



# THE USUAL SUSPECTS: DECISION-MAKING IN ARBITRATOR SELECTION

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# FOREWORD

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This project has been a privilege to lead, and I am thrilled to present this report on **The Usual Suspects: Decision-Making in Arbitrator Selection**.

Parties' power to pick an arbitrator is one of arbitration's unique selling points. It is also one of the most important strategic decisions a party can make. Selecting an arbitrator is also heavily reliant on human judgment and decision-making.

The field of psychology teaches us that our decision-making is fundamentally prone to error and bias. This is particularly so when it comes to our decisions about people. For example, we favour people we feel an affinity towards, we are more likely to remember names we have seen recently, and we judge professional performance differently depending on who we are evaluating.

With input from hundreds of arbitration professionals across geographies around the world, this report systematically unpicks the thought processes behind arbitrator selection. The project's regional focus was Hong Kong, but preliminary indications suggest that practices are materially similar across jurisdictions. Illuminated by cognitive science on decision-making bias, this report also provides a roadmap for those seeking a more rigorous and equitable approach to arbitration selection.

I hope this report takes decision-making in arbitrator selection one big leap forward and that thoughtful discussion of this important topic continues.



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## EXECUTIVE SUMMARY

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- This report examines the decision-making process around the way parties select arbitrators for appointment and articulates for the first time current practices about how this is done.
- The Usual Suspects project deliberately focused on Hong Kong but data were gathered across a broad global reach and preliminary indications suggest that practices are materially similar in other regions.
- All human decision-making suffers from common cognitive biases, especially in the context of decisions we make about people such as selecting arbitrators.
- Common biases in this context include: Ingroup Bias, Affinity Bias, Recency Bias, Stereotyping, Halo and Horns Effects, and Outgroup Homogeneity.
- It is important to be aware of our biases when selecting arbitrators and to take active steps to reduce their impact throughout the decision-making process.
- Client involvement in arbitration selection is changing a little but in general, clients are led entirely by the counsel team advising them.
- Although there is currently little formality to decision-making procedures in arbitrator selection, strong similarities emerged in relation to the typical practices respondents use.
- The process for selecting an arbitrator involves broadly the same steps for most respondents. These are: specifying the profile of the ideal arbitrator for the case; an initial search for candidates; due diligence on those candidates; finalising a shortlist of candidates; and presenting the shortlist to the client for final decision.

- To create the specification for the ideal arbitrator, several factors relating to the dispute are analysed and then matched to corresponding arbitrator qualities. These include: structural features of the arbitration (e.g. claimant/respondent; contractual requirement), characteristics of the dispute (e.g. subject matter, amount, language); and the professional profile of the arbitrator (e.g. availability, work ethic).
- There are three main methods respondents employ to draw up the initial list of candidates: extemporaneous thinking, personal recommendations, and consulting external sources (e.g. lists, industry rankings).
- Due diligence is conducted on candidates in order to assess their suitability for the case. This process involves asking contacts for intelligence, looking at industry ranking and comment, and conducting internet research. The level of screening on arbitrators varies case-by-case.
- Trust is critical in candidates being shortlisted and ultimately selected. After direct personal experience with a candidate, a positive recommendation from a trusted contact is generally the next best source of information for the purposes of listing and vetting.
- Respondents expressed various attitudes towards diversity in the context of appointment decisions. Some follow informal policies, some follow more rigorous checks, while some do not currently view diversity as a relevant consideration in the decision process.
- There are several ways to improve decision-making processes around arbitrator selection.
- These include: capturing the process in writing and publicising best practice within the organisation; regular reminders about any diversity commitments; systematising the evaluation process by recording the arbitrator specification for each case and comparing candidates meaningfully against the relevant criteria; diversifying the network of contacts who are approached for recommendations and intelligence; looking at external sources during the initial candidate search; conducting checks on initial lists and final shortlists to test for any missing candidates; and recording the due-diligence and decision-making process in writing.





# HIDDEN INFLUENCES IN ARBITRATOR SELECTION

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## The blind spot

For sharp legal minds, it is difficult to accept that our professional thinking might somehow be flawed. When we reflect on our own cognitive abilities, we believe that, in general, we do a good job of making solid decisions based on a reasonable evaluation of relevant data.

But decades of replicated research in psychological science teaches us that our decision-making and our judgments are regularly and predictably wrong.

In fact, our inability to detect biases in our own thinking is itself a cognitive bias called the Blind

Spot Bias. This is why educating ourselves on the topic of human decision-making is so important and why we must remind ourselves regularly of its limitations.

## Tilted thinking

The systematic and predictable errors in our thinking are called cognitive biases. Most of the time, these biases are adaptive and functional. They enable us to make decisions quickly and to operate effectively in the world. Without them, we would be overwhelmed with information and suffer analysis paralysis.

In certain circumstances, however, cognitive biases can

lead to mistakes and unfairness. This is especially so in the context of important decisions we make about people in professional settings. Selecting arbitrators is therefore the perfect petri dish for cognitive bias.

## Us and them

When we think about other people, including arbitrators, we automatically categorise them into different social groups. This sort of categorisation simplifies our perception of the social world by grouping people with similar features together and/or by imposing structure across multiple people.

Often, we group people along dimensions which are immediately visible like gender, age or ethnicity. But we also delineate categories along any other factor we deem (consciously or unconsciously) as important in the relevant context – university education, law firm affiliation, pet preference etc.

Most of the time we aren't aware that we are doing this. As with other cognitive biases, categorising people into different social groups is a background operation our brain performs automatically when we think about them. We don't consciously think 'male' when we see a man for example, but our brain will immediately make this computation.

This unconscious process gives rise to unconscious bias. For example, an important and immediate corollary of placing people into social groups is that we draw an invisible distinction between the group to which we feel we belong – our so-called 'ingroup' – and everyone else who falls outside this circle – the 'outgroup'. The unconscious mental delineation has fundamental implications about the way we perceive, think about and behave towards other people including when we evaluate arbitrators (see Figure 1).

### **Only on merit**

Any arbitration lawyer involved in selecting an arbitrator will want to make their decision solely based on who they deem to be the best person for the case. This approach is sometimes cited in response to questions about diversity and whether gender or ethnicity is (or should be) considered in selection decisions.

What this articulation of the decision process unintentionally discounts is that we are sometimes wrong about who we conclude is the 'best' – because cognitive biases invariably colour our initial evaluations of candidates.

More than 100 different cognitive biases have been documented to date and there are undoubtedly many more which have not yet been studied. Of these, there are subsets of unconscious biases which are especially germane when we make people decisions like selecting an arbitrator. Six of these common people biases are explained and discussed in the context of arbitrator selection below (see Figure 1).

We cannot eliminate these biases from our thinking entirely. But we can lessen their power over our decisions if we understand when they are likely to arise and what impact they are likely to have on our perception of individuals.



Ingroup Favouritism (or Ingroup Bias) is an umbrella term describing a host of different ways that we prefer or favour people we identify as members of our ingroup ('one of us') as compared with outgroup members. Particularly pertinent to this discussion, we tend to give preferential treatment to ingroup members (e.g. in distributing rewards or gifts) and we generally judge them more positively.

Appointing an arbitrator to a particular panel confers significant professional rewards over and above financial income – such as recognition, status and experience. Where the choice of candidates includes members of different social groups (e.g. men and women), Ingroup Favouritism will therefore unconsciously incline us towards choosing those candidates with whom we identify as being in our group.

### Ingroup Favouritism

### Affinity Bias

Closely related to Ingroup Bias, we have a natural tendency to gravitate towards people we perceive as being 'like us' and away from people we feel are different from us. This is the Affinity Bias in action. If we reflect on those we like to network with at conferences, for example, this is probably something with which we are all very familiar. Being around and talking to people 'like us' engenders higher levels of trust and lower levels of anxiety. It feels easy and we like it. But it leads to the unconscious desire always to seek familiarity and similarity.

In ordinary life, there is nothing wrong with the Affinity Bias *per se*. But in the context of arbitrator selection decisions, it can mean that candidates with characteristics which are different from the appointing deciders are not fairly considered. Even before the final selection stage for example, Affinity Bias skews our mental rolodex of candidates because it impacts who we choose to spend time with at external events and therefore which arbitrators we know and are likely to recommend.



Recency Bias is a common memory bias where recent events, which are recalled more easily and more vividly, have a greater influence over our decisions than events occurring further in the past. Drawing up shortlists of candidates and evaluating performance are two activities particularly prone to Recency Bias.

Recency Bias is one of the main reasons we have Usual Suspects in international arbitration. Names we have come across recently are more likely to come to mind in the initial shortlisting process and they are more likely to be chosen in the final selection. This is why diversifying speakers at industry events is such an important and effective step in increasing diversity on arbitral tribunals.

### Recency Bias



### Halo Effect & Horns Effect

The Halo Effect is our tendency for an immediate positive impression of someone to influence other judgments we make about them. For example, confident people are often also considered intelligent and competent. Similarly, attractive people are typically thought of (without evidence) as funny and kind. This is the 'what is beautiful is also good' principle.

Conversely, the Horns Effect (or Reverse-Halo Effect) is where our snap judgments about someone are unduly influenced by a single negative characteristic. In judicial decisions for example, defendants who are less physically attractive are punished more severely in fines and sentencing decisions than attractive defendants.

In arbitrator selection, this bias can lead deciders for example to discount unfairly a candidate who is relatively quiet or conversely to over-estimate the skills of a confident candidate. This particular distortion created by the Halo/Horns Effect may differentially impact individuals from minority groups who may behave less confidently either because of a lifetime of social conditioning (as is often the case with women) or simply because they are in the minority.



