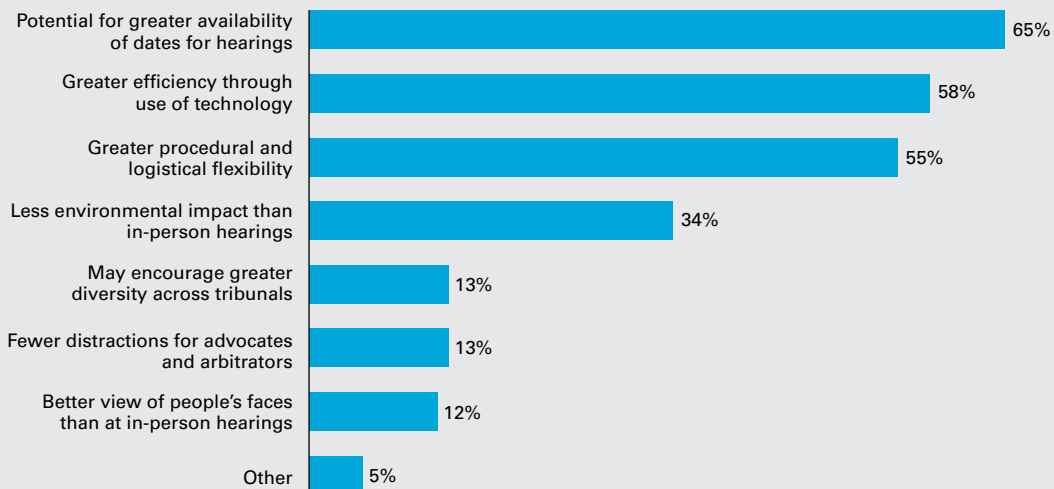
Two key points emerged from interviews. First, and as noted above, although virtual hearings were not widely seen prior to the pandemic, the idea was not new and the technology was available.<sup>43</sup> This means arbitration users were already equipped with the available tools, and so were able to adapt



**The vast majority of interviewees felt that AI cannot substitute for human arbitrators and counsel**



**Chart 15: What are the main advantages of virtual hearings?**



Respondents were able to select up to three options

easily and relatively quickly to the remote environment. Second, this readiness to switch to virtual hearings was not instant. Despite this availability of technology, the majority of interviewees confessed that their initial reaction at the start of the pandemic was a sense of procedural paralysis or a preference to ‘wait and see’. They reported that in the first months of the pandemic, they generally preferred to postpone any scheduled hearings in the expectation that the consequent delays would be of relatively short duration. As it became clear that the exceptional circumstances of the pandemic could continue for some time, there was a shift in attitude towards proceeding at the scheduled time using a virtual format. Interviewees explained that this shift was motivated by the practical need to limit the time and costs consequences of indefinite procedural delay. Those who were familiar with forms of remote participation even before the pandemic cited this familiarity as another reason that led them to lean towards a remote hearing instead of postponing.

Interestingly, breaking down the results by respondents’ primary role revealed that arbitrators overwhelmingly lean towards

holding the hearing as scheduled but in a virtual format (87% of arbitrators selected this option). As interviews revealed, arbitrators were acutely conscious of the difficulty in accommodating multiple postponed hearings in already full diaries. They feared that the need to find multiple fresh sets of hearing dates might lead to even more extensive delays.

It is also interesting to note that some interviewees who said they would opt for a documents-only procedure disclosed that this is a basis on which they routinely practice in any event. For example, arbitrations involving the trade and maritime sectors are commonly conducted without the need for hearings. Interviewees explained they would likely be more comfortable with the idea of forsaking an oral hearing in favour of a documents-only process than users who are more familiar with, or expect, oral hearings to be part of the process—whether in person or virtual.

**Not a black or white picture: The pros and cons**

By and large, the arbitration community’s reaction after the initial procedural paralysis due to the pandemic was pragmatic. In essence, that the show must go on.



**65%**

of respondents think a key advantage of virtual hearings is ‘**potential for greater availability of dates**’

The resulting (and, in many cases, new) experience of virtual hearings has offered an opportunity to gauge users’ perception of this procedural innovation. We asked respondents what they deemed to be the main advantages and disadvantages of virtual hearings. In each case, respondents were able to choose up to three options from a list of suggested features, and could also include their own suggestions.

The ‘potential for greater availability of dates for hearings’ was seen as the greatest benefit of virtual hearings (65%), followed closely by ‘greater efficiency through use of technology’ (58%) and ‘greater procedural and logistical flexibility’ (55%). One-third (34%) of respondents included ‘less environmental impact than in-person hearings’. ‘Fewer distractions for advocates and arbitrators’ and the potential to ‘encourage greater diversity across tribunals’ were each chosen by 13% of respondents, closely followed by ‘better view of people’s faces than at in-person hearings’ (12%).

The biggest disadvantages of virtual hearings were found to be ‘difficulty of accommodating multiple or disparate time zones’ and the impression that it is ‘harder for counsel teams and clients to confer during hearing sessions,

i.e., other than in breaks', each chosen by 40% of respondents. Almost as many respondents thought it might be 'more difficult to control witnesses and assess their credibility' (38%). Issues relating to technology were also of concern: 'Technical malfunctions and/or limitations (including inequality of access to particular and/or reliable technology)' and 'more difficult for participants to maintain concentration due to 'screen fatigue' were each chosen by 35% of respondents. Between a quarter and a third of respondents selected 'confidentiality and cybersecurity concerns' (30%) and the view that it is 'more difficult to 'read' arbitrators and other remote participants' (27%).

Views expressed in interviews were diametrically opposed. This may not seem remarkable in the context of questions asking respondents to turn their attention separately to the pros and cons rather than considering issues in the round. However, notwithstanding the way in which the questions were phrased, interviewees tended to come down on one side or another: either very positive towards virtual hearings, or very sceptical of them.

This general opposition of views is exemplified by the fact



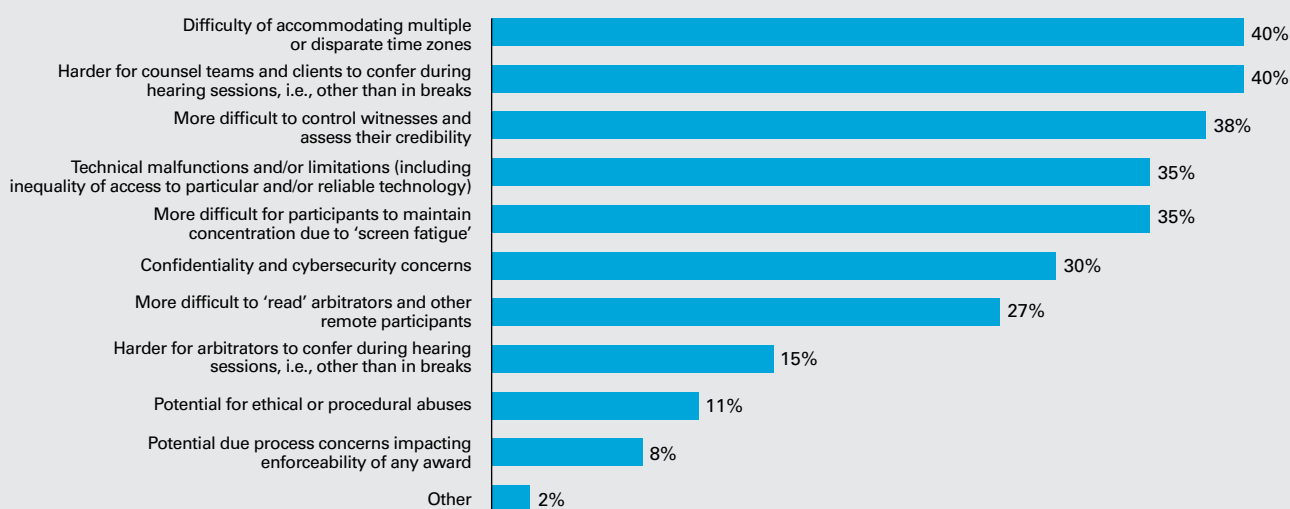
## As far as virtual hearings are concerned, respondents tended to come down on one side or another: either very positive towards them, or very sceptical of them

