International Dispute Resolution Survey: Currents of Change 2019 Preliminary Report

SMU
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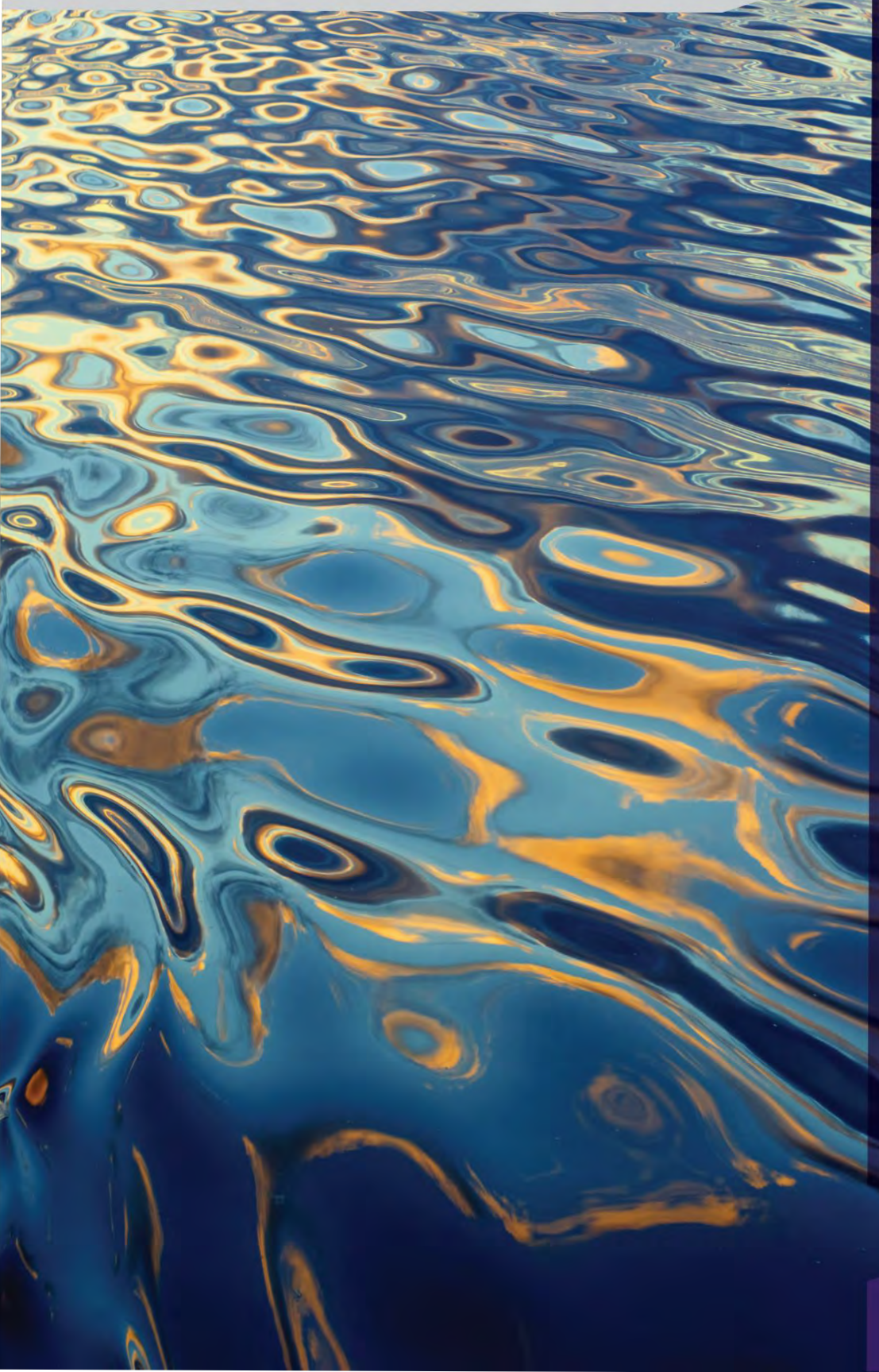
SINGAPORE INTERNATIONAL DISPUTE RESOLUTION ACADEMY



SCHOOL OF LAW

International Dispute Resolution Survey: Currents of Change
2019 Preliminary Report

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The Singapore International Dispute Resolution Academy is Asia's global thought-leader for learning and research in dispute resolution. A research centre at the Singapore Management University School of Law, SIDRA is committed to providing world-class research and development, learning tools, and capacity building for dispute resolution providers, practitioners, and users in Asia and around the world.

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Foreword

Dear Reader:

I am delighted to present to you the preliminary findings of SIDRA's inaugural International Dispute Resolution Survey, which has been commissioned by the Singapore Ministry of Law.

In a world increasingly characterised by unpredictability, complexity and ambiguity, we at SIDRA wanted to learn more about how businesses are making decisions about resolving cross-border disputes, and why. This led to the development of a major international survey, the initial results of which are contained in the pages that follow.

There are five aspects of the SIDRA survey that make it unique.

First, it is 100% user-centric. All respondents are users and they are identified either as external legal counsel or corporate users (executives or corporate counsel) that engage in cross-border trade. Views of neutrals, academics, institutional providers and other non-user stakeholders are not represented in this survey and so the data really speaks for the users.

Second, the views are based on user experiences and not just preferences. Once respondents indicated that they had used a particular dispute resolution process, they were then asked to respond to a series of specific questions in relation to that mechanism. If they did not have experience with a particular process, the survey directed them to next process category.

Third, the survey focuses on dispute resolution mechanisms for cross-border disputes only, and not for domestic disputes. International dispute resolution involves different considerations compared to dispute resolution in the domestic setting and we did not want to confuse the two.

Fourth, the survey has been distributed internationally in all six official UN languages: Arabic, Chinese, English, French, Spanish, and Russian with the help of the survey administrators, PWC South East Asia Consulting. In this way we wanted to reach a more diverse selection of users compared to those who primarily work in English.

Finally, we felt it was necessary to avoid examining any single dispute resolution mechanism in isolation. Dispute resolution developments are increasingly interconnected as the emergence of hybrid dispute resolution and (international) court referrals to mediation show.

In 2019 the world of international dispute resolution is at its turning point. Whether we are talking about arbitration, mediation or litigation, international dispute resolution systems are evolving rapidly. Think of the recent emergence of international commercial courts in ascendant global cities like Dubai and Singapore, the new UNCITRAL spotlight on reforming investment arbitration, the United Nation's adoption of the Singapore Convention on Mediation, and the advancement of technology to support online dispute resolution.

Indeed, wherever we look, currents of change are emerging. The inaugural SIDRA survey puts forward a user perspective on these changes and how they may shape the future of international dispute resolution.

Professor Nadja Alexander
Professor & Director
Singapore International Dispute Resolution Academy

Executive Summary

The **2019 International Dispute Resolution Survey: Currents of Change Preliminary Report** presents the first-look findings of the **Singapore International Dispute Resolution Academy's** groundbreaking examination into the preferences, practices, and perspectives of international dispute resolution users around the globe. These findings examine three international dispute resolution mechanisms: International Commercial Arbitration, International Commercial Mediation, and International Commercial Litigation. The report summarises findings from each mechanism in turn and provides an overview of the results, then explores key trends drawn from the data identifying currents of change drawing international dispute resolution into the third decade of the 21st century.

Key Findings

International Commercial Arbitration

- International commercial arbitration remains the most-used form of international dispute resolution, and was used by 74% of respondents between 2016 and 2018.
- International commercial arbitration remained the dispute resolution mechanism of choice even as users were dissatisfied with the costs of arbitration, as factors such as enforceability and finality outweigh costs in the respondents' choice of arbitration.
- Users are taking a balanced approach to increasing transparency in international commercial arbitration.

International Commercial Mediation

- In selecting international commercial mediation, more than 80% of users indicated impartiality/neutrality, speed, and confidentiality as 'absolutely crucial' or 'important' factors influencing their choice of process.
- International commercial mediation users did not rank enforceability very highly on their list of reasons to mediate. This may reflect the current lack of an internationally recognised expedited enforcement mechanism. The Singapore Convention on Mediation offers expedited enforceability mechanisms for mediated settlement agreements, and may attract current users of litigation and arbitration who value enforceability more.
- When choosing mediators, the qualities of having 'good ethics' and 'dispute resolution experience' were most frequently rated as 'absolutely crucial' by users. New regulatory developments such as the Singapore Convention on Mediation place the spotlight on professional standards for mediation practice and are congruent with users' priorities.
- Corporate users were more likely to recognise certain technologies as 'extremely useful' or 'useful' compared to lawyers.