We tend to perceive members of an outgroup (i.e. a social group to which we do not belong) as more similar ('they're all the same') than members of our ingroup, who we view as diverse individuals – the Outgroup Homogeneity Effect. For example, while women may view themselves as diverse and different from one another, men may tend to view them (i.e. women) as 'all alike' including in professional ability and approach.

When it comes to distinguishing between arbitrators, this can lead decision-makers to overlook relevant details on one candidate's CV while spending more time examining another's, or erroneously assuming a candidate will operate in a certain way because of experience with another arbitrator in the same social group.

### Outgroup Homogeneity

A stereotype is a widely held belief about a particular category of people. For example, we might expect someone who attended Oxford University to think, behave or perform in a certain way. Or we might assume that all women prefer and excel at interpersonal interactions over data analysis.

We are usually unaware of our own stereotypical thinking in relation to the people we meet and the evaluations we make about them. Stereotypes reduce the amount of cognitive processing we do in relation to a particular person but they also lead to inaccurate judgments and biased decisions about them.

### Stereotypes





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## THE DECISION-MAKING PROCESS

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The full methodology used in this research project is described in the **Appendix** to this report. Briefly, the research comprised a qualitative interview study featuring senior arbitration lawyers followed by a large-scale survey study. The studies were primarily focused on practitioners in Hong Kong and the Asia region but participants from across the world responded to the survey including people from Europe and the Americas. There was nothing in the data to suggest that practices differ significantly across geographical regions, so the analysis in this report is relevant to the international arbitration community as a whole.

### Standard practice

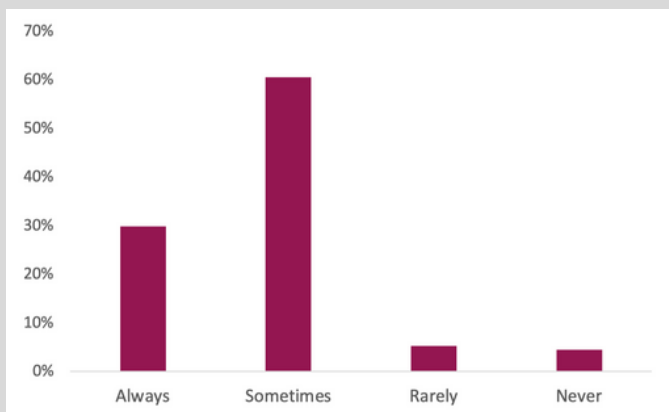
Reflecting on their standard practice for selecting arbitrators, none of the interview respondents follows a formal procedure, checklist or policy. Instead, there is a 'fairly logical thought process' that varies depending on the case.

This matches the approach reported by most survey respondents, 61% of whom said that they 'Sometimes' follow the same process when selecting an arbitrator; 30% 'Always' follow the same process; 5% 'Rarely'; and 4% 'Never' (see Chart 1).

Interviewees explained that their typical process developed organically over time. A few mentioned that they learned their current practice from early mentors.

The same shared practice is usually followed within law firm arbitration teams. Interviewees were unaware of the precise process for selecting arbitrators followed elsewhere in their firms, though one noted that it is 'likely not a million miles away' from their own. Survey respondents shared similar thoughts: 49% didn't know if the same process was followed by colleagues; 36% adopt the same approach organisation-wide; while 15% do not (see Chart 2).

**Chart 1:** To what extent do you follow the same process when selecting an arbitrator?



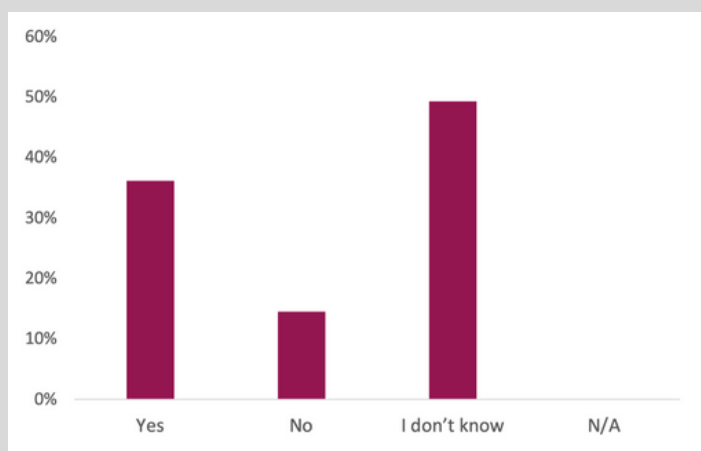
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*“There is a typical process. It’s an informal one that’s grown up over time through the way people do it in the firm.”*

”

*“You’re very much led by your original mentor.”*

**Chart 2:** Is the same process followed by colleagues within your organisation?



### How it happens: the arbitrator selection process

Although practice varies from case to case, all interview respondents described a broadly similar five-step process during the selection of arbitrators. The same structure was mirrored in the survey study. The decision-making process is set out below and summarised in Figure 2.

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*“Normally we discuss what we want from an arbitrator before we talk about names, otherwise the discussion gets hijacked by this person or that person.”*

### Step 1: Ideal profile

The selection process usually begins with a conversation about the qualities and profile of the ideal arbitrator for the case. These depend largely on the specific features of the dispute and become the criteria against which candidates are assessed.

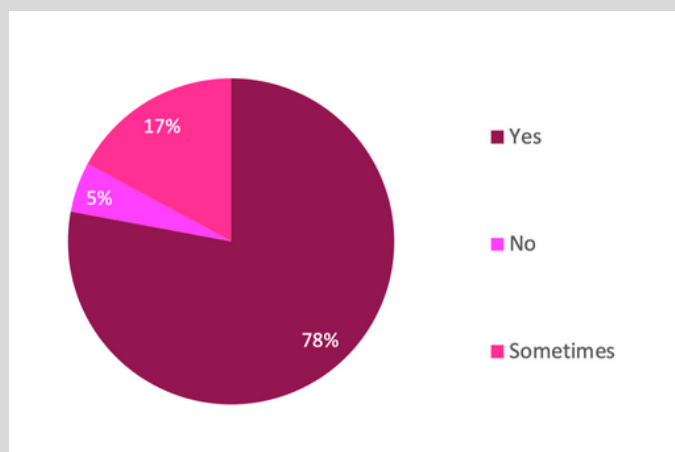
This initial discussion usually takes place between senior members of the team working on the arbitration. Emphasis is placed on finding the right qualities first, before turning to consider individual candidates.

### Step 2: Initial search

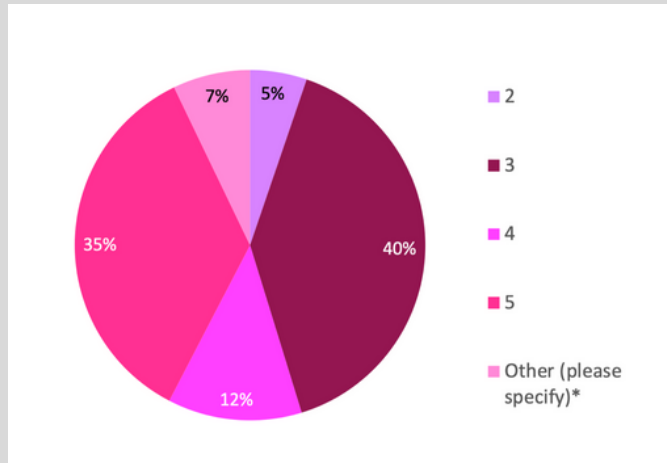
The next step is to search for candidates who meet the relevant criteria and to collate an initial list. This list usually forms the total pool of candidates from which the party’s arbitrator is ultimately chosen, following screening and evaluation (the **list method**).

Almost all participants across both interview and survey studies used the list method when selecting arbitrators (see Chart 3), though there was some variation in relation to the number of names collected (see Chart 4).

**Chart 3:** Do you create a shortlist of candidates as part of your selection process?



**Chart 4:** How many candidates do you typically include on a shortlist?



\* Other specified ranged from nil to ten+, and 'depends on the situation / case'

In terms of how candidates reach the initial list, again there was no formal process. However, interview respondents identified three main approaches:

- **The mental rolodex approach:** Coming up with names that spring to mind.
- **Phone a friend:** Asking colleagues for suggestions.
- **Consult the oracle:** Looking at external lists, asking search companies etc.

There were varied responses when it came to checking conflicts under the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

See below for further discussion of the initial search for candidates.

### Step 3: Due diligence

Next, each of the candidates on the initial list goes through a process of due diligence. This usually entails asking colleagues for informal feedback, looking at market intelligence and conducting broad internet research.

Depending on the case, the degree of intelligence-gathering on names can be extensive. See below for more details relating to the due-diligence process.

### Step 4: Final shortlist

Once due diligence is complete, candidates are compared against one another, and names on the initial list pruned accordingly.

At this stage, some interviewees pause to give deliberate thought to any additional candidates who

meet the criteria but who did not appear on the initial list. A handful also said that they 'sense check' their shortlist from a diversity perspective before it is finalised (see below for further discussion of diversity considerations).

New candidates may then be added (after passing due diligence) based on these checks in order to produce the final shortlist.

### Step 5: Ultimate selection

After candidates have cleared conflicts, the final shortlist is presented to the client for consideration.

Practice varied a little as to whether interview respondents provide recommendations as to the final choice of arbitrator. One interviewee said they never gave a recommendation but many often give a steer, while ensuring that the final choice was up to the client.

