BCLP International Arbitration Survey 2024

ARBITRATION AND THE CHALLENGES OF CORRUPTION

Does arbitration have the tools to tackle the elephant in the room?

BCLP

For over ten years, BCLP's International Arbitration Group has conducted a number of surveys on issues affecting the arbitration process. Recent surveys include: cyber-security in arbitration proceedings (2019), rights of appeal (2020), party-appointed experts (2021), the reform of the Arbitration Act (2022), and the use of AI in international arbitration (2023). Reports from all our most recent surveys can be found HERE

Arbitration and the Challenges of Corruption

Does arbitration have the tools to tackle the elephant in the room?

George Burn,
Co-Head of
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Welcome to the results of our International Arbitration Survey 2024. The topic for this year's survey is Corruption and the challenges that it poses for arbitration.

Corruption is a complex social, political and economic phenomenon that affects all countries. The United Nations and World Economic Forum have estimated the global cost of corruption at 5% of the world's Gross Domestic Product. In spite of international efforts to combat corruption, it remains one of the biggest challenges facing international commerce. As a result, the treatment of corruption allegations in commercial and investment arbitration is of particular significance.

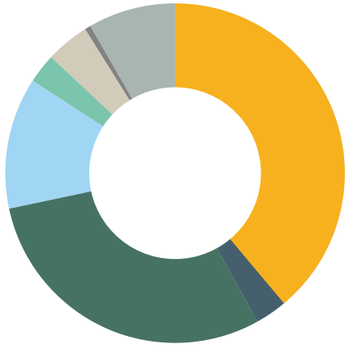
The English High Court decision in Nigeria v Process & Industrial Developments highlighted the challenges faced by arbitrators when dealing with corruption allegations and the impact that this can have on the reputation of arbitration as a method of dispute resolution. This year's survey canvases views on some of those risks and asks whether change is needed to avoid arbitration becoming a safe harbour for corruption.

In his judgment in the P&ID case, Mr Justice Knowles expressed the hope that the facts and circumstances of the case would provoke debate and reflection among the arbitration community. We hope that the results of the survey and the analysis provided in this report provide a useful contribution to that debate. We would like to thank all those who responded to the survey, on whose contribution these surveys depend.

WHO WE ASKED

131 responses to the survey

We received 131 responses to the survey. Respondents included lawyers at law firms, in-house counsel, arbitrators, staff at arbitral institutions, experts, academics and litigation funders. The geographical regions covered include Central and South America, North Africa, Western Europe, East and South East Asia, Australasia, the Middle East, and the Caribbean, Eastern Europe (including Russia and CIS), West and East Africa and North America. Our respondents are involved in disputes across a wide range of sectors including construction and engineering, energy and natural resources, technology, international trade and commodities, and banking and financial services. 61.1% of respondents were from a common law background, 12.2% were from a civil law background and 18.3% from both. 8.4% of respondents did not have a legal background.



What is the nature of your involvement in international arbitration?

- Lawyer at a law firm: 55%
- In-house counsel: 4.6%
- Arbitrator: 42%
- Expert witness: 17.6%
- Work at an arbitral institution: 3.8%
- Academic: 6.1%
- Litigation Funder: 0.7%
- Other: 11.5%

In what region/s do you work?

- Central and Southern Asia: 20.6%
- East and South East Asia: 39.7%
- Asia (other): 15.3%
- Australasia: 13%
- Middle East: 38.2%
- North America: 29%
- Latin America and the Caribbean: 25.2%
- Western Europe: 74.8%
- Eastern Europe (including Russia and CIS): 28.2%
- North Africa: 15.3%
- West Africa: 16%
- East Africa: 7.6%
- Other: 4.6%

In which sector/s do disputes that you are involved in tend to arise?

- Banking and Financial Services: 35.1%
- Construction and Engineering: 58.8%
- Energy and Natural Resources: 62.6%
- Hotels and Hospitality: 17.6%
- Insurance and Reinsurance: 19.8%
- International Trade and Commodities: 47.3%
- Manufacturing: 16.8%
- Maritime and Shipping: 17.6%
- Pharmaceuticals: 16%
- Sports and Entertainment: 9.2%
- Technology: 27.5%
- Other: 13%

Is your legal training in a common law system or a civil law system or both?

- Common Law: 61.1%
- Civil Law: 12.2%
- Both: 18.3%
- Not Applicable: 8.4%

Respondents could select multiple responses so the percentages do not add up to 100.

DEFINING CORRUPTION

Corruption is a commonly used term, but it can be hard to define. For the purposes of the survey, we adopted Transparency International's definition of corruption as "the abuse of entrusted power for private gain". In a note to respondents we made it clear that the term "corruption" was intended to encompass a broad range of behaviours including, but not limited to, bribery, fraud, kickbacks, misappropriation, money laundering and unmanaged conflicts of interest.

WHAT WE ASKED

The survey considered a variety of issues including:

- Whether corruption has become an increasingly prominent feature of international arbitration.
- Whether the arbitration process is sufficiently robust to deal with the challenges posed by corruption.
- Whether action is required to protect the integrity of the arbitration process.

KEY FINDINGS

31%

of respondents thought that the incidence of corruption allegations in arbitration has increased over the last 10 years.

64%

of respondents were concerned about the risk of abuse of the arbitral process in cases involving allegations of corruption.

82%

of respondents were confident that the arbitration process is sufficiently robust to deal with the challenges of arbitrating disputes involving allegations of corruption.

53%

of respondents thought the risk of abuse of process was greater in ad hoc arbitration.

58%

of respondents were concerned that the confidentiality nature of arbitration increases the risk of abuse of process.

67%

of respondents favoured the introduction of transparency rules for commercial arbitrations involving States or state-owned entities.

83%

of respondents thought it appropriate for arbitrators to require "clear and cogent" evidence for corruption allegations.

61%

of respondents thought that arbitrators should be more interventionist when faced with an under-represented or poorly represented party.

72%

of respondents thought the arbitration process would benefit from additional best practice guidelines for the conduct of arbitrations involving allegations of corruption.

THE RESULTS
Corruption and arbitration

The P&ID case highlighted the vulnerability of arbitration to fraud in cases involving corruption allegations. But the issues raised in the case are not new.

