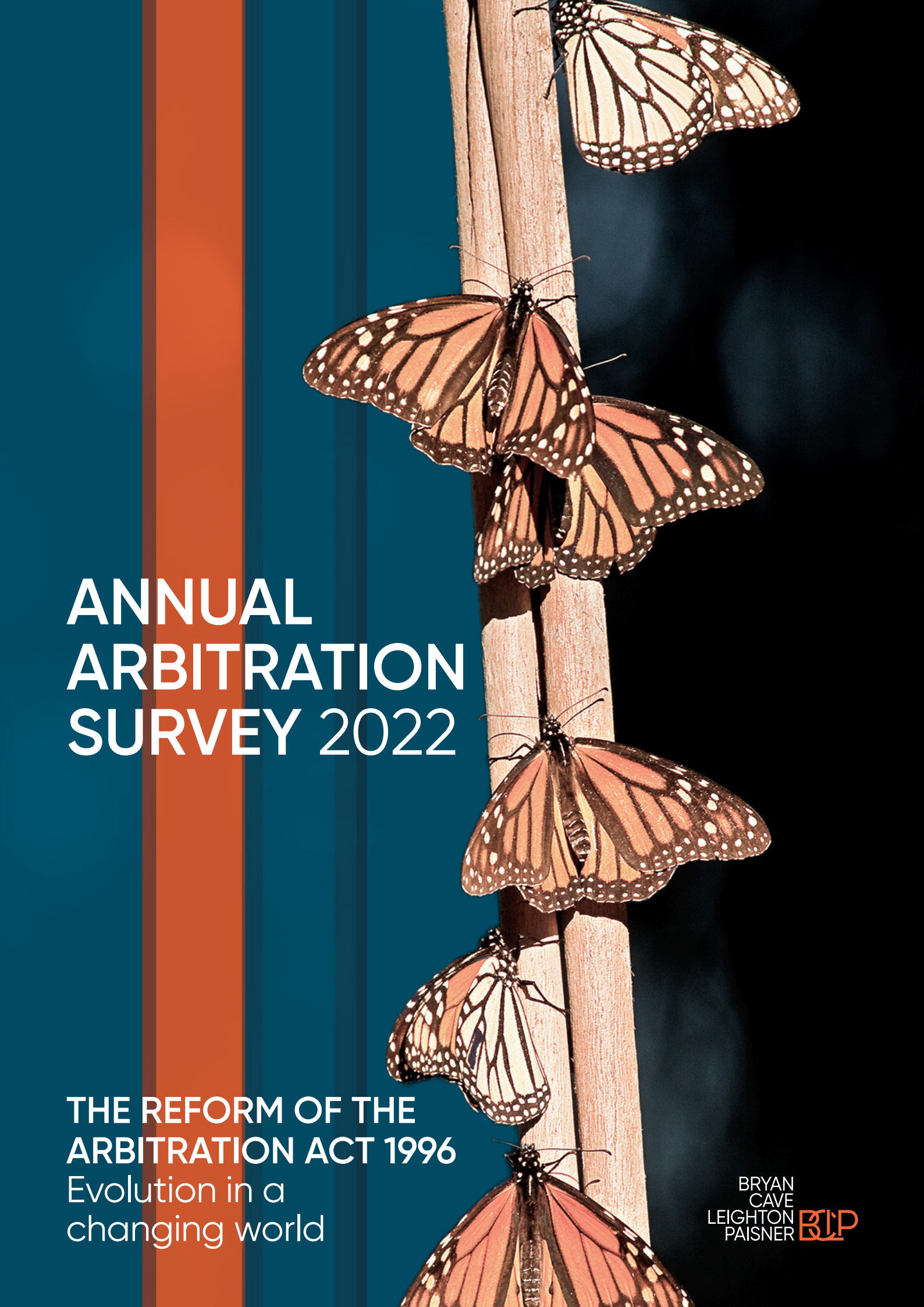


ANNUAL ARBITRATION SURVEY 2022

THE REFORM OF THE ARBITRATION ACT 1996

Evolution in a changing world

BRYAN CAVE LEIGHTON PAISNER BLP

BCLP'S INTERNATIONAL ARBITRATION GROUP

Over the last 11 years we have conducted a number of surveys on issues affecting the arbitration process:

- Expert Evidence in International Arbitration (2021)
- Rights of appeal (2020)
- Cybersecurity in arbitration proceedings (2019)
- Unilateral arbitrator appointments (2018)
- Increasing diversity on tribunals (2017)
- The use of tribunal secretaries (2015)
- Choice of seat (2014)
- Document production (2013)
- Delay (2012)
- Conflict of interest (2010)

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

We advise clients on high-stakes disputes often involving cutting-edge issues and represent them in arbitral proceedings and proceedings ancillary to arbitrations in these regions:

- Europe
- Russia and the CIS
- North America
- Latin America
- The Middle East
- Africa
- Asia
- India and Pakistan

Our clients come to us for our technical legal excellence combined with our in-depth industry knowledge and experience resolving disputes arising in the following sectors:

- Banking and Finance
- Energy
- Real Estate and Data Centres
- Engineering and Construction
- Digital and IT Infrastructure Projects
- Life Sciences and Pharma
- Media
- Hotel and Hospitality
- Healthcare
- Transport and Electronic Vehicles
- Public Contracts and International Trade
- FinTech and Cryptocurrency
- Telecommunications
- Insurance
- Mining and Commodities
- Industrial Products and Manufacturing
- Food and Agriculture
- Sport and Entertainment

We have a strong track-record of successfully resolving different types of disputes, covering a broad range of areas, including:

- Corporate
- Foreign Investment
- Public International Law
- Anti-trust and Competition
- Licensing
- Distribution
- Class or Group Action Arbitrations
- Data Privacy, Security & Cybersecurity
- Intellectual Property

EVOLUTION IN A CHANGING WORLD

This year our survey topic is the reform of the Arbitration Act 1996.

On 30 November 2021, the Law Commission announced that it would be conducting a review of the Arbitration Act 1996. We decided to use this year's survey as an opportunity to canvas views on the Act, potential areas of reform and to share the results of the survey with the Law Commission as part of the on-going consultation process.

The aim of the Law Commission's review is to maintain the attractiveness of England and Wales as a "destination" for dispute resolution and the pre-eminence of English Law as a choice of law.

London is a popular seat of arbitration and one of the reasons for that is the Arbitration Act 1996. The Act is widely respected as a clear, well-drafted arbitration law that provides an effective framework for the conduct of arbitration. That said, competition between the top seats is fierce and there is no room for complacency. The Act is now more than 25 years old. Over that time, there have been significant developments in arbitration law and practice and in the wider business world. For example, in 1996, the emergency arbitrator was a relatively unknown concept; now most of the major arbitral institutions have introduced emergency arbitrator provisions into their arbitration rules. Further, the last two decades have seen the increased use of technology and artificial intelligence in arbitral proceedings. The indications are that the use of technology tools will increase in the future as the arbitration community embraces more environmentally sustainable practices.