International Commercial Litigation

- More than 80% of international commercial litigation users consider enforceability, clarity in rules, impartiality and neutrality as 'important' or 'absolutely crucial', when deciding to take a dispute to litigation.
- The (lack of) speed of litigation was the greatest source of dissatisfaction with litigation.
- In the choice of courts, more than 80% of respondents have indicated that efficiency is 'important' or 'absolutely crucial' in their consideration, but only 45% were satisfied.
- International commercial courts have an opportunity to enhance efficiency to increase its attractiveness as a dispute resolution forum.

Hybrid Dispute Resolution Mechanisms

- Users considered hybrids most useful where preserving parties' business relationship is important and where costs and efficiency are critical process choice considerations.

Investor-State Dispute Resolution

- The top three factors influencing choice of dispute resolution mechanism are enforceability, impartiality, and political sensitivity.
- Corporate users were less satisfied with dispute resolution outcomes compared to lawyers.

Approach and Design

In this survey we targeted responses from external counsel and corporate users (business executives and counsel) who had been involved in international commercial disputes from 2016 to 2018. The survey was disseminated globally from January to July 2019, using PWC's global networks, with assistance from SIDRA. For this preliminary report, we used the dataset as it stood in July 2019 with 304 respondents.

The survey was designed with 'user-centric' questions to hone in on lawyers' and corporate users' actual decision-making processes in relation to the use of international arbitration, mediation and litigation.

Preliminary data analysis covers summary statistics and disaggregates responses in two ways:

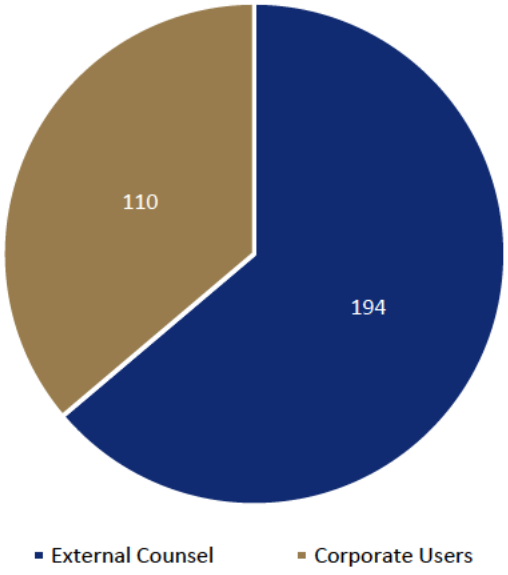
- Corporate (Executives) vs Lawyer (External Counsel) responses; and
- By dispute resolution mechanism (International Commercial Arbitration; International Commercial Mediation, International Commercial Litigation).

The report discusses trends and observations in two topical areas:

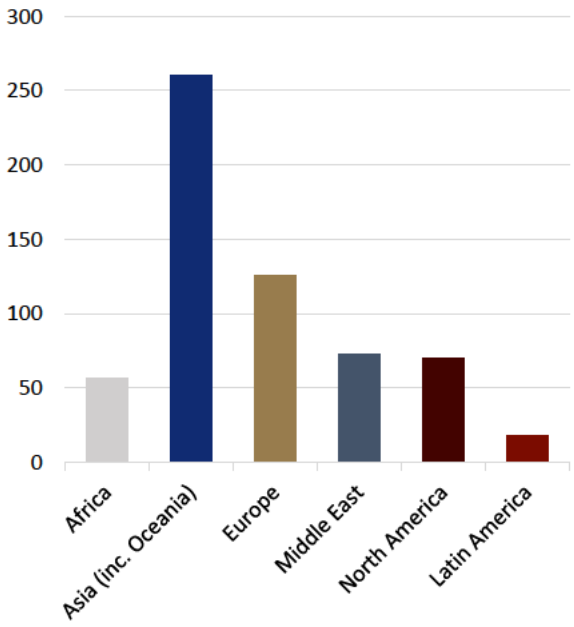
- Hybrid mechanisms; and
- Investor-State disputes.

Respondent Profile

Users are distributed between external counsel ('lawyers') and corporate users ('corporates')

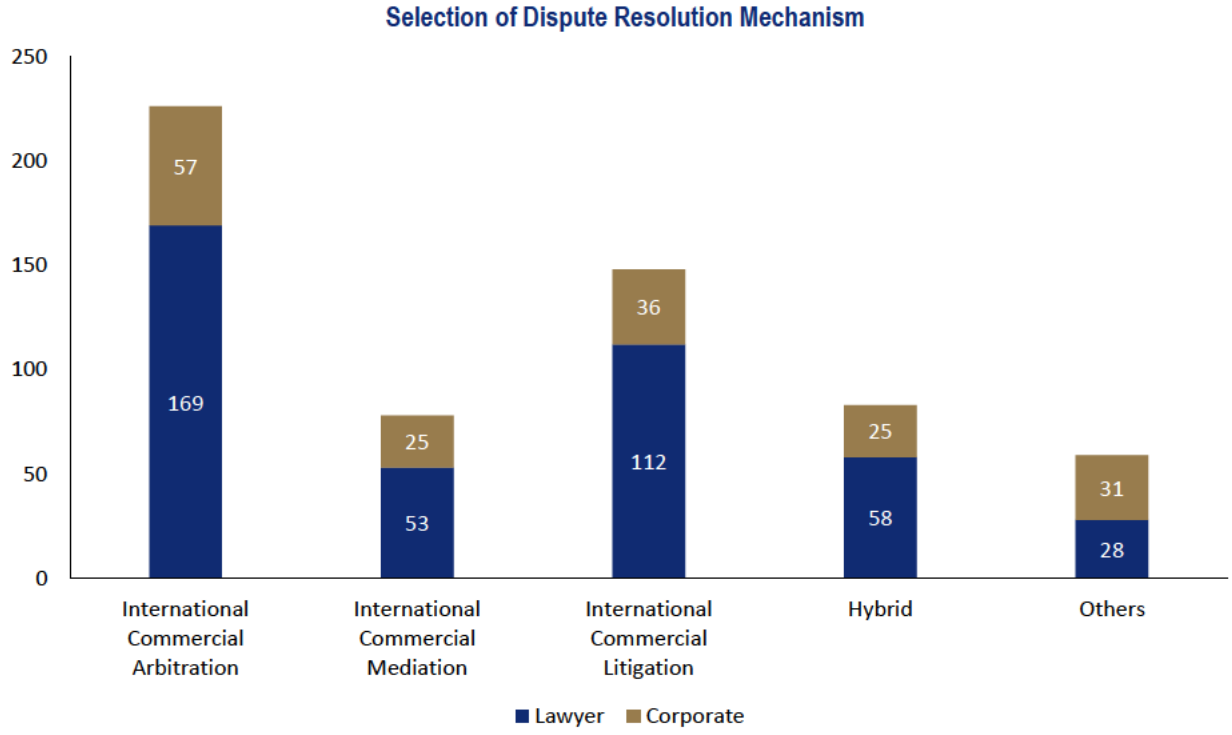


Respondents operate in all regions of the world, with the majority having operations in Asia

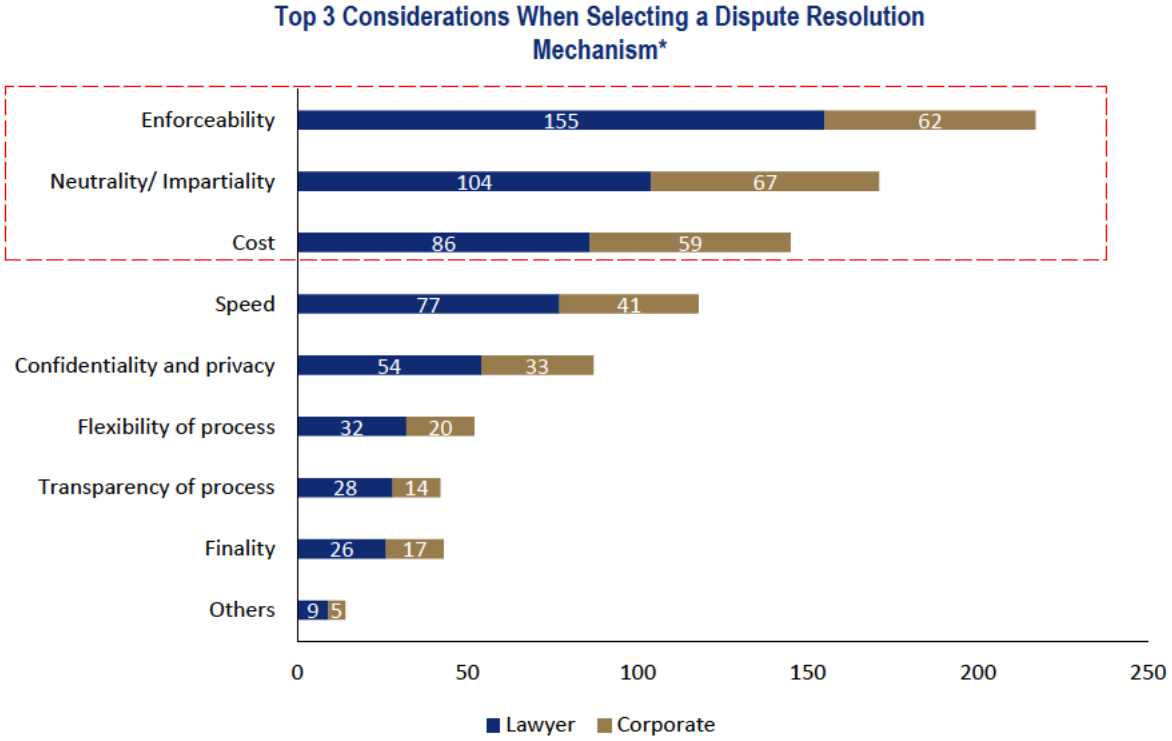


Choice of Dispute Resolution Mechanism

International commercial arbitration remained the dispute resolution mechanism of choice by a large majority of respondents, and was used by 74% of the respondents between 2016 and 2018. This was followed by international commercial litigation (49%), hybrid mechanisms involving arbitration and mediation (27%) and international commercial mediation (26%).