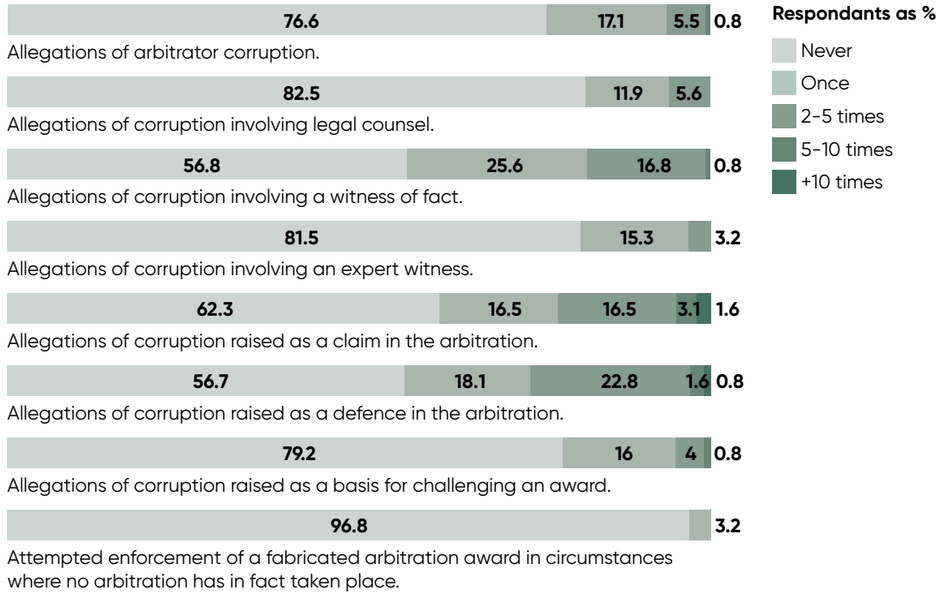
For many years now the arbitration community has been grappling with the question of how to deal with corruption allegations in arbitration and what controls and safeguards are needed to protect the integrity of the arbitration process. Whilst allegations of corruption are likely to be raised at the outset of an arbitration, they can have an impact at all stages of the process, from the appointment of the tribunal to the enforcement of an award. There is a general perception that corruption issues have become an increasingly prominent feature of international arbitration. However, the confidentiality of the arbitration process makes it difficult to establish whether that perception is well-founded as any research and analysis is necessarily limited to published awards and court judgments.

In Investor-State arbitration, corruption allegations are often raised by respondent States as an issue that affects whether the investment lies within the protection of investment treaties or are excluded by illegality. This is cast as a "gateway issue" that could affect the jurisdiction of the tribunal. For claimant investors, corruption allegations may come into play within allegations of unfair treatment prompted by corruption amongst governmental officials. With the rise in foreign investment in recent years, commentary has suggested a corresponding increase in corruption allegations raised in Investor-State arbitration.

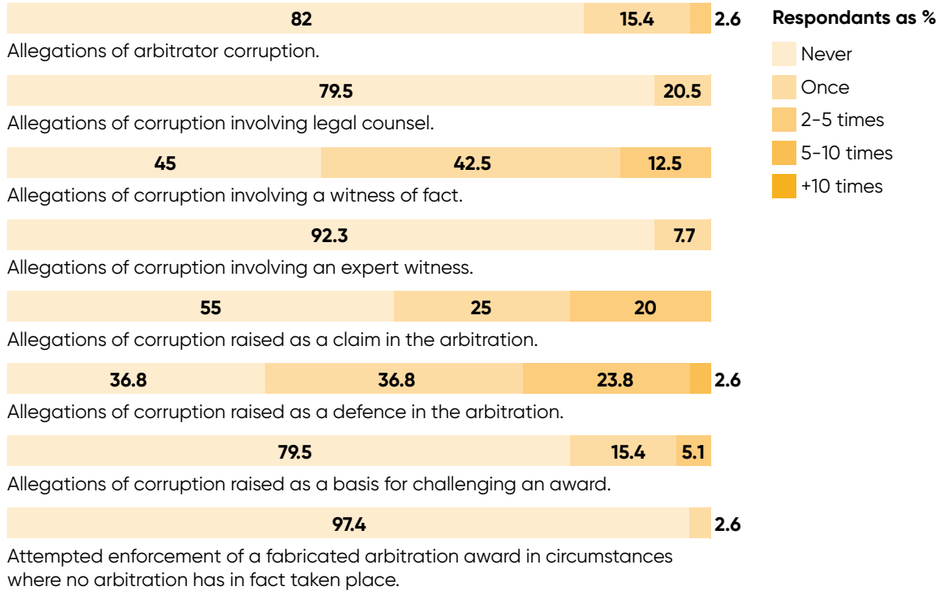
The survey was an opportunity to assess, by reference to empirical evidence, how frequently issues of corruption arise in international arbitration and in what context

To what extent has corruption featured in any arbitrations with which you have been involved in a professional capacity over the last 10 years?

A: International Commercial Arbitration



B: Investor-State Arbitration*



* 40 responses

23% of respondents had experience of allegations of corruption involving an arbitrator.

The results of the survey indicate that the incidence of corruption on the part of arbitrators, legal counsel and expert witnesses, is fairly limited. Almost a quarter (23.4%) of respondents had experience of allegations of corruption involving an arbitrator. Interestingly this percentage dropped to 18% for respondents involved in Investor-State arbitration. 18.5% of respondents had experience of allegations of corruption involving an expert witness. Again, this percentage dropped to 7.7% for respondents involved in Investor-State arbitration. 17.5% of respondents had experience of allegations of corruption involving legal counsel and this percentage rose to 20.5% for respondents involved in Investor-State arbitration. In all cases, the incidence rate was low with the majority of respondents having experienced a single instance of corruption involving an arbitrator, legal counsel or expert over the past ten years. Only one respondent reported more than five instances – involving allegations of arbitrator corruption in the context of commercial arbitration.

Experience of corruption allegations on the part of witnesses of fact was more widespread amongst respondents. In the commercial arbitration context more than 40% of respondents had experience of corruption allegations involving witnesses of fact and this percentage rose to more than 50% of respondents involved in Investor-State arbitration. However, the incidence rate remained low, with no respondents reporting more than five instances of corruption involving witnesses of fact over the last ten years.

Allegations of corruption involving:	Commercial Arbitration	Investor-State Arbitration
Arbitrator	23.4%	18%
Legal counsel	17.5%	20.5%
Witness of fact	42.4%	55%
Expert	18.5%	7.7%

42% of respondents had experience of corruption allegations involving witnesses of fact.

63% of respondents had experience of corruption allegations being raised as a defence in Investor-State arbitration.

Over a third (37.7%) of respondents had experience of corruption allegations being raised as claims in commercial arbitration and this percentage rose to 45% for respondents involved in Investor-State arbitration. 43.3% of respondents had experience of corruption allegations being raised as a defence in commercial arbitration and this percentage rose to 63.3% for respondents involved in Investor-State arbitration. These responses were consistent with what is perceived to be a common feature of Investor-State arbitration whereby a host State invokes corruption as a defence against investor claims.

One in five (21%) of respondents had experience of allegations of corruption being used as a basis for challenging an award. This figure was consistent for respondents involved in commercial arbitration and those involved in Investor-State arbitration.