The reform of the Act is not just of interest to UK practitioners. Many international practitioners choose the UK as a seat of arbitration so have a vested interest in maintaining the quality of the Act. Other jurisdictions have responded to developments in arbitration law and practice with updated arbitration legislation. This review by the Law Commission is an excellent opportunity for the UK to do the same.

We have once again canvassed the opinions of the many international arbitration practitioners and users with whom we work. We hope that readers will find the results of the survey and the analysis provided in this report both interesting and useful.

We would like to thank all those who responded to the survey, on whose contribution these surveys depend, and OGEMID/TDM for publicising the survey.

GEORGE BURN Co-Head of International Arbitration
CLAIRE MOREL DE WESTGAVER Partner, International Arbitration
VICTORIA CLARK Knowledge Development Lawyer, International Arbitration

WHAT WE ASKED

WHAT IS THE CURRENT PERCEPTION OF THE ACT AND OF ENGLISH SEATED ARBITRATION?

We wanted to find out how respondents rate English seated arbitration and the Arbitration Act 1996. We asked respondents to:

- Rate their experience of English seated arbitration with other arbitration jurisdictions;
- Rate their level of satisfaction with the Arbitration Act 1996;
- Choose words to describe the Arbitration Act 1996; and
- Tell us about their preferred seat/seats of arbitration.

HOW COULD THE ACT BE IMPROVED?

The Law Commission has identified several possible areas for reform including:

- Summary disposal;
- Confidentiality;
- Independence of arbitrators; and
- Interim measures ordered by the court in support of arbitration.

We asked respondents for their views on these and other potential areas of reform.

WHO WE ASKED

- Arbitrators
- Corporate counsel
- External lawyers
- Those working at arbitral institutions
- Academics
- Expert witnesses

The geographical regions in which our **116** respondents[1] work include Central and South America, North Africa, Western Europe, East and South East Asia, Australasia, the Middle East, and the Caribbean, Eastern Europe (including Russia and CIS), West and East Africa and North America. The majority, **60%**, of respondents were from a common law background. The respondents were involved in disputes across a wide range of sectors including construction and engineering, energy and natural resources, international trade and commodities and maritime and shipping.

90% of respondents had been involved in an arbitration seated in England, Wales or Northern Ireland in the last 10 years. **45%** in more than 10 cases. **88%** of respondents had been involved in an arbitration seated in another jurisdiction in the last 10 years.

[1] We received 116 responses to the survey. 14 of the responses were incomplete. The report reflects the responses received for each question.

KEY FINDINGS

ENGLISH-SEATED ARBITRATION IS HIGHLY RATED

83% of respondents had experience of English seated arbitration and arbitration in other jurisdictions. **45%** of those respondents rated English seated arbitration as much better or a bit better than their experience in other jurisdictions.

HIGH LEVEL OF SATISFACTION WITH THE ARBITRATION ACT 1996

We invited respondents to rate their satisfaction with the Arbitration Act 1996 on a scale of 1-10, with 1 being lowest and 10 being highest.

74% of respondents gave the Act a rating of 7 or higher.

SUMMARY DETERMINATION

77% of respondents thought that the Act should include an express provision of summary determination/disposal. **48%** of those respondents thought the Act should set out the test for summary determination/disposal.

EMERGENCY ARBITRATORS

72% of respondents thought that the Act should define the legal status of emergency arbitrators.

83% of respondents thought that court powers exercisable in support of arbitral proceedings, including the power to grant interim injunctions, should remain available in cases where parties have the option of seeking relief from an emergency arbitrator.

SECTION 67 CHALLENGES: REVIEW OR FULL RE-HEARING?

68% of respondents favoured a review.

21% of respondents favoured a full re-hearing.

SECTION 44 AND NON-PARTIES

67% of respondents thought that court powers exercisable in support of arbitration should be available against non-parties to the arbitration agreement. **40%** of those respondents thought that the non-party should have the right to challenge any order made by petition to the Court of Appeal.

SHOULD THE RIGHT TO APPEAL ON A POINT OF LAW BE ABOLISHED?

67% of respondents thought the right of appeal on a point of law should be retained. **24%** of those respondents thought the right of appeal should be limited to issues of public importance and with a real prospect of success.

CONFIDENTIALITY

83% of respondents favoured either full codification of the duty confidentiality or the embedding of general principle of confidentiality in the Act with only a small minority, **14%**, favouring the status quo.

ARBITRATORS: INDEPENDENCE AND THE DUTY OF DISCLOSURE

84% of respondents thought the Act should include an express duty of the tribunal to be independent.

86% thought the Act should include an express duty to disclose any circumstances that might give rise to justifiable doubts as to the impartiality or independence of the tribunal.

DIVERSITY

64% of respondents thought the language of the Act should be made gender-neutral.

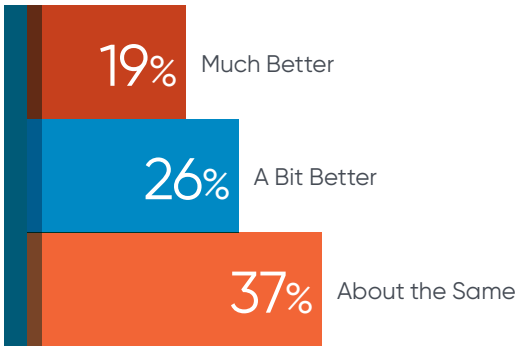
PERCEPTION VERSUS REALITY

What is the current perception of the Act and of English seated arbitration?

One of the aims of the Law Commission's review of the Arbitration Act 1996 is to enhance the experience for those who choose to arbitrate in England and Wales and maintain English law as the gold standard in international arbitrations. There is a general perception that the Act is a clear, well-drafted arbitration law that provides an effective framework for English seated arbitration. Indeed, when the Law Commission announced that it would be reviewing the Act, many stakeholders queried whether major reform was needed, adopting the view that "if it ain't broke, don't fix it". London is certainly a popular seat of arbitration, frequently topping surveys as the most popular seat of arbitration. Although the Act is not the only reason for the popularity of London as a seat of arbitration, a modern and effective arbitration law is key to retaining that position. Competition between seats of arbitration is fierce leaving no room for complacency. Whilst the Act works well, it is more than 25 years old and over that time other jurisdictions have responded to developments in arbitration law and practice with updated arbitration legislation. In an increasingly competitive market is the Act still a "gold standard" that reflects current arbitration practices or could complacency jeopardise the future of English-seated arbitration?

