



2020 Australian Arbitration Report





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Introduction from ACICA

The Australian Centre for International Commercial Arbitration (ACICA), with the support of FTI Consulting, the WA Arbitration Initiative, Francis Burt Chambers and the Australian Bar Association, is pleased to present the results of the inaugural Australian Arbitration Survey.

The survey collected information about the nature and extent of arbitration activity involving Australia, Australian parties and Australian practitioners. The survey represents the first empirical evaluation of arbitration across Australia.

The aims of the survey were several. The first was to gather data to allow more meaningful conversations with key stakeholders, including corporate users and government decision-makers, about arbitration in Australia. A second was to provide a framework for informing collective efforts to promote enhanced use of, and best practices in, arbitration in Australia, and increase the attractiveness of Australian seats. A third was to provide a baseline against which future developments and perceptions can be assessed.

The results of the survey show that arbitration in Australia is thriving, and that Australian corporates and practitioners are increasingly turning to arbitration as a means of resolving disputes. The survey results also indicate there are measures that can yet be taken to promote arbitration within Australia and to encourage the application of international best practices to enhance the arbitration experience for all participants. The survey highlights that the field of arbitration in Australia is diverse, and that the use of arbitration, although historically concentrated in the construction, infrastructure, mining and resources sectors, is diversifying into other sectors as well. There is also a wide variation in the amounts in dispute, and in the jurisdictions and institutions involved. All of this reinforces the impression of arbitration as an inherently flexible dispute resolution mechanism that allows for rigorous decision-making, in which the parties have considerable ability to influence the procedure pursuant to which the case is heard and decisions are taken.

Our review of the data obtained, the comments received, and the sentiments expressed by respondents revealed certain areas of interest and focus that we believe warrant external commentary. To obtain this commentary, extracts of the data and sentiments on particular issues were provided to leading Australian arbitration specialists with a request that they prepare editorials drawing from the survey information provided to them. These editorials are interspersed in the report to align with the issues to which

they are addressed, and to provide practical insight into and context for the survey responses.

As can be seen from the report, there is considerable activity in the arbitration space in Australia. We at ACICA look forward to working with the arbitration community, both practitioners and users, to build upon the progress that has already been made and to continue to enhance the global reputation of Australia and its practitioners in the provision of excellence in dispute resolution.

Going forward, we anticipate conducting further surveys to follow up on some of the findings contained in this report, and to focus on particular areas of interest. We think this work will continue to be valuable in illustrating the nuances of arbitration in Australia. In the meantime, we expect the findings from this inaugural survey will jump-start an important conversation about Australia's place in the global arbitration community.

ORIGINS OF THE REPORT



This report builds on substantial work undertaken by the WA Arbitration Initiative, led by Brian Millar and Scott Ellis, to produce a survey report in 2019 focused on arbitration activity in Western Australia. A copy of the 2019 WA Arbitration Report may be [downloaded here](#). The WA Arbitration Report demonstrated significant arbitration activity, particularly in the energy and resources sector, and an active, experienced arbitration community in Western Australia. The results instigated this collaboration between ACICA, FTI Consulting, the WA Arbitration Initiative and the Australian Bar Association to explore arbitration activity in Australia at a national level.



FTI Consulting executive summary and key findings

FTI Consulting is proud to have been invited by ACICA to participate in its inaugural Australian Arbitration Survey. FTI Consulting performed data collection and data analysis on Australian arbitration spanning three years, and looks forward to having the opportunity to compare its results with the subsequent growth of Australian arbitration.

The data collection effort

FTI Consulting thanks ACICA and the state champions of this arbitration survey for performing the groundwork and outreach required to achieve such tremendous engagement. Of course, it is the respondents themselves who are the most instrumental aspect of this exercise, and we thank each respondent for taking the time to provide us with data, without which we would have nothing to analyse. The survey was long and required preparation, time and effort to complete. We are grateful to our respondents for doing their part, which allows us to do ours.

111 respondents provided us with insights into their own arbitration practice, as well as data in relation to 223 unique arbitrations concluded, conducted, or commenced between 2016 and 2019.

High volume of arbitration with an Australian connection

The data revealed an enormous amount of arbitration with an Australia connection, by virtue of involving Australian parties, Australian projects, or Australian legal or expert

assistance. Construction and engineering disputes accounted for almost half of all the arbitrations reported by respondents.

The total amount in dispute over 223 arbitrations was over \$35 billion*.

Arbitration's (mostly) satisfied customers

For international as well as domestic arbitration, survey respondents reported that either they or their clients were satisfied overall with the arbitration process in matters they were involved in, with over 50% indicating that they were either 'satisfied' or 'very satisfied'. This result was expected but welcome, based on FTI Consulting's own experience with arbitration in Australia.

The potential of arbitration

Despite overall satisfaction with the arbitration process, the survey data also provided hints as to why about 10% of responses in relation to both domestic and international arbitration indicated that the parties were dissatisfied or very dissatisfied with the arbitration process. A number of

Fig. 1: Total amount in dispute by jurisdiction (\$billions)

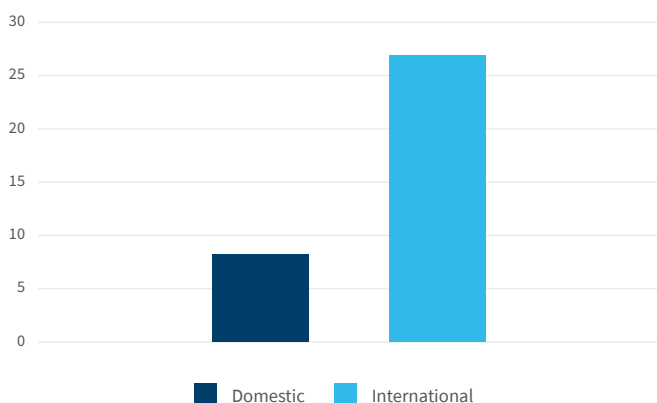
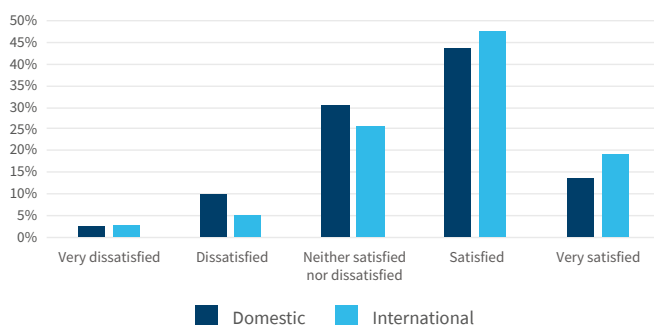


Fig. 2: Respondent satisfaction with arbitration



*Note: All amounts are in AUD



respondents suggested that the full potential of arbitration remains untapped. Almost all of the critical feedback cited a tendency to conduct arbitration in the same manner as litigation and a reluctance to take advantage of the flexibility afforded by arbitration.

Diversity in arbitration – room for improvement

In domestic arbitration, it is perhaps unsurprising that the vast majority of arbitrators were Australian. In the reported international arbitrations, there was a strong reliance on Australian and UK arbitrators. We hope that future surveys with more questions addressing this theme will make it possible to develop more detailed analysis of the reasons and trends possible in the future.

The survey data did reveal the overwhelming appointment of male arbitrators in both domestic and international arbitration. FTI Consulting notes that although institutional appointments were substantially more likely than party appointments to be female arbitrators, overall the proportion is still small.

The future of arbitration in Australia

In addition to ACICA, the state champions, and the survey respondents, FTI Consulting is grateful to the editorial contributors to this report, who have kindly provided insightful commentary on the basis of the data collected to further illuminate the practice of arbitration in Australia. In relation to FTI Consulting’s key findings, we thank:

1. Justin Gleeson SC and Jonathon Redwood SC, for discussing the impact of COVID-19 on arbitration and the future of arbitration in Australia.
2. Doug Jones AO, for commentary regarding the efficient practice of arbitration.
3. Max Bonnell, for his views on a pathway to improving advocacy in arbitration.
4. Jo Delaney and Erika Williams for providing valuable insight into the status of diversity in Australian arbitration.

The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals.

Fig. 3: Reported disputes by industry

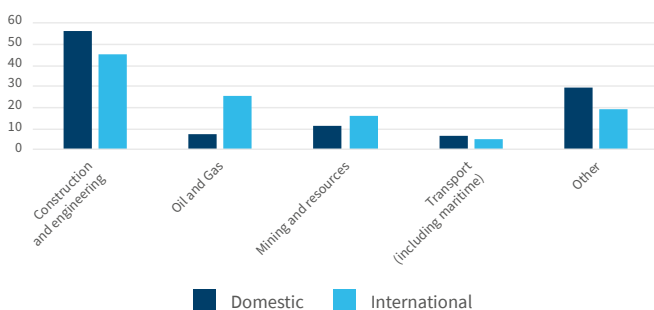
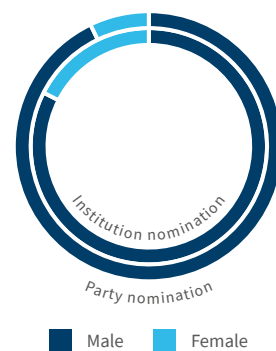


Fig. 4: Arbitrator gender



Australia as a centre for excellence

The results of this survey show us that dispute resolution with an Australian connection is already thriving. Given the timing of the survey, however, it is worth reflecting on the impact that the COVID-19 pandemic has had on dispute resolution practice and the opportunities for innovation and growth for Australia and Australian practitioners.

Dispute resolution in 2020 has been transformed by the global effects of the COVID-19 pandemic. International arbitration has been no exception. The great transformative change has been the rise of online hearings and virtual platforms. All leading arbitral institutions, including ACICA, now have guidelines for the conduct of online hearings. It can be expected that into the future most hearings for international arbitration, especially preliminary hearings and applications for interim measures and other interlocutory applications, will be conducted through virtual online platforms. Even though there will likely be a gradual return to in-person final hearings for many large and complex arbitrations, many final hearings will continue to be undertaken virtually. In that respect technology and familiarity with virtual hearings continue to progress rapidly. The world has changed and so has international arbitration.

This has profound implications for the future of international arbitration in Australia. It has exploded what Geoffrey Blainey coined as Australia's 'tyranny of distance'. Despite many other attractive features of selecting Australia as a seat for international arbitration, Australia's distant geographical location in the antipodes has frequently been referred to as a reason for it attracting less international arbitration than other more 'convenient' locations like Singapore and Hong Kong. With the emergence of virtual hearings and participants from all around the world in different locations (continents), the relevance and constraints of Australia's 'tyranny of distance' have receded, if not evaporated. It is a well-established principle of international arbitration law that the juridical seat and the 'venue' of the arbitration need not be the same. In the new world of virtual hearings, parties are free to choose a seat less constrained by any particular geographical location for the conduct of the arbitration. After-all, even though the supervisory seat must be tied to a particular jurisdiction, the conduct of the arbitration itself can now 'float' seamlessly throughout the virtual world without being anchored to any particular location. In short, what it means for an international

arbitration to be 'in' any particular country has been reconceptualised.

The other significant development of 2020 was geopolitical. Certainly within the Asia-Pacific region, and arguably beyond, democracy and the rule of law have been seriously challenged. Within the region, Australia now stands out, amongst the arbitration seats and venues, as a stable liberal democracy committed to the rule of law and with an independent and supportive judiciary. These are advantages of a juridical seat that can no longer be taken for granted in the modern world.

Together, the confluence of the two factors presents the Australian arbitral community with enormous opportunities to enlarge Australia's share of international arbitration and the participation of emerging Australian arbitration practitioners in international arbitrations across the virtual world. The results of this survey demonstrate that there is already a significant volume of arbitration activity within or connected to Australia. The Australian arbitral community should be seizing this opportunity with the aim of trebling that volume of arbitration activity within the next five to 10 years.

However, this will not be achieved by complacency or more of the same. Collaboration and co-operation must eliminate any remnants of division that still exist in various quarters. We are referring here to lingering divisions: (1) between dispute resolution bodies, (2) between domestic and international arbitration, (3) between Australia's largest cities looking to attract international arbitration, (4) between solicitors and barristers competing for lucrative work in this arena, and (5) between Australian courts and arbitral tribunals. All stakeholders must speak with one voice towards a common objective.

Australia's dispute resolution bodies should continue to improve areas of co-operation and, if possible, be streamlined. The arid dichotomy between 'domestic' and 'international' arbitrations should be collapsed, especially now that Australia has succeeded in creating an integrated legislative arbitral framework under the Model Law.



A national ‘grid’ or ‘network’ for the conduct of arbitrations should be established across at least Sydney, Melbourne and Perth, and beyond if possible. Solicitors and barristers, through their professional bodies, should actively co-operate to enlarge the pie with the confidence that both branches of the profession will benefit. They should do so with an appreciation that within international arbitration, the rigid lines outmoded. There is ample space to build highly experienced, integrated ‘arbitration teams’ from both sides of the profession. The depth of Australian legal expertise, particularly in key arbitration sectors such as construction and infrastructure, and energy already well known globally, and this gives Australia important cost competitive advantages over many of its neighbours in the region.

The legal profession must also be committed to the continued promotion of ‘international best practice’ in the conduct of arbitrations. Co-operation amongst Australian courts and between Australian courts and arbitral bodies, of which the ACICA Judicial Liaison Committee is a global exemplar, should continue to solidify cross-pollination and mutual support between the courts and arbitration. Arbitration practice notes and procedures should be further harmonised. In appropriate cases, courts should be encouraged to refer matters to arbitration. In all of these matters, there are positive signs but more needs to be done.