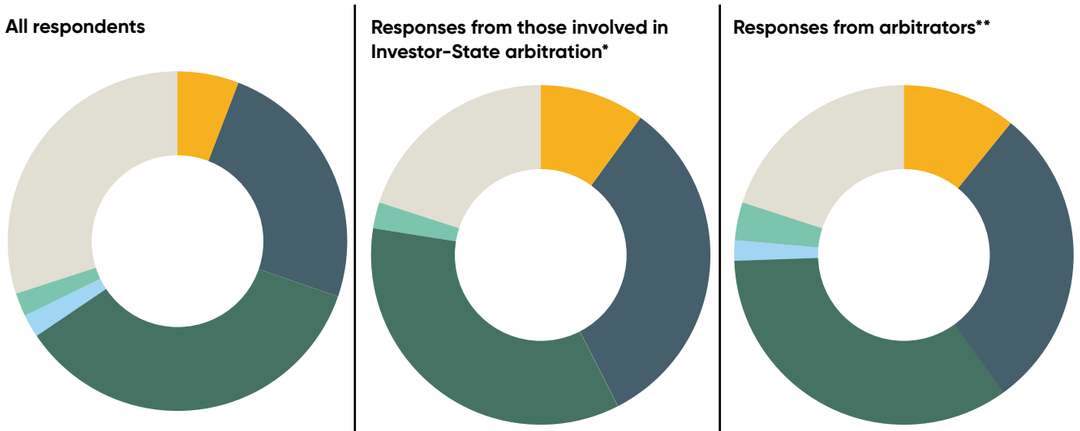
Allegations of corruption:	Commercial Arbitration	Investor-State Arbitration
Raised as a claim	37.7%	45%
Raised as a defence	43.3%	63.3%
Raised as a basis for challenging an award	20.8%	20.5%

Earlier this year the English Court set aside an order for the enforcement of an arbitral award having found that the award was a fabrication, there being no arbitration agreement or arbitration giving rise to the award. Mr Justice Butcher, giving judgment, described the case as "unique". Responses to the survey were consistent with this view. Only 3% of respondents had experience of attempted enforcement of a fabricated award. The percentage may be low, but, as one respondent to the survey commented, it shows that the risk is real and is not something that the arbitration community can ignore.

	Commercial Arbitration	Investor-State Arbitration
Attempted enforcement of a fabricated award	3.2%	2.6%

21% of respondents had experience of allegations of corruption being used as a basis for challenging an award.

Based on your professional experience over the last 10 years do you think incidence of corruption allegations in arbitration has increased?



* 40 responses
** 55 responses.

It has been suggested that allegations of corruption have become an increasingly prominent feature of international arbitration. We asked respondents whether, in their experience, the incidence of corruption allegations in arbitration has increased over the last ten years.

30.5% of all respondents thought the incidence has increased whilst 35.1% thought it has remained about the same. Of those respondents involved in Investor-State arbitration, 42.5% thought the incidence has increased whilst 35% thought it has remained about the same. Less than 5% of all respondents thought the incidence has decreased. 40.1% of arbitrator respondents thought the incidence has increased, 34.5% thought it has remained the same and 5.4% thought the incidence has decreased.

31% of all respondents thought that the incidence of corruption allegations in arbitration has increased.

Respondents	Increased	About the same	Decreased
All respondents	30.5%	35.1%	4.6%
Respondents involved in Investor-State arbitration	42.5%	35%	2.5%
Arbitrator respondents	40.1%	34.5%	5.4%

40% of arbitrator respondents thought that the incidence of corruption allegations in arbitration has increased.

43% of respondents involved in Investor-State arbitration thought that the incidence of corruption allegations in arbitration has increased.

Risk of abuse

> ...this is a highly unusual case, although one that draws attention to matters of wider importance. Quite apart from the consequences for the parties, the matter touches the reputation of arbitration as a dispute resolution process."
> **Mr Justice Knowles**

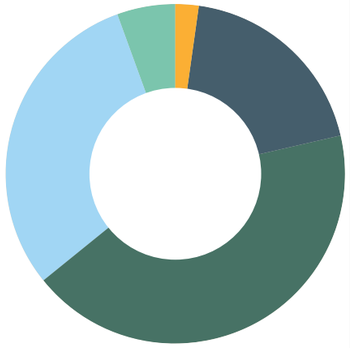
The P&ID case has generated widescale discussion over the issue of corruption in arbitration. In the UK, this has coincided with the passage of the Arbitration Bill which introduces reforms to the Arbitration Act 1996.

Parliamentary debate over the Bill has highlighted two different approaches to addressing the issue of corruption in arbitration. On one side are those who support Lord Hacking's proposal that the Bill be amended to include a new clause requiring tribunals to safeguard arbitral proceedings against fraud and courruption. On the other are those, including Lord Bellamy, who counsel against a "knee-jerk" response to P&ID, arguing that there is no one solution to the issues posed by corruption. This school of thought relies on procedures within the legal and arbitral system (discovery, cross examination and the right of appeal) to safeguard the arbitration process and on the ethics and professional obligations of those responsible for the conduct of proceedings.

We asked respondents how concerned they were about the risk of abuse of the arbitration process in cases involving allegations of corruption and how confident they were that the arbitration process is sufficiently robust to deal with the challenges posed by corruption.

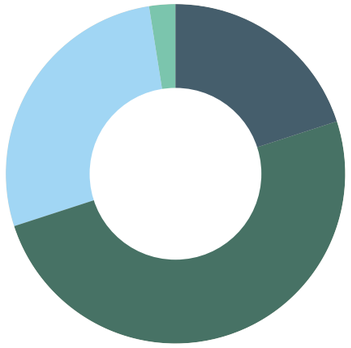
How concerned are you about the risk of abuse of the arbitral process in cases involving allegations of corruption?