In choosing the dispute resolution mechanism, survey participants ranked enforceability (71%), neutrality/impartiality (56%), and cost (48%) as the top three most important considerations behind their choice.



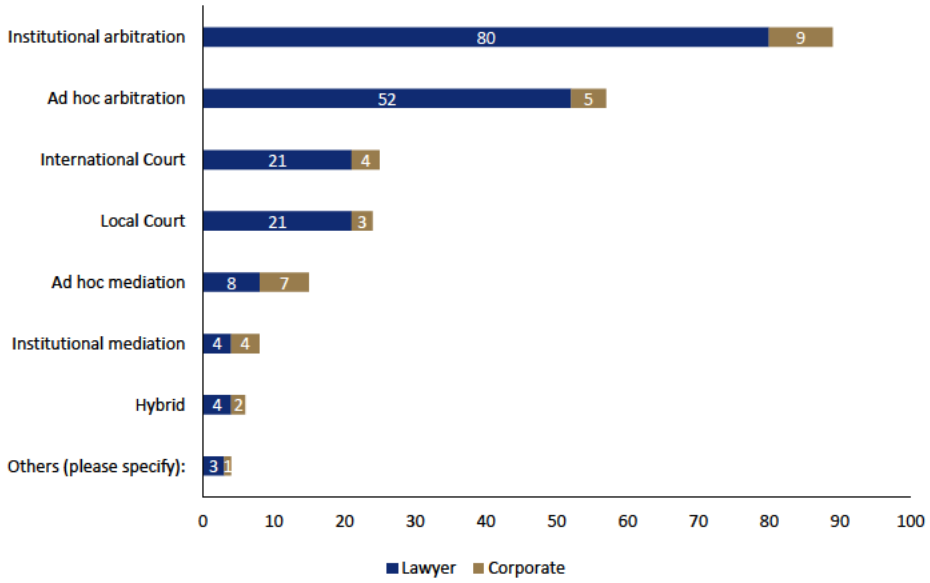
*Respondents who ranked the factor as one of their top three considerations when selecting a dispute resolution mechanism.

Investor-State Dispute Resolution

Almost half of the lawyers who responded to our survey indicated they had been involved in investor-State or multi-lateral investment disputes from 2016 to 2018.

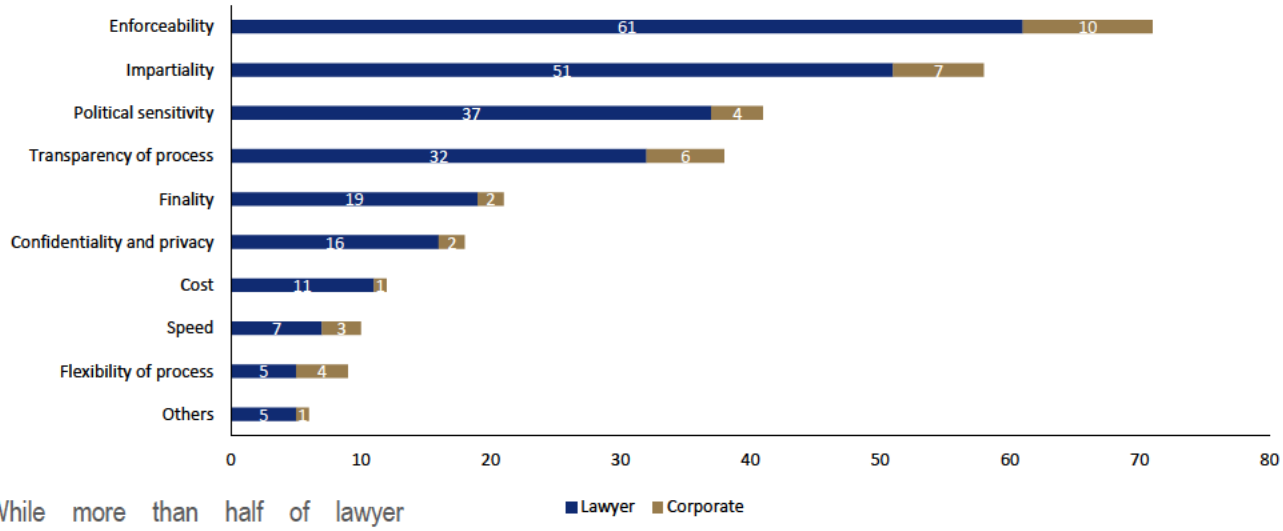
The most used dispute resolution mechanism for investor-State disputes was institutional arbitration followed by ad hoc arbitration. International and local courts were next in line, followed by mediation and the least used dispute resolution mechanism was hybrid processes. Ad hoc mediation was more frequently used compared to institutional mediation. This suggests a preference for the use of mediation post-dispute, when the need arises.

Most Commonly-Used Mechanisms in Investor-State Disputes



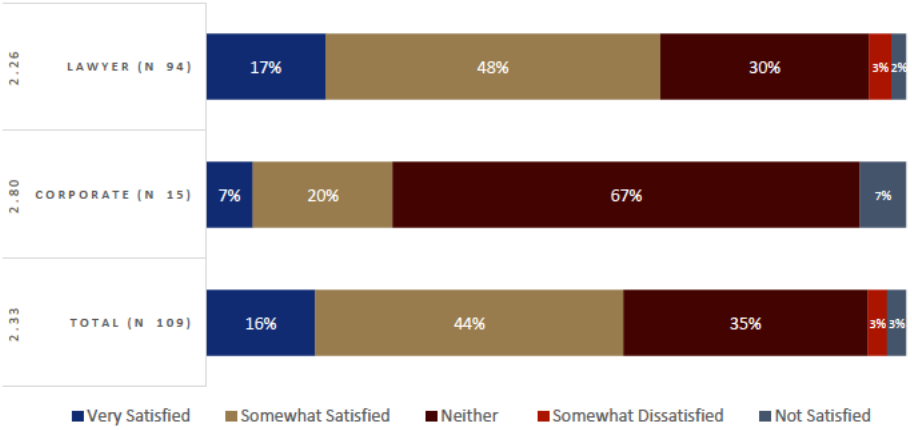
In selecting a dispute resolution mechanism for investor-State disputes, the top three influencing factors were 'enforceability', 'impartiality' and 'political sensitivity', followed closely by 'transparency of process'.

Considerations Behind Selection of Dispute Resolution Mechanism



While more than half of lawyer respondents (65%) indicated satisfaction with enforcement of outcomes in investor-State dispute resolution, the percentage was much less for corporate respondents with only 27% indicating that they were either very satisfied or somewhat satisfied. This suggests that corporate users, in particular, may well be open to selecting dispute resolution mechanisms other than arbitration. These findings reflect the need for reform in this area and align with current initiatives by UNCITRAL and other bodies.