In Part 1 of the survey we wanted to test the extent to which the "if it ain't broke, don't fix it" perception reflects reality. We asked respondents to give their views on the Act and their experience of English seated arbitration.

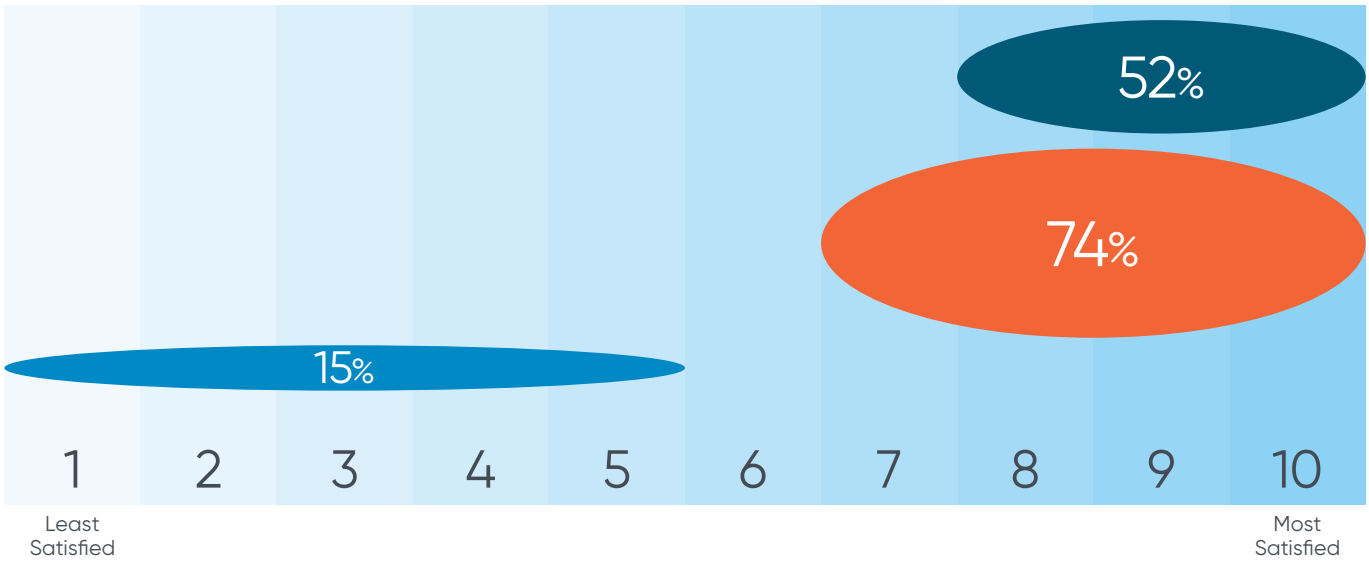
HOW WOULD YOU RATE YOUR EXPERIENCE OF ENGLISH SEATED ARBITRATION IN COMPARISON WITH OTHER ARBITRATION JURISDICTIONS?



We asked respondents with experience of English seated arbitration and arbitration in other jurisdictions to rate their experience of English seated arbitration with other arbitration jurisdictions.

83% of respondents had experience of English seated arbitration and arbitration in other jurisdictions. **19%** rated their experience of English seated arbitration as "much better" than their experience with other arbitration jurisdictions; **26%** rated it "a bit better" and **37%** as "about the same". Only one respondent rated their experience of English seated arbitration as "much worse" than arbitration in another jurisdiction.

HOW SATISFIED ARE YOU WITH THE ARBITRATION ACT 1996?



We asked respondents to rate their satisfaction with the Arbitration Act 1996 on a scale of 1-10, with 1 being lowest and 10 being highest.

The responses indicated a fairly high level of satisfaction with the Arbitration Act 1996. More than half, **52%**, of respondents gave the Act a rating of 8 or higher. **74%** gave the Act a rating of 7 or higher. Only **15%** of respondents gave the Act a rating of 5 or lower.

HOW WOULD YOU DESCRIBE THE ARBITRATION ACT 1996?

We asked respondents how they would describe the Arbitration Act 1996. Again, the responses indicated a fairly high level of satisfaction with the Act. Respondents rated the Act highly for being easy to understand (**77%** strongly agree or agree) and for promoting finality (**73%** strongly agree or agree).

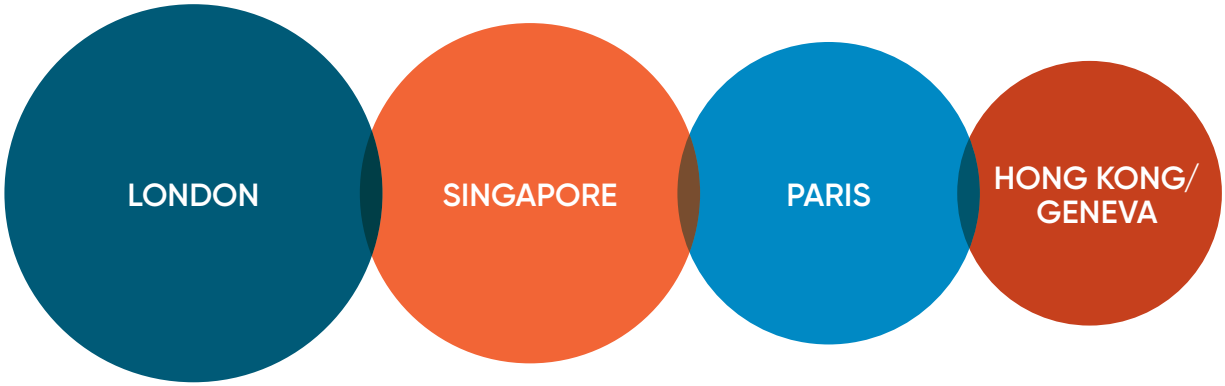
In terms of cost, there was a perception that English-seated arbitration is expensive. Only a third of respondents thought the Act avoids unnecessary costs (**33%** strongly agree or agree). Just under a quarter, **23%**, disagreed or strongly disagreed, with **44%** neither agreeing nor disagreeing.

It was also interesting to note that **19%** of respondents agreed or strongly agreed that the Act was overly complex and **32.5%** agreed or strongly agreed that the Act was dated. This suggests that, in spite of its reputation as a clear and well-drafted arbitration law, there is room for improvement.