All respondents



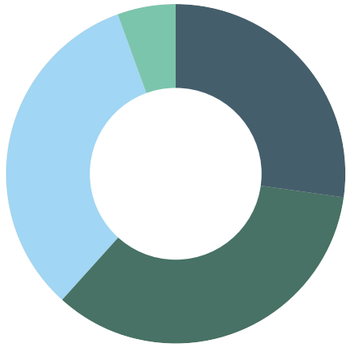
Extremely concerned	2.3%
Very concerned	19.1%
Moderately concerned	42.8%
Slightly concerned	30.5%
Not at all concerned	5.3%

Responses from those involved in Investor-State arbitration*



Extremely concerned	0%
Very concerned	20%
Moderately concerned	50%
Slightly concerned	27.5%
Not at all concerned	2.5%

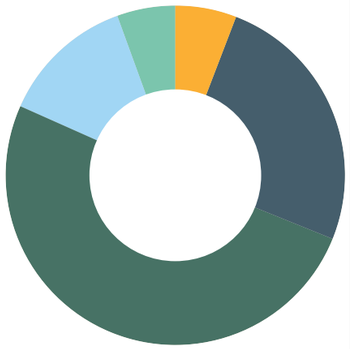
Responses from arbitrators**



Extremely concerned	0%
Very concerned	27.3%
Moderately concerned	34.5%
Slightly concerned	32.7%
Not at all concerned	5.5%

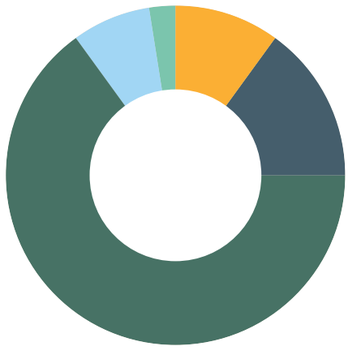
How confident are you that the arbitration process is sufficiently robust to deal with the challenges of arbitrating disputes involving allegations of corruption?

All respondents



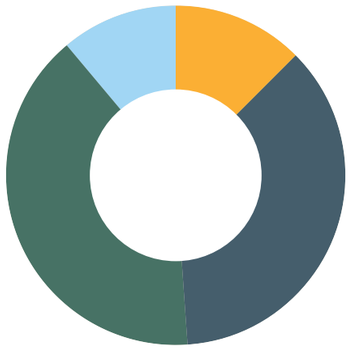
Extremely confident	6.1%
Very confident	25.2%
Moderately confident	50.4%
Slightly confident	13%
Not at all confident	5.3%

Responses from those involved in Investor-State arbitration*



Extremely confident	10%
Very confident	15%
Moderately confident	65%
Slightly confident	7.5%
Not at all confident	2.5%

Responses from arbitrators**



Extremely confident	12.7%
Very confident	36.3%
Moderately confident	40%
Slightly confident	11%
Not at all confident	0%

* 40 responses
** 55 responses.

64% of respondents were concerned about the risk of abuse of the arbitral process in cases involving allegations of corruption.

Level of concern v Level of confidence

Almost two thirds (64.2%) of respondents indicated a high or moderately high level of concern about the risk of abuse of the arbitral process in cases involving allegations of corruption. This rose to 70% for respondents involved in Investor-State arbitration.

However, all respondents also indicated a high level of confidence in the robustness of the arbitration process. 81.7% of respondents indicated high or moderately high level of confidence. This rose to 89% for arbitrator respondents and 90% for respondents involved in Investor-State arbitration.

This suggests that respondents are aware of the risks that arbitrating cases involving corruption allegations can pose to the integrity of arbitration but are confident that the arbitration process is sufficiently robust to deal with those risks.

Level of concern

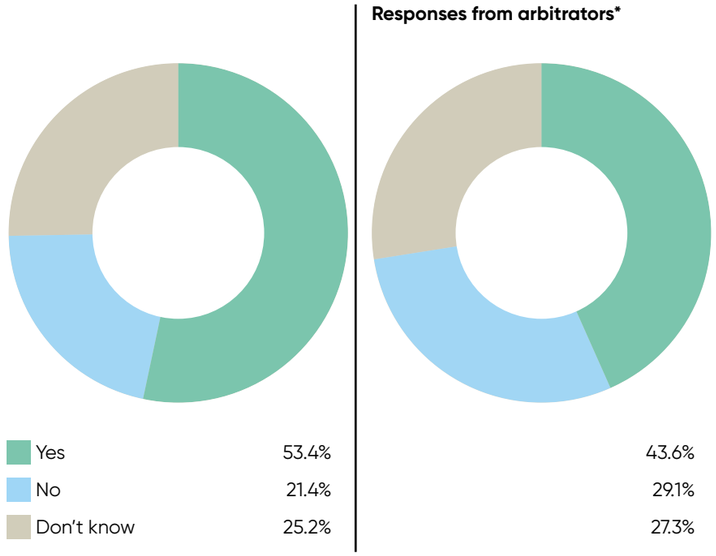
Respondents	High	Moderate	Total
All respondents	21.4%	42.8%	64.2%
Respondents involved in Investor-State arbitration	20%	50%	70%
Arbitrators	27.3%	34.5%	61.8%

Level of confidence

Respondents	High	Moderate	Total
All respondents	31.3%	50.4%	81.7%
Respondents involved in Investor-State arbitration	25%	65%	90%
Arbitrators	49%	40%	89%

82% of respondents were confident that the arbitration process is sufficiently robust.

Do you think the risk of abuse of the arbitral process in cases involving allegations of corruption is greater in ad hoc arbitration where parties have not selected an institution to administer the arbitration?



* 55 responses.

53% of respondents thought the risk of abuse of process was greater in ad hoc arbitration.

More than half of respondents (53.4%) thought that the risk of abuse of the arbitral process in cases involving allegations of corruption is greater in ad hoc arbitration. The percentage was slightly lower (43.6%) for arbitrator respondents.

However, as one respondent commented, administered arbitration is also vulnerable to abuse particularly because the involvement of an arbitral institution lends respectability to the arbitration process. This highlights the important role that arbitral institutions play in mitigating the risk of arbitration being misused.

In the UK, this is an issue that has been raised during the passage of the Bill to amend the Arbitration Act 1996. In April 2024, Lord Ponsonby, the Under Secretary of State at the Ministry of Justice, wrote to a number of leading arbitral institutions seeking views on the mitigations in place and whether more is needed.

Responses were received from the Chartered Institute of Arbitrators, the International Chamber of Commerce, the London Court of International Arbitration, the London Maritime Arbitrators' Association and the Grain and Feed Trade Association as well as from the Law Society and the Bar Council. In summary, the responses expressed the view that sufficient policies and procedures were in place to mitigate against corruption. Having reviewed the responses, the UK government has confirmed that the Arbitration Bill will not be amended to incude a specific provision requiring tribunals to safeguard arbitral proceedings against fraud and courruption.

Confidentiality v Transparency

> The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done. … An open process allows the chance for the public and press to call out what is not right."
>
> **Mr Justice Knowles**

For many, privacy and confidentiality are seen as core features of arbitration and one of the reasons why parties choose arbitration as a method of dispute resolution.

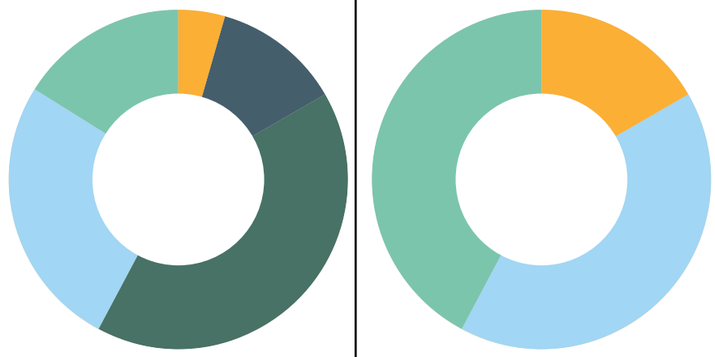
However, confidentiality can have negative connotations, giving rise to concerns that disputes are being resolved in secret, without any public scrutiny and that the privacy of the arbitration process can be used to cloak corruption.