Satisfaction with Enforcement of Outcomes

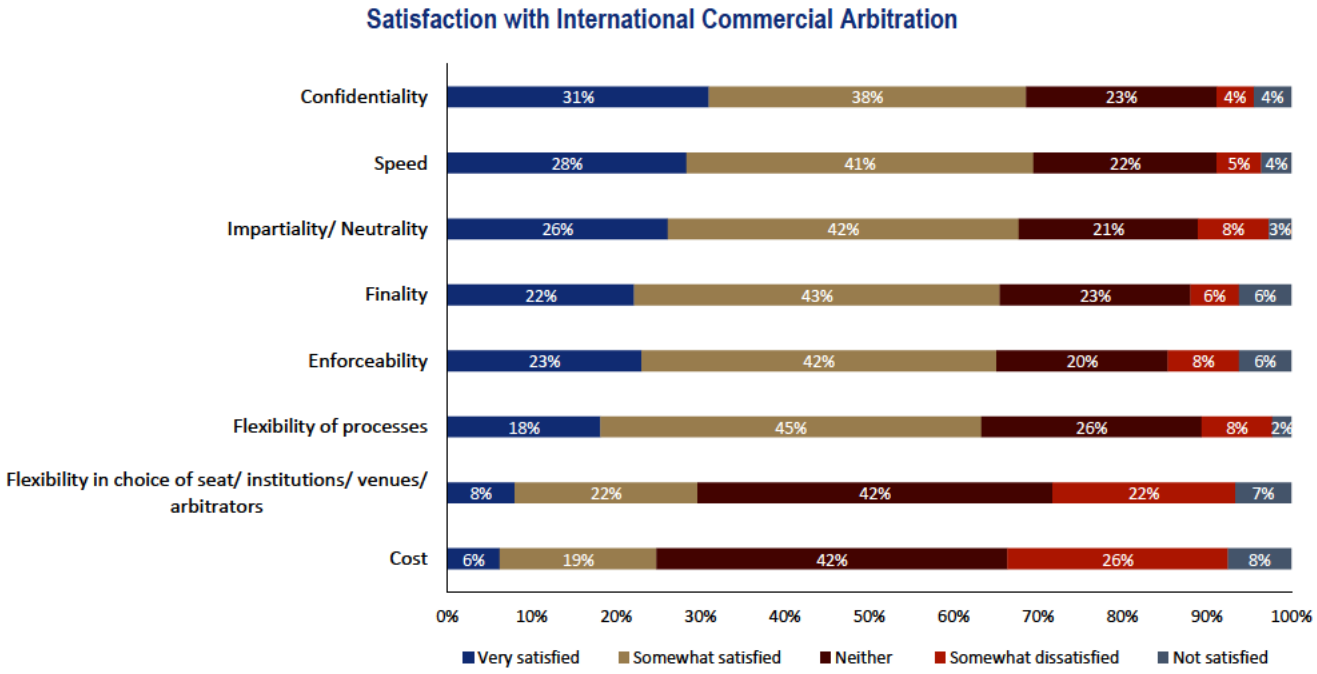


International Commercial Arbitration

At a Glance:

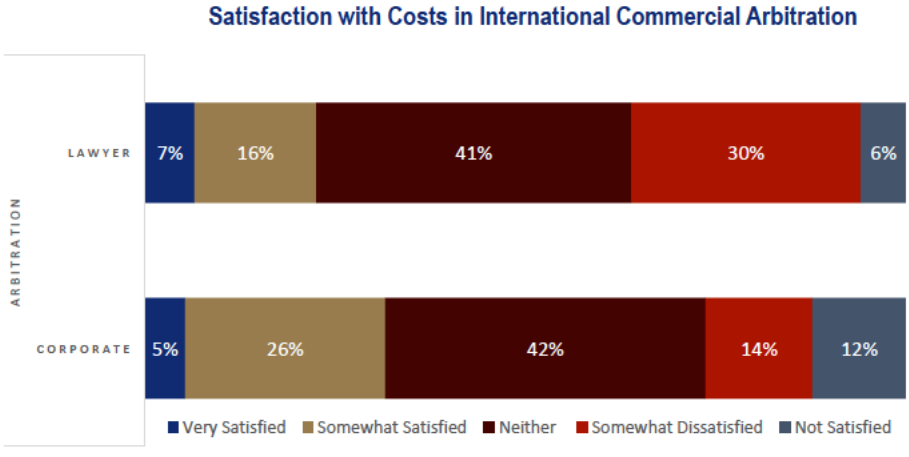
- International commercial arbitration remains the most-used form of international dispute resolution, and was used by 74% of respondents between 2016 and 2018.
- Arbitration remained the dispute resolution mechanism of choice even as users were dissatisfied with the costs of arbitration, as factors such as enforceability and finality outweigh costs in the respondents' choice of arbitration.
- Users are taking a balanced approach to increasing transparency in international commercial arbitration.

International commercial arbitration continues to dominate the field of international dispute resolution. With the robust and nearly universal framework for enforcement afforded by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') which was adopted in 1958 and currently has 160 signatories, international commercial arbitration enjoys widespread success and the perception of international commercial arbitration from the user perspective remains strong. About 65% of arbitration users were 'very satisfied' or 'somewhat satisfied' with the mechanism's enforceability, and about 68% of users were 'very satisfied' or 'somewhat satisfied' with neutrality/impartiality. Confidentiality, speed, and finality also earned satisfactory marks from respondents.



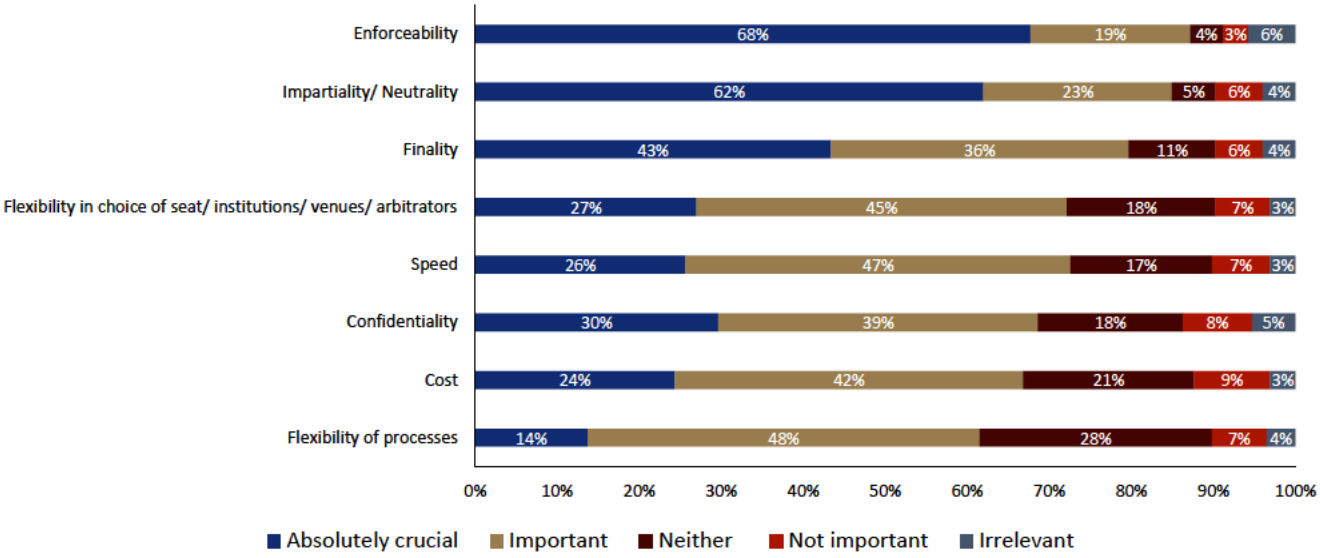
Dissatisfaction with costs

On costs, international commercial arbitration faces less favorable reviews. While 64% of disputes lawyers and 76% of corporate users indicated that cost was either an 'absolutely crucial' or 'important' consideration in selecting arbitration as a dispute resolution mechanism, only 23% of disputes lawyers and 33% of corporate users were 'very satisfied' or 'somewhat satisfied' with the cost of arbitration.



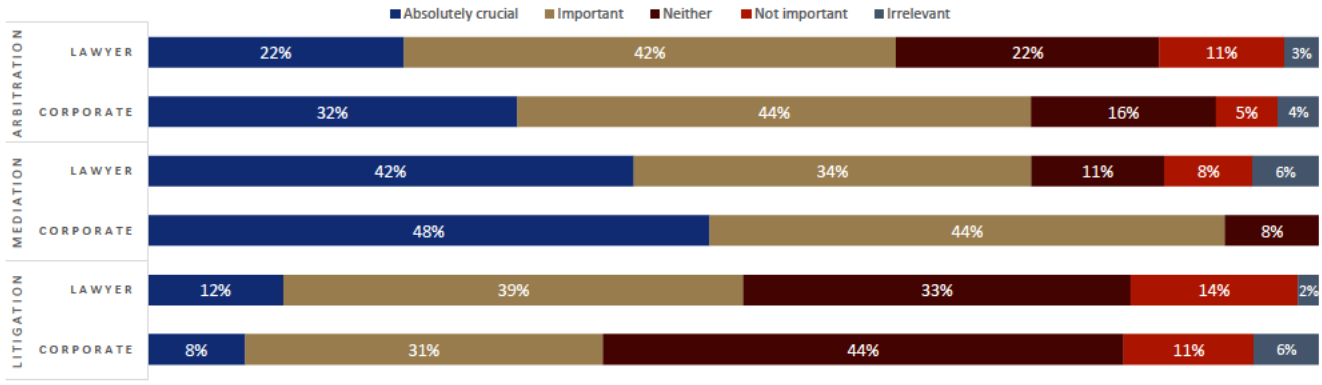
The discrepancy between the users' expectation and experience with respect to cost appear incongruous with arbitration's popularity at first glance, as dispute resolution users had identified cost as the third most important consideration behind their choice of dispute resolution mechanism. However, a closer examination suggests that when choosing *arbitration specifically*, costs were much less of a consideration when compared to other factors, such as enforceability and finality. These results may demonstrate that satisfaction with the enforceability and finality of arbitration awards ultimately overrides dissatisfaction with its associated costs.