	STRONGLY AGREE	AGREE	NEITHER AGREE NOR DISAGREE	DISAGREE	STRONGLY DISAGREE
Easy to understand	30%	47%	16%	7%	0%
Avoids delay	11.5%	42.5%	36%	9%	1%
Avoids unnecessary costs	6%	27%	44%	22%	1%
Promotes finality	19%	54%	16%	10%	1%
Overly complex	4%	15%	30%	43%	8%
Out-dated	5.5%	27%	31%	30.5%	6%

> As a general point of view, I do believe that updating law is a good idea, but one has to be careful not to overdo it. If it ain't broke, don't fix it.
>
> Erik Koster
> Partner, AKD NV

WHAT IS YOUR PREFERRED SEAT OF ARBITRATION AND WHY?



London topped the list as the preferred seat of arbitration. This was not surprising as a high proportion of respondents to this year's survey were from a common law background and practice in Western Europe. London scored highly for familiarity and predictability, supportive courts and judiciary, thriving legal community, good venue options, service providers and transport links.

Singapore came in second with respondents valuing the fact that Singapore has adopted the UNCITRAL Model law and has an "arbitration savvy" judiciary. Singapore was also highly rated for cost and convenience. Close behind was **Paris**, with respondents referencing a strong pro-arbitration law and civil law orientation. **Hong Kong** and **Geneva** each received an equal number of votes. Geneva was highly rated for its modern arbitration legislation and arbitration friendly courts. Hong Kong, like Singapore, was valued for adopting the UNCITRAL Model Law – though some respondents did express reservations over choosing Hong Kong as a seat of arbitration due to concerns over the rule of law.

The responses were reflective of the demographic of respondents, 90% of whom had been involved in arbitrations seated in England. However, the results were also in line with other recent surveys, including the 2021 International Arbitration Survey conducted by Queen Mary University of London and White & Case LLP, which found that the five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva. Other preferred seats included DIFC, Milan and New York, with "familiarity with home jurisdiction" frequently cited as a key factor in the choice of seat. A number of respondents indicated that they had no fixed preference as to seat, preferring to select a seat based on the nature of the dispute and the parties involved.

> Along with the English courts' strong track record of supporting arbitration, the Arbitration Act 1996 has played a significant role in attracting users from different parts of the world. In this context, keeping up with new developments and users' needs is very important to ensure that parties will continue to choose London as a seat of their arbitration, despite Brexit and other recent turbulences.
>
> Nadia Hubbuck
> Senior Associate, Bryan Cave Leighton Paisner

EVOLUTION IN A CHANGING WORLD

How could the Act be improved?

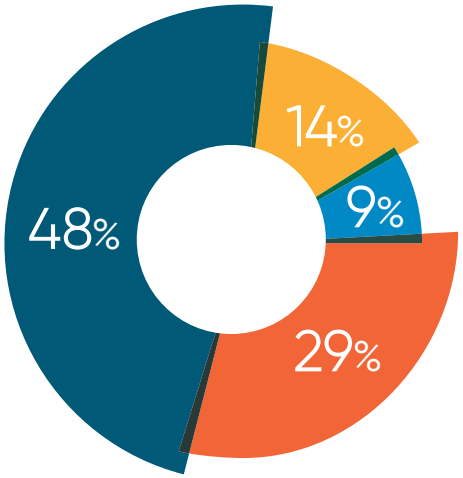
During the course of its on-going consultation, the Law Commission has identified several discrete areas for reform including:

- Summary disposal;
- Interim measures ordered by the court in support of arbitration;
- Confidentiality;
- Independence of arbitrators and disclosure;
- Jurisdictional challenges against arbitral awards; and
- Appeals on a point of law.

In Part 2 of the survey we asked respondents for their views on the areas for reform identified by the Law Commission and on other potential areas for reform.

SUMMARY DETERMINATION/DISPOSAL

SHOULD THE ACT INCLUDE AN EXPRESS PROVISION FOR SUMMARY DETERMINATION/DISPOSAL?



- **(29%)** Yes
- **(48%)** Yes and the provision should set out the test for summary determination/disposal
- **(14%)** No
- **(9%)** Don't know/No opinion on this issue

Overall, **77%** of respondents thought that the Act should include an express provision for summary determination/disposal. **48%** of respondents thought the Act should set out the test for summary determination/disposal.

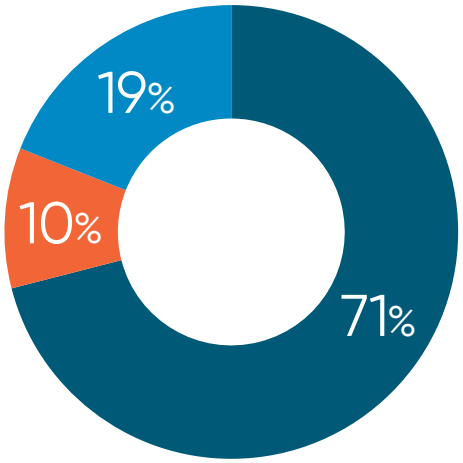
A number of respondents were of the opinion that arbitrators already have this power under the Act but that an express provision, setting out a clear test would be valuable.

Several respondents felt that the Act should include a provision for summary determination but that the test should come from the rules of arbitral institutions (that parties can choose to adopt) rather than being set out in the Act.

Several respondents expressed concern that whilst, in theory, summary determination should promote efficiency it could result in unmeritorious applications and open up additional grounds for challenging an award. It was felt that a clear threshold test was necessary to allow efficient disposal in cases where claims or defences are clearly unmeritorious whilst preventing costly interim applications in more finely balanced cases.

EMERGENCY ARBITRATORS

SHOULD THE ACT DEFINE THE LEGAL STATUS OF EMERGENCY ARBITRATORS?



- **(71%)** Yes
- **(10%)** No
- **(19%)** Don't know/ No opinion on this issue

71% of respondents thought the Act should define the legal status of emergency arbitrators. One respondent noted that emergency arbitrators have been part of the arbitration landscape for many years and it is time for the Act to reflect that.

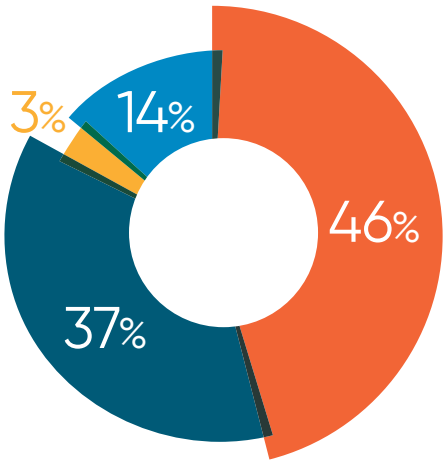
10% of respondents thought the Act should not define the status of emergency arbitrators, with several respondents commenting that they felt this was a matter for institutional rules not for national arbitration law. Others were concerned that it would encourage the use of emergency arbitrators (described by one respondent as an expensive creature of institutional arbitration) and that any provision should define circumstances in which recourse may be made to an emergency arbitrator.