Australia has the unrivalled legal talent to develop and promote panels of arbitrators across all subject matters that is unmatched in the region (if not the world). These panels should be promoted within the region and draw from emerging and younger arbitration practitioners. And the use of arbitration by Australian companies must be broadened and promoted by the legal profession, arbitral institutions, industry bodies and government in areas that have so far been largely left untouched, including insurance, financial institutions, climate change, telecommunications and technology, tourism and hospitality, healthcare, and mergers and acquisitions.

Australia has an opportunity, particularly with Commonwealth and state government support, to secure its position as a centre for excellence, innovation and the use of state-of-the-art technology in arbitration. We should seize that opportunity.

Justin Gleeson SC and Jonathon Redwood SC,
Banco Chambers

Case profile data

General case profile

The survey data includes information spanning 223 unique arbitration cases with commencement dates ranging from the beginning of 2016 to the beginning of 2019. Of those, 111 were international and 109 domestic (three did not indicate jurisdiction). Unsurprisingly, domestic arbitration was more likely to involve Australian projects, Australian hearing venues, and Australian laws (Fig. 5). Disputes in the construction, mining and resources, and oil and gas industries were the most common subjects of both the reported domestic and international arbitration. We note that respondents only reported international arbitration if it had an Australian connection, so it is not surprising that the primary industries represented in arbitration are the same across jurisdictions. However, compared to mining and resources and construction, oil and gas disputes were much more likely to be the subject of international disputes rather than domestic disputes. This is likely because Australian oil and gas projects tend to include international participants.

Fig. 5: Nature of Australian connection, domestic (inside ring) and international (outside ring)

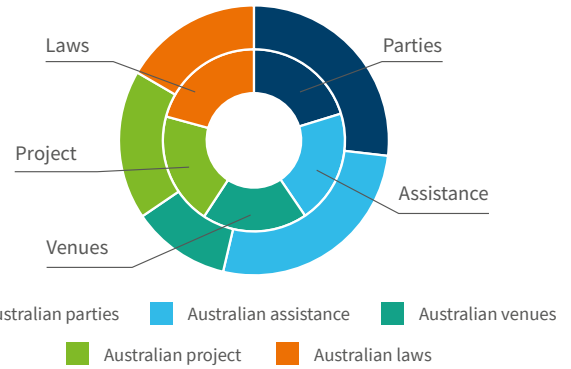


Fig. 6: Total amounts in dispute by jurisdiction (\$millions)

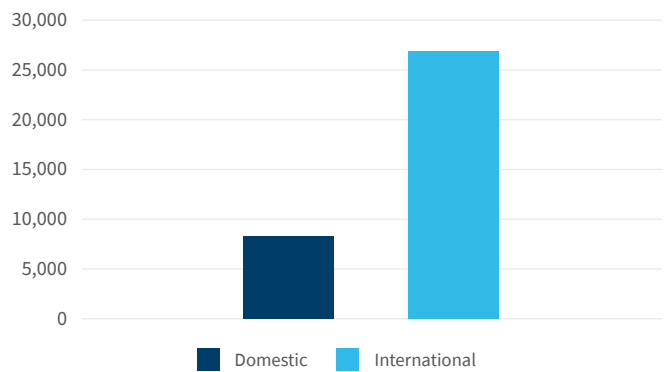


Fig. 7: Average amount in dispute by jurisdiction (\$millions)

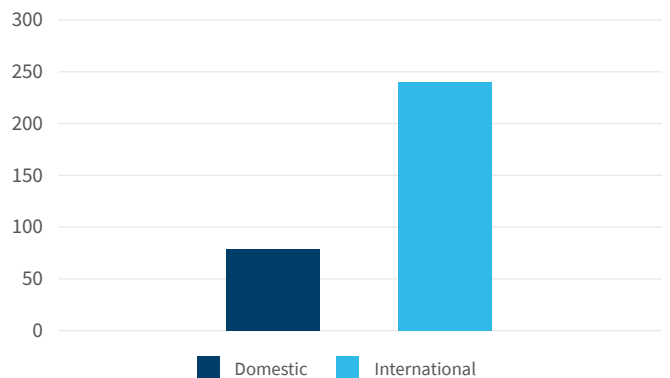
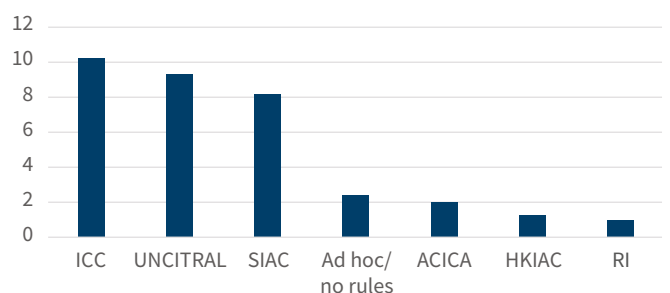


Fig. 8: Total amount in dispute by rules/institution (\$billions)



VALUE IN DISPUTE ESTIMATE



The estimated value in dispute for the reported arbitrations is \$35 billion (Fig. 6). Of that, about 75% is in international arbitration.

The data provided to us are in ranges, and so an exact figure for the total amount in dispute is not calculable. We produced an estimate by taking the average of each range (i.e. a dispute value between \$10 million and \$20 million is added as \$15 million) and the lower bound of high-value disputes (i.e. a dispute value reported as being greater than \$500 million is added as \$500 million). The total dispute value is a combined total of claims and counterclaims, and represents the total amounts claimed by the parties, not the total amounts actually awarded.

Disputes by industry

The vast majority of domestic and international arbitration occurs in relation to construction, engineering, and infrastructure, accounting for almost 50% of all reported arbitration (Fig. 9). For international arbitration, oil and gas is the second most common industry represented in the data. For domestic arbitration, the data shows a relatively even split between oil and gas, mining and resources, transport and ‘other’ (which includes property, banking and agriculture).

Despite accounting for about 20% of the total number of reported arbitrations, the oil and gas industry represented 34% of the total amount in dispute. Meanwhile, construction accounted for 43% of the reported arbitrations and 48% of the total amount in dispute (Fig. 12). In general, the data shows that arbitration in the oil and gas industry consists of a relatively small number of cases with large amounts in dispute, while arbitration in the construction industry consists of a relatively large number of cases with smaller amounts in dispute (Fig. 11).

Rules of arbitration

A number of respondents answered questions relating to their preferred rules of arbitration when drafting clauses. The preferred rules reported for domestic arbitration were ACICA, Resolution Institute (RI), and United Nations Commission on International Trade Law (UNCITRAL) rules, which were also the three most common rules used in the case data. For international arbitration, Singapore International Arbitration Centre (SIAC), International Court of Arbitration (ICC) and ACICA rules were the most preferred for inclusion in arbitration clauses. However, the case data reveals that for reported international cases, the most frequently used rules were those of the ICC, SIAC and UNCITRAL, with almost three times as many reported actual international cases under the UNCITRAL rules as under the ACICA rules.

USE OF ACICA RULES IN ARBITRATION



The data suggests that the inclusion of ACICA clauses in new contracts is more frequent than it has been in the past, so we can reasonably expect that the share of cases heard under the ACICA rules will increase in the medium term. See page 30 for more information regarding the nomination of institutions in clause drafting.

Fig. 9: Reported number of cases by industry

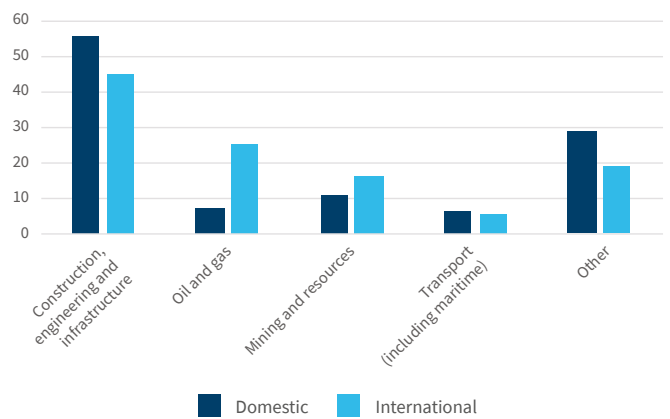


Fig. 10: Rules used in arbitration (% of cases)

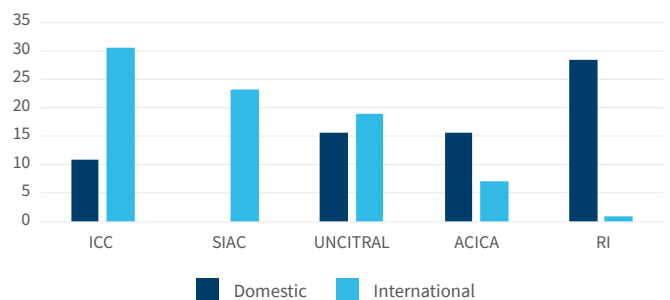


Fig. 11: Average disputed amount by industry (\$millions)

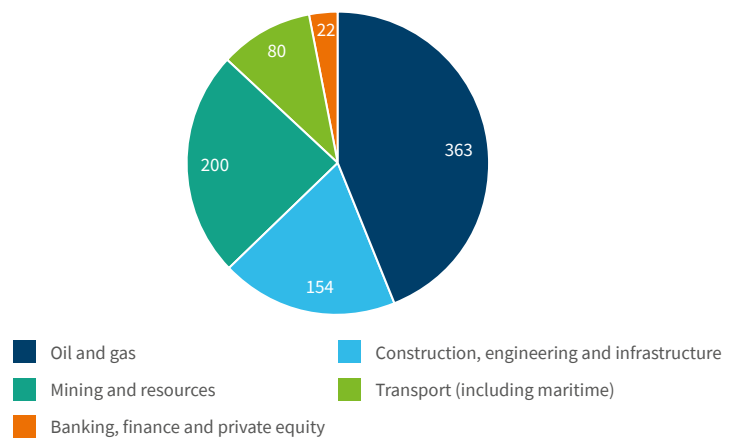
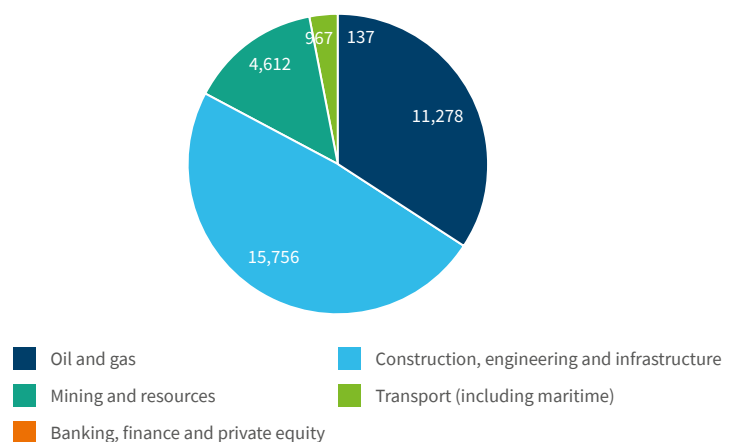


Fig. 12: Total dispute amount by industry (\$millions)



Case costs

Cost of arbitration

Respondents reported amounts charged in relation to about \$18 billion worth of the total reported amount in dispute (Fig. 13), just over half of the total. Predictably, total costs generally followed the amounts in dispute, though notably the spread of charges is wide regardless of the amount in dispute (Fig. 15). We note that the nature of engagements recorded is not necessarily like for like. That is, lower charges may represent a relatively small component of work, such as expert advice on a subset of the disputed amount, whereas higher charges may represent engagements for substantial amounts of work for the duration of the dispute. For example, Fig. 14 shows the average external legal cost over the amount in dispute, with indicators for the standard deviation showing, generally, how widely external costs can vary for arbitrations with similar amounts in dispute.

The survey found that costs do not vary particularly by industry once the amounts in dispute are accounted for – that is, costs were relatively high in those industries where the amounts in dispute were generally high, and low in those industries where the amounts in dispute were relatively low.

In total, respondents reported a total of \$124 million of their own billing in relation to 138 of the reported arbitrations. Of that, 69% was reported by solicitors, 17% by barristers, and 9% by experts. Detailed comparisons are not possible due to the difference in the number of each type of respondent and the different levels of disclosure between respondent types. However, the billing mix is broadly in line with the overall reported costs of arbitration.

External costs were reported in relation to 75 proceedings with a combined amount in dispute of \$15 billion, or a bit less than 50% of the total reported amount in dispute. However, in those responses, \$174 million of expenditure was recorded against external legal costs alone. This is as expected, since total expenditure is likely to include practitioners that were not involved in the survey and so are not included in the self-reported billing amounts.

External legal costs were, perhaps unsurprisingly, by far the largest cost in arbitration. Such costs are followed distantly by witness costs, tribunal costs, and internal costs.