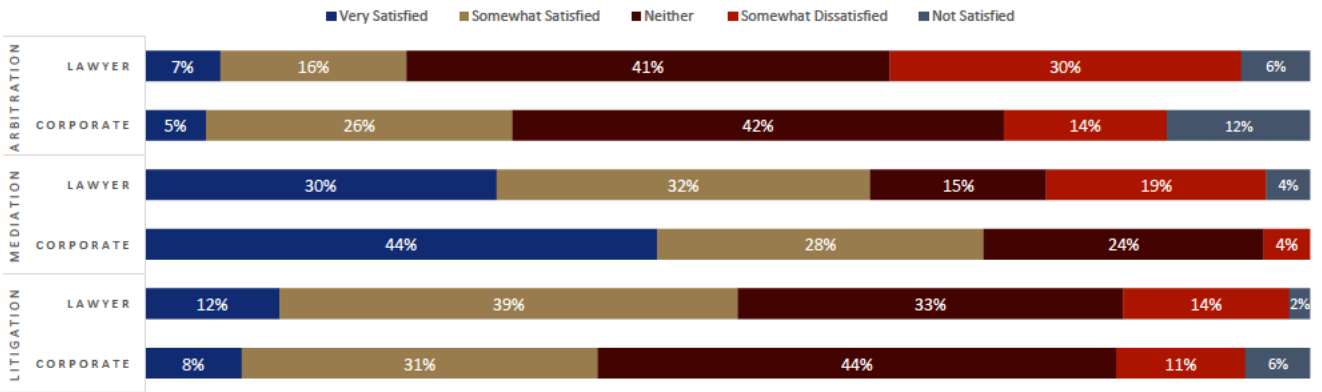
Considerations in Selection of Arbitration



Across dispute resolution mechanisms, cost considerations vary compared to arbitration alone. Compared to arbitration users, mediation users generally considered costs to be more important, and were also more satisfied with it, which may suggest that mediation could be the dispute resolution mechanism of choice for more cost conscious users.

Importance vs Satisfaction with Costs Across Dispute Resolution Mechanisms





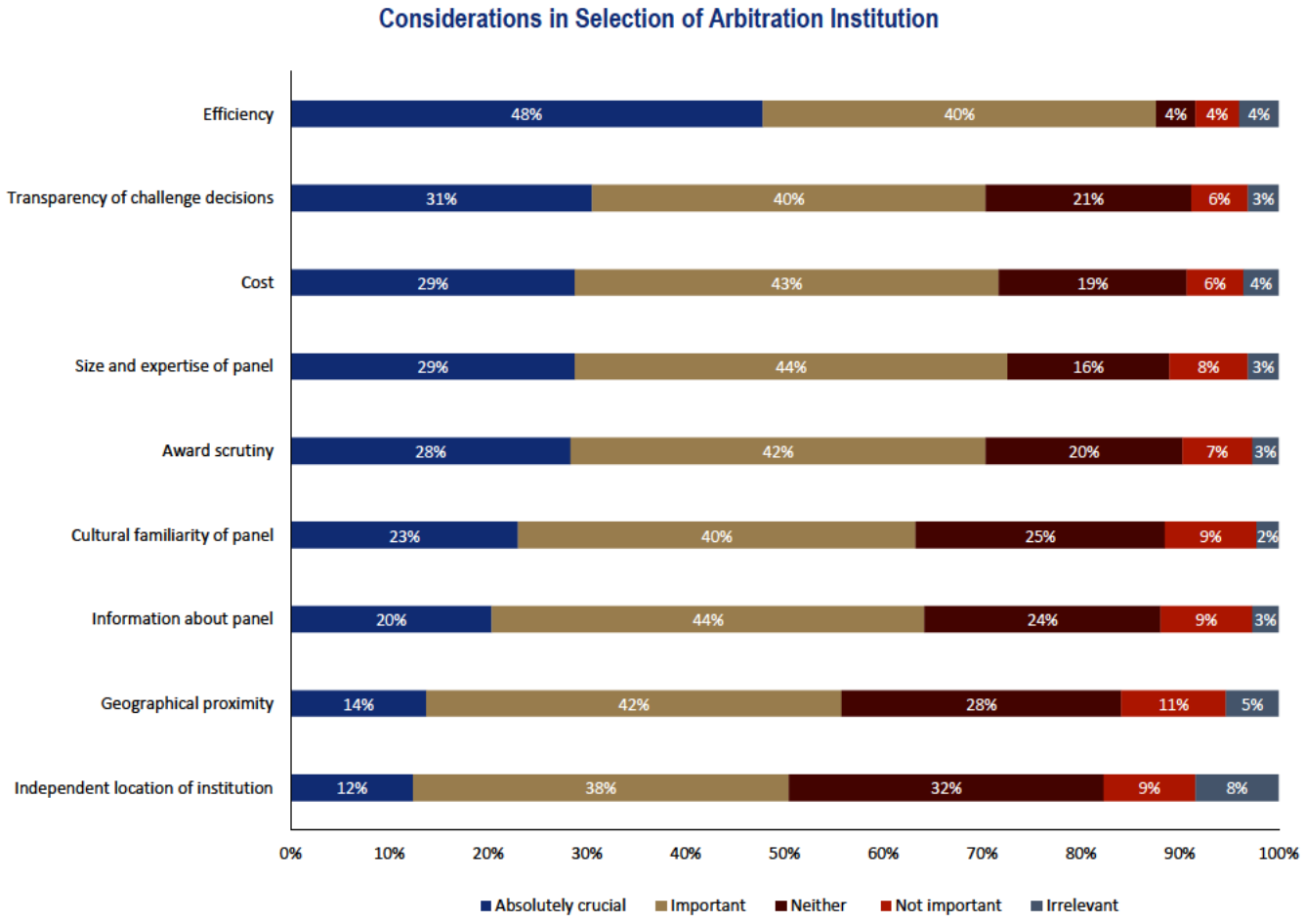
International Commercial Arbitration
Key Findings

Users taking a balanced approach to calls for greater transparency

A recent trend in international commercial arbitration tracks the increase in calls for greater transparency into institutional procedures, challenge decisions, and arbitrator records. Such calls have been met on one hand with measures taken by commercial arbitration institutions to open up certain aspects of arbitral proceedings, and on the other hand with responses from the legal community urging institutions to avoid reactionary measures.