Several respondents commented that the Act should address the enforceability of decisions made by emergency arbitrators and the role of the courts in cases where emergency relief is required.

SECTION 44 - INTERIM MEASURES ORDERED BY THE COURT IN SUPPORT OF ARBITRAL PROCEEDINGS

Since the Act came into force, two main questions have arisen about the operation of section 44. First, to what extent section 44 is available when arbitral parties have also agreed a regime which provides for an emergency arbitrator. Second, whether the court can make orders against third parties, that is, against those who are not party to the arbitral proceedings.

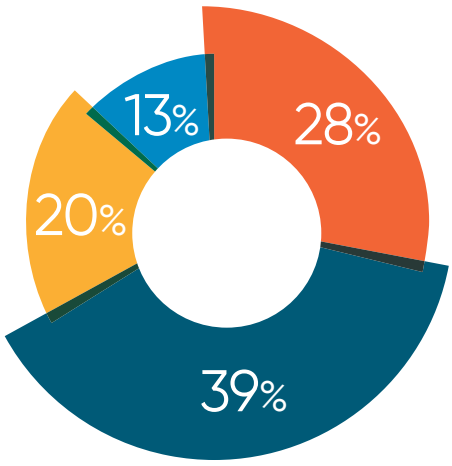
SHOULD THE ACT MAKE IT CLEAR THAT COURT POWERS EXERCISABLE IN SUPPORT OF ARBITRAL PROCEEDINGS, INCLUDING THE POWER TO GRANT INTERIM INJUNCTIONS, REMAIN AVAILABLE IN CASES WHERE ARBITRAL RULES GIVE PARTIES THE OPTION OF SEEKING RELIEF FROM AN EMERGENCY ARBITRATOR?



There was a split between respondents on this issue. Some thought that any limit on the ability of parties to seek interim relief from the court was unattractive from an international standpoint. Others felt that the court should only have such power pending the appointment of an Emergency arbitrator or where, in exceptional circumstances, an Emergency Arbitrator is unable to give effective relief.

- **(46%)** Yes
- **(37%)** Yes provided that an Emergency Arbitrator has not been appointed in relation to the application
- **(3%)** No
- **(14%)** Don't know/No opinion on this issue

SHOULD COURT POWERS UNDER SECTION 44 OF THE ACT BE AVAILABLE AGAINST NON-PARTIES TO THE ARBITRATION AGREEMENT?



The majority of respondents agreed that court powers under section 44 should be available against non-parties. However, opinion was divided on the question of whether the non-party should have a right to challenge any order. Several respondents favoured a right of appeal but queried whether the right of appeal needed to be to the Court of Appeal. One respondent highlighted the distinction ex-parte applications, which can be challenged on a return date at the same 'level' of court and on-notice applications where the right of appeal should be determined as with other court applications.

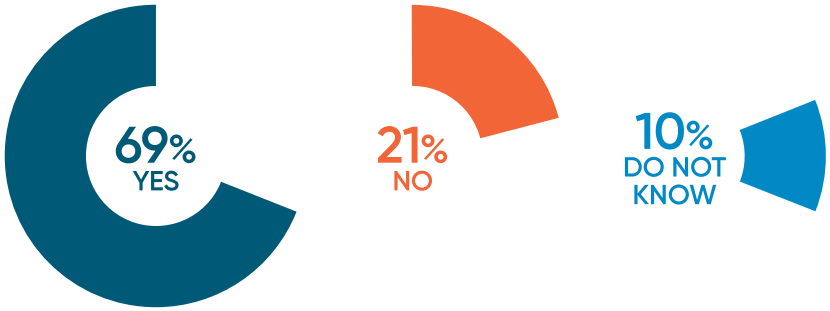
- **(28%)** Yes
- **(39%)** Yes but the non-party should have an automatic right to challenge any order made by petition to the Court of Appeal
- **(20%)** No
- **(13%)** Don't know/No opinion on this issue

> The proposed changes to section 44 are indicative of how the Court's relationship with the arbitration has evolved in the 26 years since England's landmark arbitration legislation was enacted. When it came to the interim powers of the Court under section 44, the 1996 Act incorporated a regime which jealously guarded the jurisdiction of the Tribunal. The proposals that changes to section 44 ensure it extends to third parties and lend the Court's power to the enforcement of emergency arbitrator orders are a clearer recognition the English court may need to act in a broader range of situations to support an arbitral tribunal, and hence a greater confidence in the Court/arbitral tribunal relationship.

Angeline Welsh
Barrister, Essex Court Chambers

SECTION 67 – JURISDICTIONAL CHALLENGES

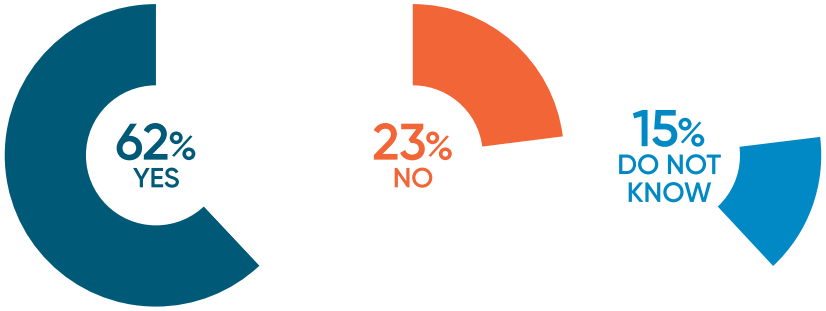
WHERE AN APPLICANT HAS PARTICIPATED IN AN ARBITRATION, SHOULD AN APPLICATION CHALLENGING ANY AWARD OF THE TRIBUNAL AS TO ITS SUBSTANTIVE JURISDICTION UNDER SECTION 67 OF THE ACT BE DEALT WITH BY WAY OF REVIEW RATHER THAN A FULL RE-HEARING?



A significant majority, **69%**, of respondents favoured review over a full re-hearing with one respondent commenting that a full re-hearing undermines arbitration.

21% of respondents disagreed, with several respondents commenting that jurisdiction is fundamental and that a full rehearing is an essential safeguard for questions of substantive jurisdiction.

SHOULD SECTION 67 OF THE ACT BE AMENDED TO ALLOW THE COURT TO REMIT AN AWARD TO THE TRIBUNAL, IN WHOLE OR IN PART, FOR RECONSIDERATION?



The majority, **62%**, of respondents favoured allowing the court to remit an award to the tribunal. Several respondents commented that it was better to conclude proceedings before the same tribunal rather than having the award set aside and start the process all over again and that the amendment could save a considerable amount of time and money in the right cases. Others expressed concern that once a tribunal has issued its award it may not be inclined to reconsider its decision. Alternative suggestions were for the court to determine the issue or for remission to a review committee set up by the arbitral institutions.