There has been a long-running drive for greater transparency in arbitration. In the context of investment arbitration, both UNCITRAL and ICSID have introduced transparency rules, in both cases driven by a recognition of the wider public interest in cases involving states. The rules include provisions relating to the publication of information at the commencement of an arbitration, the publication of documents submitted in an arbitration and the publication of awards. In the context of commercial arbitration, the ICC has led the charge with the introduction new policies designed to make the arbitration process more transparent, including publishing information about arbitrators sitting in ICC cases and providing parties with reasons for decisions made by the ICC Court.

We asked respondents whether increased transparency is needed in commercial arbitration.

How concerned are you that the confidentiality nature of arbitration increases the risk of abuse of the arbitral process in cases involving allegations of corruption?

All respondents

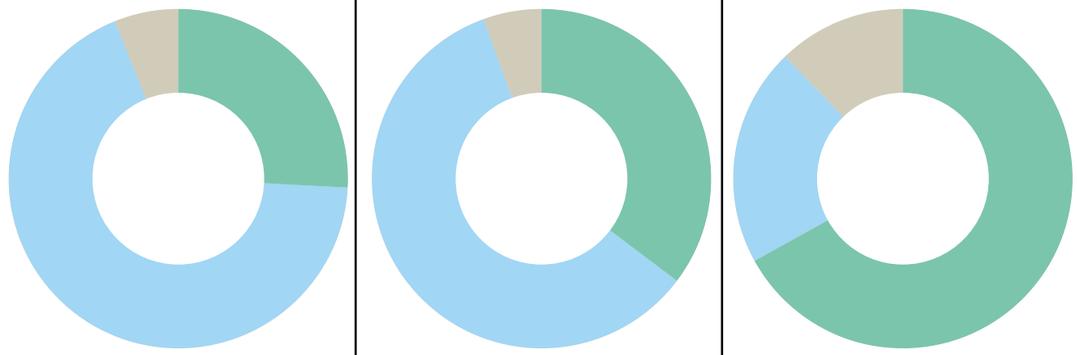


- Extremely concerned – 4.6%
- Very concerned – 12.2%
- Moderately concerned – 41.2%
- Slightly concerned – 26%
- Not at all concerned – 16%

High	16.8%
Moderate	41.2%
Low	42%

In recognition of the need for provisions on transparency in the settlement of treaty-based Investor-State disputes to take account of the public interest involved in such arbitrations, UNCITRAL produced Rules on Transparency in Treaty-based Investor-State Arbitration.

Do you think that similar provisions are required to increase transparency in commercial arbitration?



	A: All commercial arbitrations	B: Commercial arbitrations involving high-value disputes	C: Commercial arbitrations involving States or state-owned entities
Yes	26%	35.4%	67.2%
No	68%	59.2%	20.6%
Don't know	6%	5.4%	12.2%

58% of respondents were concerned that the confidential nature of arbitration increases the risk of abuse of process.

58% of respondents were concerned that the confidential nature of arbitration increases the risk of abuse of the arbitration process.

In spite of that concern, respondents were not in favour of increased transparency in commercial arbitration generally. Only 26% thought there should be greater transparency in all commercial arbitrations and only 35.4% thought there should be increased transparency in commercial arbitrations involving high-value disputes.

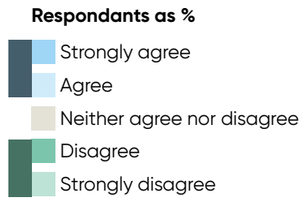
However, 67.2% of respondents were in favour of increased transparency in commercial arbitrations involving States or state-owned entities. This endorses Mr Justice Knowles' suggestion that greater visibility in this context is desirable to allow press and public scrutiny of what is going on and to mitigate the risks posed by corruption.

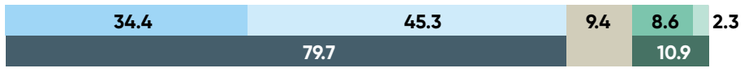
26% of respondents thought there should be greater transparency in all commercial arbitrations.

67% of respondents thought there should be greater transparency in commercial arbitrations involving States or state-owned entities.

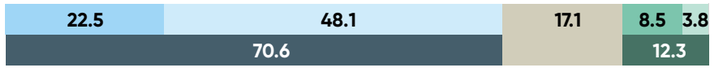
What approach should be adopted to achieving increased transparency?

Results are in order of preference based on combination of Strongly Agree and Agree responses

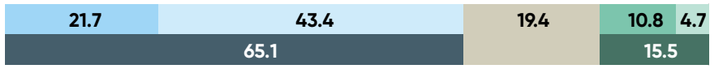




The parties and the arbitrators to agree appropriate provisions on a case-by-case basis.

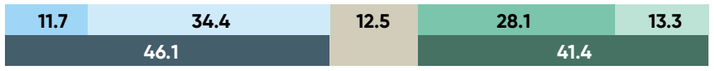


Arbitral institutions to include transparency provisions in arbitration rules.



UNCITRAL, the IBA or similar organisation to produce transparency rules for commercial arbitration.

National arbitration law to include transparency provisions.



The arbitrators to have the power to order appropriate provisions, without the consent of the parties, on a case-by-case basis.

The preferred approach of respondents to increasing transparency in commercial arbitration highlights the value that respondents place on party autonomy. The most preferred approach was for the parties and the arbitrators to agree appropriate provisions on a case-by-case basis. The least popular approach was for arbitrators to have the power to order appropriate provisions without the consent of the parties. The inclusion of transparency provisions in arbitration rules (rules which parties can choose to adopt when agreeing to arbitrate) was the second most popular approach. 65.1% favoured transparency rules produced by UNCITRAL, the IBA or similar institution and 58.1% favoured the introduction of transparency provisions in national arbitration law.

80% of respondents thought parties and the arbitrators should agree transparency provisions on a case-by-case basis.

Raising suspicions of corruption

> In the Arbitration the Tribunal did what it did with what it had. … But the fact is that the Arbitration was a shell that got nowhere near the truth."
>
> **Mr Justice Knowles**

Arbitrations involving allegations of corruption pose particular challenges for arbitrators. Corruption, by its very nature, tends to be hidden leaving little by way of documentary evidence of corrupt practice. In arbitration this problem is exacerbated by the fact that arbitrators have limited powers to compel the production of documents and witness testimony.