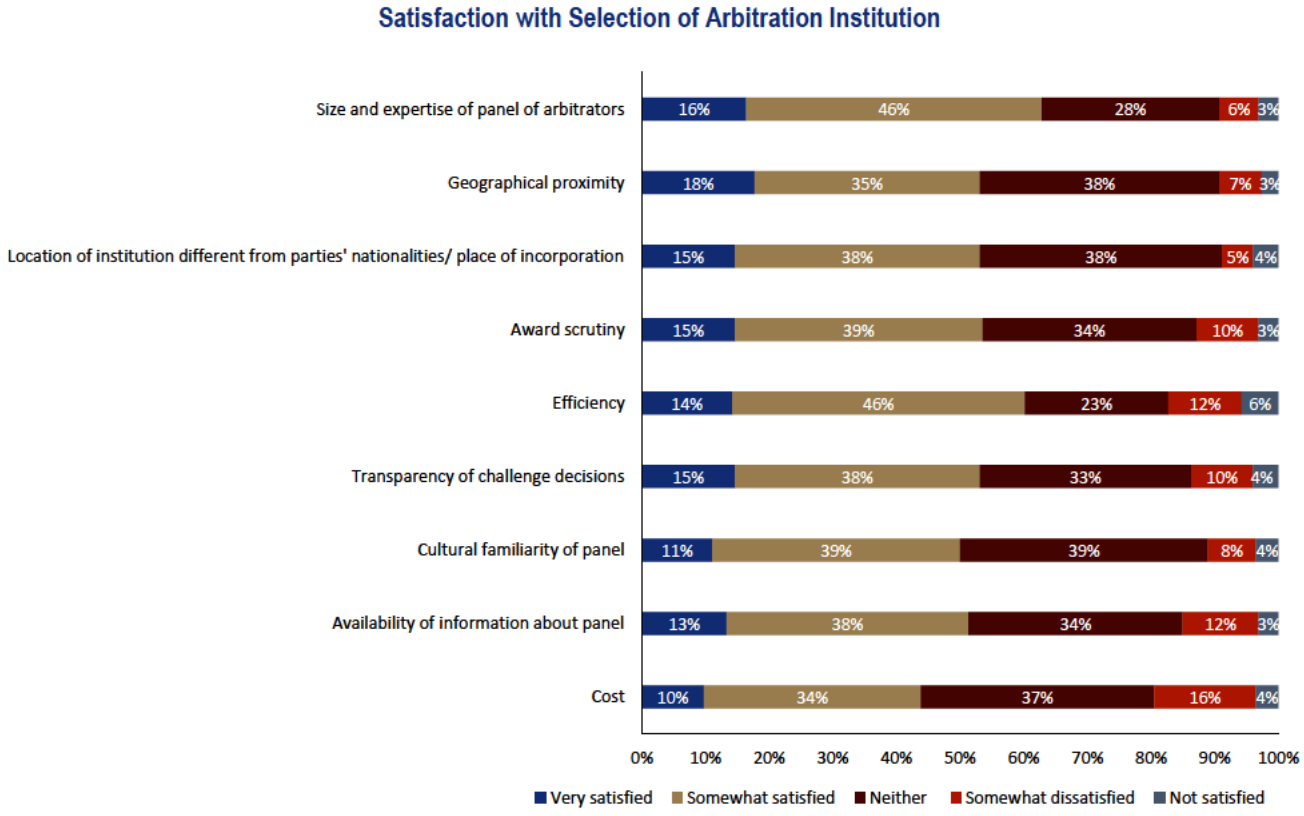
In the first instance, for example, some institutions have begun listing arbitrator appointments and roles, and publishing reports detailing average case length and costs, size of disputes, allocation of fees, and the number of women arbitrators appointed. Going further, a handful of institutions have begun publishing case summaries or award extracts. The International Chamber of Commerce has begun publishing awards made as of January 2019, provided that parties are given an opportunity to object to its publication or request psuedonymisation and subject to any confidentiality agreements between the parties. Other institutions provide rules under which parties may opt out of publication of their award, or under which express consent by the parties to publish the award is required, as in the case of the SIAC Arbitration Rules. In the second instance, legal scholars who appear open to increasing transparency in investment arbitration have signaled resistance to increased transparency in commercial arbitration without also preserving confidentiality for parties who prioritise private commercial dealings.

Respondents to our survey confirmed this trend in international arbitration. While a significant majority (69%) of respondents indicated that 'confidentiality' was 'absolutely crucial' or 'important' to their decision to use arbitration, a slightly greater majority (71%) indicated that 'transparency of challenge decisions' of arbitrators was either 'absolutely critical' or 'important' to their choice of ***arbitration institution***. The same percentage of respondents ranked 'award scrutiny' as 'absolutely critical' or 'important', and another 64% indicated that they considered 'availability of information about the panel' as 'absolutely critical' or 'important' to their choice of arbitration institution.



When ranking their satisfaction with these elements of arbitration institutions, respondents gave more measured reviews. An average of 54% of respondents were 'somewhat satisfied' or 'very satisfied' with award scrutiny, transparency of challenge decisions, and availability of information about the panel. But, a sizeable portion (an average of about 33%) of users also indicated that they were 'neither satisfied nor dissatisfied' with these factors, which may demonstrate that in many cases access to such information did not impact users' experience.

These results suggest a balanced approach in the industry to transparency and confidentiality, which are often seen as opposing values but which in fact need not be mutually exclusive, is required. Our users seem to indicate that they wish to have both at their disposal. If this is the case, then the various institutional approaches to transparency provide an avenue for party autonomy for international commercial arbitration users who are seeking a set of rules which strikes the balance most appropriate for their dispute. We predict that this natural evolution will ultimately benefit the industry.

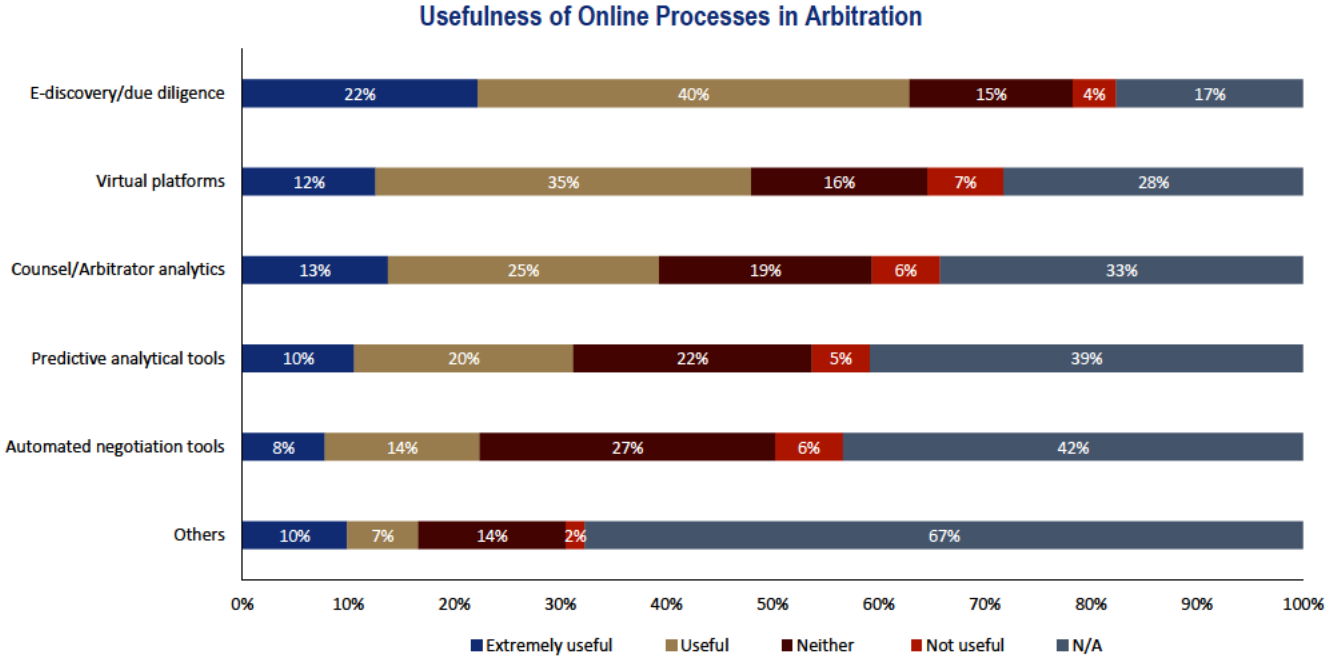


Opening up to online processes

A greater number of firms are turning to automated and online processes to assist in the dispute resolution process, and more arbitral institutions are following suit. Powerful document review software has been an industry standard for quite some time, and now technologies such as videoconferencing, virtual meeting rooms, and e-settlement tools are becoming commonplace features in the dispute resolution landscape. As the volume of data and information in complex arbitration cases grows, the demand for more efficient means of conducting arbitrations has led providers and users to turn to online and technology-assisted methods with greater frequency. Some rules, for example, explicitly require the arbitral tribunal to consider the effective use of technology to avoid expense and delay.

There are also inherent challenges to the incorporation of technological solutions to the arbitration process. First, lawyers need to be capable of understanding and using these tools effectively. Moreover, they need to have access to tools which are cost-effective for the size of the dispute they are managing. Furthermore, there are attendant security, privacy, and data protection concerns when processes are taken online or utilise cloud-based storage and document production systems. The ethical dilemma of AI-driven dispute resolution versus a human-centric approach has been most consistently cited as a challenge to advancing online solutions and processes. While current technological applications in international commercial arbitration do not go so far as delegating analysis of merits or drafting of awards to algorithms, such potential developments are within the scope of possibility in the future.

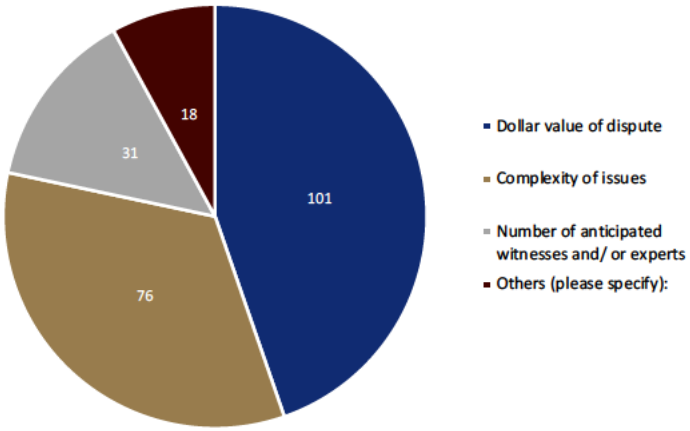
Our survey respondents indicated that technologies such as e-discovery/due diligence tools (62%) and platforms for the conduct of virtual/online hearings (45%) were considered useful to the international commercial arbitration process.