SHOULD THE ACT BE AMENDED TO PROVIDE THAT SECTION 31 (TRIBUNAL TO RULE ON ITS OWN JURISDICTION) AND SECTION 32 (THE COURT TO RULE ON THE TRIBUNAL'S JURISDICTION) ARE MUTUALLY EXCLUSIVE ALTERNATIVES?

Opinion on this question was divided and none of the respondents expressed strong views on this issue. One respondent felt that the amendment was unnecessary because the safeguards in section 32(2) are sufficient to protect against undue duplicity of proceedings.

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r place in the world of arbitration.

uis Flannery KC
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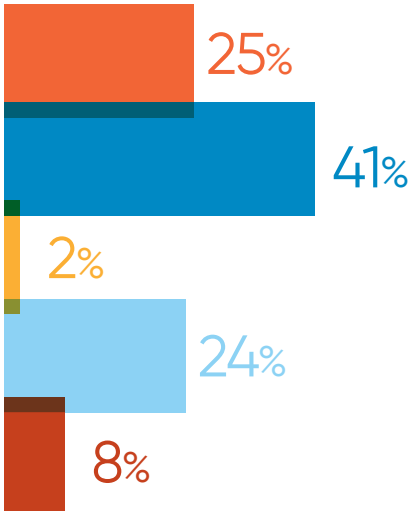
SECTION 69 – APPEALS ON A POINT OF LAW

SHOULD THE RIGHT TO APPEAL ON A POINT OF LAW UNDER SECTION 69 OF THE ACT BE ABOLISHED?



- **(25%)** Yes
- **(41%)** No, the right of appeal under section 69 should be retained as is
- **(2%)** No, but the right of appeal under section 69 should be limited to issues of public importance
- **(24%)** No, but the right of appeal under section 69 should be limited to issues of public importance and with a real prospect of success
- **(8%)** Don't know/No opinion on this issue

The right of appeal on a point of law under section 69 is a controversial provision and a marked departure from the UNCITRAL Model Law.

Many take the view that allowing a right of appeal on a point of law to a court subverts the parties' agreement to arbitrate and is anathema to the doctrine of finality. Others view it as a positive feature of the English Arbitration Act and an important safeguard in cases where an arbitral tribunal gets the law wrong. The 1996 DAC Report on the Arbitration Bill considered both sides of the argument and decided to retain a limited and controlled right to appeal to the court on a question of law.

In practice, the impact of section 69 in English seated arbitration is limited as many parties choose to exclude the right of appeal on a point of law – either by express words in their arbitration agreement or by the adoption of institutional rules that exclude a right of appeal.

The majority, **67%**, of respondents thought that the right of appeal on a point of law should be retained. Several respondents commented that the right of appeal is one of the main reasons that London is such a popular seat for international commercial arbitration and that section 69 works well. One respondent commented that a right of appeal on a point of law is necessary to ensure that the law develops uniformly and so that arbitrators know that the quality of their reasoning can be reviewed.

Opinion was divided on whether qualifications should be introduced to reduce unmeritorious appeals, which may be a tactical ploy to delay enforcement. **24%** of respondents felt that the right of appeal should be limited to issues of public importance and with a real prospect of success.

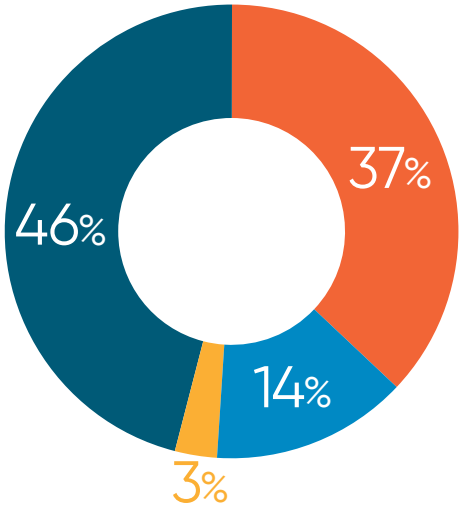
25% of respondents were in favour of the abolition of section 69 – several commenting that the grounds of challenge to an award should be limited to those available under the UNCITRAL Model Law.

To maintain its pre-eminence in the arbitral world, London must ensure, along with all else, that its arbitration legislation remains at the forefront. An important choice with the current reforms: Will London continue to go it alone with distinctive legislation, or will it join the mainstream by basing the new Act on the UNCITRAL Model Law?

Professor Janet Walker

CONFIDENTIALITY

SHOULD THE ACT INCLUDE AN EXPRESS DUTY OF CONFIDENTIALITY?



- **(46%)** Yes, the Act should codify the duty of confidentiality
- **(37%)** No, but the Act should include a general principle of confidentiality and set out the grounds on which the parties may derogate from that principle
- **(14%)** No
- **(3%)** Don't know/No opinion on this issue

An overwhelming majority, **83%**, of respondents thought that the Act should address the issue of confidentiality but opinion was divided on how best to do so. **46%** were in favour of codifying the duty of confidentiality. **37%** thought the Act should include a general principle of confidentiality and set out the grounds on which the parties may derogate from that principle. **14%** thought the Act should not address the duty of confidentiality. Several respondents commented that parties should include confidentiality provisions in the arbitration clause or adopt arbitration rules that include confidentiality provisions.

This is a significant finding. There has been a long debate over whether or not confidentiality can and should be codified. There is no doubt that confidentiality is one of the major selling points of arbitration. As the 1996 DAC Report noted, "Privacy and confidentiality have long been assumed as general principles in English commercial arbitration..." and "users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration." The issue is whether the principle of confidentiality can be put on a firm statutory basis in the Act. Back in 1996, the task proved too controversial and too difficult for the DAC and the issue was left to the common law to evolve. The response to the survey suggests that there is a real appetite for codification of the duty of confidentiality, at least to some degree, so now may be the time to address this.

> The ability to resolve high-stakes commercial disputes behind closed doors continues to carry significant weight for our clients when it comes to submitting disputes to arbitration rather than litigation. Confidentiality may be needed to avoid reputational risks associated with the dispute itself or to preserve sensitive information such as trade secrets. In that context, codifying the common law position on confidentiality would make a lot of sense, particularly for London arbitration users located or practising abroad.
>
> Claire Morel de Westgaver
> Partner, Bryan Cave Leighton Paisner

INDEPENDENCE OF ARBITRATORS AND DISCLOSURE

SHOULD THE ACT INCLUDE AN EXPRESS DUTY OF THE TRIBUNAL TO BE INDEPENDENT?