that the main advantage and main disadvantage identified by the respondents both related to scheduling issues: the perceived ease of finding more available dates to schedule virtual as opposed to in-person hearings on the one hand, and the challenge of accommodating disparate time zones on the other. Interviewees highlighted that the truly global nature of international arbitral practice means that the various stakeholders in any given case (e.g., party representatives, counsel, arbitrators, witnesses and experts) may be located in different places and, critically, different time zones all over the world. This makes it particularly challenging to find a given set of hours in the course of a day that would be

equally convenient and fair for all participants.

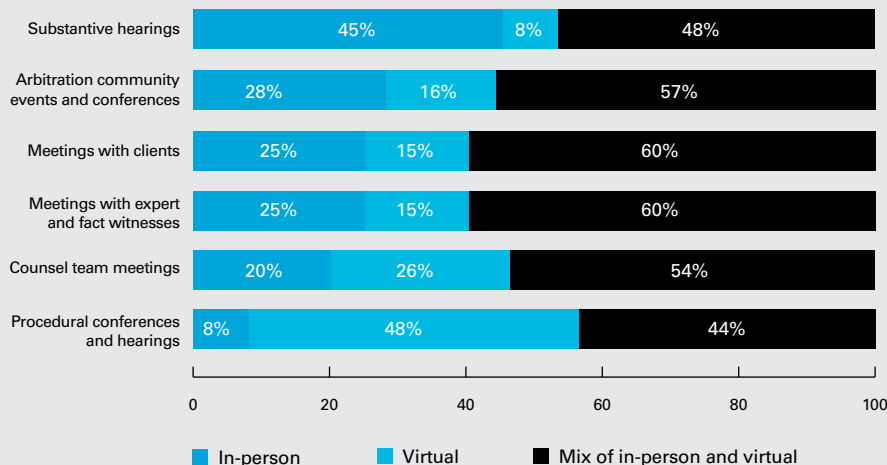
On the issue of ease, or lack thereof, of team communications during virtual hearing sessions, interviewees recounted that they have used various means of communication within their teams. However, they have found that none of them compare to being in the same room physically. This extends to communications outside the strict confines of the hearing room. A number of interviewees, in particular arbitrators, explained that in-person hearings offer the merit of face-to-face deliberations and casual exchanges (for example, over shared meals or in scheduled breaks) that are not simply social encounters. They facilitate the arbitral process by encouraging

**Chart 16: What are the main disadvantages of virtual hearings?**



Respondents were able to select up to three options

**Chart 17: Post-COVID-19, what do you think your preferred format will be for the following interactions?**



a more collegial atmosphere, making it easier to come to agreements with co-arbitrators or other participants.<sup>44</sup> In the same vein, interviewees in the role of counsel mentioned finding it easier to resolve such things as minor procedural issues in face-to-face discussions in more casual environments, such as over the coffee machines in breaks or a quick knock on the door. In a virtual environment, dealing with the same kind of minor issues is more likely to be a more formal and time-consuming process.

However, respondents did not appear to be unduly concerned about the enforceability of awards when hearings were held virtually. Only 8% of respondents thought ‘potential due process concerns impacting enforceability of any award’ was one of the main disadvantages of virtual hearings. Only 11% pointed to ‘potential for ethical or procedural abuses’. Interviewees revealed that any initial concerns they may have had were alleviated by the first positive messages coming from domestic courts considering enforceability questions arising from virtual hearings. They were also reassured by statements and guidance issued by arbitral institutions (in the context of administered arbitrations) confirming that virtual hearings were permitted under their rules.

Another set of concerns that were frequently mentioned in the interviews related to advocacy and the ability to ‘read’ other participants. Interviewees conceded that the view of other participants’ faces can be better on screen than in person, but stressed that it is harder to capture body language over video, as well as the overall dynamics of a hearing that one can only feel if everyone is in the same room. For some, their misgivings come from a sense of counsel having less control of the process in a virtual setting. Several interviewees found that some aspects of advocacy are tougher when conducted remotely, such as cross-examination. Notwithstanding this, one common theme emerged: A good advocate is a good advocate in any environment, in-person or remote, and the decision whether to choose an in-person or a remote hearing should be made on one basis only—what is best for the client.

How, then, do the parties who are the ultimate stakeholders of the arbitral process feel about virtual hearings? Some interviewees in the role of counsel reported that their clients tended to be very resistant to the idea of a virtual hearing, even if it might lead to costs savings. This was sometimes seen in cases involving states or where the clients were personally invested in the issues

at stake. This may be due in part to those clients wanting to have the arbitration equivalent of ‘their day in court’. A remote hearing feels less like that. On the other hand, several counsel reported that the majority of their clients were delighted to be able to keep the resolution of their dispute on track and were largely satisfied with the virtual hearings in which they participated. It seems these clients would also be willing to entertain virtual settings as a preference in the future, as discussed further below. As one counsel commented, ‘it will be hard to explain to certain clients in the future why an in-person hearing is needed’.

Another interviewee offered the most pragmatic summation of the virtual experience, particularly in the current context: ‘Sometimes, good enough is good enough and we should accept that we cannot always operate in a perfect paradigm scenario’.

**Here to stay or a necessary stop-gap in extreme circumstances?**

Hearings are not the only type of interaction that arbitration users have been experiencing in a virtual environment. From meeting clients, colleagues and witnesses to attending seminars and conferences, the arbitration community has had to adapt to interacting online. Are virtual settings for hearings and other interactions here to stay even when the pandemic (or similar circumstances) does not form part of the equation? Or is the current prevalence of remote interactions tolerated as a necessary stop-gap until ‘normal’ service resumes?



Only **8%** of respondents would prefer **substantive hearings to be held virtually or procedural hearings to be held in-person**



**A good advocate is a good advocate in any environment—in-person or remote—and the decision whether to choose an in-person or a remote hearing should be made on one basis only: what is best for the client**

To explore this, we asked respondents what their preferred format for these kinds of interactions is likely to be post-COVID-19—i.e., in ‘normal’ circumstances, without factors such as social distancing and travel restrictions. A choice of three formats was offered for each category of interaction: ‘in-person’, ‘virtual’, and ‘mix of in-person and virtual’.