The position of arbitrators becomes even more challenging in cases where no corruption allegations have been made but the arbitrator suspects corruption. To what extent can or should arbitrators investigate suspected corruption on their own initiative to avoid potential abuse of arbitral process? Is the jurisdiction of an arbitrator limited to determining claims raised by the parties or do arbitrators have a duty to investigate suspicions of corruption? If they do, how far should that duty extend? Should it be limited to raising suspicions of corruption with the parties or do arbitrators have a duty to report suspicions of corruption to the relevant national authorities?

We asked respondents what approach arbitrators should adopt to raising and reporting suspicions of corruption.

What approach should arbitrators adopt to raising suspicions of corruption with the parties on their own initiative?

Respondants as %

- All Respondents
- Arbitrator Respondents*
- Respondents involved in Investor-State Arbitration**
- Respondents with a civil law background***

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Arbitrators should not raise suspicions of corruption with the parties on their own initiative, they should confine themselves to deciding the issues raised by the parties.	3.8%	12.3%	17%	52.3%	14.6%
	7.4%	9.2%	13%	57.4%	13%
	2.5%	7.5%	22.5%	55%	12.5%
	2.6%	13.2%	7.9%	47.4%	28.9%
Arbitrators should only raise suspicions of corruption with the parties on their own initiative if they have a duty to do so under any applicable law or arbitration rules.	6.9%	23.1%	11.6%	46.9%	11.5%
	11.1%	20.4%	14.8%	42.6%	11.1%
	2.5%	30%	7.5%	52.5%	7.5%
	13.2%	13.2%	5.2%	47.3%	21.1%
Arbitrators should only raise suspicions of corruption with the parties on their own initiative in cases involving States or state-owned entities.	2.3%	7%	16.2%	60.5%	14%
	3.8%	5.7%	15.1%	62.2%	13.2%
	0%	10%	12.5%	70%	7.5%
	5.2%	7.9%	7.9%	55.3%	23.7%
Arbitrators should always raise suspicions of corruption with the parties on their own initiative to avoid the risk of rendering an award that may violate public policy.	22.1%	51.1%	13.8%	13%	0%
	18.2%	49%	16.4%	16.4%	0%
	20%	55%	12.5%	12.5%	0%
	30.8%	48.7%	7.7%	12.8%	0%

* 54 responses.
** 40 responses.
*** 38 responses.

What approach should arbitrators adopt to reporting suspicions of corruption to the relevant national authorities?

Respondants as %

- All Respondents
- Arbitrator Respondents*
- Respondents involved in Investor-State Arbitration**
- Respondents with a civil law background***

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Arbitrators should not report suspicions of corruption to the relevant national authorities as it may constitute a breach of their duty of confidentiality to the parties.	6.9%	28.5%	26.1%	32.3%	6.2%
	11.1%	37%	20.4%	27.8%	3.7%
	7.5%	35%	27.5%	30%	0%
	10.5%	31.6%	18.4%	31.6%	7.9%
Arbitrators should only report suspicions of corruption to the relevant national authorities if they have a duty to do so under any applicable law or arbitration rules.	13.1%	49.2%	10.8%	22.3%	4.6%
	13%	57.4%	9.3%	16.6%	3.7%
	15%	52.5%	12.5%	20%	0%
	21.1%	44.6%	7.9%	21.1%	5.3%
Arbitrators should only report suspicions of corruption to the relevant national authorities in cases involving States or state-owned entities.	2.3%	15.4%	21.5%	53.1%	7.7%
	1.8%	13%	16.6%	59.3%	9.3%
	5%	15%	17.5%	62.5%	0%
	2.6%	15.8%	15.8%	57.9%	7.9%
Arbitrators should always report suspicions of corruption to the relevant national authorities.	8.5%	23.3%	21.7%	40.3%	6.2%
	5.6%	14.8%	18.5%	50%	11.1%
	5.1%	15.4%	23.1%	53.8%	2.6%
	7.9%	21.1%	18.4%	42.1%	10.5%

* 54 responses.
** 40 responses.
*** 38 responses.

73%

of respondents thought arbitrators should always raise suspicions of corruption with the parties on their own initiative.

73.2% of all respondents thought arbitrators should always raise suspicions of corruption with the parties on their own initiative to avoid the risk of rendering an award that may violate public policy. This percentage rose to 75% for respondents involved in Investor-State arbitration.

There was a more nuanced approach to the question of whether arbitrators should report suspicions of corruption to the relevant national authorities. 31.8% of respondents thought that arbitrators should always report suspicions of corruption to the relevant national authorities. However, this percentage dropped to 29% for respondents with a civil law background, 20.5% for respondents involved in Investor-State arbitration, and 20.4% for arbitrator respondents.

62.3% of respondents thought that arbitrators should only report suspicions of corruption to the relevant national authorities if they have a duty to do so under any applicable law or arbitration rules. This percentage rose to 65.7% for respondents with a civil law background, 67.5% for respondents involved in Investor-State arbitration and 70.4% for arbitrator respondents.

62%

of respondents thought that arbitrators should only report suspicions of corruption to the relevant national authorities if they have a duty to do so under any applicable law or arbitration rules.

The question of proof

Another challenge faced by arbitrators is how to deal with evidentiary issues that arise in cases involving allegations of corruption.

There is no international consensus as to the standard of proof that should be applied to allegations of corruption or the circumstances (if any) in which the burden of proof may be shifted.

In the context of Investor-State arbitration, corruption allegations may be used as a "gateway issue" to prevent access to arbitration or as a defence based on the violation of international public policy. It has been suggested that where allegations of corruption are raised in the context of a jurisdiction objection, the evidence must be "clear and cogent" and/or must satisfy a more stringent standard of proof.

The lack of direct evidence is another challenge. Corruption, by its very nature, tends to be hidden leaving little by way of documentary evidence of corrupt practice. In what circumstances is it appropriate for arbitrators to reverse the burden proof; draw adverse inferences from a party's failure to produce evidence to rebut an allegation of corruption; or to make findings of corruption based on circumstantial evidence.

We asked respondents what approach arbitrators should adopt when dealing with these evidentiary issues and about their experience in practice.

KEY FINDINGS

56%

of all respondents thought it appropriate for arbitrators to adopt a civil standard of proof (balance of probabilities) for corruption allegations and 29% had seen this standard applied in practice.

60%

of respondents with a civil law background thought it appropriate for arbitrators to adopt a civil standard of proof (balance of probabilities) for corruption allegations and 37% had seen this standard applied in practice.

83%

of all respondents thought it appropriate for arbitrators to require "clear and cogent" evidence for corruption allegations and 40.5% had seen this standard applied in practice.