- **(84%)** Yes
- **(12%)** No
- **(4%)** Don't know/ No opinion on this issue

A significant majority, **84%**, of respondents thought that the Act should include an express duty of the tribunal to be independent. Several respondents commented that recent high profile court decisions on arbitrator conflicts may have damaged the perception of London as a seat of arbitration and that this is something that could be addressed by the codification of a duty of independence.

12% of respondents were against the introduction of an express duty of independence. Several respondents expressed concern over the impact that this may have on repeat appointments. This was of particular concern to respondents from the insurance/reinsurance and maritime and shipping sectors where repeat appointments are seen as desirable particularly where a number of disputes occur on similar issues. It was suggested that the Act should include some guidance or interpretative provisions on what it means to be independent, including guidance on how many repeat appointments an arbitrator may accept whilst remaining independent.

SHOULD THE ACT INCLUDE AN EXPRESS DUTY TO DISCLOSE ANY CIRCUMSTANCES THAT MIGHT GIVE RISE TO JUSTIFIABLE DOUBTS AS TO THE IMPARTIALITY OR INDEPENDENCE OF THE TRIBUNAL?

- **(86%)** Yes
- **(10%)** No
- **(4%)** Don't know/ No opinion on this issue

A significant majority, **86%**, of respondents thought that the Act should include an express duty to disclose any circumstances that might give rise to justifiable doubts as to the impartiality or independence of the tribunal. One respondent commented that consensus has coalesced around this test and it's time to include it in the Act.

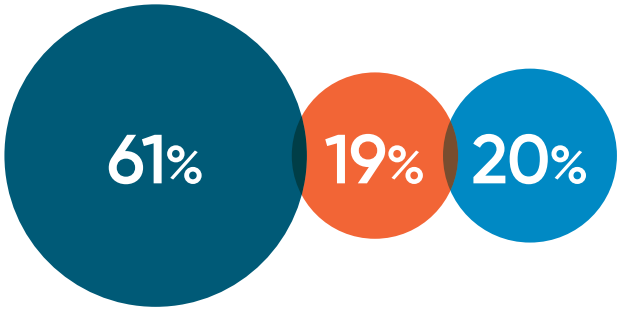
However, as with the question of independence, concerns were expressed over the impact that a duty of disclosure would have on repeat appointments and, specifically, how the duty to disclose would be balanced against the duty of confidentiality.

ARBITRATOR IMMUNITY

Section 29 of the Act provides that an arbitrator is not liable in respect of matters done or omitted in the discharge of the functions as arbitrator unless the act or omission is shown to have been in bad faith. The statutory declaration of immunity does not define "functions" of an arbitrator, leading to questions as to whether the immunity extends to both the administrative and adjudicative functions of an arbitrator. The scope of the statutory immunity is also limited: it does not extend to situations where an arbitrator resigns or to an arbitrator's liability for costs where an application is made to court which impugns as arbitrator.

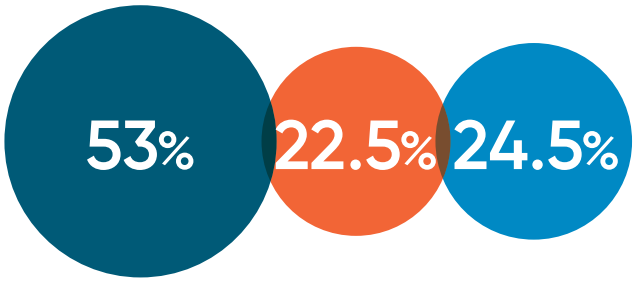
The majority of respondents were supportive of amendments to clarify the scope of arbitrator immunity. On the question of whether arbitrator immunity should be retained following resignation, **83%** of respondents thought that it should. Of that 83%, **37%** thought immunity should not be retained in circumstances where the resignation was shown to be unreasonable.

SHOULD SECTION 29 OF THE ACT DEFINE "FUNCTIONS" OF AN ARBITRATOR TO MAKE IT CLEAR THAT IMMUNITY EXTENDS TO BOTH THE ADMINISTRATIVE AND ADJUDICATIVE FUNCTIONS OF AN ARBITRATOR?



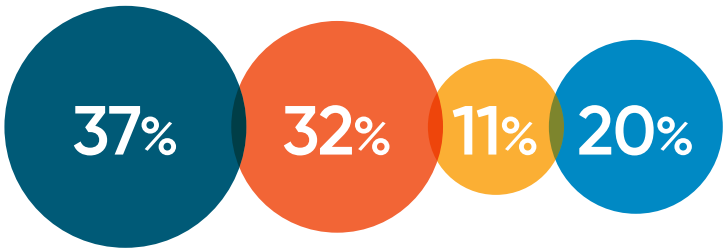
- **(61%)** Yes
- **(19%)** No
- **(20%)** Don't know/No opinion on this issue

SHOULD SECTION 29 OF THE ACT PROVIDE THAT ARBITRATOR IMMUNITY EXTENDS TO THE COSTS OF ARBITRATION CLAIMS IN COURT?



- **(53%)** Yes
- **(22.5%)** No
- **(24.5%)** Don't know/No opinion on this issue

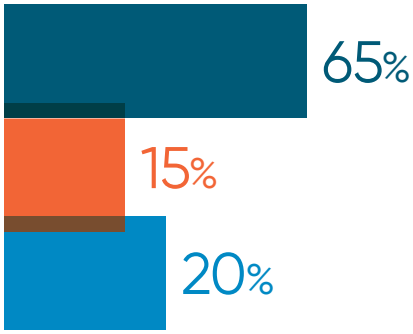
SHOULD SECTION 29 OF THE ACT PROVIDE THAT ARBITRATOR IMMUNITY IS RETAINED FOLLOWING RESIGNATION?



- **(37%)** Yes
- **(32%)** Yes, unless the resignation is shown to be unreasonable
- **(11%)** No
- **(20%)** Don't know/No opinion on this issue

DIVERSITY AND DISCRIMINATION

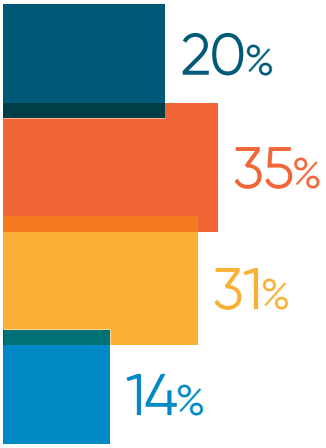
SHOULD THE LANGUAGE OF THE ACT BE MADE GENDER-NEUTRAL?



- **(65%)** Yes
- **(15%)** No
- **(20%)** Don't know/No opinion on this issue

The majority of respondents were in favour of the language of the Act being made gender-neutral. Several respondents commented that the changes should be organic, not imposed and implemented in a non-cumbersome way. Constant references to "his or her" were seen as undesirable.