Fig. 13: Total external costs (\$millions)

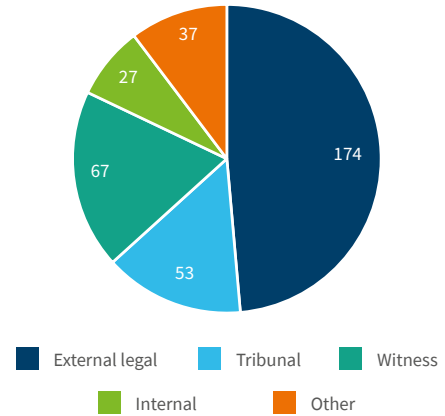


Fig. 14: Average external legal costs by amount in dispute

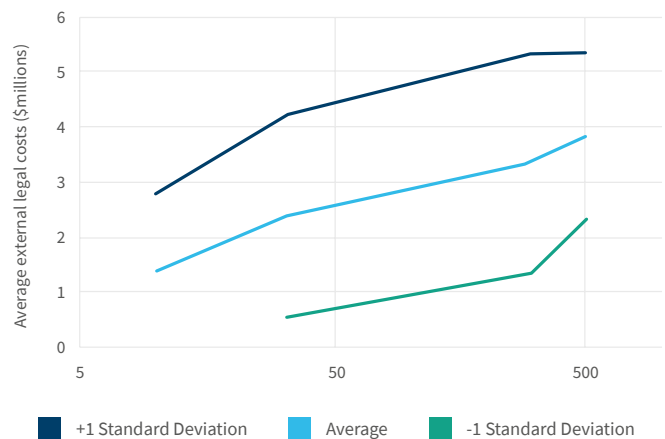
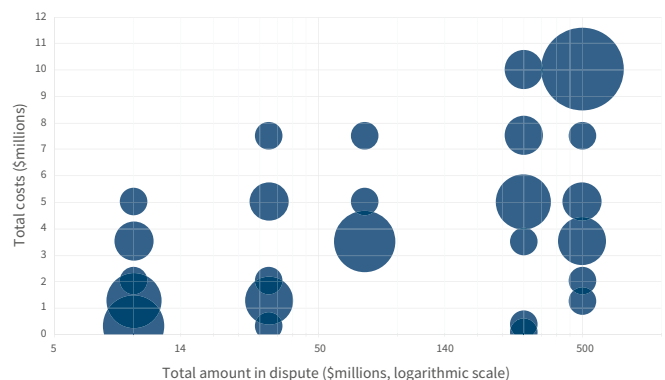


Fig. 15: Total costs vs dispute value (bubble size is number of cases)



There is a large spread in the cost of arbitration. Though the higher end of reported costs increases with an increase in dispute value, there is a large range of costs for high-value disputes. Although the reported costs for most high-value disputes were also high, a substantial portion of disputes had relatively low costs. The survey data do not contain information regarding the complexity of disputes, so it may be that a higher proportion of high-value claims are of more complex and therefore require more legal and expert resources.

There was a notable difference in tribunal costs by institution, although it is difficult to form firm conclusions because there were insufficient responses regarding the costs of ACICA- or RI-administered international arbitrations upon which to draw (Fig. 17). From the survey responses, tribunal costs for ACICA and RI domestic arbitrations were substantially lower than for ICC and UNCITRAL domestic arbitrations. The survey data revealed that the tribunal costs, broadly, increased linearly with the amount in dispute, and the data also showed that the amounts in dispute tended to be lower for ACICA and RI domestic arbitration (Fig. 16). Higher-value disputes tended to also involve more hearing days than low-value disputes.

Overall, the total number of hearing days increased as the total amount in dispute increased (Fig. 18). However, the amount in dispute itself was more predictive of the tribunal cost than the number of hearing days. A portion of this difference may also arise from the different pool of arbitrators selected for domestic and international arbitrations, and the different amounts they charge.

Fig. 16: Average amount in dispute by institution (\$millions)

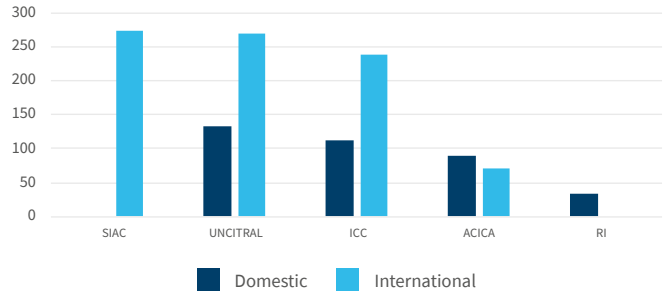


Fig. 17: Average tribunal cost by institution (\$millions)*

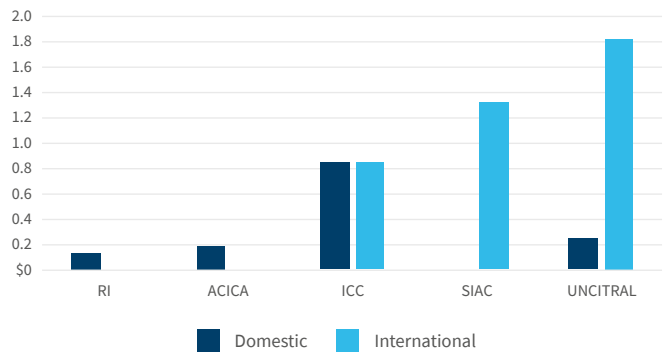
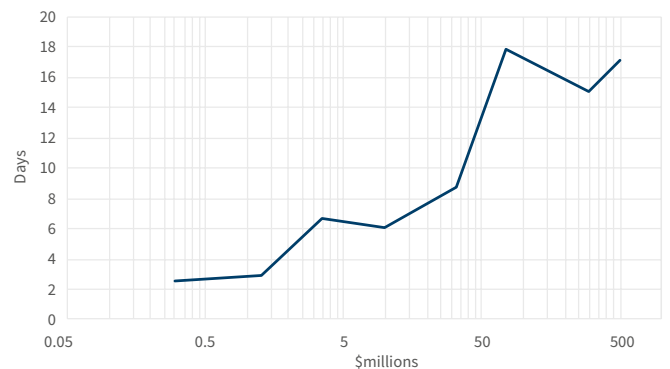


Fig. 18: Average total hearing days vs amount in dispute



* Note: The survey received limited data for the tribunal cost of ACICA- and RI-administered international arbitrations, so we have not included an average for these arbitrations

Efficiency in arbitration

Efficiency in arbitration remains a vexed issue, despite significant discussion in recent years. In some cases, the efficiency of an arbitration is hindered by diligent advocates who, in seeking to promote their client's case, persist with unnecessary or irrelevant claims that are peripheral to the main issues in dispute. Another cause is the tendency for arbitrators to conduct the arbitration in a manner that too closely resembles domestic litigation. In doing so, arbitrators may fail to take advantage of procedural innovations that can be used to deliver a bespoke process suitable for the needs of particular disputes. Indeed, the results of the 2020 Australian Arbitration Survey reveal that a key complaint is that efficiency in arbitration is being stifled by its increasing "judicialisation". The use of rigid, formal procedures deprives arbitration participants of one of the key advantages associated with arbitration: flexibility.

UNLOCKING THE FULL POTENTIAL OF ARBITRATION



The survey respondents reported generally favourable experiences with arbitration. However, the data also suggests that the efficiency advantages of arbitration were often unrealised due to a rigid approach to the arbitration process that could be, in the words of one respondent, 'insufficiently innovative or flexible'. We believe that, via adoption of international best practices, Australian arbitration practitioners can enhance the value of arbitration to parties in dispute.

How then can we improve efficiency in arbitration?

I suggest three strategies. First and foremost, there must be early, and regular, case management by proactive arbitrators. Tribunals should adopt a proactive approach to case management from the very first case management conference, right up until the final award is rendered. Ongoing case management is critical in areas including document disclosure, lay witness evidence and particularly in the handling of expert evidence. As discussed in my presentation at the Chartered Institute of Arbitrators Australia seminar in Brisbane 2019, early engagement with the experts can allow the tribunal and the parties to resolve expert issues which can later grow intractable (and are often a significant driver of cost and delay).

Second, arbitrators should be willing to utilise the flexibility of arbitration to adapt the arbitral procedure in a bespoke manner. Large, complex arbitrations often require exceptional treatment in order to remain cost effective. Arbitrators must take the initiative to devise creative procedural techniques, in collaboration with the parties. In the international arbitrations over which I have presided, I have seen counsel embrace a variety of techniques to resolve low-value claims that would otherwise be uneconomic to determine. For instance, the use of statistical sampling and grouping claims with common legal and factual issues can resolve claims in a cost-effective manner. By moving away from the procedures seen in domestic litigation, participants can take advantage of the malleable nature of arbitration. It is, after all, a process that belongs to the parties and should be tailored to their needs.

Finally, as discussed in my keynote at the 8th Asia-Pacific ADR Conference in 2019, it is my belief that efficiency in arbitration may be achieved through greater transparency. By this, I am referring to the need for greater access to information about the process of arbitration and the arbitrators themselves, which is often only known to the participants themselves. Disseminating more information about the arbitrators, their awards and their approaches to procedure will allow parties to make informed decisions. Given that the choice of arbitrator is often a determinative factor in the efficiency of an arbitration, greater objective material on their quality and experience is crucial. The same can be said for the procedure that is adopted in these arbitrations. Innovations in arbitral procedure cannot be enjoyed by all arbitration participants if they are being applied behind closed doors.

The results of the 2020 Australian Arbitration Survey usefully shed light on the areas requiring improvement in domestic and international arbitration. These issues represent a challenge but are capable of resolution with careful innovation. Thus, with flexibility and consultation, proactive tribunals can improve the efficiency of the process and ensure arbitration retains its value.

Doug Jones AO

International Arbitrator

“Domestic arbitrations tend to run more like proceedings in domestic courts, with arbitrators and parties even referring to or adopting court practice notes or rules. This undermines one of the key benefits of arbitrating - being the ability to adopt a less formal and more streamlined procedure that responds to the particular dispute.”

- Feedback from a survey respondent



The arbitration process: settlement and mediation

Settlement and mediation

Of those matters for which respondents provided detailed data regarding settlement and mediation, parties only reported conducting mediation or settling in a minority of cases.

Mediation was conducted in just over 30% of domestic matters and just over 20% of international matters – typically prior to commencement of the arbitration but in some cases continuing during the arbitration itself (Fig. 19). There was a notable difference in the amount of mediation depending on the rules under which the arbitration was conducted – those arbitrations conducted under ACICA, RI, or UNCITRAL rules were almost twice as likely (40%) to involve mediation than those under ICC or SIAC rules (Fig. 20).

Only one in five arbitration matters were settled prior to award (Fig. 21). International matters were slightly but not significantly more likely to settle prior to award. As with mediation, arbitration conducted under ACICA or RI rules was more likely to be settled compared with arbitration conducted under ICC, SIAC, and UNCITRAL rules. The data shows that although UNCITRAL arbitration is almost as likely as ACICA and RI arbitration to involve mediation, that did not translate into rates of settlement as high as ACICA and RI arbitration.

In fact, the data revealed little correlation between mediation and settlement (Fig. 24). Matters that settled were only marginally more likely to have been subject to mediation than those that were not. Matters that underwent mediation and matters that did not had a similar likelihood of settlement (around 20%). The most significantly correlated factor in relation to settlement was the amount in dispute (Fig. 23). That relationship also accounts for the relatively high rate of settlement in ACICA and RI arbitrations, as most of the provided data lower overall average amount in dispute compared to international arbitrations. The propensity to settle appears to drop substantially as matters approached \$100 million in disputed value. Though based on a limited subset of the data, the results do suggest that when the amounts in dispute are relatively low (less than \$10 million), mediation has a greater positive impact on the likelihood of settlement.

Fig. 19: Mediation by jurisdiction

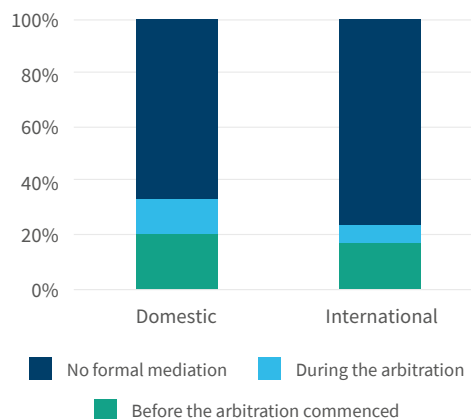


Fig. 20: Mediation by rules

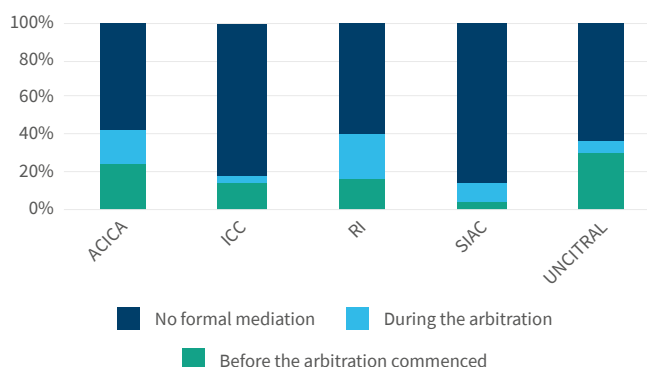
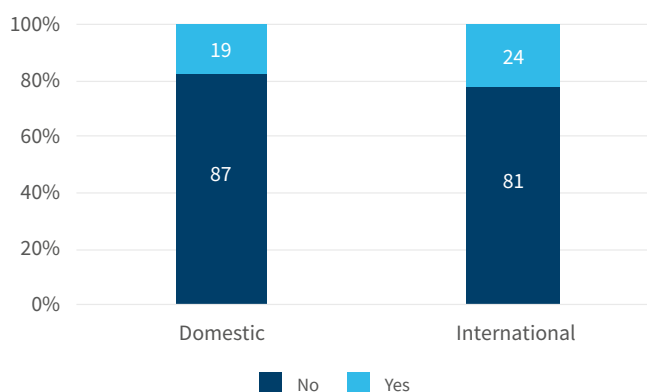


Fig. 21: Settled prior to award



It is important to note that each arbitration has its own facts, and that aggregate data, while illuminating, does not take into account factual features that may make some disputes far more likely to settle than others. A proportion of matters will be more likely to be settle at the outset based on the factual circumstances, and other factors (rules, mediation, amounts in dispute, for example) can only augment the underlying probability of settlement.