Interviewees confirmed they deemed the mixed option to be equivalent to every lawyer’s favourite answer: ‘it depends’. As such, it is unsurprising that a ‘mix of in-person and virtual’ was the most popular option for almost all types of interactions. Respondents expressed a strong preference for this mixed format for ‘meetings with clients’ (60%), ‘meetings with expert and fact witnesses’ (60%), ‘arbitration community events and conferences’ (57%), and ‘counsel team meetings’ (54%). The only type of interaction for which a different format was narrowly preferred was ‘procedural hearings and conferences’, where 48% of respondents would prefer a wholly ‘virtual’ format, compared to 45% preferring the mixed option. For ‘substantive hearings’, the mixed format was again the most popular choice (48%), but the ‘in-person’ format was a very close second

(45%). Only 8% of respondents said they would prefer a purely virtual setting for ‘substantive hearings’. That relative lack of enthusiasm may suggest that those who prefer the mixed approach might be more motivated by the wish to preserve the ability to hold an in-person hearing than by the desire to keep open the option of a virtual arrangement.

In a similar vein, while a mixed format was comfortably the preferred choice of respondents for arbitration community events and conferences, the vast majority of interviewees highlighted the importance of in-person contact. They appreciate the fact that offering access to an event online allows a wide audience to participate, including people who might not otherwise have been able to do

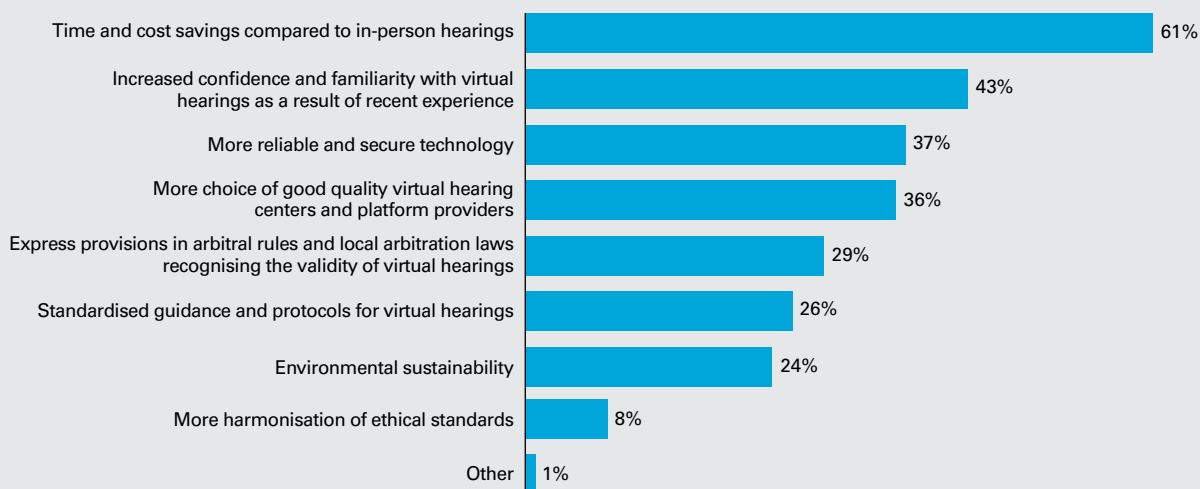
so. However, attending an event in person enhances the sense of community and provides networking opportunities that cannot be fully replicated in a virtual setting. By contrast, with regard to client meetings and meetings with expert and fact witnesses, most interviewees agreed that an in-person meeting is rarely required beyond, perhaps, the first encounter. They also reported, however, that the choice of in-person or virtual meetings tended to be largely driven by the client’s preference. Some counsel reported increased recourse to routine videoconferences with clients, rather than telephone calls, giving them a kind of face-to-face contact (even if virtual) that they would not otherwise have had.

When discussing virtual hearings, two key takeaways emerged from



**From meetings with clients, colleagues and witnesses to attending seminars and conferences, a mix of in-person and virtual was the most popular option for almost all types of interactions**

**Chart 18: What would make you more likely to choose a virtual rather than in-person format for hearings post-COVID-19?**



Respondents were able to select up to three options

interviews. First, there appears to be a growing expectation that virtual hearings will become the default option in the future for procedural hearings and conferences. As several interviewees pointed out, it is difficult now to find a plausible explanation for travelling, sometimes to a different country, to attend a procedural hearing. Similarly, it is hard to say why telephone calls rather than video-conferences have been seen as the standard alternative. As one senior practitioner noted, it used to be common practice for early case management conferences to be held in person, as the first opportunity to 'put a face to the dispute' and evaluate the dynamics. They felt the advent of videoconferencing technologies could achieve largely the same result, a sentiment echoed by others. Second, as discussed further below, interviewees consider it is less probable that wholly virtual formats will become the prevalent choice for substantive hearings. In particular, they viewed the in-person format as the dominant arrangement for substantive hearings for cases with complex factual backgrounds. However, they predicted that 'hybrid' hearings (mix of virtual and in-person) would continue to grow in popularity as users gained increased familiarity with the relevant technology and the procedural and logistical demands of remote participation in a hearing.

We also asked what would make respondents more likely to choose a virtual rather than in-person format for hearings post-COVID-19. Respondents were again asked to select up to three options from a list of suggestions. 'Time and cost savings compared to in-person hearings' (61%) was the most popular choice, followed by 'increased confidence and familiarity with virtual hearings as a result of recent experience' (43%). Technical and practical factors, such as 'more reliable and secure technology' and 'more choice of good-quality virtual hearing centres and platform providers' ranked third and fourth with almost identical percentages (37% and 36% respectively). Almost a third of the respondents chose 'express provisions in arbitral rules and local arbitration laws recognising the validity of virtual hearings' (29%),



## There appears to be a growing expectation that virtual hearings will become the default option for procedural hearings



**61%**

**Time and cost savings** was cited by 61% of respondents as a reason to opt for virtual rather than in-person hearings

while 'standardised guidance and protocols for virtual hearings' and 'environmental sustainability' were selected by almost a quarter (26% and 24% respectively).

These findings were reflected in interviewees' thoughts on the use of technology and their predictions for the future use of virtual hearings. A vast majority of interviewees emphasised the importance, going forward, of developing best practices and reliable technology. They also stressed the need for guidance from arbitral institutions in administered arbitrations.

Before the COVID-19 pandemic, the vast majority of users attending hearings would have considered the in-person format to be the norm, particularly for substantive hearings. The pandemic necessitated the switch for many users to virtual arrangements. Regardless of whether users may prefer to continue with remote forms of participation or revert to the in-person model where and when possible, the experiences we have now had with virtual hearings have presented an opportunity to evaluate and learn from their use. As interviewees optimistically hoped, perhaps this will also encourage accelerated acceptance by the arbitration community of technology-driven change in the future.

# Sustainability and information security: Opportunities and challenges

The increasing use of technology also offers other opportunities and challenges for international arbitration. In particular, there has been increased focus in recent years on the environmental impact of international arbitration, and concerns surrounding cybersecurity and data protection issues and how to address them. We sought to explore how each of these topics are viewed and dealt with in practice by users.