In comparison, fewer respondents found automated negotiation support tools (22%), analytics for the appointment of arbitrators or counsel (38%), and predictive analytical tools (30%), to be useful. Many respondents were also unfamiliar with these tools: they indicated unfamiliarity with e-negotiation tools (42%), appointment analytics (33%) and predictive analytics (39%).

When asked which factors would most likely increase the likelihood of using a wholly online (documents only) international commercial arbitration platform, respondents indicated that the dollar value of the dispute would be the most dispositive to their decision. Respondents also cited other practical reasons such as convenience to the parties, the unavailability of witnesses to attend proceedings in person, and the number of different countries connected with the dispute.

Factors Likely to Increase Use of Online Processes



Other Factors:

'Convenience to parties'
'Ease of use'
'Confidence in security systems'
'Enforceability'
'Convenience for filing forms'

The results of our survey suggest that technological solutions which have deeper market penetration in international commercial arbitration such as e-discovery and online (including, for example, Skype-assisted) hearings also enjoy greater support among lawyers and corporate users. Therefore, it may simply be a matter of time before other technologies such as automated negotiation and predictive analytics become more familiar and commonplace tools in the international commercial arbitration toolbox. It also remains to be seen how users will respond as online processes become more readily available at various international commercial arbitration institutions and attendant issues arise. In traditional international arbitration the choice of seat and the location of arbitration do not necessarily need to coincide; for instance, parties and the tribunal need not be physically located at the seat of arbitration when it is being conducted. This dynamic is even more pronounced in online procedures. As the trend towards online processes for arbitration develops, users will need to be cognizant of potential conflicts in their express choices of seat, forum and law; mandatory laws could override defective express choices.

International Commercial Mediation

At a Glance:

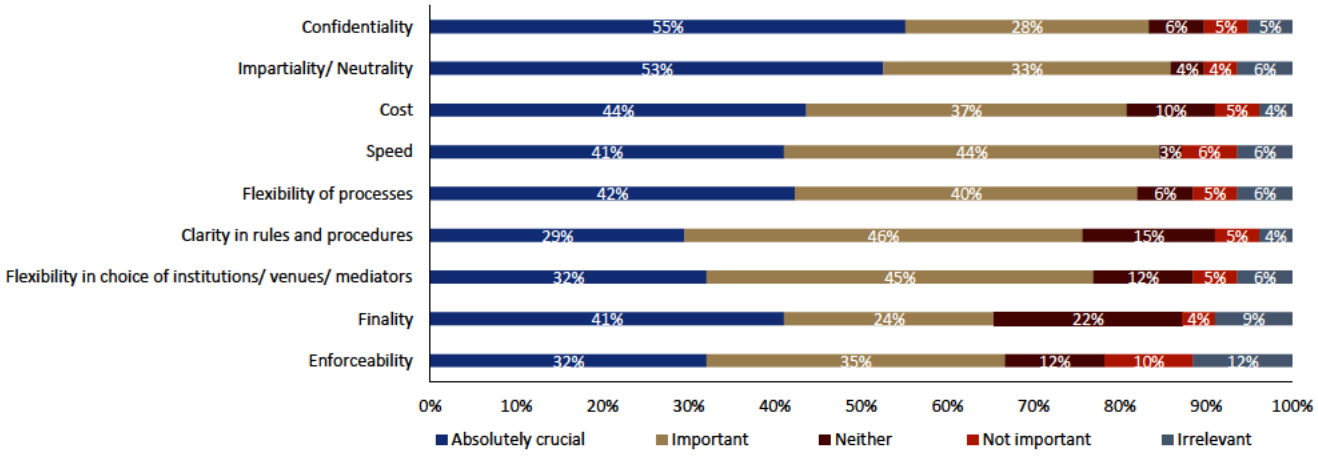
- In selecting international commercial mediation, more than 80% of users indicated impartiality/neutrality, speed, and confidentiality as 'absolutely crucial' or 'important' factors influencing their choice of process.
- International commercial mediation users did not rank enforceability very highly on their list of reasons to mediate. This may reflect the current lack of an internationally recognised expedited enforcement mechanism. The Singapore Convention on Mediation offers expedited enforceability mechanisms for mediated settlement agreements, and may attract current users of litigation and arbitration who value enforceability more.
- When choosing mediators, the qualities of having 'good ethics' and 'dispute resolution experience' were most frequently rated as 'absolutely crucial' by users. New regulatory developments such as the Singapore Convention on Mediation place the spotlight on professional standards for mediation practice and are congruent with users' priorities.
- Corporates were more likely to recognise specific technologies as 'extremely useful' or 'useful' compared to lawyers.

Factors influencing selection of mediation

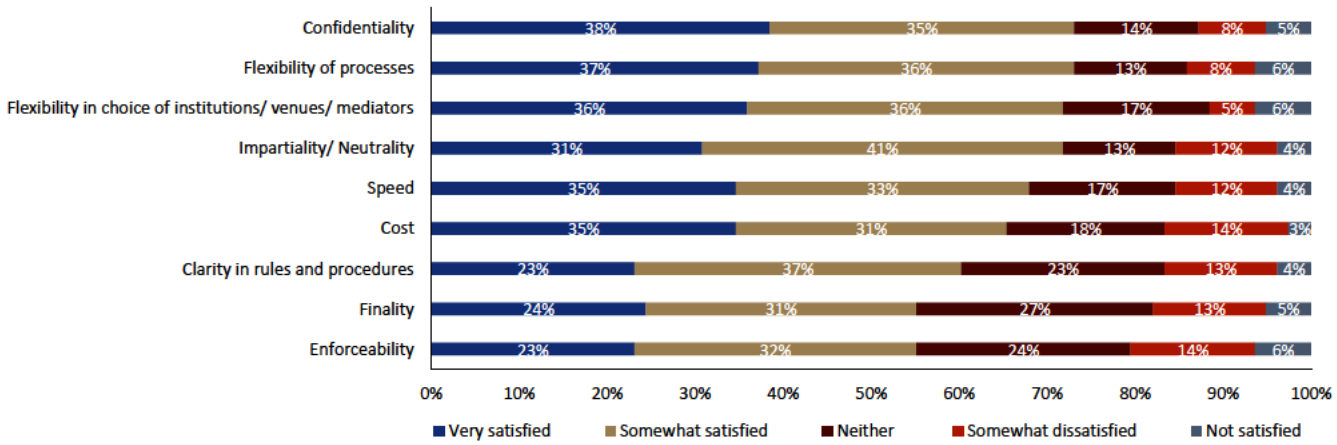
Mediation was the least-used process between 2016 and 2018, although when mediation within hybrids is taken into account, the number of mediations increases considerably. While still trailing arbitration, the use of hybrids brings mediation much closer to litigation in terms of usage.

In selecting mediation, users indicated impartiality/neutrality (86%), speed (85%), and confidentiality (83%) as 'absolutely crucial' or 'important' factors influencing their choice of process. Users were generally satisfied with the respective characteristics of mediation, including its cost.