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*“It’s very ad hoc; you think of names off the top of your head.”*

*“The list is drawn almost exclusively from people we know. Sometimes we look at lists.”*

### Box 1: Client involvement

Client involvement in the arbitrator selection process has changed gradually in recent years.

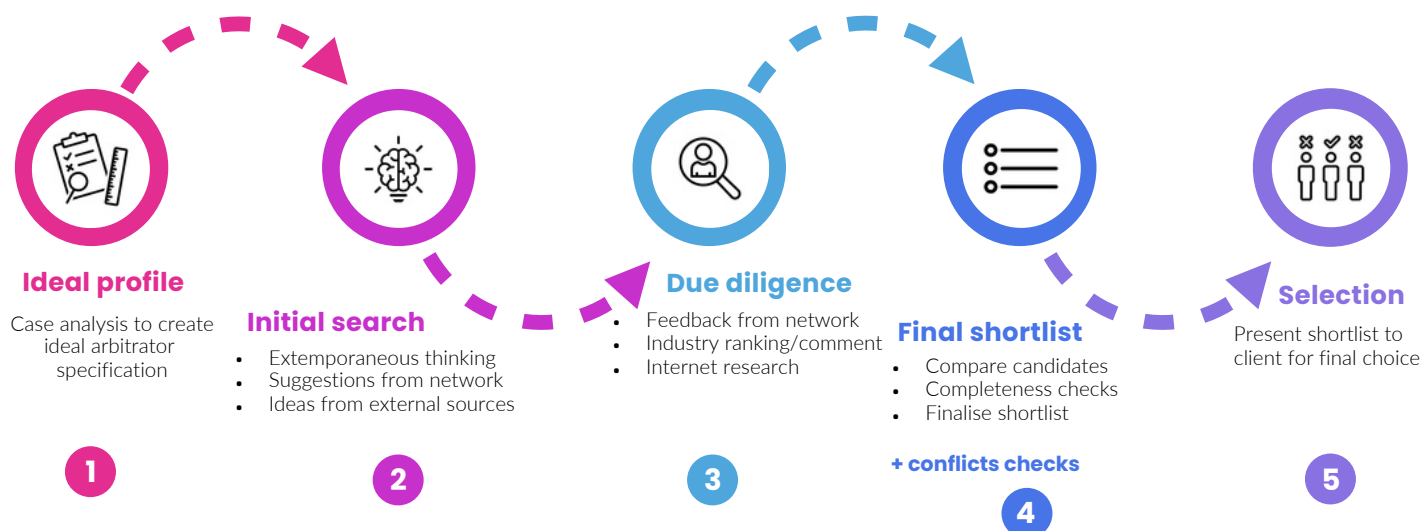
Interviewees noted that, while still relatively rare, some more sophisticated corporate clients will suggest candidates themselves. Some clients also insist on a more diverse shortlist, generally by asking for more female candidates.

Predominantly though, clients are guided almost entirely by the counsel team advising them.

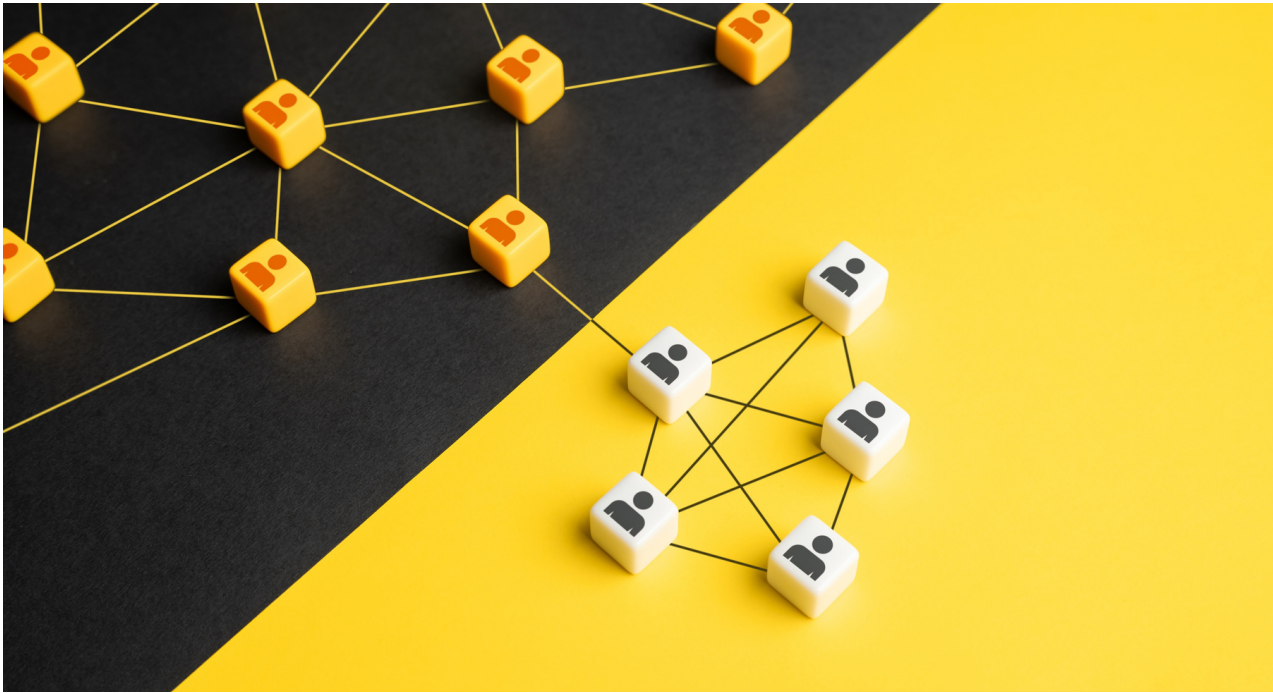
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*“It’s increasingly common, though still relatively rare, for clients to have views or ideas about arbitrators.”*

Figure 2: The decision-making process







## CREATING THE SPEC

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In order to create a list of arbitrators, interviewees first analyse specific factors or characteristics relating to the dispute and then pattern match those factors against corresponding arbitrator qualities. These qualities form the criteria against which candidates are assessed. Additional skills or strengths may also be considered, either when formulating characteristics of the ideal arbitrator or when evaluating candidates who meet the criteria.

Ultimately, the goal of this process is to identify an arbitrator who is most likely to

find in favour of the appointing party without being actually biased or partial. This decision therefore forms a significant component of a party's arbitration strategy and depends largely on the characteristics of the dispute.

The various factors and characteristics discussed by interview respondents can be broadly grouped according to: (1) structural features of the arbitration; (2) characteristics of the dispute; and (3) professional profile of the arbitrator (see Figure 3).

”

*“All the different criteria feed into the question of would that person be likely to find in your favour.”*

*“Choice of arbitrator is quite strategic but that means you have to think about the case not just about the arbitrator.”*

### Structural features of the arbitration

At the outset, interview respondents mentioned several structural constraints relating to the arbitration which are taken into account including:

- **Party.** Is the appointing party Claimant or Respondent? Are there multiple parties on either side?
- **Panel.** Are the parties appointing a sole arbitrator or a panel of three? If a panel of three, who will be the other party's appointee? Who might be the Chair?  
**[Arbitrator qualities: language, communication, seniority]**
- **Agreement.** Are there any contractual requirements? For example, must the arbitrator be a member of a particular industry list or hold a nationality different from either party? **[Arbitrator qualities: nationality, membership, qualification]**

### Characteristics of the dispute

Next, consideration turns to specific characteristics of the dispute itself. Each of these characteristics then determines a particular quality the ideal arbitrator will possess.

#### Box 2: It's all in the mix

Several interview respondents discussed the interpersonal dynamics within three-member panels.

In particular, interviewees want an arbitrator who is likely to have a smooth relationship with the other party-appointed arbitrator and the ability to communicate effectively – especially with the presiding arbitrator.

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*“The unilateral choice of the co-arbitrator is the only thing you have a free hand over. Charisma is really important, the way they relate to the Chair. You want a good communicator.”*

- **Merits and nature of the dispute.** One of the most important features of the dispute is the merits of the legal arguments. Closely linked to this is the degree of legal argument involved. Where a party's legal case is strong and where questions of law will be determinative, arbitrators who are strong on black letter law ('legal purists') will be preferred. Where the arguments are less clear cut, or where legal arguments are unlikely to be decisive in the overall case, creative thinkers or 'moral deciders' are preferred.  
**[Arbitrator quality: Legal mind]**

”

*“The main criterion we use is do we want a legal purist or someone who's likely to go with the moral of the case? It depends on how strong the legal arguments are.”*

- **Governing law(s).** The governing law (or laws) is another critical feature of the dispute influencing the selection of candidates. Where the applicable law of the contract and/or the seat is likely to feature heavily in the arbitration or to be determinative of the outcome, arbitrators with the relevant legal background will be important. ‘Background’ here includes both qualifications and experience. **[Arbitrator quality: Legal background/qualification]** (See Box 3)

”

*“The way a French professor interprets compared to an English barrister – the margin can be really different.”*

- **Subject matter.** Familiarity with the subject matter of the dispute can be very important. Some cases demand relevant expertise to understand the issues fully. For gas pricing or shipping disputes, for example, interviewees want arbitrators who have specialist experience in those particular fields. **[Arbitrator quality: Subject matter expertise]**

”

*“Sometimes experience in the subject matter is critical, e.g. gas pricing is basically economics. I really value people who know what they’re doing.”*

- **Language.** Language can be an important factor in determining ideal arbitrator qualities. This includes: the language of the underlying contract(s); the evidence (documents and key witness testimony); and the arbitration. Where any of these is significant, the arbitrator’s language skills are important. **[Arbitrator quality: Language capability]** (See Box 3)

- **Cultural dimensions.** The international context of a case can be an important factor in understanding the dispute. This can include cultural dimensions relating to the parties and the witnesses. For those cases, several interviewees mentioned looking for arbitrators with relevant cultural sensitivity, usually determined by cultural background or personal experience. **[Arbitrator quality: Cultural sensitivity]** (See Box 3)

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*“We do think about cultural appreciation sometimes. The way that business is done in Asia can be difficult to understand for Europeans – how relationships are formed and who can say what in front of whom.”*

- **Amount in dispute.** The total amount in dispute is likely to be another factor that influences the list of candidates. For larger value claims, interviewees look for senior arbitrators with plenty of experience handling high-value cases. There was no fixed threshold for this factor and it depends partly on the risk-appetite of the client.