## How 'green' are our arbitrations?

Reducing the environmental impact of international arbitration is a serious objective. But how 'green' are arbitration users willing to go in practice? We aimed to shed some light on this by presenting respondents with a list of options that are used, or potentially could be used, to reduce the environmental impact of international arbitration. For each option, respondents were asked to indicate whether they had experience of using that measure. They were also asked whether they thought the measure should be used. Respondents did not have to have experience of using any given option in order to express their view of whether it should be used.

It may seem surprising that, as detailed further below, even for the measures that respondents indicated they had used most, a lesser percentage of respondents in each case suggested that they should be used. A possible explanation for this came to light in the course of the interviews. The majority of interviewees on the topic explained that they had mistakenly understood that if they had used a given measure, they did not then need to specify whether they also thought it *should* be used. While this was not the case for all respondents,



34%

of respondents expect that while **data protection** issues and regulations have limited impact now, they are **likely to increase** in importance in the future

## Summary

- Respondents show a willingness to adopt paperless practices, such as production of documents in electronic rather than hard-copy form; providing submissions, evidence and correspondence in electronic format; and the use of electronic hearing bundles. Many respondents would also welcome more 'green' guidance, both from tribunals and in the form of soft law.
- While the environmental benefits of remote participation rather than in-person participation are recognised, this is not the primary motivation behind the decision as to whether interactions should be remote or in-person.
- There appears to be increasing awareness of the need to embrace 'greener' practices. However, the overall message from respondents is that the reduction of environmental impact is a welcome side-effect of their choices throughout the arbitral process, rather than a priority in and of itself.
- Even though users generally acknowledge data protection issues and regulations may have an impact on the conduct of arbitrations, the extent and full implications of that impact are not understood by all. 34% of respondents predicted that data protection issues and regulations have 'limited impact at present but [this is] likely to increase'.
- Only around a quarter of respondents said they have 'frequently' or 'always' seen cybersecurity measures being put in place in their international arbitrations. The majority (57%) encountered such measures in less than half of their cases.
- The IT security measures and tools most used or recommended by respondents include 'cloud-based platforms for sharing electronic or electronically submitted data'; 'limiting access to prescribed individuals'; 'data encryption'; and 'access controls, e.g., multi-factor authentication'. Almost half of the respondents recommended the use of 'secure/professional email addresses for arbitrators rather than web-based email providers (i.e., no Gmail, Yahoo, Hotmail, etc.)'.
- Respondents appreciate being able to rely on specialist IT support and systems to ensure robust cybersecurity protections are in place.
- Although there are encouraging signs that users are mindful of cybersecurity issues and the need to address them, there is nonetheless ample scope for more engagement on this front.

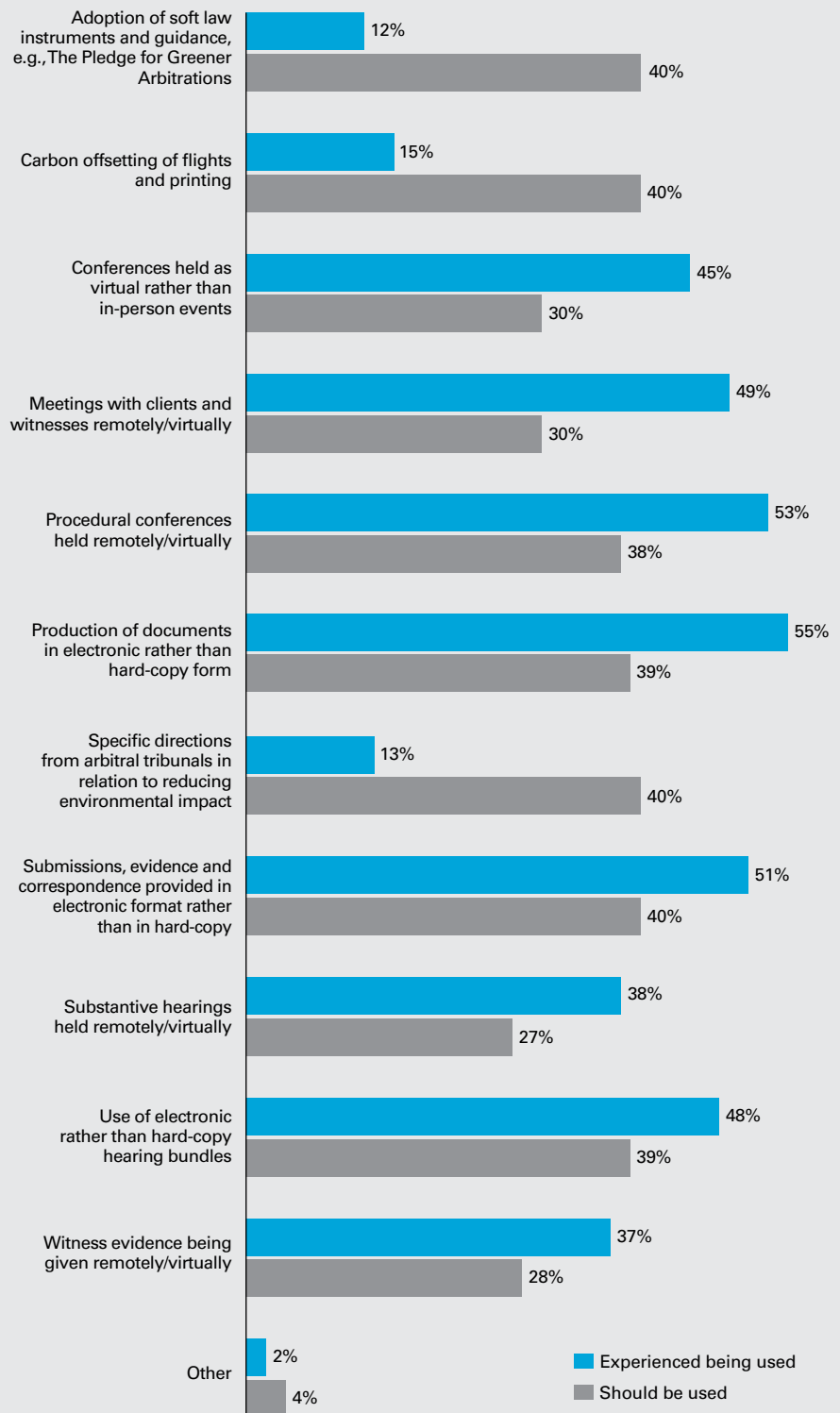
the findings from this enquiry must be assessed in light of this misunderstanding.

The most commonly used measures included 'production of documents in electronic rather than hard-copy form in document production exercises', providing 'submissions, evidence and correspondence in electronic format rather than in hard copy' and 'use of electronic rather than hard-copy hearing bundles'. Each of these options were chosen by around half of the respondents (between 48% and 55% in each case). All three options also ranked highly as measures that respondents felt should be used (between 38% and 40% in each case).

Interviewees favoured a move towards more paperless practices although, while they welcomed the environmental benefit, they often focused more on the cost and efficiency of these measures. They expressed surprise that it should still be considered necessary to print multiple copies of hearing bundles, emphasising that it is important to 'think before you print'. They preferred making the choice themselves on whether or not to print documents, rather than expecting by default to be sent paper copies. Some suggested that going paperless should be an opt-out rule, at least for disputes under a certain monetary threshold.