Fig. 22: Settled prior to award

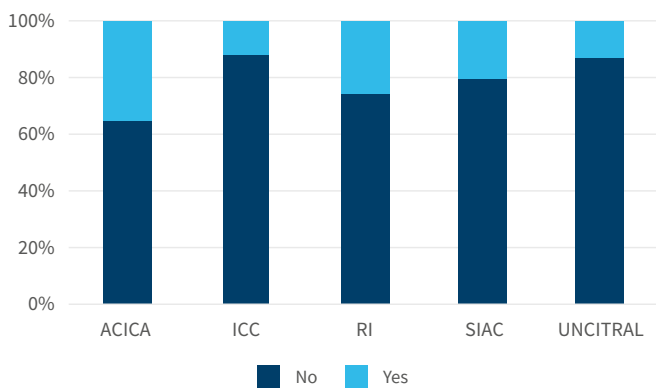


Fig. 23: Proportion of settled matters by amount in dispute

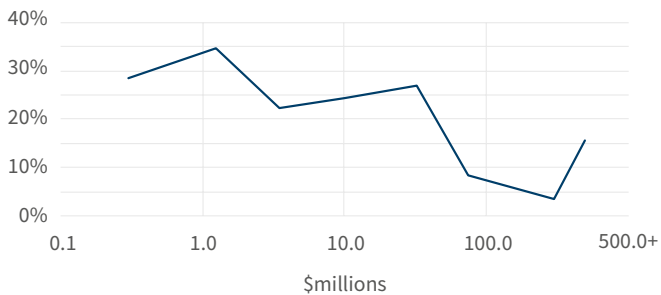
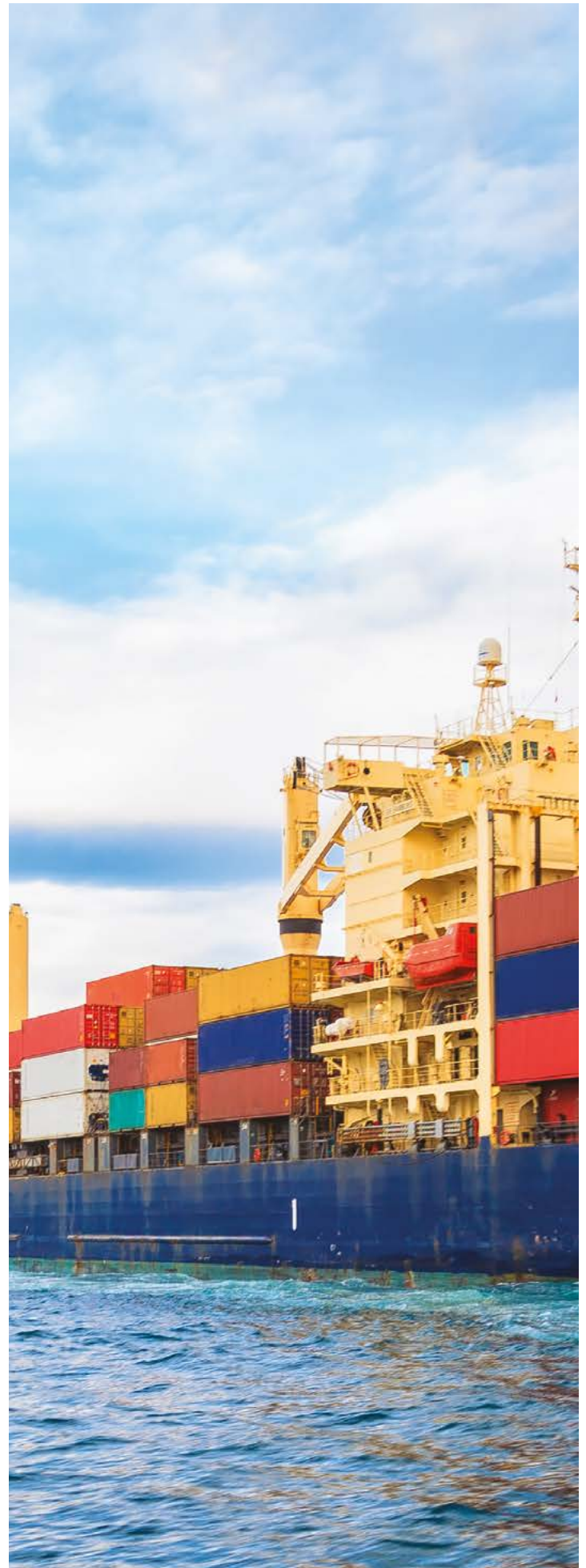
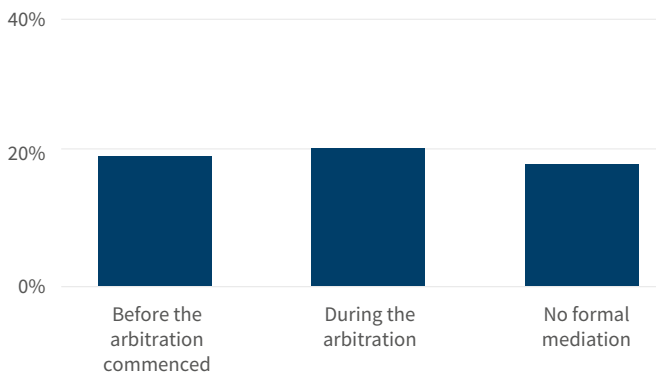


Fig. 24: Mediation impact on the likelihood of settlement



The arbitration process: award and award satisfaction

Awards and award satisfaction

Respondents indicated whether or not an award had been issued for over 80% of the recorded arbitrations. Of those, an award had been issued in about 50% of international and domestic arbitration matters (Fig. 28). For the most part, awards were issued within 6 months of the final hearing, though international matters were likely to receive an award more slowly than domestic matters.

There was a strong relationship between the amount in dispute and the average time for issuance of an award (Fig. 25). That relationship also accounts for the longer period of time before issuance of an award in international arbitration compared with domestic arbitration, as international matters had, on average, an amount in dispute four times higher than domestic arbitration.

Only a small number of respondents disclosed the extent to which the award was satisfied in matters for which an award had been issued. However, the available data shows that, for the most part, awards had been fully or at least partially satisfied (Fig. 26).

Fig. 26: Award satisfaction

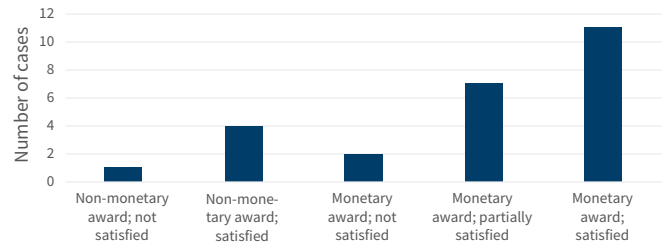


Fig. 27: Time for award (months) by jurisdiction

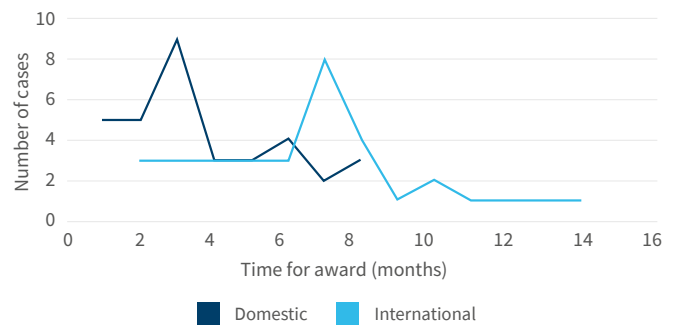


Fig. 25: Average time for award (months) vs total amount in dispute (\$millions)

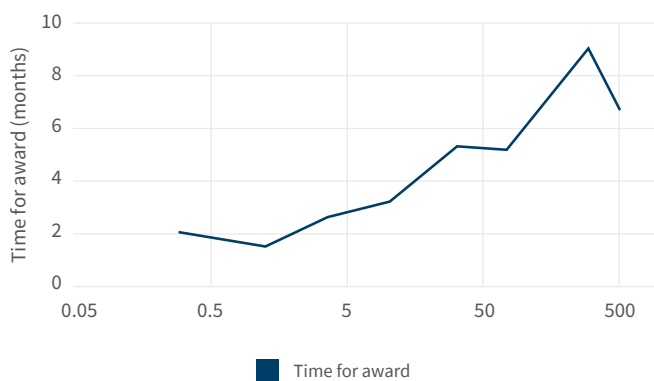
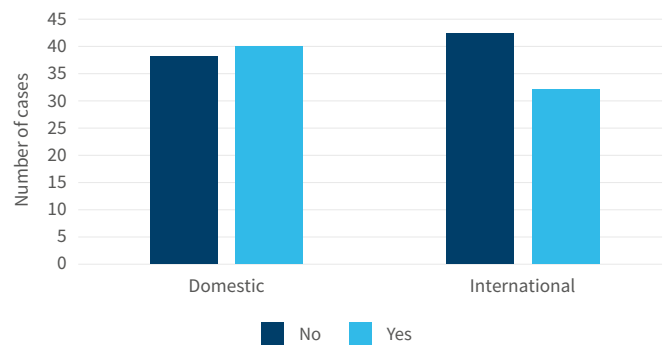


Fig. 28: Award issued



The arbitration process: hearings

Hearings

The survey asked respondents about four types of hearings: procedural, jurisdiction, merits and quantum. Procedural and merits hearings were reported in the majority of arbitrations, while jurisdiction and quantum hearings occurred on less than 20% of occasions. Procedural hearings were, in the vast majority of cases, held in person. Although teleconferencing was also fairly common, hearings via videoconference were rare (Fig. 31). It should be noted that the survey respondents were asked for data in relation to cases as of the end of 2019, prior to COVID-19. It is anticipated surveys that remote hearings will be more frequent in future.

As discussed previously in relation to tribunal costs, the total number of hearing days is closely related to the total amount in dispute, and this relationship broadly accounts for the difference in the average number of hearing days by institution as well as the average number of hearing days by jurisdiction (Fig. 32).

As can be seen in the charts below, which show the minimum, average, and maximum number of hearing days by hearing type, hearings in international arbitrations were, on average, longer (Fig. 29). In both international and domestic arbitration, merits hearings were the longest by far, followed by quantum and procedural hearings.

Fig. 30: Hearing days by type (domestic arbitration)*

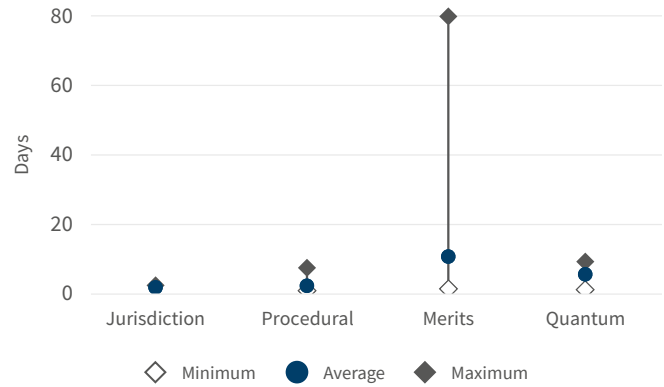


Fig. 31: Procedural hearing method

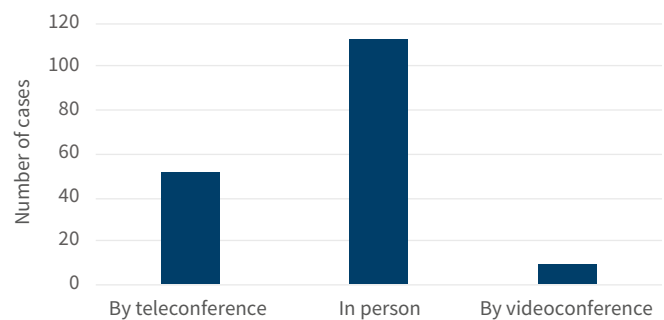


Fig. 29: Hearing days by type (international arbitration)*

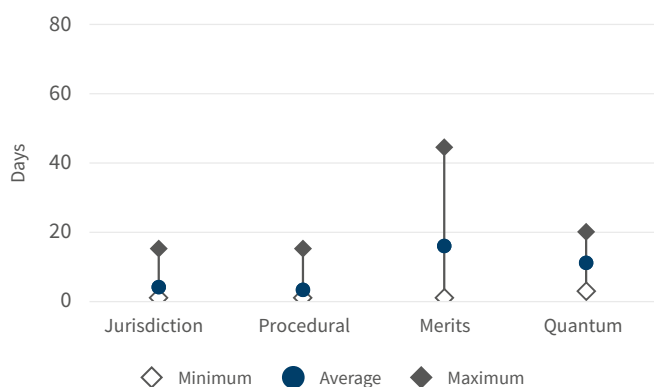
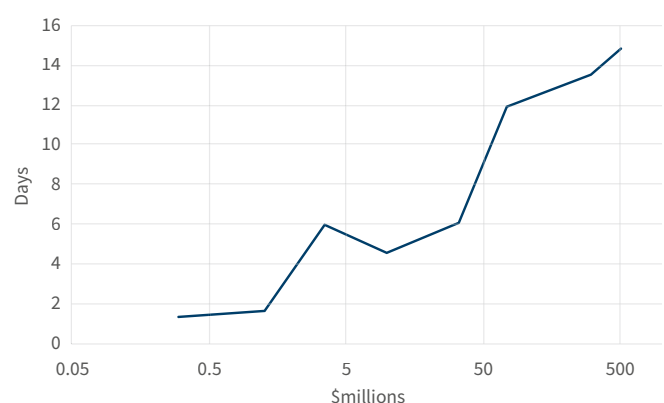


Fig. 32: Average total hearing days vs dispute value



* Note: These charts show the maximum, average, and minimum number of hearing days for each type of hearing.