**[Arbitrator quality:  
Arbitrator experience]**



*“The size of the claim still matters. I know there are lots of discussions about giving people with less experience a shot, but in bigger claims, clients still generally want someone with the seniority and experience to handle those sorts of cases.”*

**Professional profile of the arbitrator**

Finally, several interview respondents mentioned the importance of certain skills or profiles when assessing the relative appeal of candidates matching the criteria, such as availability and interpersonal skills. Many of these additional factors impact (directly or indirectly) efficiency and cost in

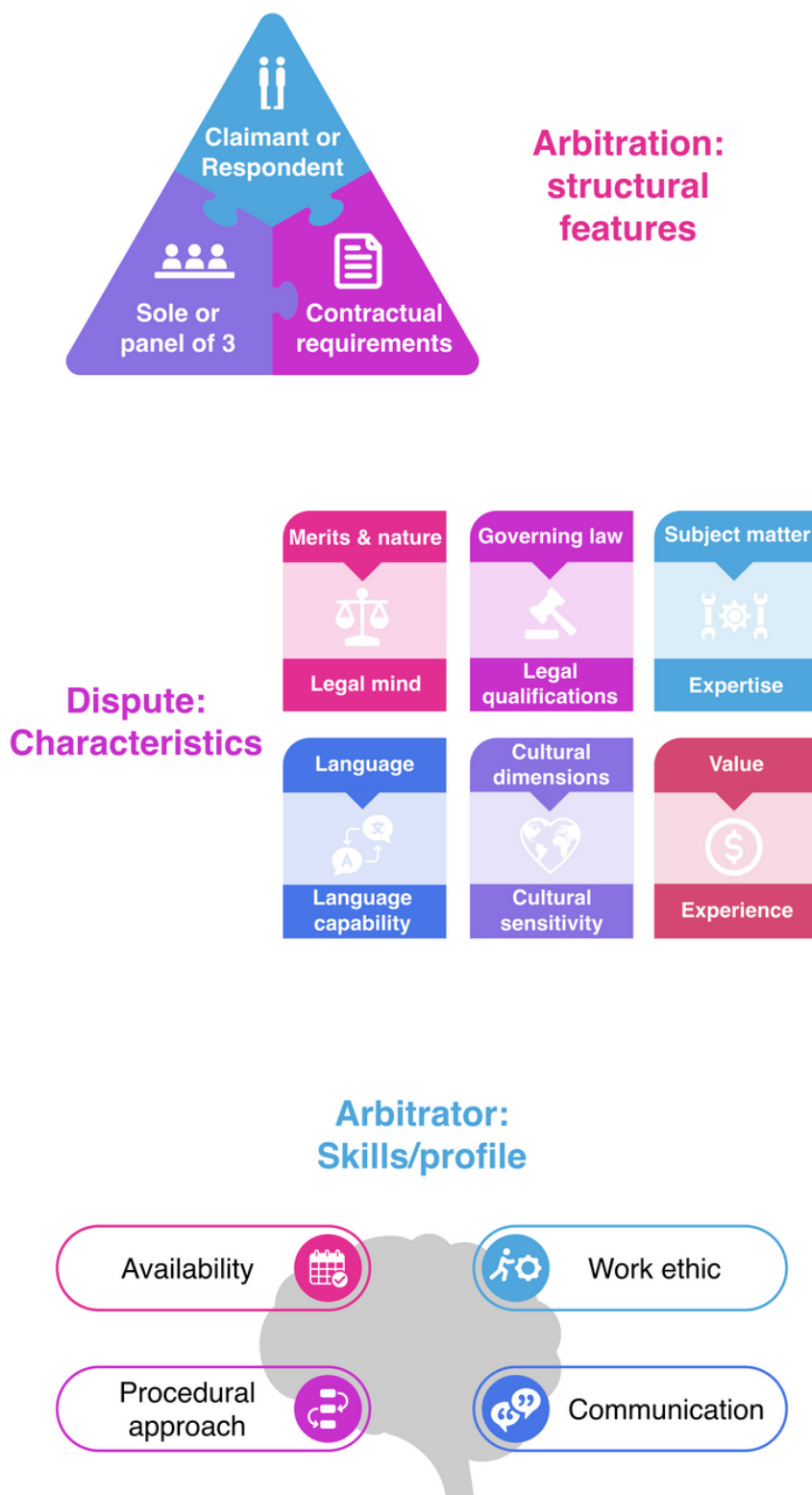
the arbitration. Others impact substantive matters, such as the arbitrator’s awareness and understanding of the parties’ respective cases, or the arbitrator’s relationship with the other members of the tribunal.

- **Availability.** Availability is a critical consideration because it determines in large part the speed with which the dispute is resolved and, closely linked to this, efficiency and cost. Ringfencing time in diaries for final hearings and even preliminary hearings can introduce challenges if a busy arbitrator is appointed. For complex cases in particular, there is also a need to balance experience against availability.
- **Work ethic.** An arbitrator’s professional reputation is another important factor influencing selection decisions. For instance, does the arbitrator usually come to hearings prepared and having read the papers? Does he or she appear engaged in the hearing? Does the arbitrator respond quickly to communications? This factor impacts both substance and procedure. An efficient and thorough arbitrator is likely to maximise efficiency and reduce cost within the arbitration, and a well-prepared arbitrator will show greater understanding of the parties’ respective cases and use this understanding to produce a better award.

- **Procedural approach.** The arbitrator’s approach to procedural matters can be influential in selection decisions. Some procedural orders require delicate consideration and the outcome can be decisive to the case – e.g. decisions on bifurcation or permitting rejoinder of an additional party at a late stage. Parties may look for arbitrators known for their robust approach to procedure or for their careful analysis at every stage.
- **Interpersonal skills.** Many interviewees spoke about the interpersonal dynamics on panels of arbitrators. A party-appointed arbitrator must be able to communicate clearly and effectively with the other members on the panel, especially the presiding arbitrator. Factors such as seniority, language and collegiality all contribute to this assessment.

Survey respondents were asked to indicate their top five criteria when selecting arbitrators from a list of 11 possible criteria. Their responses matched much of the discussion reported by interviewees (see Chart 5).

**Figure 3: Considerations for the ideal arbitrator specification**





**Chart 5:** Please specify your top FIVE criteria when selecting candidates



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*“Work ethic is something I value a lot. You can be as smart as you want, but if you don’t turn up prepared, it’s for naught. I actually like arbitrators who turn me down because they’re too busy.”*

”

*“Their availability is critical because if you go with someone who is very busy, you worry they won’t be available or won’t be prepared enough.”*

**Box 3: Case study on the tricky intersection of language, law, culture and nationality in China-related disputes**

The rise of China-related disputes over recent years has introduced a new focus on language capability, civil law experience and cultural sensitivity in arbitrators.

In the same breath, many interviewees mentioned the real lack of candidates sufficiently qualified in all of these relevant criteria. Language in particular was raised repeatedly as limiting options for appointments. An arbitrator's facility with language impacts many important aspects of an arbitration including the interpretation of contracts, the understanding of witnesses and dynamics between members of the tribunal.

When these factors intersect with nationality requirements (e.g. the arbitrator must not hold the same nationality as either party), it can be particularly tricky to find suitably qualified candidates.

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*“With Chinese, you can get two translations of the same document that are completely different, so if you want someone who understands what the document actually says then you might recommend a native speaker.”*

”

*“I wouldn't want to have the co-arbitrator who doesn't speak Chinese with two other Chinese-speaking arbitrators. Because language is important and people have a preferred language, the ability to be able to speak the language gives you a connection.”*



## CANDIDATE SEARCH

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### **Extemporaneous thinking**

When drawing up the initial list of candidates, the first approach is usually to think of names that immediately spring to mind (the mental rolodex approach). This extemporaneous method of producing candidates off the top of one's head was reported by almost all interview and survey respondents (see Chart 6).

This approach is particularly subject to cognitive bias. For instance, arbitrators we know and believe to be good will be summoned from memory more readily because of the Recency Bias, thus creating 'the Usual Suspects Effect'. Relatedly, the

Affinity Bias leads us to spend more time getting to know arbitrators we feel are 'like us' and Ingroup Bias means we will evaluate those same arbitrators more positively. See above and Figure 1 for further analysis of the biases that are likely to influence the top-of-the-head method for generating names. The operation of these biases reduces and skews the initial pool of candidates from which we select.

### **Personal recommendations**

After extemporaneous thinking, the next most important source of names for the initial list of candidates was consulting colleagues.

Most interview respondents said that they ask other arbitration lawyers within their firms for suggestions or recommendations for their initial lists. Personal referrals are a valuable source of information, often trumping any other source.

Some interview respondents also reported consulting contacts at other law firms for suggestions on a confidential basis. This might happen on occasions where there was a particular need to widen the pool of candidates.