Environmental sustainability was confirmed as a factor that influenced users' choice of a virtual rather than in-person interaction.<sup>45</sup> 'Procedural conferences held via telephone conference, videoconference or virtual hearing rooms', 'meetings with clients and witnesses via telephone conference', 'video-conference or virtual hearing rooms rather than in person', 'substantive hearings held via video conference or virtual hearing rooms' and 'witness evidence being given via video conference or virtual hearing rooms' were all measures that significant numbers of respondents both reported having experienced and thought should be used. Indeed, 'procedural conferences held via telephone conference, video-conference or virtual hearing rooms' was one of the most commonly experienced measures, identified by 53% of respondents. However, although the

**Chart 19: What measures have you experienced being used, and/or do you think should be used, to reduce the environmental impact of international arbitration?**



Respondents were able to select up to three options

environmental benefits of remote participation were recognised, interviews revealed that this was not the primary motivation behind the decision as to whether interactions should be remote or in person.

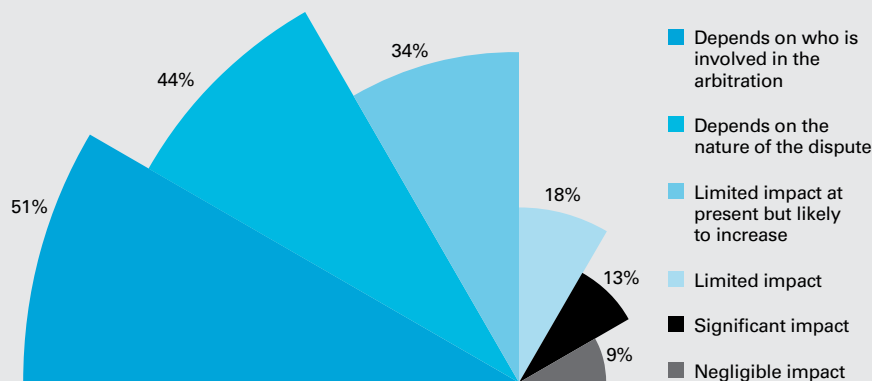
Adoption of soft law instruments and guidance, e.g., The Pledge for Greener Arbitrations<sup>1</sup> emerged as another measure that a large number of respondents thought should be used (40%). Reflecting that this fell short of a majority view, opinions expressed in interviews diverged. Some interviewees praised the importance of these initiatives. Others were more sceptical, urging the avoidance of over-regulation through soft law. Interestingly, a number of interviewees felt institutions being more proactive in encouraging reduction of environmental impact would be more effective than soft law. Several interviewees agreed that, at least for administered arbitrations, arbitral institutions could take the lead by modifying their rules in order to provide that written submissions and supporting evidence should be submitted in electronic form only, unless otherwise ordered by the tribunal. On that note, while very few respondents have had experience with 'specific directions from arbitral tribunals in relation to reducing environmental impact' (13%), they would welcome more direct guidance from arbitrators (40%).

There appears to be increasing awareness of the need to embrace 'greener' practices. However, the overall message from respondents is that the reduction of environmental impact is a welcome side-effect of their choices throughout the arbitral process rather than being a priority in and of itself.



**There is a general awareness of the potential financial consequences of non-compliance, but the exact implications of existing data protection regulations are far from understood**

**Chart 20: How much impact do you consider data protection issues (e.g., obligations under the EU General Data Protection Regulation) have on the conduct of arbitrations?**



Respondents were able to select up to three options



**9%**

Only 9% of our respondents felt that data protection regulations have **negligible impact** on the conduct of arbitrations

**Data protection: How much do we actually know?**

We asked respondents to indicate how much impact they consider data protection issues (e.g., obligations under the EU General Data Protection Regulation (GDPR)) have on the conduct of arbitrations. We sought to identify both when they thought data protection issues would be of relevance to their arbitrations, and the degree to which they have an impact. They were asked to select all options that they deemed applicable from the following: 'depends on who is involved in the arbitration'; 'depends on the nature of the dispute'; 'limited impact'; 'limited impact at present but likely to increase'; 'negligible impact and significant impact'.

Inevitably, options including the word 'depends' were popular. Half of the responses (51%) indicated that it 'depends on who is involved in the arbitration' and just under that threshold (44%) that it 'depends on the nature of the dispute'.

With regard to the extent to which data protection issues were thought to have an impact, 34% of respondents predicted that they have 'limited impact at present but likely to increase'. Only 13% felt that they have 'significant impact', and 9% voted for negligible impact. These results may indicate a lack of familiarity with the reach and applicability to international arbitration of many data protection regimes that are in place around the world.

It is interesting to note that although we only referred to the GDPR as an indicative example in the question, an overwhelming number of interviewees, across all regions and roles, expressly referred to this EU legislation when discussing data protection. Interviewees explained that they felt the GDPR in particular had brought the issue of data protection to the fore. As one observer stated, the GDPR 'put the issue of accountability in data processing operations in the context of arbitration on the table'. The large fines potentially payable for non-compliance was thought





## The amount of consideration given to cybersecurity in arbitrations depends in large part on the nature of the dispute, and the interests and identity of the parties

to be a major factor in drawing attention to data protection issues.

Most tellingly, the interviews revealed a general awareness of the potential financial consequences of non-compliance, but the exact implications of existing data protection regulations are far from understood. Very few interviewees revealed extensive understanding of the issues and the measures required to address them. The vast majority of interviewees indicated that they delegated all responsibility for data protection to others in their organisations (such as data protection officers) where they had the ability to do so. Most confessed they had no direct experience of grappling with data protection issues in their arbitrations. Others voiced their dissatisfaction with what they saw

as an unnecessary new layer of complexity added to proceedings. They felt that arbitration proceedings should be exempted from the scope of data protection regulations.

Ultimately, the prevailing theme that emerged was that users generally acknowledge there is an impact. However, they find it hard to define exactly what that impact is and what it might mean in practical terms both for them and their arbitrations.

### The cybersecurity conundrum

We asked respondents how often, over the previous three-year period, they had experienced measures being put in place in international arbitrations to protect the confidentiality and security of electronic or electronically submitted data. They were asked to choose from one of four options: 'always',



27%

of respondents have seen cybersecurity measures used in more than half of their cases over the past three years

'frequently (i.e., more than half of the cases)', 'sometimes (i.e., less than half of the cases)' or 'never'.

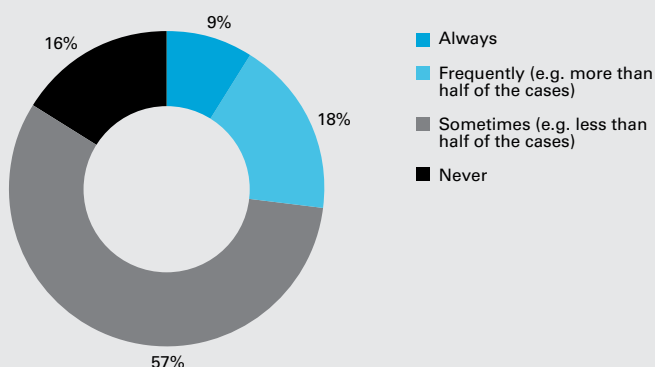
The responses were mixed: Only around a quarter of respondents said they have 'frequently' (18%) or 'always' (9%) seen cybersecurity measures being put in place in their international arbitrations. The majority said they only encountered such measures in less than half of their cases (57%), while a further 16% of respondents said they have 'never' seen such measures put in place.