The arbitration process: satisfaction and sentiment

Most users were satisfied with the arbitration process

Satisfaction

Survey respondents indicated either their satisfaction or their clients' satisfaction with the arbitration process in over 80% of the recorded arbitrations. Respondents were generally either satisfied or neutral with the arbitration process in the individual matters they reported, though we note that all data comes from self-selecting respondents (Fig. 33). The data did not reveal any substantial relationships between satisfaction and rules or institution: satisfaction and industry; or satisfaction and the amount in dispute.

Generally, if the client was satisfied so was the respondent, and vice versa.

Sentiment

Respondents were asked about what strengths and weaknesses they perceived in the arbitration process generally. As with respondents' reasons for including arbitration in the dispute resolution clauses (discussed on page 30 below), the perceived strengths of arbitration were primarily enforceability (for international arbitration), confidentiality, and flexibility (Fig. 34).

Consistently, speed and cost were two of the most commonly cited weaknesses of arbitration, together with limited options for selecting arbitrators and some dissatisfaction with the quality of arbitrators (Fig. 35).

Respondents were given the opportunity to provide their comments in relation to their experience of arbitration. Only a small minority did so. Not unsurprisingly, those that did provide comments generally provided constructive criticism.

With regard to domestic arbitration, almost 80% of the comments received (34/42) concerned two related criticisms: the selection of arbitrators and the tendency of arbitration proceedings to mirror litigation. Respondents saw a relationship between the number of former judges and legal practitioners with a background in litigation acting as arbitrators, and the tendency for arbitration to resemble litigation – though some respondents noted that parties' legal representatives also contributed to that tendency. A number of respondents suggested that domestic arbitration does not always follow international best practice.

Fig. 33: Arbitration satisfaction by jurisdiction

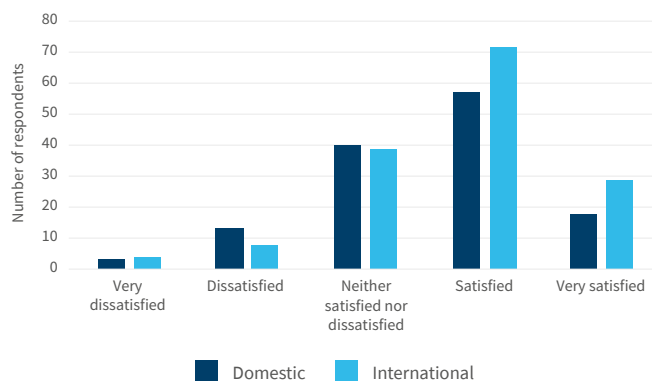


Fig. 34: Perceived benefits of arbitration

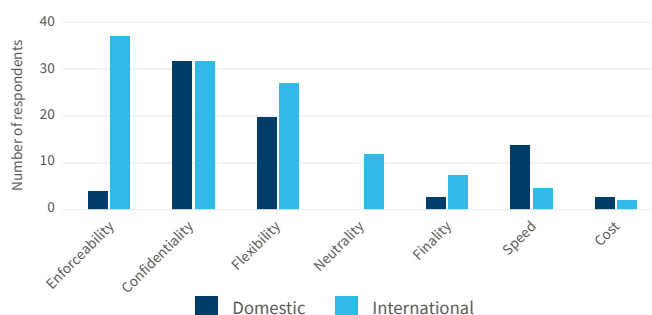
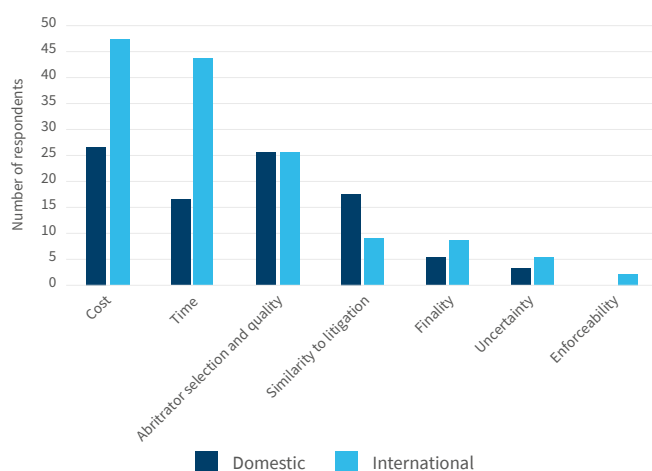


Fig. 35: Perceived weaknesses of arbitration



The authors note some of the specific suggestions made by respondents to improve the arbitration process:

- More ‘robust’ case management.
- Early agreement of the issues by the parties.
- Separation of liability and quantum.
- Use of joint expert reports.
- Joint expert testimony.

Some respondents noted a lack of transparency around arbitrator performance, and many suggested that arbitral institutions should provide more training and education for arbitrators. The shallowness of the pool of arbitrators was a criticism in both domestic and international arbitration. This perception may be partly driven by the tendency of parties to only choose from a subset of experienced and/or prominent arbitrators.

With regard to international arbitration, respondents made similar comments relating to the tendency of arbitration to mirror litigation and the resulting impacts on the cost and duration of arbitration. However, multiple respondents drew a direct relationship between the level of involvement of Australian practitioners – whether arbitrators or legal representatives – and the tendency to conduct arbitration like litigation.

The ‘flexibility’ of arbitration was the third most and second most important benefit of international and domestic arbitration, respectively, according to our respondents. Based on open-ended survey answers, it is clear that current arbitration proceedings do not always meet respondents’ expectations in terms of flexibility.

ARBITRATION AS A DISTINCT PRACTICE



Respondents’ experiences with Australian practitioners may be partly driven by the tendency of parties to limit their choice of representation to a small set of practitioners. This may be compounded by a lack of appreciation of the features of arbitration that make it distinct from litigation, and that make it beneficial to parties to engage representation with specific experience in arbitration rather than litigation.



Representation

Respondents answered questions on the representation of parties in each individual matter they reported. Perhaps predictably, law firms and barristers representing parties in international arbitration were far more likely to be located outside Australia than those engaged for domestic arbitration.

In domestic arbitration, there were almost no instances of participation by law firm offices outside Australia or barristers outside Australia (Fig. 36). The most common location for law firm offices in reported domestic arbitrations was Perth by a substantial margin, followed by Sydney, Melbourne and Brisbane. We note that the data considered within this report includes non-duplicate case data obtained during a WA only survey in 2018, which included a number of domestic arbitrations in which Perth-based offices participated. Barristers were more likely to be located in Sydney or Melbourne than in Perth or Brisbane (Fig. 39). It was relatively common for barristers to work with law firms interstate.

The representation of Australian cities in international arbitration was broadly similar to domestic arbitration. However, more than 50% of international cases involved firms and barristers outside Australia.

International firms were located primarily in London, Singapore, and Hong Kong – perhaps predictable given the popularity of those jurisdictions as arbitral seats (Fig. 38). However, international barristers were far more uniform: the overwhelming majority were from London.

Fig. 36: Law firm location by arbitration jurisdiction

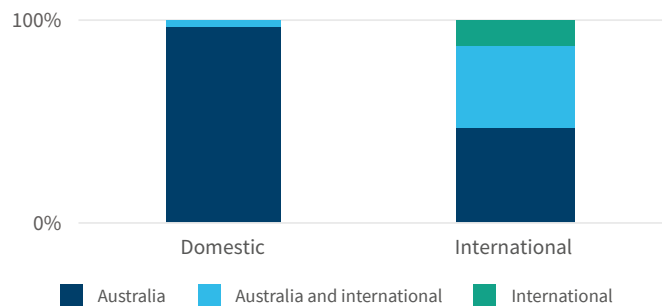


Fig. 37: Barrister location by arbitration jurisdiction

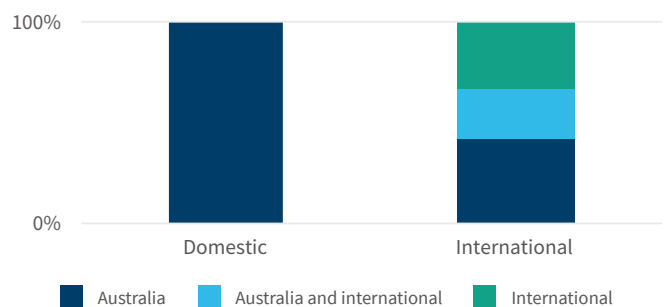


Fig. 38: International firm locations involved in Australian arbitration

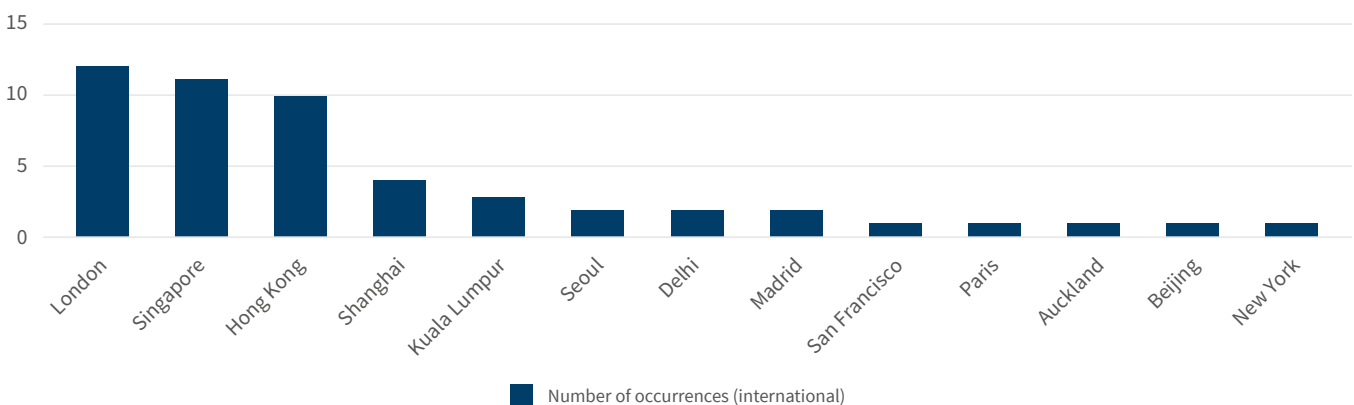


Fig. 39: Australian barrister locations

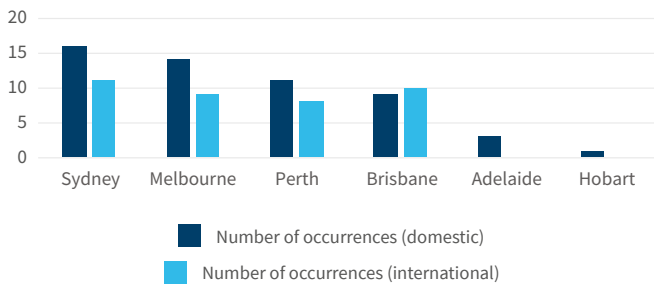
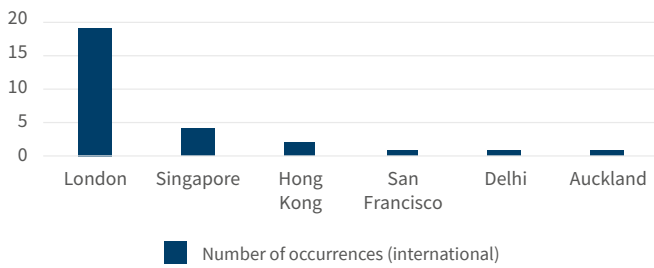


Fig. 40: International barrister locations



Advocacy in international arbitration

There are some Australian lawyers who are exceptional advocates in international arbitration.

The recent Australian Arbitration Survey, however, adds some statistical weight to my own experience, which suggests that too many Australian advocates neglect to make the small, but significant, adjustments that would enable their clients to derive, more fully, the benefits of arbitration.

To give only one illustration: I have been opposed to Australian barristers (or sat on tribunals with Australian barristers) in perhaps half a dozen arbitrations. On each occasion, on the opening day of the final hearing, a hefty sheaf of objections to evidence, based on the law and practice of the advocate's local State court, has been tabled before the tribunal. The work performed is thorough and careful, of high quality and no doubt cost their clients a substantial amount – and it's quite useless in an arbitration where no rules of evidence apply. I readily acknowledge that this is not the practice of all Australian barristers acting as advocates in arbitration, yet it has been a common pattern in my experience.

There is absolutely no reason why an outstanding court advocate ought not to be an outstanding arbitration advocate – and many are. But too many continue to make the assumption that they can operate before an international tribunal in the same way that they usually do in their domestic courts. A common complaint from the respondents to the Australian Arbitration Survey was that lawyers in arbitrations 'run it like litigation'. This frustrates tribunals, can add delay and expense to cases, and can tend to deprive the parties of the efficiencies that are available in arbitration.

It's frustrating that many Australian lawyers have been slow to absorb the differences between court advocacy and arbitration advocacy, because they are not especially complicated. The key differences, I'd suggest, are these:

- Embrace the flexibility of the process. At least in theory, most arbitrations begin, procedurally, with a blank sheet of paper. Instead of duplicating familiar court rules, consider what process will best serve your client's needs in the case – which may be something very different to Australian litigation procedure. Don't reject possibilities merely because they're unfamiliar.

- Your case may have lasted for four months in the Supreme Court; an international tribunal will generally deal with a case like that in four weeks or less. You may be used to the Supreme Court giving you a day and a half to present an oral opening of your case. If an international tribunal wants an opening address, you might get an hour and a half. That two-day cross-examination? It may need to be done in two hours. Especially if you're on a chess clock, you need to be more focused and concise than in most court cases.
- Leave your courtroom manner behind. Court litigation is a heavily ritualised process: judges and counsel wear costumes, people stand and bow, and everyone has a title – 'Your Honour', 'My learned friend', 'the witness'. But behaviour that looks magisterial in a courtroom looks odd when engaged in by a group of people sitting across a desk from each other in a small room. Techniques that work well in a courtroom – such as highly aggressive questioning of a witness – can be disconcerting to a tribunal, and ineffective. Arbitrators have names there's no reason not to refer to an arbitrator as 'Ms Smith' rather than 'Madam Arbitrator'. Court rituals have their place: it's not in arbitration.