The same practice of consulting contacts was reported by almost all survey respondents.

90% said that they consult their own personal knowledge or contacts when coming up with candidates.

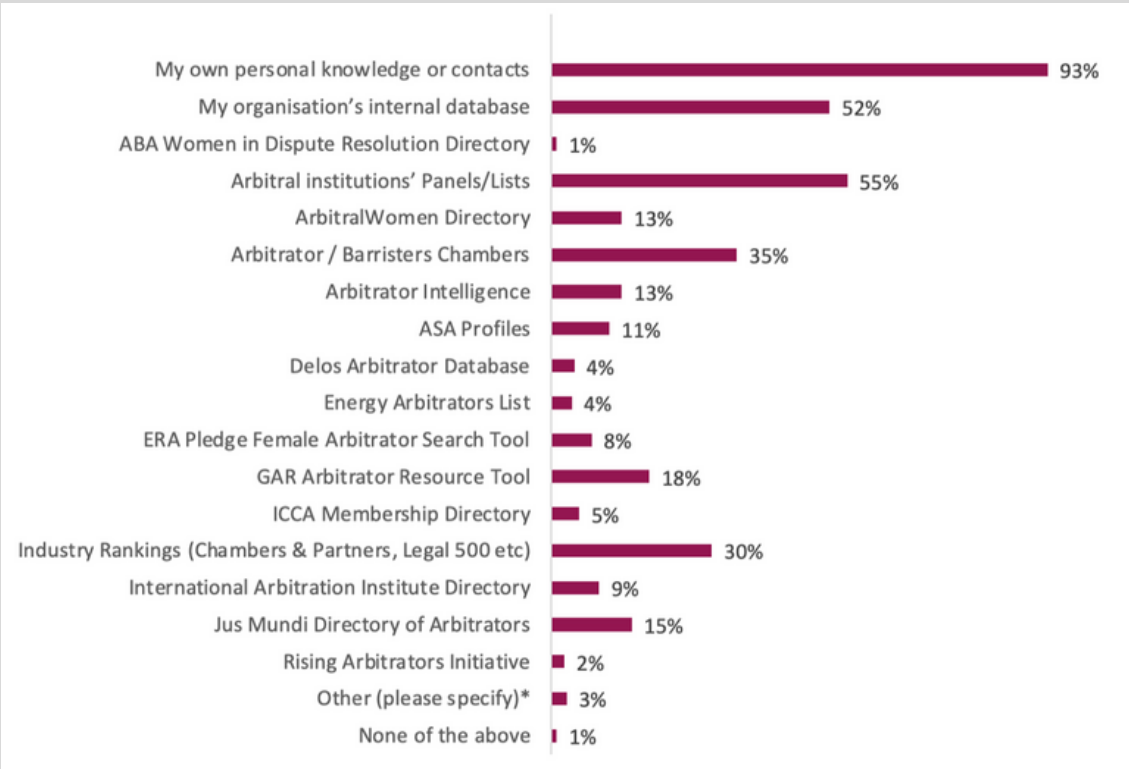
According to anecdotal evidence, it is likely that anyone asked for suggestions or recommendations will themselves employ the extemporaneous method for

producing names. It is important to be aware that this thought process will similarly be skewed by the unconscious influence of cognitive bias.

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*“It’s always useful to reach out to key individuals for ideas. Oftentimes you get some really good suggestions that are really on point, so that’s my go-to process first.”*

**Chart 6:** Do you consult any of the following resources when selecting candidates? Please tick all that apply



\*Other specified included: ABOTA, general research (published decisions, presentations, writings), Internet searches, LinkedIn, Mute Off list, searches of judgments on the Hong Kong Judiciary website to understand cases that the candidate may have been involved in

### External sources

The final stage in creating the initial shortlist is to look at external sources for ideas. Most interviewees reported this practice. These sources include arbitral institutions' panels and lists; databases or lists published by other organisations; industry directories and rankings; and prominent arbitration chambers.

Lists were particularly popular as a source of ideas because of their searchability.

Survey respondents also favour institutions' panels/lists (50%); followed by arbitration chambers (35%); directories/rankings (29%); and then a range of external databases including those offered by GAR Art, Jus Mundi and Arbitral Women (see Chart 6 above).

Occasionally, where interview and survey respondents need extra assistance coming up with candidates for a particular dispute, they enlist the help of specialist arbitrator search companies such as ArbiTra.

”

*“We'll look at a list but a personal recommendation is better.”*

”

*“It comes rather instinctively to reach out to our internal contacts to get referrals because no matter how long you've been working in this area, it's always good to pull in knowledge and research and resource from everywhere else.”*

#### Box 4: The VIP list

After top-of-head thinking and word of mouth, lists and panels maintained by arbitral institutions were by far the most popular source of candidates. Interview respondents praised their searchability functions, with location, qualification and nationality being especially useful.

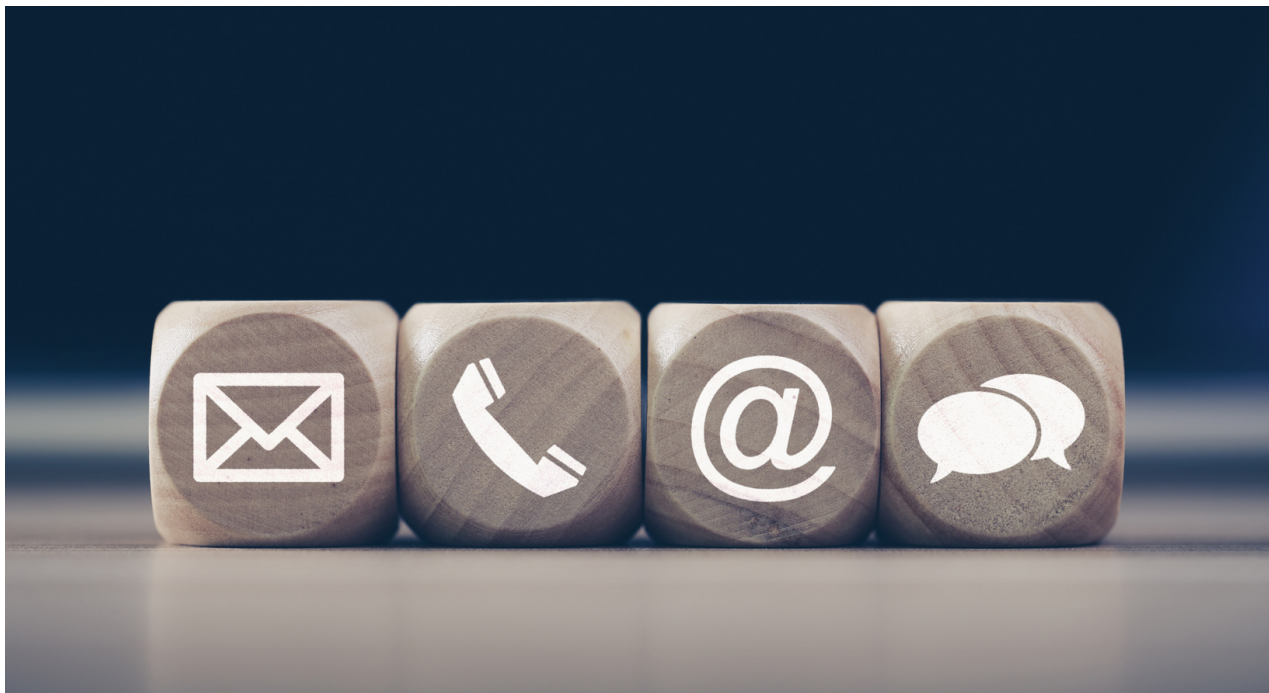
Reflecting the importance of institutional lists in respondents' search for candidates, lists featured twice when interview respondents were asked about ways to improve the selection process.

One respondent said that ensuring the lists are up-to-date is important to ensure their continued value. Another respondent suggested that institutions could provide more information about how new arbitrators can join their lists.

”

*“Properly maintained databases that have qualifications, residence and nationality are very useful.”*





## CANDIDATE DUE DILIGENCE

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### Personal endorsement

When it comes to vetting candidates, interview respondents highlighted personal networks as the most important component of the due-diligence process. Interview respondents invariably ask their colleagues for intelligence and feedback on different candidates. Many emphasised that a positive recommendation is essential to a particular arbitrator being appointed.

Responses varied across interviewees as to whether the solicitation of feedback constitutes a separate step in the process or whether feedback is sought at the same time as suggestions for the initial list (see above).

”

*“Colleagues across the globe are the most useful source of intelligence because we can ask quite detailed information regarding temperament etc. We can get good feedback from personal knowledge.”*

*“It’s the personal connection that’s key – for good reason. We don’t want to take a risk.”*

### Seal of approval

External sources such as industry directories and rankings are also commonly consulted for feedback on arbitrator candidates.

Critically, however, many interview respondents emphasised that they would only appoint an arbitrator they know and trust personally or who was known and trusted by someone they themselves know and trust. This chain of trust appears to be the primary barrier to new arbitrators entering the market (see Box 5).



*“The published rankings like Who’s Who are useful for candidates to say I’m featured in XYZ. It gives a stamp of credibility. A lot of it is about having the confidence to appoint less experienced people.”*

### Enhanced due diligence

In some instances, background research on candidates will extend to a wider sweep of all available sources, such as webinar recordings, written articles, judgments etc, in order to determine any leanings the individual arbitrator may have with regard to relevant substance or procedure.