SHOULD THE ACT PROHIBIT DISCRIMINATION IN ARBITRAL APPOINTMENTS ON THE BASIS OF PROTECTED CHARACTERISTICS?



- **(20%)** Yes
- **(35%)** Yes, save in circumstances where it can be shown to be a genuine occupational requirement
- **(31%)** No
- **(14%)** Don't know/No opinion on this issue

Opinion on this issue was divided. A significant minority, **31%**, of respondents felt that the Act should not prohibit discrimination in arbitral appointments on the basis of protected characteristics. Several respondents commented that such a provision would unduly restrict party autonomy in arbitral appointments. Others commented that, in the case of arbitration within religious communities, it would not be reasonable to prohibit requirements that arbitrators be members of the same religious community.

> "As things stand, the Act assumes that arbitrators sitting in London are all men. This cannot credibly be dismissed as an insignificant detail that the reform doesn't need to address. Arbitration users expect tribunals to reflect the demographics of the business community and they should – for diversity and inclusion and even more crucially perception and legitimacy."
>
> Sara Paradisi
> Senior Associate, Bryan Cave Leighton Paisner

TECHNOLOGY, CYBERSECURITY AND GREEN ARBITRATION

One of the areas for reform under consideration is whether the Act should refer to technological advances and more cost-efficient and environmentally friendly ways of working. The key question is whether section 34 (the power of the tribunal to decide all procedural and evidential matters) is wide enough to encompass the use of technology without the need for additional, express provisions.

The majority of respondents were in favour of express provisions dealing empowering the tribunal to consider the use of technology, the adoption of measures relating to cybersecurity, and the adoption of environmentally sustainable practices. However, a significant minority felt that the wording of section 34 of the Act was already sufficiently broad to accommodate the use of such measures. There was also a concern that express provisions could fetter the discretion of the parties and could be rendered obsolete in the light of future technological advances.

SHOULD SECTION 34 EXPRESSLY PROVIDE THAT PROCEDURAL AND EVIDENTIAL MATTERS INCLUDE THE USE OF TECHNOLOGY/ARTIFICIAL INTELLIGENCE INCLUDING FOR THE PURPOSE OF CASE MANAGEMENT, COMMUNICATION, HEARINGS AND THE TAKING AND PRESENTATION OF EVIDENCE?

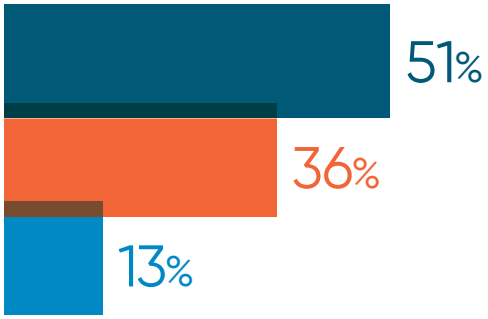
SHOULD SECTION 34 EXPRESSLY PROVIDE THAT PROCEDURAL AND EVIDENTIAL MATTERS INCLUDE WHETHER TO ADOPT ANY NECESSARY MEASURE(S) RELATING TO CYBERSECURITY OR DATA PROTECTION?

SHOULD SECTION 34 EXPRESSLY PROVIDE THAT PROCEDURAL AND EVIDENTIAL MATTERS INCLUDE WHETHER TO ADOPT ENVIRONMENTALLY SUSTAINABLE PRACTICES SUCH AS REMOTE HEARINGS AND ELECTRONIC DOCUMENTS?

THIRD PARTY FUNDING

One notable omission from the list of issues identified by the Law Commission is the issue of third party funding and the disclosure issues surrounding third party funding. There is no obligation to disclose the existence of third party funding in arbitration proceedings seated in England and the Act is silent on the issue of third party funding in general. There is a general acceptance within the arbitration community that disclosure of the existence of third party funding is desirable to prevent challenges to the arbitral tribunal's independence and impartiality. A number of arbitral institutions, including the SIAC, the HKIAC and the ICC have included in their Rules either the power of a tribunal to order the disclosure of the existence of third party funding and the identity of the funder, or the requirement that a party should do so. Hong Kong has passed law to this effect in its Arbitration Ordinance and Singapore has implemented similar requirements through amendments to its Legal Professional Conduct Rules. A separate, but related, question is whether section 59 of the Act empowers arbitrators to award third party funding costs as part of the costs of the arbitration.

SHOULD THE ACT INCLUDE AN EXPRESS PROVISION REQUIRING THE DISCLOSURE OF THIRD PARTY FUNDING?

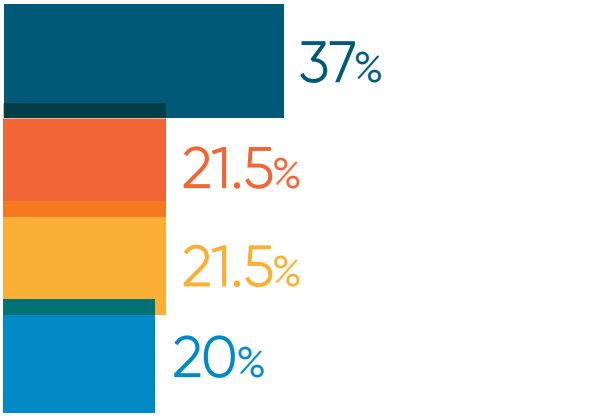


- **(51%)** Yes
- **(36%)** No
- **(13%)** Don't know/No opinion on this issue

Just over half of respondents, **51%**, were in favour of an express provision requiring the disclosure of third party funding. Comments from those in favour included the suggestion that the position should be coordinated with position in relation to litigation in the English courts and that disclosure should be restricted to disclosing the existence of funding, not the funding agreement itself.

Comments from those opposed to disclosure included the observation that insurance has funded London seated arbitrations for more than 150 years without the need for disclosure. Another respondent expressed concern that a disclosure obligation would put an undesirable and divisive spotlight on organisations like Defence Clubs who provide funding on a discretionary basis and with specific conditions and restrictions.

SHOULD SECTION 59 BE AMENDED TO CLARIFY WHETHER THIRD PARTY FUNDING COSTS FORM PART OF THE COSTS OF THE ARBITRATION?



- **(37%)** Yes, to provide that third party funding costs should form part of the costs of the arbitration
- **(21.5%)** Yes, to provide that third party funding costs should not form part of the costs of the arbitration
- **(21.5%)** No
- **(20%)** Don't know/No opinion on this issue

Opinion was divided on this question. Those opposed to third party funding costs forming part of the costs of the arbitration were also opposed to amending the Act to require the disclosure of third party funding – and vice versa.

Several respondents felt that arbitrators have (or should have) the discretion to decide whether third party funding costs should form part of the costs of the arbitration and that the Act could make this explicit.

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GETTING IN TOUCH

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