There is an opportunity for both barristers and solicitors to participate actively in training and other professional development activities to enhance their advocacy skills in an arbitration context, so long as they give due recognition to the different forum in which they are practising.

The continuing growth of international arbitration in the region (especially, but not only, the expansion of Singapore as an arbitration centre) offers rich opportunities to Australian lawyers to practise in the field. The lawyers who best seize those opportunities will be the ones with the humility to understand that they need to make small adjustments to their habitual practices, and the wisdom to put a few old habits aside.

Max Bonnell

International Arbitration Practitioner & Executive Lawyer,
Henry William Lawyers



Tribunal composition

The survey data revealed the composition of tribunals to be remarkably homogenous in arbitration with an Australian connection. Arbitrators appointed in domestic arbitrations were almost guaranteed to be Australian males – Arbitrators appointed in international arbitrations were almost guaranteed to be male and either Australian or from the UK.

Arbitrator nationality was so uniform that further breakdown of the data was not illuminating. However, there were some notable aspects in relation to arbitrator gender.

Firstly, tribunal members in international arbitration were marginally more likely to be women compared with those in domestic arbitration (Fig. 41). Secondly, tribunal members were more than twice as likely to be women if they were nominated by an institution rather than nominated by the parties (Fig. 42). Some respondents separately noted both that they considered the pool of available arbitrators to be too shallow and also that they chose arbitrators based on previous experience, familiarity, and reputation. While it is not possible to draw conclusions, the data suggests that parties' tendencies to choose well-known arbitrators may further concentrate the diminished pool of experienced arbitrators and contribute to the narrow demographic represented.

Notwithstanding that institution-appointed arbitrators are much more likely to be women, the proportion is still very small (less than 20% overall). Likewise, although there are some differences in the proportion of female arbitrators depending on the institution, that proportion is low even in ACICA arbitrations (which was the best performing institution by this metric (Fig. 44)).

We note that the graphs on this page are based only on the information provided by respondents. In some cases respondents did not provide information about the gender of the tribunal members, and it is assumed that other arbitration activity in the relevant period was not captured in the respondents' answers at all. Accordingly, the numbers presented on this page are not without a margin of error – though the general trends are strongly indicated.

Fig. 41: Arbitrator gender

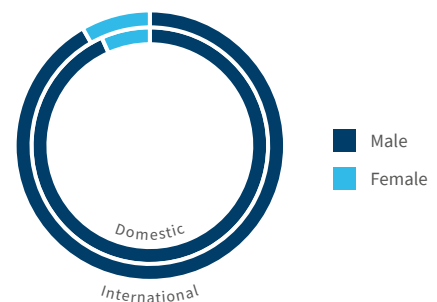


Fig. 42: Arbitrator gender

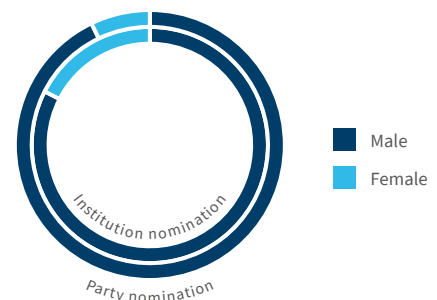


Fig. 43: Arbitrator nationality

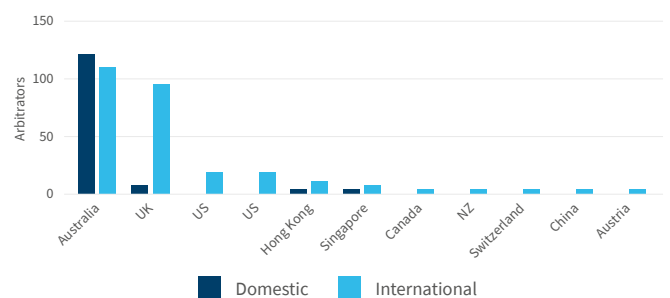
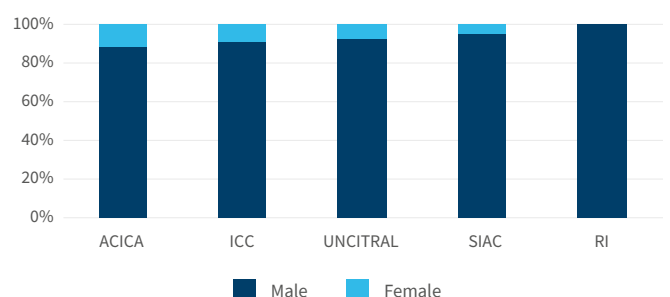


Fig. 44: Arbitrator gender by rules

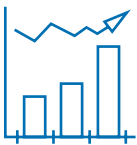




Diversity in arbitration

Diversity in arbitration continues to be an important topic for discussion. Gender diversity has been at the centre of that discussion for many years. However, cultural and other forms of diversity are just as important.

ACICA'S EXPERIENCE SUGGESTS POSITIVE TRENDS



The report can only reflect the information provided by respondents. ACICA's institutional experience supports the report finding that more institutional appointments of female arbitrators are made than party appointments. However, it is worth noting that in ACICA's recent experience (2019-2020), there has been a perceptible increase in party appointment of female arbitrators, as well as an increase in the consideration of female arbitrators (even if they were not ultimately appointed). As an institution ACICA has also focused on increasing its 'first time' appointments and has noticed greater use and consideration of 'up and coming arbitrators' by parties to ACICA arbitrations.

The Australian Arbitration Survey included questions related to the issue of gender diversity in arbitrator appointments. We understand that it is intended to address issues of diversity more broadly in subsequent surveys. The focus on gender is not intended to downplay or reduce the importance of cultural or other forms of diversity.

For many years now, there has been a proactive and concerted effort to improve gender diversity in arbitration, particularly in relation to the appointment of female arbitrators. In 1993, ArbitralWomen, the first organisation to promote gender diversity was founded. In 2015, members of the arbitration community drew up the Equal Representation in Arbitration Pledge (ERA Pledge) to take specific action to improve the statistics for the appointment of female arbitrators. Even though signatories to the ERA Pledge have surpassed 4,000, there is still significant room for improvement, as indicated by the Australian Arbitration Survey.

For example, the results of the Australian Arbitration Survey show that in the 223 arbitrations referred to, where parties indicated the gender of the arbitrator, less than 10% of arbitrators appointed were women: for international arbitrations, 92% of arbitrators were male and 8% were female; and for domestic arbitrations, 93% of arbitrators were male and 7% were female.

These statistics can be broken down further according to the arbitration rules that applied to the arbitration:

- ACICA rules: 88% of tribunal members were male, 12% were female.
- ICC rules: 91% of tribunal members were male, 7% were female.
- SIAC rules: 95% of tribunal members were male, 5% were female.
- RI rules: 100% of tribunal members were male.
- UNCITRAL rules: 93% of tribunal members were male, 7% were female.

It is encouraging to see that the number of female arbitrators appointed in ACICA arbitrations was over 10%. However, it is very concerning that 100% of the arbitrators appointed in the reported arbitrations conducted under the auspices of the Resolution Institute were male.

The statistics from the Australian Arbitration Survey are much lower than the overall statistics reported in the ICCA Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (ICCA Report) released earlier this year. The ICCA Report indicates that the total number of female arbitrators as a percentage of the total number of arbitrator appointments globally has almost doubled from 12.2% in 2015 to 21.3% in 2019. The percentage for all of the arbitral institutions considered in the report was above 15% with many institutions being above 20% in 2019 (eg. ICC (21.1%), LCIA (29%) and the SCC (23%)).

However, the analysis in the ICCA Report indicates that the increase in the appointment of female arbitrators is largely due to the increased appointments by institutions. For example, the ICC has increased the percentage of female appointments that it has made from 19.6% in 2015 to 34% in 2019; and the LCIA has increased its female appointments from 28.2% in 2015 to 48% in 2019. Indeed, LCIA won the ERA Pledge Global Arbitration Review 2020 in July 2020, for these increased numbers.

In contrast, there has been some but not as much improvement in the percentage of female appointments

by parties. These percentages are generally lower: the percentage for ICC arbitrations of 6.9% in 2015 has improved to 15.3% in 2019; similarly, the percentage for LCIA arbitrations has improved from 6.9% to 12.0%.

Nonetheless, these numbers are still higher than those recorded in the Australian Arbitration Survey. In fact, it indicates that the appointment of female arbitrators in Australia-related arbitrations may be about five years behind the global trends reflected in the ICCA Report.

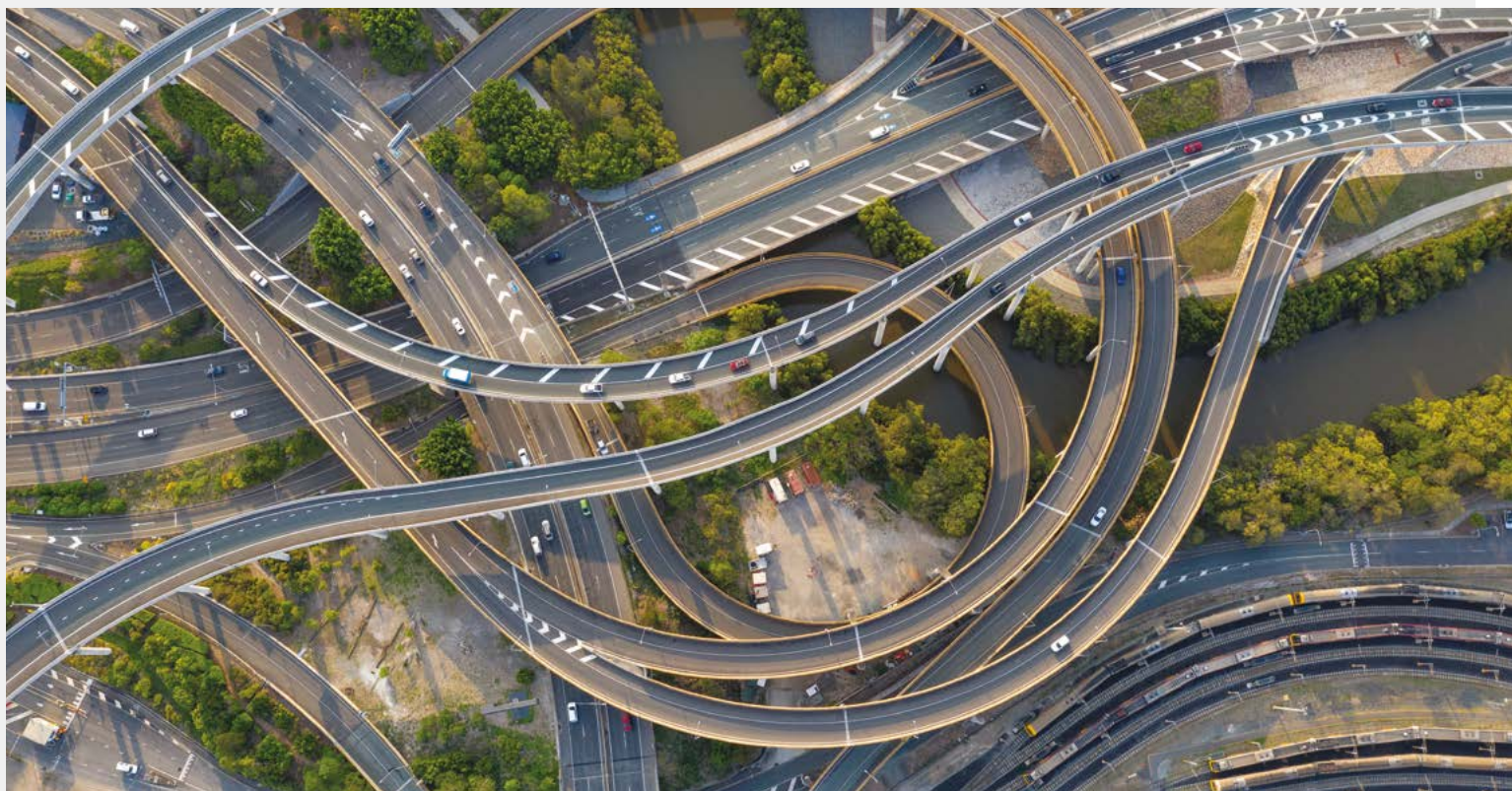
Whilst there is still substantial room for improvement, the consistent hard work and effort of organisations such as ArbitralWomen and the ERA Pledge, is having a positive impact. It is evident that more work is required with respect to appointments of female arbitrators in Australian related arbitrations.

Jo Delaney

Partner, Baker McKenzie, member of the ERA Pledge Steering Committee and former Director, ArbitralWomen and

Erika Williams

FCIArb, FACICA, Independent Arbitration Practitioner and Director, ArbitralWomen.



Clause drafting data

The data on inclusion or recommendation of arbitration clauses in the contracts entered into by a respondent's company or client is limited to 28 respondents, seven of whom were in-house counsel, 21 of whom were solicitors. Not every respondent provided answers to all questions.