One interview respondent mentioned that, where they don’t know a particular arbitrator, they might interview them prior to selection under the Chartered Institute of Arbitrators (**CIArb**) process to get a better sense of their style and views. CIArb has issued a Practice Guideline on Interviews for Prospective Arbitrators (2016) (**CIArb Guideline**) setting out current best practice for pre-appointing interviews. The CIArb Guideline covers communications with arbitrator candidates, matters that can be discussed and those that cannot, and specific arrangements for interview conversations.



*“This internet stalking is a step we are deploying more and more since Covid.”*

### Evaluating evaluations

Evaluations expressed in personal recommendations and formal industry testimonials are likely to be influenced to some degree by cognitive bias.

For example, research has shown that stereotypes and gender bias reliably colour our perception of professional performance. CVs and work product are consistently rated more highly when people think they relate to male candidates compared to identical CVs and work product thought to relate to female candidates. We also use different and more positive language when referring to brilliant male candidates compared with brilliant female candidates.

Awareness of potential biases in our and others’ judgments of candidates is therefore a critical step in improving our decision-making in arbitrator selection.

**Box 5: The chain of trust**

In general, interview respondents said they were reluctant to select an arbitrator they don't know because it presents a risk clients would prefer to avoid.

Expanding on what constitutes 'knowledge' in this context, many respondents prefer to have direct experience of seeing the individual in action – ideally as arbitrator, but alternatively as counsel, as a speaker, or through an appearance in another public setting.

In lieu of direct personal knowledge, several respondents also said they would select an arbitrator if the arbitrator was trusted by someone who they themselves trust. Oftentimes, this requires a personal endorsement from a colleague within the firm or within the broader arbitration community. In some instances, arbitrators known to a client – but not the lawyer – have been selected.

Less clear at present is what this personal endorsement needs to include for an otherwise unknown arbitrator to cross the threshold for appointment. What precisely does trust mean in the chain of trust?

”

*“We want practical experience of someone and whether or not they're sensible because it's ultimately a business and why would a client take a risk?”*

”

*“We'll almost always find someone that somebody knows. It's difficult to appoint without that.”*



## DIVERSITY IN THE PROCESS

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### **How is diversity considered in the process of selecting arbitrators?**

Results were mixed on the question of diversity and the extent to which it was considered by respondents during the process of selecting arbitrators.

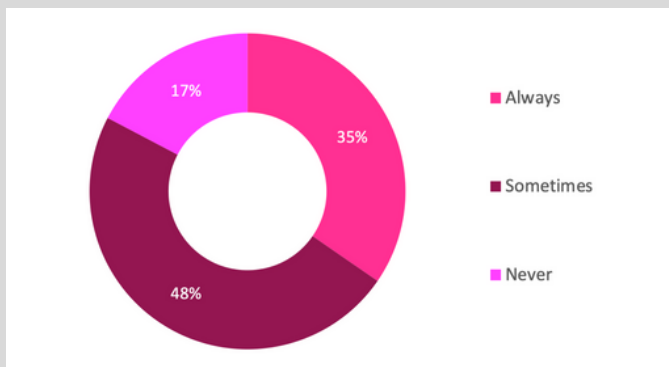
Most respondents interviewed do actively factor diversity into their decision-making process in some way or another. Most often, diversity comes into the thought process as a 'sense check' once the shortlist has been drawn up. If the original shortlist comprised entirely White European arbitrators, for example, effort would be made to consider candidates of other

ethnicities/nationalities who meet the criteria and who could be included on the final shortlist. A few respondents described more robust policies that are applied to ensure that shortlists they create contain diverse candidates (see further below).

A few interviewees were clear, however, that diversity was not a consideration in the shortlisting phase or the ultimate selection. For these respondents, diversity is not a specific criterion that feeds into their decision process. Instead, focus is placed solely on the arbitrator's technical abilities, skills profile and suitability to the case.

Those surveyed showed similar trends in their approach to diversity and arbitrator selection. 35% 'Always' consider diversity; 48% 'Sometimes' consider diversity; and 17% 'Never' consider diversity when selecting candidates (see Chart 7).

**Chart 7:** How often do you consider diversity when selecting candidates?

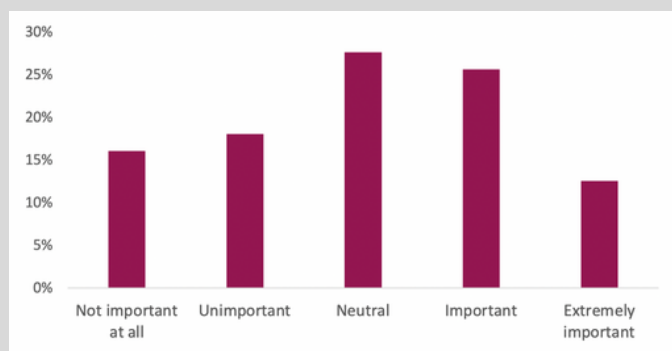


There was a broad spread in relation to the priority survey respondents give to diversity as well. For 39% of those surveyed, diversity was either 'Important' (26%) or 'Extremely important' (13%). At the other end of the scale were 34% of respondents, who consider diversity 'Unimportant' (18%) or 'Not important at all' (16%). The remaining respondents (28%) were neutral towards diversity as a factor in selecting arbitrators (see Chart 8).

Open-answer survey responses also conveyed similar sentiments regarding the perceived disconnect between diversity and arbitrator ability, with several respondents noting that diversity is irrelevant to the ultimate decision to appoint.

In relation to the types of diversity characteristics considered, responses were broadly similar across both studies. Most consider gender (80%); a large proportion consider race/ethnicity (60%); around half think about age (50%); and small proportions think about sexual orientation (7%) and disability (7%). Other types of diversity mentioned by survey respondents (8%) include: faith/belief and ideological (see Chart 9).

**Chart 8:** How important is diversity to you when selecting candidates?



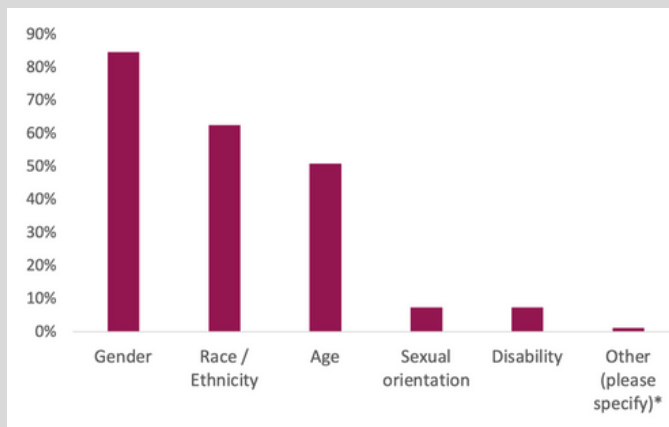


### Being objective

As noted at the start of this report, believing that we are naturally capable of making entirely objective decisions fails to acknowledge the very many biases and errors that psychological science has proven impact our thinking every day. Becoming aware of our people biases and learning about the ways they are likely to impact our thinking are the first steps in reducing their influence.

Diversity may not be a decision criterion in the same way as language capability or work ethic are used. But if lists of candidates are never appraised with diversity factors in mind, the ultimate selection is likely to be drawn from a biased pool where diverse candidates do not get to swim.

**Chart 9:** Which types of diversity characteristics do you consider when selecting candidates? Please tick all that apply



\*Other specified were: ideological and faith / belief

”

*“First and foremost we would think about the characteristics for shortlist and thereafter bring in diversity.”*

”

*“Now with the new emphasis on diversity, we reflect on who’s appropriate and if we can introduce diversity to the appointment.”*

### The gender agenda

Gender was the most frequently discussed diversity factor. Two interviewees commented that people are more conscious of gender diversity than they were ten years ago. Some specifically credited the role of the Equal Representation in Arbitration Pledge for the strides that have been made in this area (see Box 6). Practices regarding gender in arbitrator selection are also more advanced than any other diversity characteristic.

Many interview respondents referred to the diversity ‘sense check’ approach to expanding the initial shortlist. These interviewees said that if they see there are no or a low proportion of women on the initial shortlist, they try to think of appropriate female candidates. One noted that they make special effort to ensure women are well represented on the shortlist if their instructing client is female.

”

*“We have spreadsheets of records of female arbitrators we appoint. We’re upwards of 40%.”*

Several interview respondents relayed informal policies which they themselves adopt, or which their firm’s Partners seek to follow, regarding the inclusion of female candidates on final shortlists. For example:

- Two interview respondents described informal internal rules or commitments that every shortlist of arbitrators the firm presents a client should contain at least one female candidate.
- One respondent said they put forward a shortlist of all female candidates whenever they can.

### Box 6: The Equal Representation in Arbitration Pledge

The ERA Pledge was frequently recognised by interview respondents for its role in shifting the gender agenda quickly.

Almost half of those surveyed (44%) said that they or their organisation had signed the Pledge, 30% said that they had not, and a similar number (27%) didn’t know.

For those who had signed, monitoring compliance with the Pledge varied: 38% do monitor compliance, 30% do not, and 31% didn’t know.