A significant number of interviewees pointed out that the amount of consideration given to cybersecurity in their arbitrations depends in large part on the nature of the dispute, and the interests and identity of the parties. For example, interviewees thought cybersecurity was likely to be a significant concern when a dispute involved a state or public interest issue.

We then explored which specific cybersecurity measures respondents have experienced being used, or think should be used. Respondents were provided with a list of measures. For each option, respondents were asked to indicate whether they had experience of using that measure. They were also asked whether they thought the measure should be used. Respondents did not have to have experience of using any given option in order to express their view of whether it should be used.<sup>46</sup>

The measure that respondents reported using most was 'cloud-based platforms for sharing electronic or electronically submitted data' (42%), suggesting that their adoption has become a relatively standard practice for many arbitration users. Around a third of respondents reported seeing the use of various concrete IT security measures and tools: 'limiting access to prescribed individuals' (37%), 'data encryption' (33%) and 'access controls, e.g., multi-factor authentication' (32%). Interviewees acknowledged that it is obviously easier to ensure robust cybersecurity protections are in place when they can rely on dedicated IT support and systems to facilitate this. As numerous interviewees were at pains to point out, they are not themselves IT specialists. In some cases, but not all, this support was available from within an interviewee's

**Chart 21: In your experience over the past three years, how often have measures been put in place to protect the confidentiality and security of electronic or electronically submitted data in an international arbitration?**



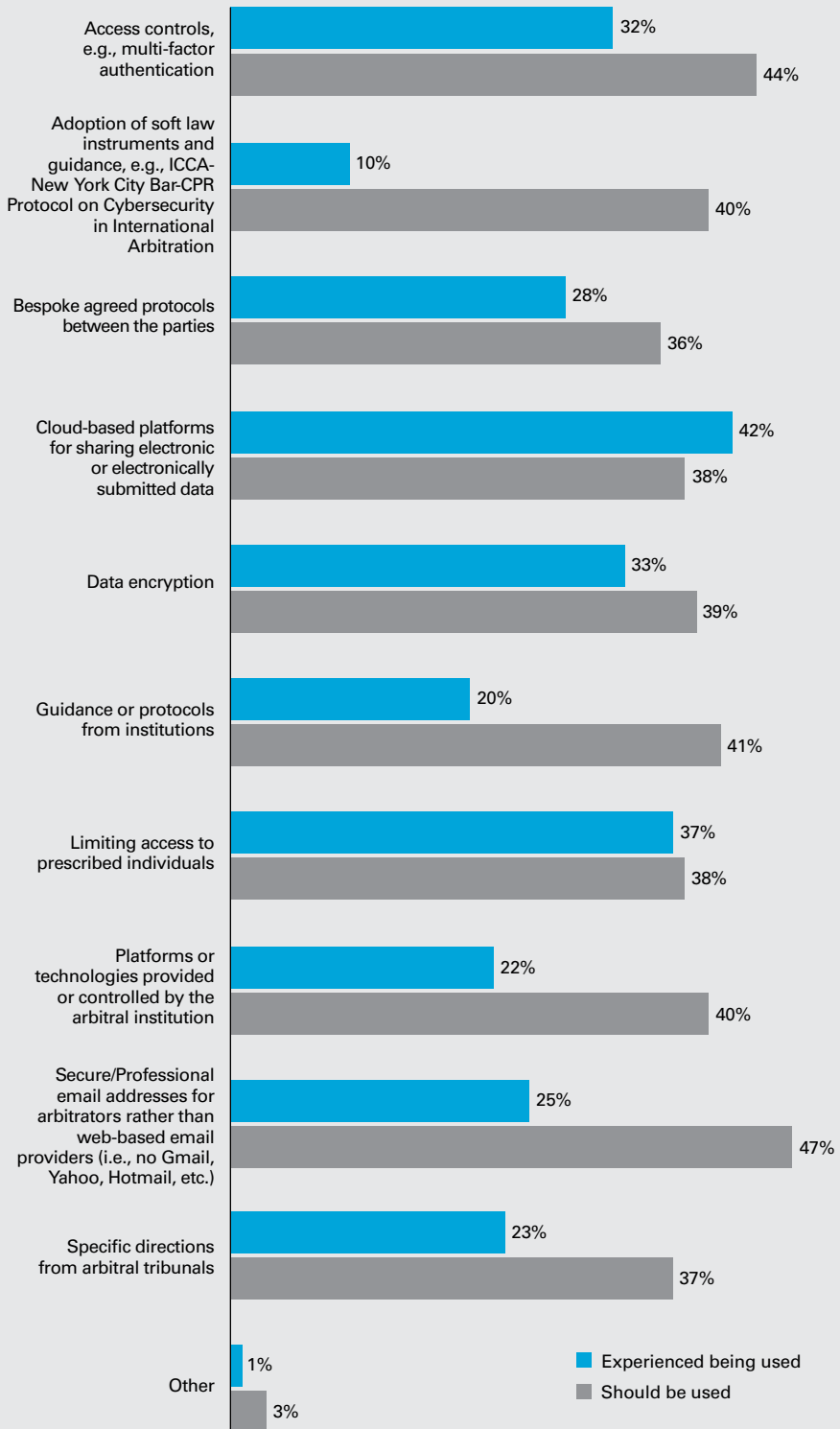
organisation. Support from other sources was also mentioned—22% of respondents said they had used ‘platforms or technologies provided or controlled by the arbitral institution’. Interviewees confirmed that they welcomed this development. It appears that the provision by non-parties, or even external vendors, of support for cybersecurity measures would help ensure a consistent level of security and risk management for all participants.

Measures involving discussion amongst participants and guidance or input from arbitrators, institutions and other sources were less commonly encountered. Most options of this kind scored between 20% and 28%, with only 10% of respondents having experienced the ‘adoption of soft law instruments and guidance’.

When it comes to measures that respondents thought should be used, almost half (47%) advised the use of ‘secure/professional email addresses for arbitrators rather than web-based email providers (i.e., no Gmail, Yahoo, Hotmail, etc.)’. This was an area of concern flagged by some counsel in interviews. While they acknowledged this is a declining practice, they voiced their discomfort that some arbitrators continue to use web-based email notwithstanding the associated risks.

Other measures which garnered significant support (each chosen by between 36% and 44% of respondents) as options that should be used included: ‘access controls, e.g., multi-factor authentication’, ‘platforms or technologies provided or controlled by the arbitral institution’, ‘guidance or protocols from institutions’, ‘adoption of soft law instruments and guidance, e.g., ICCA-New York City Bar-CPR Protocol on Cybersecurity in International Arbitration’, ‘cloud-based platforms for sharing electronic or electronically submitted data’, ‘data encryption’, ‘limiting access to prescribed individuals’, ‘specific directions from arbitral tribunals’ and ‘bespoke agreed protocols between the parties’. These are encouraging signs that users are mindful of cybersecurity issues and the need to address them. There is nonetheless ample scope for more engagement on this front.