77%

of respondents involved in Investor-State arbitration thought it appropriate for arbitrators to require "clear and cogent" evidence for corruption allegations and 56% had seen this standard applied in practice.

20%

of all respondents thought it appropriate for arbitrators to shift the burden of proof to the party accused of corruption and 10.5% of all respondents, had seen this done in practice.

13%

of respondents involved in Investor-State arbitration thought it appropriate for arbitrators to shift the burden of proof to the party accused of corruptionand 18% had seen this done in practice.

64%

of all respondents thought it appropriate for arbitrators to draw adverse inferences from a party's failure to produce evidence to rebut an allegation of corruption based on circumstantial evidence and 26% had seen this done in practice.

67%

of arbitrator respondents thought it appropriate for arbitrators to draw adverse inferences from a party's failure to produce evidence to rebut an allegation of corruption based on circumstantial evidence and 28% had seen this done in practice.

85%

of respondents involved in Investor-State arbitration thought it appropriate for arbitrators to take the same approach in dealing with evidentiary issues of corruption allegations raised against a State respondent or raised by a State respondent. 33% had seen this applied in practice.

What steps do you think it is appropriate for arbitrators to take to deal with evidentiary issues in cases involving allegations of corruption and what steps have you seen applied in practice?

Respondants

- All Respondents
- Arbitrator Respondents
- Respondents involved in Investor-State Arbitration
- Respondents with a civil law background

	Appropriate	Inappropriate	Seen in practice Yes	Seen in practice No
Arbitrators adopting a civil standard of proof (balance of probabilities) for corruption allegations.	55.9%	44.1%	29.4%	70.6%
	58.5%	41.5%	40.7%	59.3%
	51.3%	48.7%	43.6%	56.4%
	59.5%	40.5%	36.8%	63.2%
Arbitrators requiring "clear and cogent" evidence for corruption allegations.	82.8%	17.2%	40.5%	59.5%
	79%	21%	46.3%	53.7%
	76.9%	23.1%	56.4%	43.6%
	73.7%	26.3%	55.3%	44.7%
Arbitrators shifting the burden of proof to the party accused of corruption.	20.3%	79.7%	10.5%	89.5%
	14.8%	85.2%	13.5%	86.5%
	12.8%	87.2%	17.9%	82.1%
	18.9%	81.1%	13.2%	86.8%

	Appropriate	Inappropriate	Seen in practice Yes	Seen in practice No
Arbitrators drawing adverse inferences from a party's failure to produce evidence to rebut an allegation of corruption based on circumstantial evidence.	64.1%	35.9%	25.6%	74.4%
	67.3%	32.7%	28.3%	71.7%
	61.5%	38.5%	41%	59%
	65.8%	34.2%	26.3%	73.7%
Arbitrators making findings of corruption based on circumstantial evidence.	37.9%	62.1%	22.2%	77.8%
	45.3%	54.7%	29.6%	70.4%
	38.5%	61.5%	33.3%	66.7%
	33.3%	66.7%	21.1%	78.9%
In the context of investor-state arbitrations, arbitrators taking the same approach in dealing with evidentiary issues of corruption allegations raised against a State respondent or raised by a State respondent.	82.6%	17.4%	14.8%	85.2%
	79.6%	20.4%	22%	78%
	84.6%	15.4%	33.3%	66.7%
	75%	25%	18.4%	81.6%

Should arbitrators be more interventionist?

> The Tribunal in the present case allowed time where it felt it could and applied pressure where it felt it should. … Yet there was not a fair fight. And the Tribunal took a very traditional approach. … Could and should the Tribunal have been more direct and interventionist …?"
> **Mr Justice Knowles**

Arbitrators have a duty to act fairly as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent. In cases where one party is not represented or is under-represented, arbitrators must balance the obligation to do justice between the parties with the obligation to treat each party equally and provide a fair andunbiased procedure. This is not an easy balance to achieve and arbitrators who get it wrong risk removal for misconduct and/or having an award challenged.

So how should arbitrators strike the balance to ensure a fair fight?

We asked respondents whether they thought that arbitrators should be more interventionist.

Do you think that arbitrators should be more interventionist in cases involving allegations of corruption when faced with an under-represented or poorly represented party?

Respondants

- All Respondents
- Arbitrator Respondents
- Respondents involved in Investor-State Arbitration
- Respondents with a civil law background

Yes	No	Don't know
60.8%	20%	19.2%
54.6%	23.6%	21.8%
64%	18%	18%
59%	15.4%	25.6%

The majority of respondents (60.8% of all respondents and 59% of respondents with a civil law background) thought that arbitrators should be more interventionist when faced with an under-represented or poorly represented party. A slightly higher percentage (64%) of respondents involved in Investor-State arbitration thought that arbitrators should be more interventionist.

This percentage dropped to 54.6% for arbitrator respondents, which may be suggestive of due process concerns on the part of arbitrators. However, several arbitrator respondents commented that they saw it as part of their duty to assist poorly-represented parties to ensure that key issues are addressed and that they should offer such assistance to ensure confidence in the system. These comments were consistent with respondents' views on where the line should be drawn between appropriate and inappropriate intervention on the part of an arbitrator.

61% **of respondents thought that arbitrators should be more interventionist when faced with an under-represented or poorly represented party.**

What steps do you think it is appropriate for an arbitrator to take when faced with an under-represented or poorly represented party and what steps have you seen applied in practice?

Respondants

- All Respondents
- Arbitrator Respondents
- Respondents involved in Investor-State Arbitration
- Respondents with a civil law background

	Appropriate	Inappropriate	Seen in practice Yes	Seen in practice No
Arbitrator assisting with the formulation of claims and remedies provided this is done in the presence of the other party and in a way that makes it clear that the tribunal is not prejudging the merits of any such claims or remedies.	22.4%	77.6%	20%	80%
	13.2%	86.8%	22.6%	77.4%
	20.5%	79.5%	25.6%	74.4%
	13.9%	86.1%	28.9%	71.1%
Arbitrator indicating at an early stage the extent to which he/she will be involved in investigating the facts and law.	78.6%	21.4%	35.7%	64.3%
	83%	17%	51.9%	48.1%
	66.7%	33.3%	28.2%	71.8%
	86.1%	13.9%	42.1%	57.9%
Arbitrator drawing attention to arguments and points that have not been raised by either party and asking that they be addressed.	73.6%	26.4%	59.8%	40.2%
	77.4%	22.6%	70.4%	29.6%
	60.5%	39.5%	69.2%	30.8%
	82.9%	17.1%	65.8%	34.2%
Arbitrator informing himself/herself as far as he/she can as to the possible grounds of success of a party who is unable to represent itself effectively.	49.6%	50.4%	32%	68%
	38%	62%	35.8%	64.2%
	52.6%	47.4%	35.9%	64.1%
	41.7%	58.3%	44.7%	55.3%
Arbitrator researching matters on own initiative, raising any points discovered with all the parties and inviting them to present arguments on them.	54.4%	45.6%	42.3%	57.7%
	58.5%	41.5%	52.8%	47.2%
	60.5%	39.5%	43.6%	56.4%
	75%	25%	56.8%	43.2%
Arbitrator questioning of witnesses of fact.	84.9%	15.1%	72.4%	27.6%
	96.2%	3.8%	88.9%	11.1%
	84.6%	15.4%	82%	18%
	88.9%	11.1%	81.6%	18.4%
Arbitrator putting points to experts to test their opinion.	92.1%	7.9%	72.4%	27.6%
	98.1%	1.9%	87%	13%
	87.2%	12.8%	79.5%	20.5%
	97.2%	2.8%	78.9%	21.1%

74% of all respondents thought it appropriate for an arbitrator to draw attention to arguments and points that have not been raised by either party and asking that they be addressed.