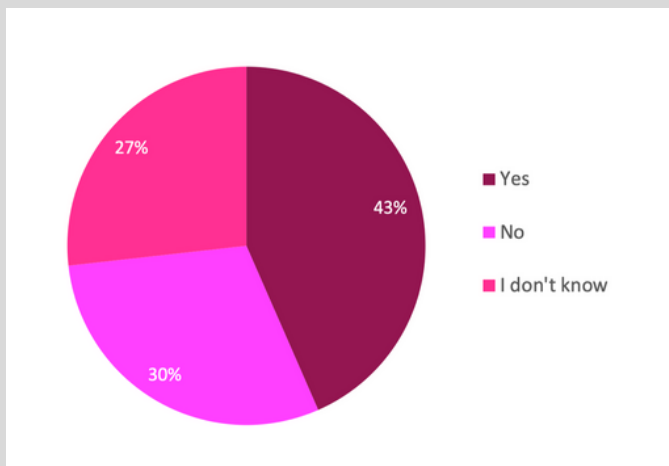
Reasons varied as to why survey respondents had not signed. The majority of non-signatories weren’t aware of the Pledge (64%) and a small minority (2%) disagreed with its aims. The remaining respondents explained that their organisations had not yet had time to focus on it or were opposed to making political statements publicly (see Charts 10, 11 and 12).

Several interview respondents suggested signing the Pledge and other similar initiatives as a quick and easy way to move diversity forwards.

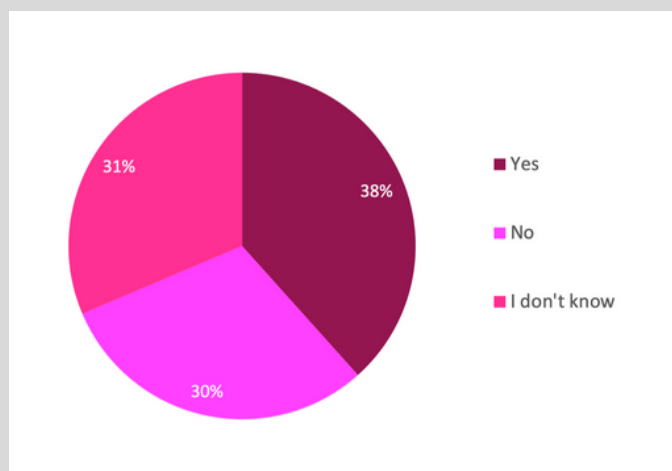
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*“The ERA Pledge was super helpful. It did change the way we thought.”*

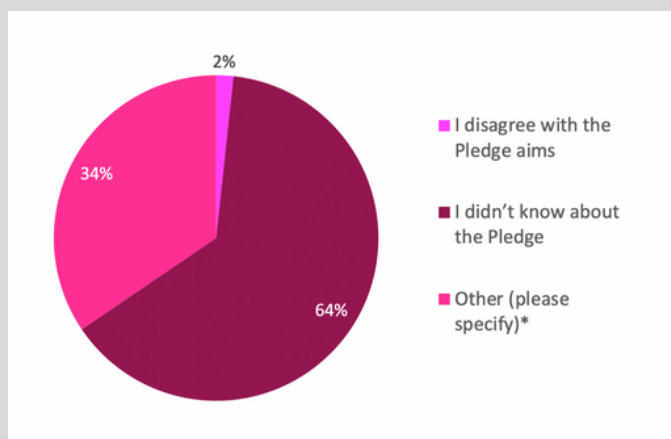
**Chart 10:** Have you and / or your organisation signed the Equal Representation in Arbitration Pledge ('the Pledge')?



**Chart 11:** Do you or your organisation monitor compliance with the Pledge?



**Chart 12:** Why have you not signed the Equal Representation in Arbitration Pledge?



\* Cited reasons why respondents or their firms had not signed the Pledge included: other priorities, lack of time, reluctance to constrain choices and rejection of gender-only focus.

### The ethnicity equation

Ethnicity was the next most discussed diversity characteristic. Different definitions and terminology were used in these discussions, such as ethnicity, nationality and cultural background. This variation in terminology highlights the particular complexity in this area of diversity.

Ethnic diversity was distinguished from gender diversity in that selecting an arbitrator of a particular ethnic background may impact a client's interests in a more direct way.

Multiple features of the overall dispute feed into the specific ethnic prism through which arbitrator candidates are considered. These include: nationality of the parties; any nationality provisions in the arbitration agreement regarding arbitrators; nationality of the other arbitrators on the panel; governing law of the contract; law of the seat; language of the arbitration; language of the contract and evidence; and cultural dimensions to the factual matrix of the dispute. Considerations of ethnicity are therefore less clear cut than gender. For example, see Box 3 above regarding the intersection of language, law, culture and nationality.

Separate from the substantive analysis of the characteristics of the dispute, ethnic diversity was also tested by some interview respondents in the same way as gender after the collation of the initial shortlist. For instance, as noted above, if a shortlist for an arbitration featuring Chinese parties contained only White Europeans, effort would be made to identify candidates with Asian nationality or background.

Aside from this *ad hoc* checking, none of the respondents described any informal practices or policies that they or their firms seek to follow regarding ethnic diversity on shortlists.



*“If it’s in the interests of the client, we might proactively go out and find someone who is more ethnically aligned to them.”*

*“Ethnic diversity is the same as gender diversity; I don’t want ten white people on the list.”*

### **Diversity in diversity**

There was less discussion of other forms of diversity in both the interview and the survey studies.

Age diversity was mentioned a few times by interview respondents. One interviewee noted appearing in two separate cases recently where arbitrators were younger than they had seen in the past. Initiatives aimed at promoting young arbitrators like Rising Stars in Arbitration were also mentioned by a few respondents. In general, these initiatives were praised for their impact on helping to lower the barrier to new arbitrators breaking into the market.

Sexual orientation and disability were mentioned by only two interview respondents, both of whom said that these diversity characteristics are not currently something they consider.

### **Clients on diversity**

Discussing diversity expressly with clients is relatively rare. For most clients, the primary driver is selecting an arbitrator who will increase their chances of winning. Absent a specific strategic reason, diversity *per se* is not usually seen as relevant to this consideration.

Interviewees reported a handful of exceptional circumstances, however, where they had discussed diversity of candidates expressly with clients. Some relatively sophisticated arbitration users, or clients interested in diversity, had expressed interest in receiving diverse shortlists or nominating diverse candidates.

Respondents also reported feeling more inclined to discuss gender diversity expressly with clients where they are being instructed by female in-house counsel.

A few respondents said they preferred not to discuss diversity with clients at all in the

context of arbitrator appointments. One fear is that the conversation risks creating the impression that diversity considerations are being elevated above the client’s interests. Another said that for some clients in particular, ‘It isn’t something they want to hear’.

One interview respondent noted that Hong Kong banks are increasingly focused on diversity, although the discussion hasn’t yet been raised in the context of selecting arbitrators.

Sentiments expressed in the survey echoed those of the interview respondents. Several comments underlined that winning the case is paramount for clients. One survey respondent explained that raising diversity with clients is difficult in the absence of a guideline or rule referring to diversity on tribunals. Another noted the need for educating arbitration users on the rationale and benefits of diverse arbitrator appointments.



”

*“I know we’ve had some clients who’ve been particularly happy if we’ve given an all-women list or women on the list. Some clients specifically ask to have women on the list or query a list if there are no women but I suspect they’re a minority.”*

”

*“Honest answer, very rarely have we discussed this as an issue with a client. Only if it’s a strategic consideration.”*

”

*“Diversity is low on the agenda for many clients. They just want to win.”*



## REFINING THE PROCESS

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As discussed, several cognitive biases are likely to impact the decision-making process around the selection of arbitrators. In fact, at every point a human mind is applied to the process, bias is likely to influence in some form.

There are a number of practical steps that can be introduced to reduce the influence of these biases and to improve rigour in the process more generally. For example. The decision-making process captured in Figure 2 and summarised above may serve as a useful starting point for those wishing to take this step.

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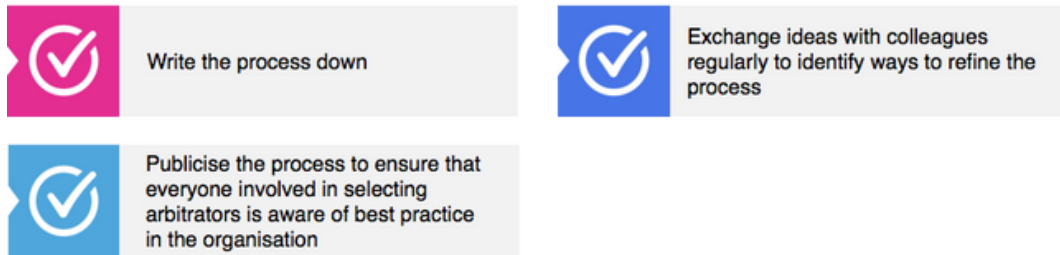
*“Writing down an actual process would be an improvement. We don’t have a flowchart that says you have to consult at least three of our internal sources and our internal database, for example.”*

Similarly, reflecting on improvements to the process, a few interviewees added that it would be helpful to factor diversity into their to-be-captured protocol. The prevailing view was that this ‘sanity check’ on diversity should take the form of guidance rather than strict policy or procedure.

Figure 4 below provides suggested steps and adaptations to consider, based on the analysis conducted in this project and the learnings gathered from institutional approaches to appointing arbitrators.