Inclusion of arbitration clauses

About 60% of in-house counsel and solicitors reported either including or recommending the inclusion of arbitration clauses in international contracts worth over \$5 million dollars (the highest bracket in the survey questions) entered into by their company or client, respectively. Both in-house counsel and solicitors recommended the inclusion of an arbitration clause in 10–25% of domestic contracts worth over \$2 million dollars. When a clause was included, ACICA and RI rules were by far the most commonly used. Overall, the actual arbitrations conducted using ACICA rules generally had a higher amount in dispute than those conducted using RI rules (almost double on average; see page 20). The highest-value arbitrations under the RI rules were related to property, while the highest-value arbitrations under ACICA rules were in the construction and infrastructure industries. Construction and infrastructure disputes were the most common under both ACICA and RI rules, but those conducted under ACICA rules had an average amount in dispute almost 10 times greater than those conducted under RI rules. When a solicitor advised a client to include an arbitration clause, that advice was followed in the majority (70%) of cases.

Arbitration rules in international contracts

The most popular rules included in arbitration clauses in international contracts were the SIAC and ICC rules, followed closely by ACICA and UNCITRAL rules (Fig. 46). Respondents often indicated that they consider a number of options when choosing rules, although 20 of 28 respondents in this section reported considering SIAC rules. Respondents indicated parties' familiarity with the rules and the acceptability of rules to counterparties are the primary considerations when choosing rules. Respondents separately indicated that Singapore is the preferred arbitration seat for many counterparties.

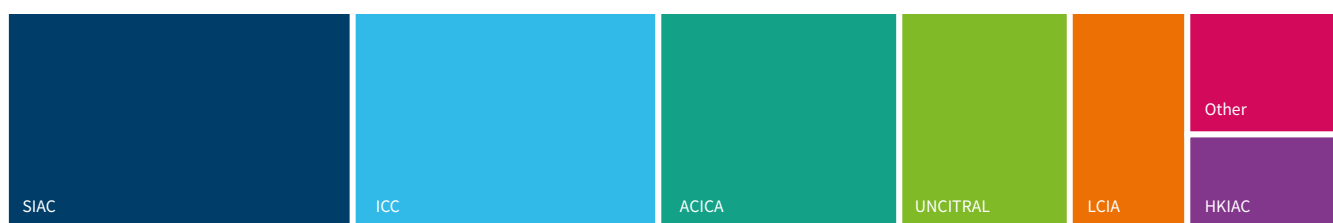
Arbitration rules in domestic contracts

Almost all respondents who addressed domestic contracts favoured the inclusion of ACICA rules, followed closely by RI rules.

Fig. 45: Popularity of arbitration rules (domestic contracts)



Fig. 46: Popularity of arbitration rules (international contracts)



Reasons for recommending arbitration

Confidentiality and cost were the most cited advantages of including arbitration clauses in domestic contracts, with enforceability a tertiary consideration (Fig. 48). In contrast, and in line with expectations, for international contracts enforceability was the most frequently cited factor considered when choosing a dispute resolution methodology (Fig. 49). Some of the other commonly perceived advantages of arbitration – including cost, speed, finality and flexibility – were only cited by a minority of respondents as important considerations when selecting a dispute resolution methodology for international contracts. A number of respondents that provided general feedback on the arbitration process indicated that, in their experience, the cost and speed advantage of arbitration was often not realised. This data suggests that for international arbitration, parties may prefer arbitration in any event. Where parties did not include an arbitration clause, a preference for litigation was most commonly cited.

Arbitration seat

Consistent with the preference for SIAC rules in international contracts, Singapore is the seat most frequently recommended by solicitors, followed distantly by Hong Kong and London (Fig. 47). Only eight of 28 respondents indicated that they have recommended Australian seats. Of those, only four expressed a preference for a city - two specified a seat in Sydney, one in Brisbane, and one in Perth. However, 19 respondents indicated that they were happy to consider recommending an Australian seat, subject to the preference of the client and counterparty, and most in-house counsel indicated that their company would consider using an Australian seat.

Overwhelmingly, counterparty objection on the basis of unfamiliarity and perceived lack of neutrality was the most commonly cited barrier to the inclusion of an Australian seat in international contracts. Respondents indicated that Singapore was the preferred seat for most foreign counterparties.

The seats actually included in final contracts largely reflect the recommendations made; 75% of respondents indicated that Singapore was typically a seat, again followed distantly by Hong Kong and London. Only five respondents indicated that an Australian seat was typically specified.

Fig. 47: Seats recommended and included in international contract arbitration clauses

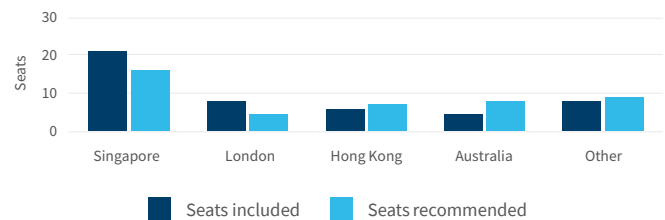
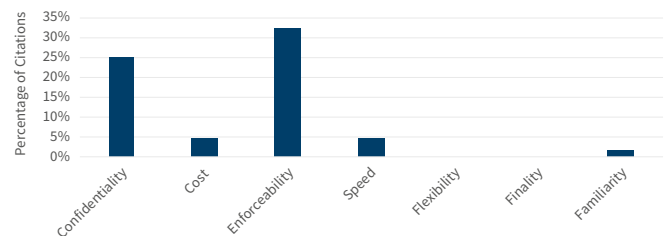
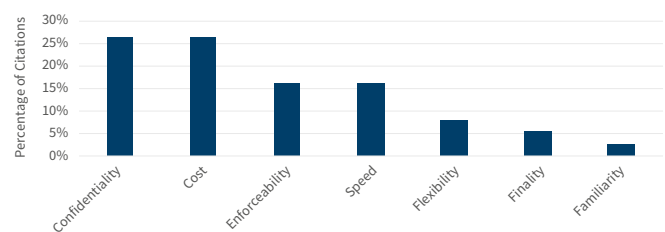


Fig. 48: Factors in selecting dispute resolution method*



*Note: This question was only asked in relation to international contracts.

Fig. 49: Reasons to include arbitration in contracts*



*Note: This question was only asked in relation to domestic contracts.

Respondent information

Respondents

The Australian Arbitration Survey received data from 111 respondents. Most respondents were arbitrators, however that includes a large number of respondents (primarily barristers and solicitors) who act as arbitrators in addition to their other roles. Of respondents who only fit into a single category, barristers were by far the most common (Fig. 52).

Arbitrators

The majority of arbitrators surveyed spent less than half their professional time on arbitration. Most commonly, these arbitrators had less than five years' experience in arbitration, though almost a quarter had more than 20 years' legal experience (Fig. 50). Mirroring the length of experience, arbitrators most commonly had experience in fewer than five individual arbitrations (Fig. 54). Almost all arbitrators experienced in international arbitration were also experienced in domestic arbitration. A small minority of arbitrators (four respondents) specialised in domestic arbitration, with experience in six or more domestic arbitrations but no experience in international arbitration).

Fig. 52: Respondent Type

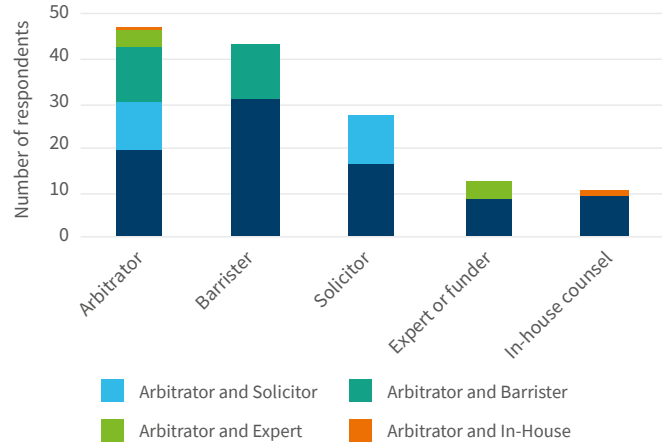


Fig. 53: Arbitrator location

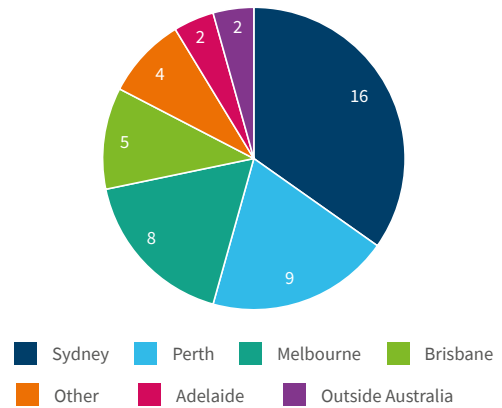


Fig. 50: Arbitrator years of experience

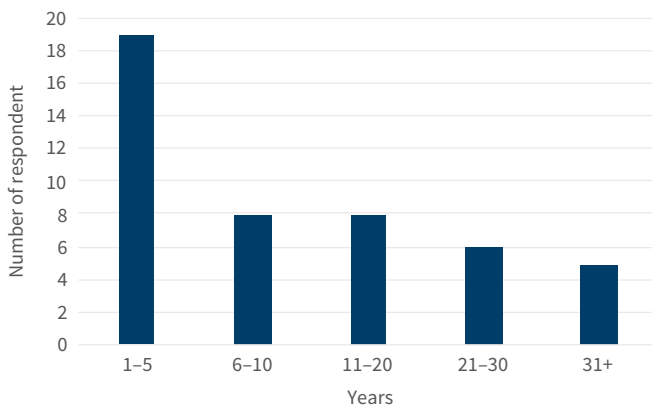


Fig. 54: Arbitrator experience

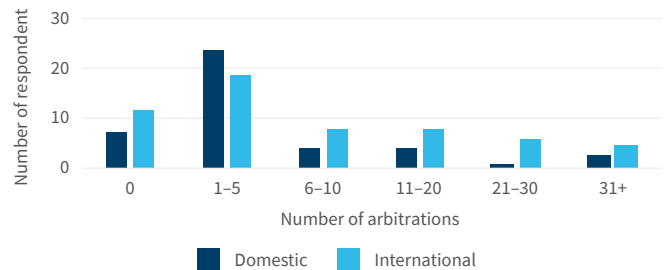
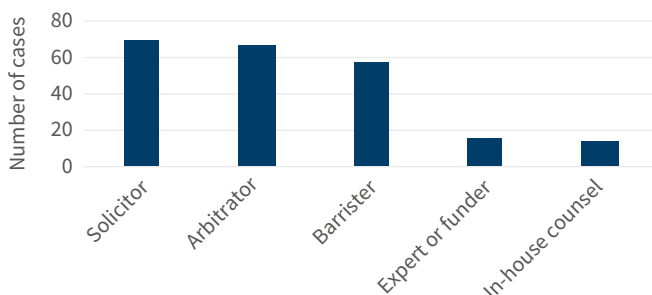


Fig 51: Unique cases reported



Almost double the number of arbitrator respondents were located in Sydney than in the next most common cities, Perth and Melbourne.

Arbitrator respondents overwhelmingly came from a legal background, with only about 10% coming from a technical background. This is unsurprising given the number of arbitrators who are also either solicitors or barristers. Although its not possible to quantify, this outcome may also be a result of the distribution of the survey and the arbitrators most likely to have participated.

Solicitors and law firms

Of the survey respondents, 29 were solicitors responding either on behalf of themselves or on behalf of their firm.

Of these 29 respondents, 11 had offices only in Australia – the remainder had offices worldwide. The total number of offices, total number of lawyers, and involvement in arbitration was extremely varied in each group. A number of smaller (fewer than 50 lawyers) firms in Australia had a strong focus on arbitration, with 20–50% of lawyers engaged in arbitration matters full time. For larger firms, generally fewer than 10% of lawyers were involved in arbitration.

Fig. 55: Number of solicitor or law firm respondents by global lawyer count

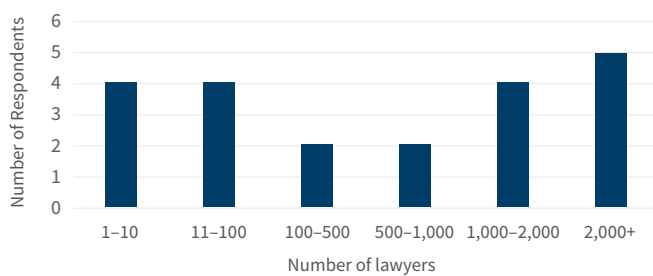


Fig. 56: Number of international solicitor or law firm respondents by number of overseas offices

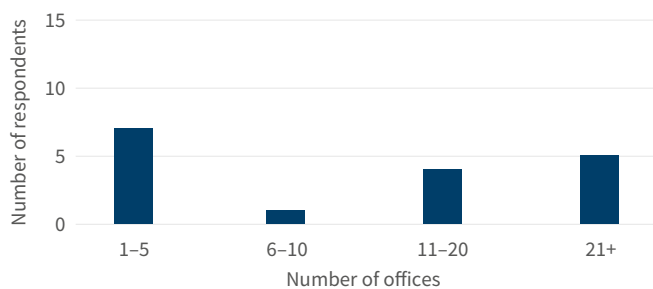


Fig. 57: Arbitrator background

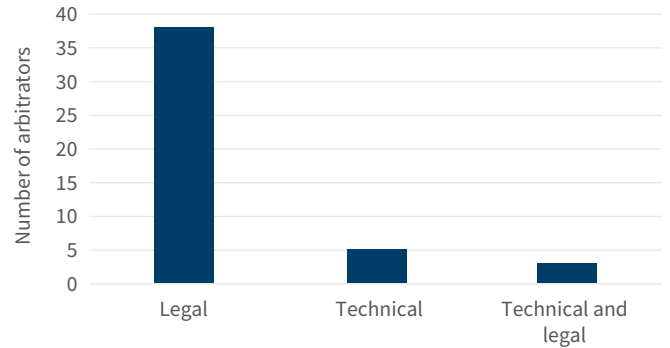


Fig. 58: Number of solicitor or law firm respondents by full-time fee earners involved in arbitration