The role of the courts

> The judgment follows an 8-week hearing by way of trial … Many of these features are highly unusual in the context of the proper limits to the role of the Court where the parties have chosen arbitration."
>
> **Mr Justice Knowles**

The finality of awards and limited grounds of appeal are frequently cited as advantages of arbitration over litigation.
Nevertheless, judicial intervention has its place, particularly when it comes to concerns over the legitimacy of the arbitration process and courts may refuse to enforce an award if to do so would be contrary to public policy.

The application of the public policy exception varies from jurisdiction to jurisdiction as does the approach the courts to the appropriate scope of review. At one end of the spectrum is the minimal review approach where the court will refrain from re-visiting a tribunal's findings of fact and law. At the other end of the spectrum is the maximal review approach where the court may not only review a tribunal's findings of fact and law but also consider new evidence that was not raised before the tribunal.

We asked respondents for their views on the scope of judicial review that should be applied by the courts.

Do you think that the legal framework for challenging an arbitral award should allow for a de novo judicial review in cases where corruption allegations have been argued before the tribunal and dealt with in the award?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
2.3%	25.6%	31%	29.5%	11.6%
27.9%			41.1%	

Do you think that the legal framework for challenging an arbitral award should only allow for a de novo judicial review in cases where corruption allegations are raised for the first time before the court?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
3.1%	25.8%	39.8%	25%	6.3%
28.9%			31.3%	

27.9% of respondents supported de novo judicial review in cases where corruption allegations have been argued before the tribunal and dealt with in the award. Only 28.9% of respondents thought that de novo judicial review should only be allowed in cases where corruption allegations are raised for the first time before the court.

Overall responses were fairly evenly split on both questions and over 30% of respondents adopted a neutral position in response to both questions. The responses are indicative of the complexity of this issue and, as one respondent commented, much depends on the context in which corruption allegations are raised, making it difficult to prescribe an appropriate standard of review in all cases.

Guidelines for arbitrators

In May 2019, the Basel Institute on Governance published Guidelines on Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators.

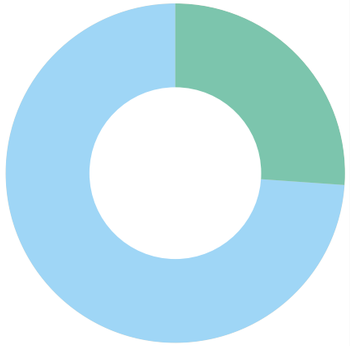
The toolkit is designed to help arbitrators who suspect, or are confronted with, alleged corruption or money laundering in relation to the underlying dispute to address the issues systematically and find a solution in accordance with the applicable laws. The rationale for the development of the toolkit was that an arbitral award rendered by an arbitral tribunal using the toolkit should have a greater chance of enforcement.

The International Chamber of Commerce's anti-corruption task force is also exploring existing approaches to allegations or signs of corruption in disputes in order to produce guidance for arbitral tribunals on how to deal with such occurrences. Responses from arbitral institutions to the matters raised at the second reading of the Arbitration Bill also reference work underway within arbitral institutions to review and update training, codes of conduct, and toolkits to help arbitrators deal with allegations or signs of corruption in arbitration.

We asked respondents whether they were aware of the Basel Toolkit for Arbitrators and whether they had experience of it being used in practice. We also asked respondents whether they thought additional guidelines were needed and, if so, who should take the lead in producing them.

Are you aware of the Basel Toolkit for Arbitrators?

All respondents



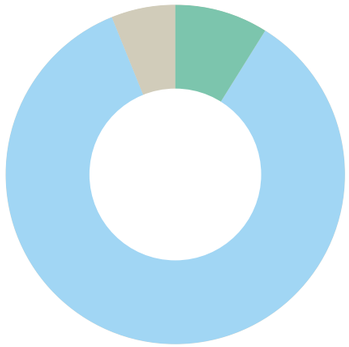
Yes	26.2%
No	73.8%

Arbitrator respondents

Yes	36.4%
No	63.6%

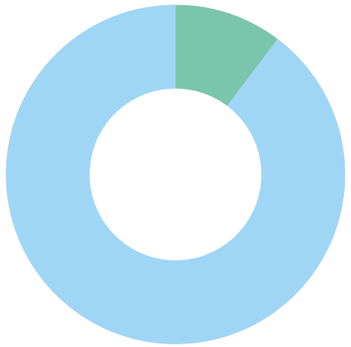
Have you been involved with an arbitration in which the Basel Toolkit for Arbitrators has been used?

All respondents*



Yes	9.1%
No	84.8%
Don't know	6.1%

Arbitrator respondents**



Yes	10.5%
No	89.5%

* 33 responses
** 19 responses

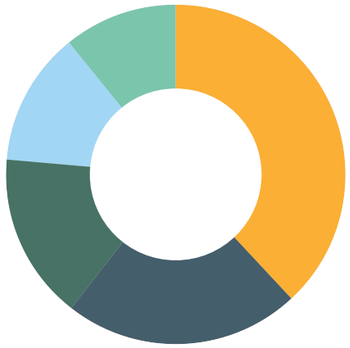
Do you think that the arbitration process would benefit from additional best practice guidelines for the conduct of arbitrations involving allegations of corruption?

Respondants

- All Respondents
- Arbitrator Respondents
- Respondents involved in Investor-State Arbitration
- Respondents with a civil law background

Yes	No	Don't know
72.3%	11.5%	16.2%
70.9%	16.4%	12.7%
79.5%	15.4%	5.1%
74.4%	10.2%	15.4%

Who should take the lead in producing them?



IBA	45.6%
Arbitral Institutions	26.6%
UNCITRAL	19%
CIArb	15.2%
Combined response from all stakeholders	12.7%

A freetext box allowed multiple responses so percentages don't add up to 100.

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