**Figure 4: Steps to refine decision-making in arbitrator selection**

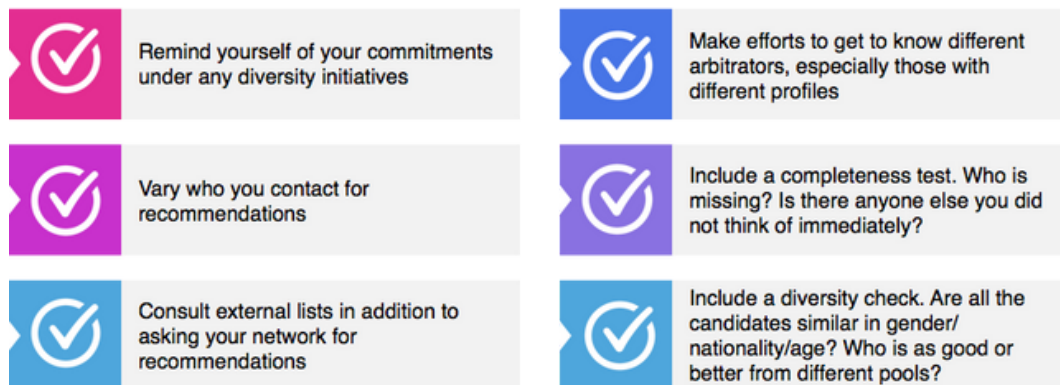
## Decision-making process



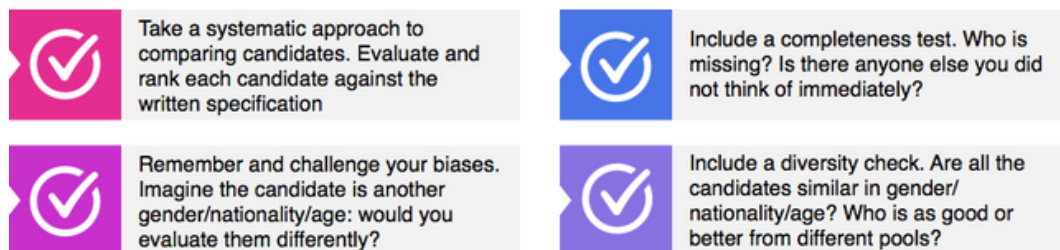
## Creating the ideal arbitrator specification



## Initial candidate search



## Due diligence and final shortlisting



## The selection decision





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## APPENDIX: METHODOLOGY

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The primary goal of this research project was to understand and elucidate current decision-making practices around the selection of party-appointed arbitrators, in order to identify and begin mitigating biases potentially impacting those decisions.

The research was conducted in two phases. The first comprised an in-depth qualitative interview study (**Study 1**) examining arbitrator selection practices and methods reported by experienced international arbitration counsel based in Hong Kong.

Guided by the data collected in the interview study, the second

phase comprised an online questionnaire study (**Study 2**) investigating arbitrator selection decision processes in party appointments. This phase was designed to measure wider trends in arbitrator selection across a broader population.

### **Study 1: The Interview Study**

Thirteen (13) senior arbitration practitioners were interviewed for the purposes of Study 1. All interview candidates had significant experience in international arbitration and were based in Hong Kong. Interview respondents worked within international law firms and their practices spanned a range of sectors.

Interview respondents comprised a mixture of Partners, senior lawyers and senior consultants. Most individuals were interviewed alone. Where two individuals worked at the same firm, they were interviewed together (there were two pair interviews). The interviews were conducted on the Zoom videoconferencing platform by Dr Ula Cartwright-Finch. All interviews lasted approximately one hour.

The interviews comprised a semi-structured discussion, following specific questions relating to the practitioners' processes around selecting arbitrators for party appointments.

Questions were designed with input from a handful of international arbitration experts based in Hong Kong. The interviews covered several topics including typical decision-making practices, factors considered, shortlisting methods, due diligence of candidates, questions of diversity and client involvement in selection decisions.

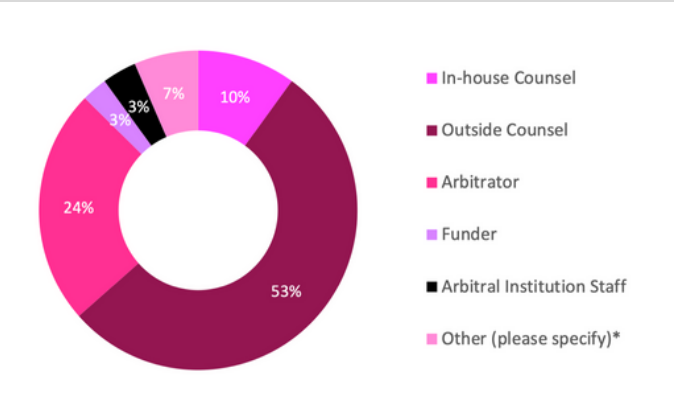
Study 2: The Survey Study

Two hundred and thirty (230) respondents completed an online questionnaire in Study 2.

Respondents performed a range of international arbitration roles. The majority acted as outside counsel (53%), arbitrator (24%) or in-house counsel (10%). Respondents also included a handful of litigation funders, arbitral institution staff, academics, tribunal secretaries and other roles relating to international arbitration (see Chart 13).

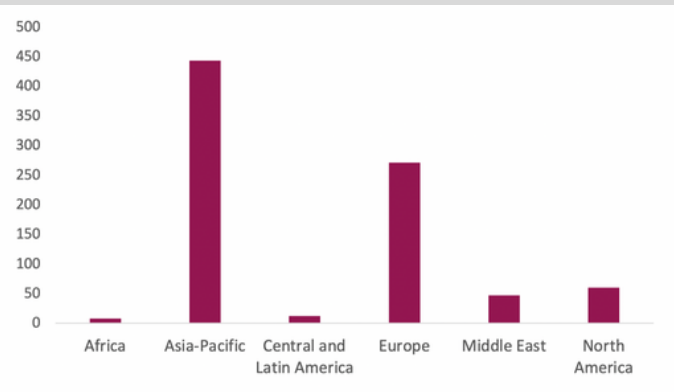
Respondents’ primary practices covered a range of arbitration jurisdictions around the world, with large concentrations in Hong Kong, England & Wales, Singapore and China (excluding Hong Kong) (see Table 1 and Chart 14). Respondents’ main sectors and specialisms also spanned a broad mix (see Table 2) and most had some or significant experience of appointing arbitrators (see Chart 15).

Chart 13: What is your primary role?



\* Other roles specified were: Academic, Researcher, Chief Executive, Secretary General, Contractor, Contracts Manager, Legal Advisor to Government, Law Firm Partner, Structural Engineer, Tribunal Assistant, Tribunal Secretary

Chart 14: Number of responses specified by region





**Table 1:** From the list below, please tick the top FIVE arbitration jurisdictions on which your practice is focused.

Answer Choices	Responses %	Number
Africa*	3%	8
Australia	17%	38
Austria	3%	6
Brazil	3%	7
China (excluding Hong Kong)	40%	91
England & Wales	57%	130
France	13%	31
Germany	9%	21
Hong Kong	57%	130
India	13%	30
Japan	6%	13
Netherlands	3%	7
Russia	9%	20
Singapore	53%	121
Sweden	7%	15
Switzerland	16%	36
UAE	18%	42
US	24%	56
Other	21%	40
<b>TOTAL</b>		<b>230</b>

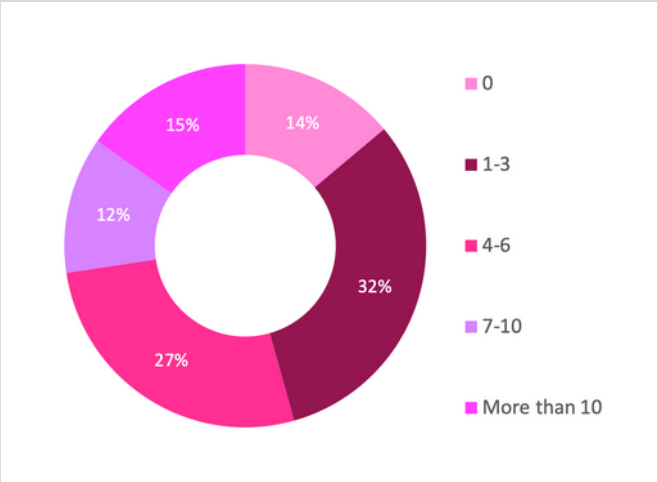
\* Jurisdictions specified were: Burundi, Egypt, Morocco, Mozambique, Nigeria, South Africa, Tunisia

**Table 2:** What are your main sectors or specialisms? Please tick all that apply

Answer Choices	Responses %	Number
Banking & Finance	29%	67
Commercial Contracts	68%	157
Construction	43%	98
Energy	38%	88
Hotels & Leisure	10%	22
Information Technology	14%	32
Insurance & Reinsurance	10%	24
Intellectual Property	17%	39
International Sale of Goods	31%	72
Investor-State	23%	54
Life Sciences	9%	21
Mining	14%	32
Oil & Gas	32%	74
Pharmaceuticals	10%	24
Shareholder, JV & Partnership Disputes	47%	109
Shipping	16%	36
Technology	20%	45
Telecommunication	13%	31
<b>TOTAL</b>		<b>230</b>

The questionnaire design was driven by common trends and themes emerging in the interview study. The questionnaire comprised 19 questions asking about respondents' typical approaches towards selecting arbitrators including decision criteria, shortlisting, due diligence and diversity considerations. The questionnaire was coded on SurveyMonkey and responses were gathered from October 2022 to February 2023.

**Chart 15:** How many arbitrators have you selected over the past two years?



# ACKNOWLEDGEMENTS

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We would like to thank all of our sponsors for supporting and promoting this research project. Their substantive input, financial support and enthusiastic championing have been appreciated enormously. We are also grateful to the Hong Kong International Arbitration Centre for its support throughout the project.

This research also benefited a great deal from the arbitration experience and wisdom of several individuals who provided important feedback on the interview and survey methodology. Thank you.

Finally, our gratitude goes to all the individuals who participated in our interviews and completed our survey. The findings from this research would not have been possible without their generous gift of time, their frank feedback and their invaluable insights.

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