**Chart 22: Which of the following measures have you experienced being used, or do you think should be used, to protect the confidentiality and security of electronic or electronically submitted data in international arbitration?**



Respondents were able to select up to three options

## Endnotes

- 1 2015 International Arbitration Survey, p.5 and 2018 International Arbitration Survey, p.5-6. In the 2018 survey, 97% of respondents chose arbitration as their preferred method of resolving cross-border disputes, either as a stand-alone method (48%) or in conjunction with ADR (49%).
- 2 2015 International Arbitration Survey, p.5 (Chart 1); 2018 International Survey, p.5 (Chart 1).
- 3 2015 International Arbitration Survey, p.12 (Chart 8) and 2018 International Arbitration Survey, p.10 (Chart 7).
- 4 Zurich was also favoured by 4% of respondents, placing it just outside the top ten, showing Switzerland's continuing popularity as an international arbitration centre.
- 5 See further the discussion at p.8 below on reasons influencing choice of seat.
- 6 55% of respondents expected Brexit would have no impact on the use of London as a seat (2018 International Arbitration Survey, p.12 (Chart 9)).
- 7 Our 2015 survey found that factors of convenience, such as the presence in a seat of well regarded arbitration institutions, can increase the attractiveness of the seat once the quality of its formal legal infrastructure has reached a threshold of established quality (2015 International Arbitration Survey, p.16 (Chart 12)).
- 8 In addition to Hong Kong and Singapore, seats in Mainland China such as Shanghai, Beijing and Shenzhen were also nominated by more respondents in this survey than in our previous surveys.
- 9 These subgroups of respondents reflect the data collected from users who have stated that they principally practise or operate in a particular region, or in a multitude of regions that includes the particular region in which a subgroup is based.
- 10 2010 International Arbitration Survey, p.17.
- 11 2018 International Arbitration Survey, p.11, Chart 8. See also 2015 International Arbitration Survey, p.14 (Chart 10) and 2010 International Arbitration Survey, p.18 (Chart 14).
- 12 GAFTA was included as an option because although it may administer arbitrations under the GAFTA rules, GAFTA does not hold itself out as an arbitral institution. However, arbitrations under the GAFTA rules could be described as administered non-institutional arbitrations rather than being purely ad hoc in the way non-administered arbitrations may be categorised.
- 13 2006 International Arbitration Survey, p.12; 2010 International Arbitration Survey, p.23 (Chart 17); 2015 International Arbitration Survey, p.17 (Chart 13); 2018 International Arbitration Survey, p.13 (Chart 12).
- 14 The LMAA stands for the London Maritime Arbitrators Association. The LMAA Terms were listed in our survey questionnaire as an example of ad hoc arbitration rules that may be chosen by users although, erroneously, an inadvertent typographic error there referred to the LMAA as the London Maritime Arbitration Association. The LMAA does not classify itself as an arbitral institution and was not described as such in our questionnaire. Notwithstanding this, it was nominated by a number of respondents in response to the question asking them to name their preferred arbitral institutions. In order to accurately reflect the answers given to this question by these respondents, and to maintain the integrity of the survey data, we have not excluded the nominations for the LMAA from the data set for this question although it is not an arbitral institution.
- 15 SIAC was chosen by 21% of respondents in 2015, 36% in 2018 and 49% in this survey (2015 International Arbitration Survey, p.17 (Chart 13); 2018 International Arbitration Survey, p.13 (Chart 12)).
- 16 HKIAC was chosen by 27% of respondents in 2018 and 44% in this survey (2018 International Arbitration Survey, p.13 (Chart 12)).
- 17 The same factors were highlighted by respondents in our 2015 International Arbitration Survey (p.19 (Chart 15)) and 2018 International Arbitration Survey (p.13-14 (Chart 13)). See further below pp.11-12.
- 18 See note 14 above regarding the nomination by respondents of the LMAA.
- 19 Our 2015 and 2018 surveys noted a similar trend whereby interviewees often showed preference for an arbitral institution in the region in which they were based, alongside appreciating widely recognised global institutions such as the ICC (2015 International Arbitration Survey, p.17 and 2018 International Arbitration Survey, p.13).
- 20 2018 International Arbitration Survey, p.14.
- 21 See also 2018 International Arbitration Survey, p.37-38 (Chart 40) where respondents voiced an expectation for the future evolution of arbitration to be driven by increased efficiency including through technology.
- 22 See also the discussion at pp.18-19 below in relation to the role played by both counsel and institutions or appointing authorities in promoting more diverse candidates.
- 23 The phrase 'due process paranoia' was first coined by a respondent to our 2015 survey (2015 International Arbitration Survey p.10).
- 24 This view was also expressed by interviewees in our 2015 survey (2015 International Arbitration Survey, p.10).
- 25 In our 2018 survey, for example, time and cost were named as the worst characteristics of arbitration (2018 International Arbitration Survey, p.8), and the wish for greater efficiency was cited as the main driver for the future evolution of arbitration (2018 International Arbitration Survey, pp.37-38).
- 26 See also the discussion on virtual hearings at pp.22-23 below.
- 27 See also the discussion at pp.26-27 below on choice of hearing format in the future.
- 28 2018 International Arbitration Survey, pp.17-18.
- 29 In 2018, only 24% of respondents agree that progress had been made in this regard over the previous five years.
- 30 See also the discussion at pp.18-19 below on initiatives to encourage greater diversity.
- 31 See 2018 International Arbitration Survey, p.19 (Chart 17). Arbitral institutions were voted by nearly half of respondents (45%) to be the best placed stakeholders to ensure greater diversity across tribunals.
- 32 See 2018 International Arbitration Survey, p.18-19.
- 33 13% of respondents thought an advantage of virtual hearings is that they may encourage greater diversity across tribunals (see further Chart 15 below).
- 34 See further pp.23-24 below.
- 35 2018 International Arbitration Survey, p.32 (Chart 35).
- 36 *Id.*
- 37 The following percentages correspond to 'never' and 'rarely': 'videoconferencing' (5% and 5%); 'hearing room technologies' (7% and 5%); 'cloud-based storage' (11% and 10%); 'virtual hearing rooms' (14% and 12%).
- 38 2018 International Arbitration Survey, p.33 (Chart 36).
- 39 *Id.*
- 40 2018 International Arbitration Survey, p.32 (Chart 35).
- 41 *Id.*
- 42 See 2018 International Survey, pp.32-33.
- 43 2018 International Arbitration Survey, p.32. The ability of participants to conduct hearings and meetings via videoconferencing or other means of communication that do not require physical presence has been acknowledged for some time as one of the most notable advantages of technology that is already very much exploited in international arbitration. See also Chart 13 above.
- 44 See also p.19 above on interactions between tribunal members.
- 45 'Less environmental impact than in-person hearings' was identified by 34% of respondents as one of the main advantages of virtual hearings (Chart 15); 24% of respondents said 'environmental sustainability' was a factor that would make them more likely to choose a virtual rather than in-person format for hearings (Chart 18).
- 46 As with a previous question (see pp.28-29 and Chart 19), a significant number of interviewees on the topic explained that they had mistakenly understood that if they had used a given measure, they did not then need to specify whether they also thought it should be used. While this was not the case for all respondents, the findings from this enquiry should be read in light of this misunderstanding.
- 47 This includes, for example, academics, judges, representatives of trade associations, third-party funders, government officials, expert witnesses, economists, entrepreneurs, law students, business development experts, and respondents who did not specify their position.