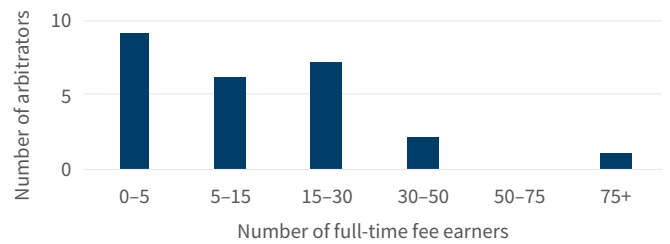


Fig. 59: Number of respondent offices by city

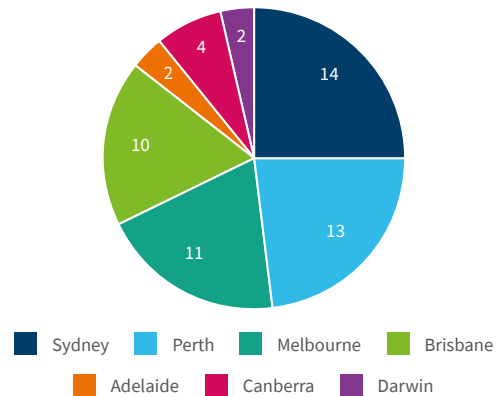
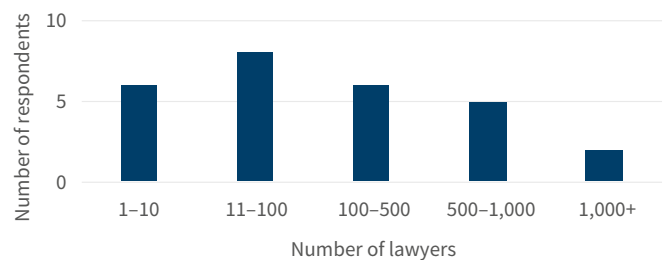


Fig. 60: Number of solicitor or law firm respondents by lawyer count



Respondent information

In-house counsel

The survey received relatively few (10) responses from in-house counsel. Drawing comparisons between respondents is further complicated by the distribution of the respondents, who have offices in every Australian state capital, and the range of industries represented, including:

- Agriculture
- Construction
- Defence
- Distribution
- Mining and resources
- Renewables
- Shipbuilding.

Respondent companies in the mining and resources and construction industries had a greater number of lawyers in their in-house legal departments (ranging from six to over 21) compared with companies from other industries, which typically reported five or fewer lawyers.

Experts

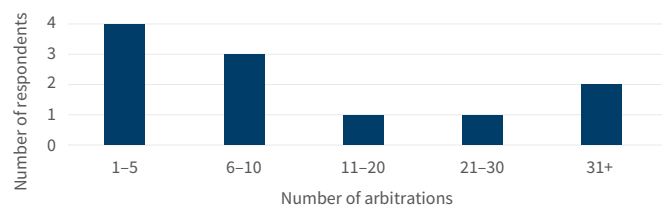
The survey received responses from 15 experts answering on behalf of themselves or on behalf of their firms. Of those, at least eight belonged to firms with international offices.

Four expert respondents reported being involved in 10 or more international arbitrations (with or without an Australian connection) between 2017 and 2019 (Fig. 61). Collectively, the expert respondents were involved in more than 50 engagements on arbitration with an Australian connection, and provided detailed information in relation to 18 unique matters. We note that multiple experts are often engaged on a single matter.

In relation to those 18 engagements, the respondents billed a total amount of \$14 million, an average of around \$0.8 million per matter. However, likely due to both the limited size of the sample and the varying nature of different engagements, the survey data do not reveal a significant correlation between the amounts billed by experts and the amounts in dispute.

The amounts charged varied from less than \$0.05 million to more than \$5.5 million. The proportion of fees to amounts in dispute varied between fractions of a percent to 7% (with an outlier at 24%), though a proportion of 1% was more typical. Perhaps predictably, expert charges as a proportion of the amounts in dispute tended to reduce as the amounts in dispute increased.

Fig. 61: Number of expert respondents by number of international arbitrations in which they were involved in 2016–19



Barristers

The survey had 43 Australian barrister respondents, of whom 12 also occasionally act as arbitrators. Only a very small proportion of the responding barristers were occupied primarily in arbitration – in general less than 25% of respondents’ billable time was spent on arbitration matters. Respondent barristers tended to have more than 10 years’ experience as a barrister.

Responding barristers reported involvement a total of in more than 75 arbitration matters in the last three years, domestic and international, with an Australian connection. It is worth noting that multiple barristers may be involved in a single matter. Respondents provided detailed information in relation to 58 engagements.

In relation to 54 of those engagements, the respondents billed a total amount of \$22.5 million, an average of around \$400,000 per matter. As with the same data for expert respondents, due to the limited size of the sample and the varying nature of different engagements, the survey data do not reveal a significant correlation between the amounts billed by barristers and the amounts in dispute.

The amounts charged varied from less than \$25,000 to more than \$1.25 million. The proportion of fees to amounts in dispute varied between fractions of a percent to 9%, though a proportion of 1% was more typical.

More than half of the barrister respondents were located in Sydney and Perth, with 15 and 13 respondents’ respectively. The next most common cities were Brisbane and Melbourne, with eight and five, respectively.

Fig. 62: Number of barristers over years at the bar

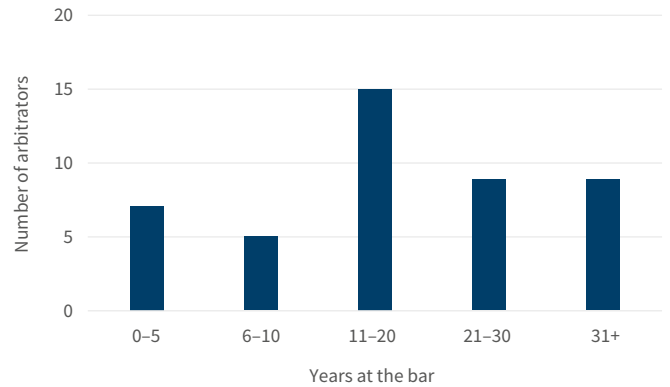


Fig. 63: Barrister location

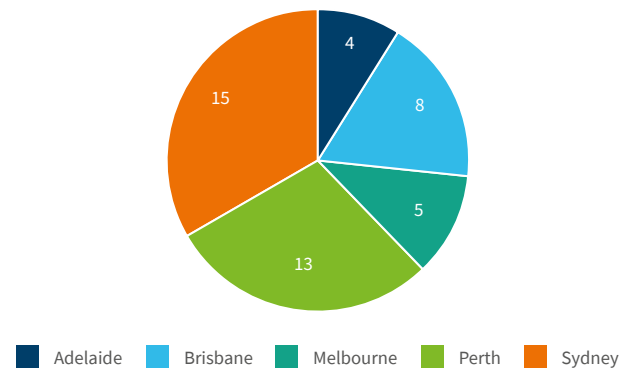


Fig. 64: Barrister billable time on arbitration (domestic)

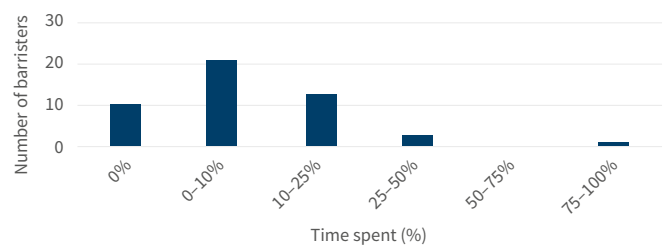
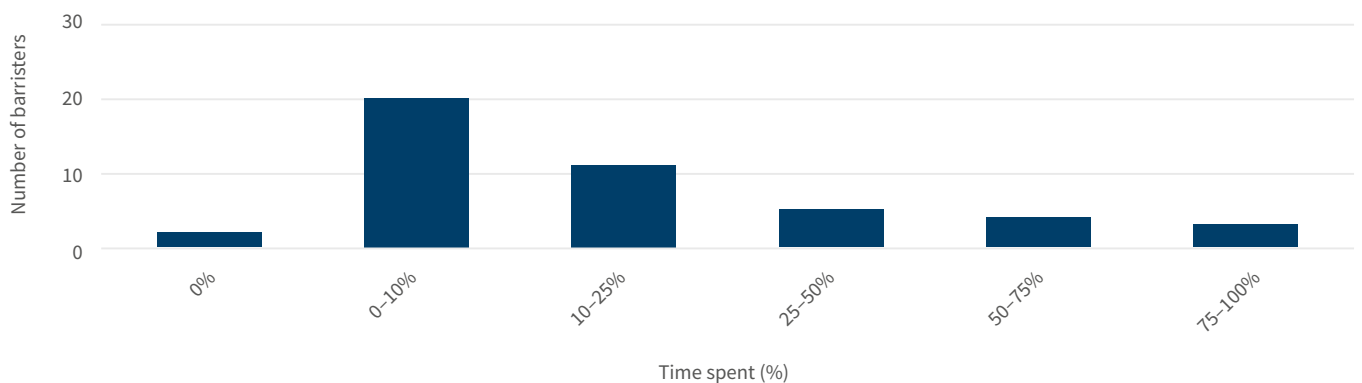


Fig. 65: Barrister billable time on arbitration (international)



Methodology

FTI Consulting gathered and analysed the data for this report. Answers were collected over a period of around four months following engagement with key respondents by ACICA and the state champions of the survey. Preliminary results were shared and discussed with ACICA, which helped identify areas of interest and unexpected results. FTI Consulting prepared and verified the final results. All results are derived from data provided by survey respondents and are therefore subject to the same biases that may exist in the original data.

The Australian Arbitration Survey was conducted by FTI Consulting in partnership with ACICA and a number of state champions that engaged directly with respondents and encouraged participation. Respondents were issued with confidential identification by ACICA that allowed us to collect the data anonymously while also receiving enough information that we were able to remove duplicate data. Duplicate data is especially problematic during analysis of the total amount in dispute in arbitration, and other aggregate measures, as multiple parties can, and often do, include detailed data in relation to the same arbitration. FTI Consulting has adopted a conservative approach to removing duplicates that prioritised avoiding duplicates. Accordingly, it is possible that some matters for which we have received data have ended up excluded due to similarities with other arbitrations. The original data is held by FTI Consulting on behalf of ACICA. FTI Consulting has provided ACICA with copies of the data with identification information removed.

De-duplication of arbitration data was performed primarily using information regarding hearing dates, dispute values, dispute industries, rules in use and number of hearing days. Where it was not possible to differentiate multiple entries, these have been treated as a single entry. On this basis, errors (if any) in the reported dispute amounts are likely to have caused underestimation rather than overestimation. Data that is not impacted by duplication has not been removed. For example, where two respondents have billed for work on the same matter, the amount in dispute and both parties' billings have been counted.

The questions included in this survey have been developed on the basis of questions used for a similar WA-only arbitration survey conducted by FTI Consulting and the WA Arbitration Initiative in 2018, with improvements and additions made by ACICA, in particular to reflect the national nature of the current survey.

A number of features of the survey made it either impossible or impractical for survey respondents to provide answers to all questions. For example, respondents only involved in a limited capacity may not have all the required information available, while other parties may have undertakings or policies that prevent disclosure of some information. As a result, and building from the experience of the previous survey, the majority of survey questions were voluntary.

Two consequences arise from these voluntary questions. Firstly, the amount of data obtained was likely greater than we would have been able to obtain if we excluded parties that were unable to provide answers to every question. Secondly, in many cases the data we received was incomplete, in a manner that makes detailed analysis difficult when considering subsets of data. For example, when considering only domestic arbitration, with a tribunal appointed by an institution and data provided regarding the number of hearing days, the resulting dataset would be insufficient to allow us to identify any further correlations with the amount in dispute, or to analyse differences between industries.

The data analysis herein was therefore frequently performed only on a subset of the total responses or in relation to a subset of the arbitrations for which data was provided. The detailed discussion of the results in each section indicates the number of responses available to draw from.

Finally, aggregate amounts had to be derived from answers indicating a range (such as \$100,000 to \$500,000) rather than exact figures. Values were added using the average amount for ranges (for the range above, \$300,000), and the lower bound for extremes (so amounts in dispute of '\$500 million or greater' were included in aggregates as \$500 million). As with the conservative approach to de-duplication, FTI Consulting has also adopted this conservative approach to calculating sums.



Acknowledgements

The results discussed in this report were only possible thanks to the efforts of our supporting organisations and state champions, who were instrumental in helping us achieve the significant response rate required to collect enough data.

ACICA and FTI Consulting acknowledge the support and assistance of the following organisations and individuals in promoting the survey discussed in this report:



Supporting organisations

Australian Bar Association

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State champions

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Julia Dreosti, Lipman Karas

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About Australian Centre for International Commercial Arbitration (ACICA)

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's international dispute resolution institution. Established in 1985 as an independent, not-for-profit organisation, ACICA's objective is to promote and facilitate the efficient resolution of commercial disputes throughout Australia and internationally by arbitration and mediation, with the aim of delivering expediency and neutrality of process, enforceability of outcome and commercial privacy to parties in dispute. www.acica.org.au

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With economic disputes growing in cost and complexity, FTI Consulting helps companies navigate through each stage of the dispute resolution process. We offer independent advice and expert testimony needed for successful outcomes. Our international arbitration experts have years of industry experience in damage quantification and in treaty and commercial arbitrations. We provide end-to-end valuation and litigation support, including: determining if a claim is worth pursuing; identifying the correct approaches or methodologies for quantifying damages; evaluating claims in the context of past and future economic damages incurred; and pinpointing the exact type of expertise, evidence and documentation required. www.fticonsulting.com