# Appendices



# Methodology

The research for this study was conducted from October 2020 to March 2021 by Dr Maria Fanou, White & Case Postdoctoral Research Fellow in International Arbitration, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, together with Ms Norah Gallagher, Deputy Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London.

An external focus group composed of senior in-house counsel, senior representatives of arbitral institutions, private practitioners and arbitrators provided valuable feedback on the draft questionnaire.

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

**Phase 1:** An online questionnaire of 31 questions (of which 20 were substantive in nature) was completed by 1218 respondents between 8 October 2020 and 21 December 2020. The survey sought the views of a wide variety of stakeholders in international arbitration. 60% of respondents declared that they have been personally involved in more than five international arbitrations over the past five years. The respondent group consisted of counsel (private practitioners) (43%), full-time arbitrators (15%), in-house counsel (private sector) (7%), in-house counsel (government or state entity) (2%), 'arbitrator and counsel in approximately equal proportion' (11%), arbitral institution staff (5%), and others<sup>47</sup> (17%). The questionnaire responses were analysed to produce the statistical data presented in this report. A reference to 'respondents' in the report refers to those respondents who answered that particular question. Each of the substantive

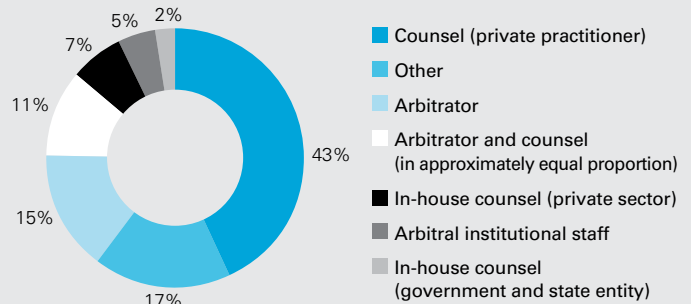
questions was answered by more than 75% of respondents. Due to rounding up/down of individual figures, the aggregate of the percentages shown in some charts may not equal 100%.

**Phase 2:** 198 video or telephone interviews, ranging from ten to 110 minutes long, were conducted between early November 2020 and early March 2021. The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, to nuance and further explain the findings on particular issues covered

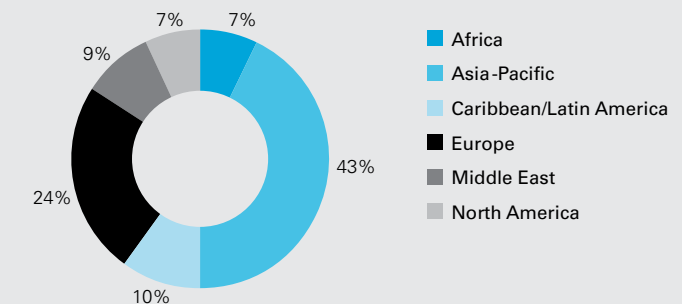
in the survey. Interviewees were based in 39 countries and 53 cities across all continents (except Antarctica). The pool of interviewees reflected all categories across the diverse respondent group. Interviewees either contacted us directly requesting an interview or were contacted on the basis of their consent in the questionnaire.

The following charts illustrate the composition of the respondent pool by: primary role; geographic region of primary practise or operation; primary industry; and experience in international arbitration.

**Chart 23: What is your primary role?**

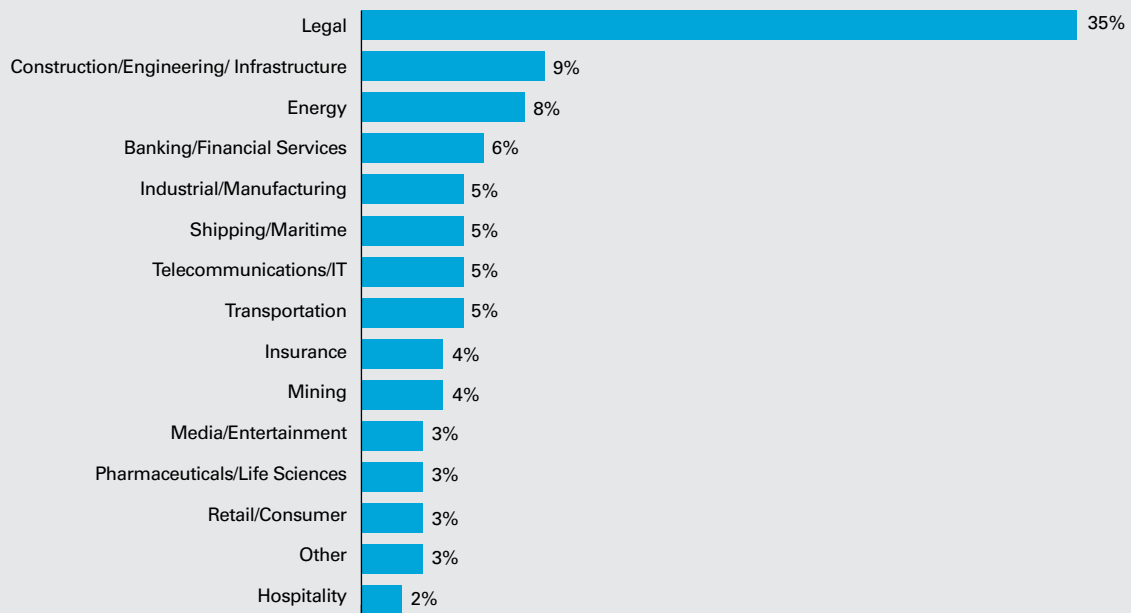


**Chart 24: In which region(s) do you principally practise or operate?**



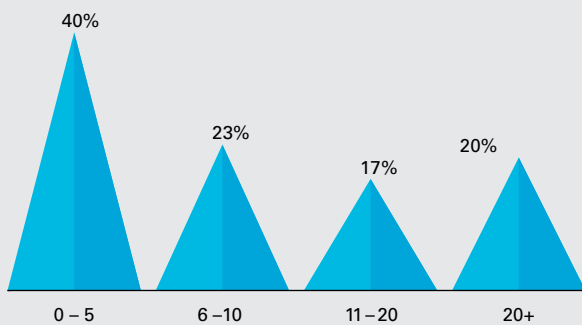
Respondents were able to select multiple options

**Chart 25: Industry in which your organisation operates**

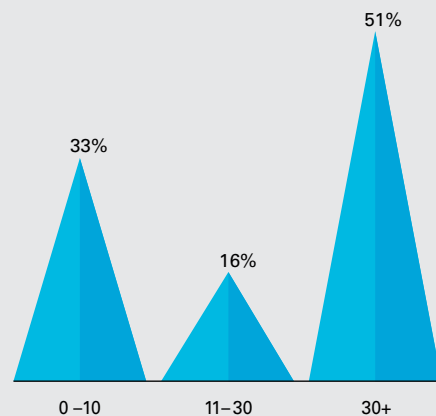


Respondents were able to select multiple options

**Chart 26: Over the past five years, approximately how many international arbitrations have you personally been involved in?**



**Chart 27: Over the past five years, approximately how many international arbitrations has your organisation been involved in?**



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