Considerations for Selection of Mediation as Dispute Resolution Mechanism

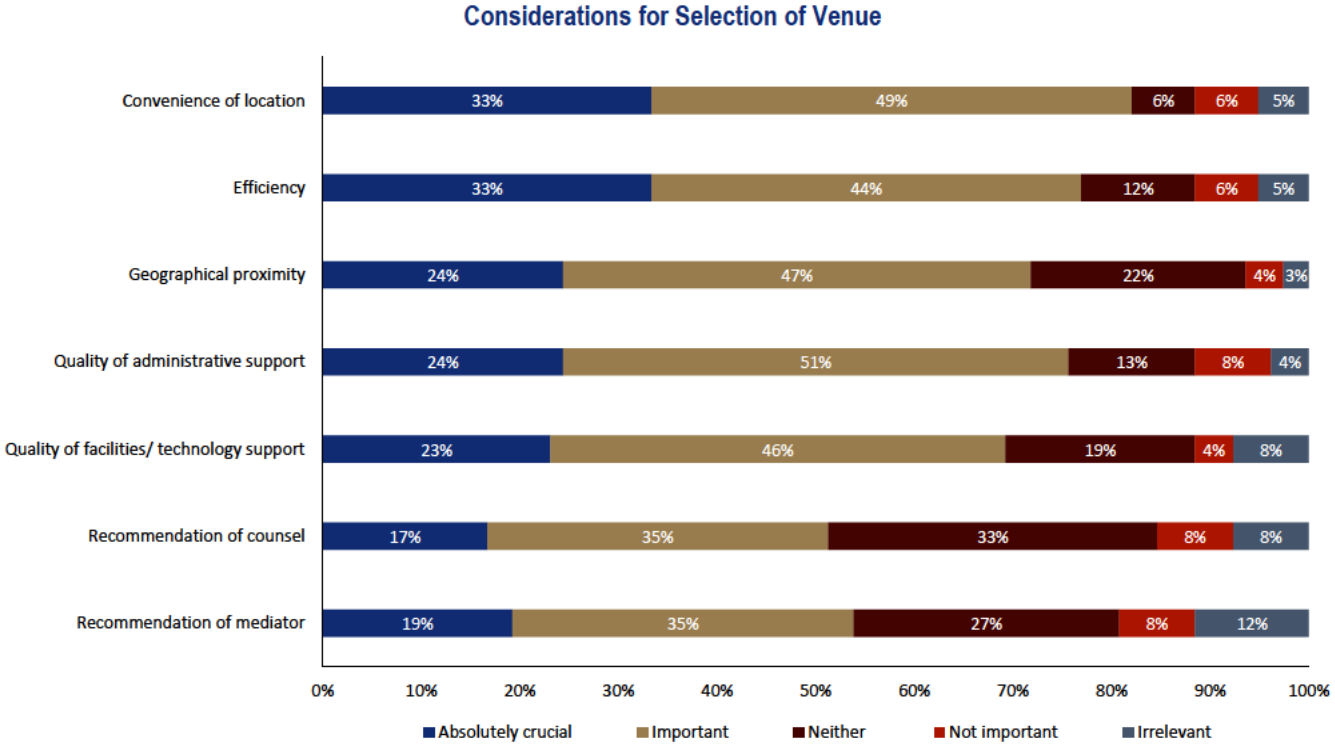


Satisfaction with Selection of Mediation

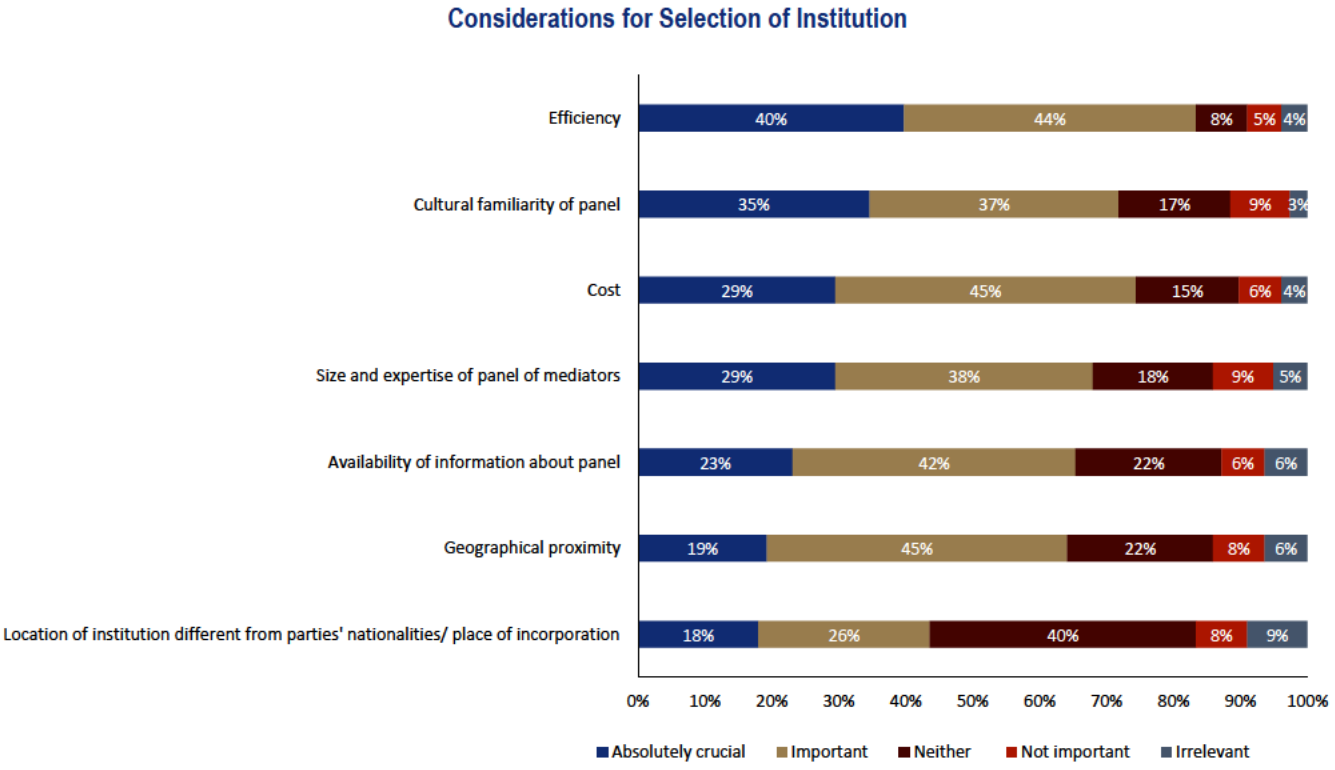


Choice of mediation venue and institution

The main factors behind the choice of mediation venue (ranked as 'absolutely crucial' or 'important') included convenience of location (82%) geographical proximity (71%), efficiency (77%), quality of administrative support (75%), and technology support and facilities (69%). The user experience suggests that respondents' expectations were largely met in relation to these factors.

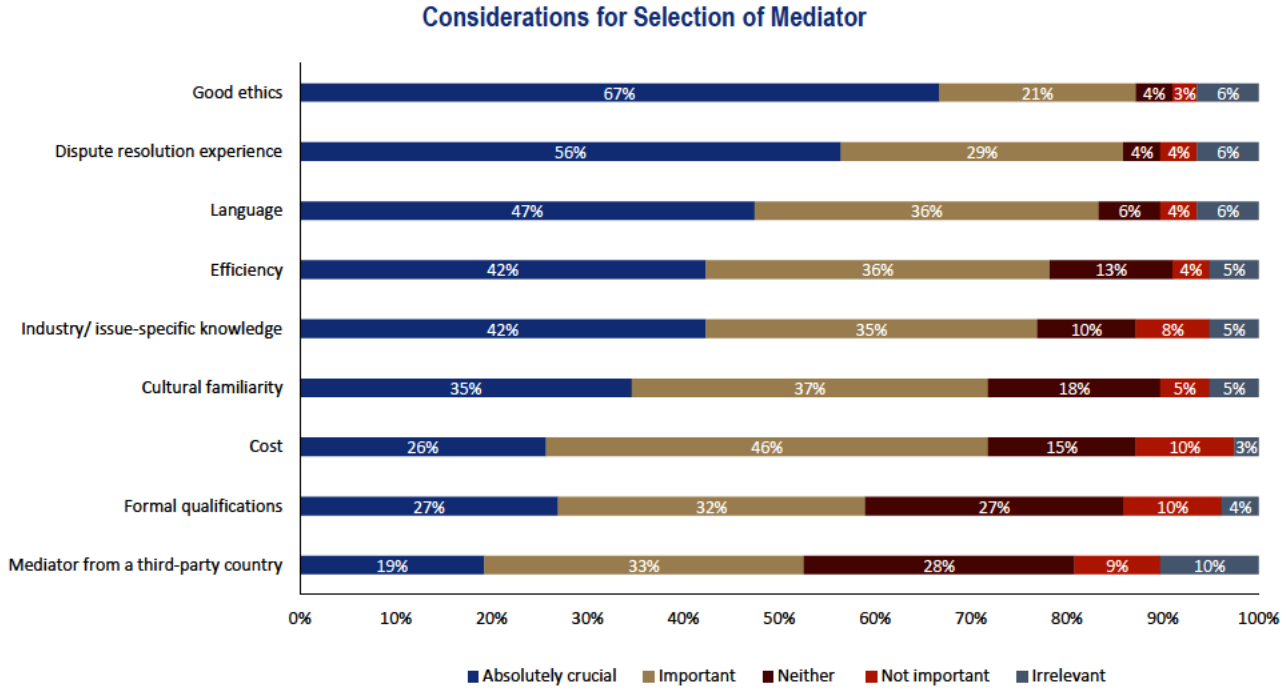


In terms of factors behind choice of institution (ranked as 'absolutely crucial' or 'important'), efficiency (84%), cost (74%), cultural familiarity (72%), size and expertise of mediator panel (67%) were the main considerations. These were also the factors with which users most often indicated satisfaction, suggesting that, by and large, their expectations were being met.



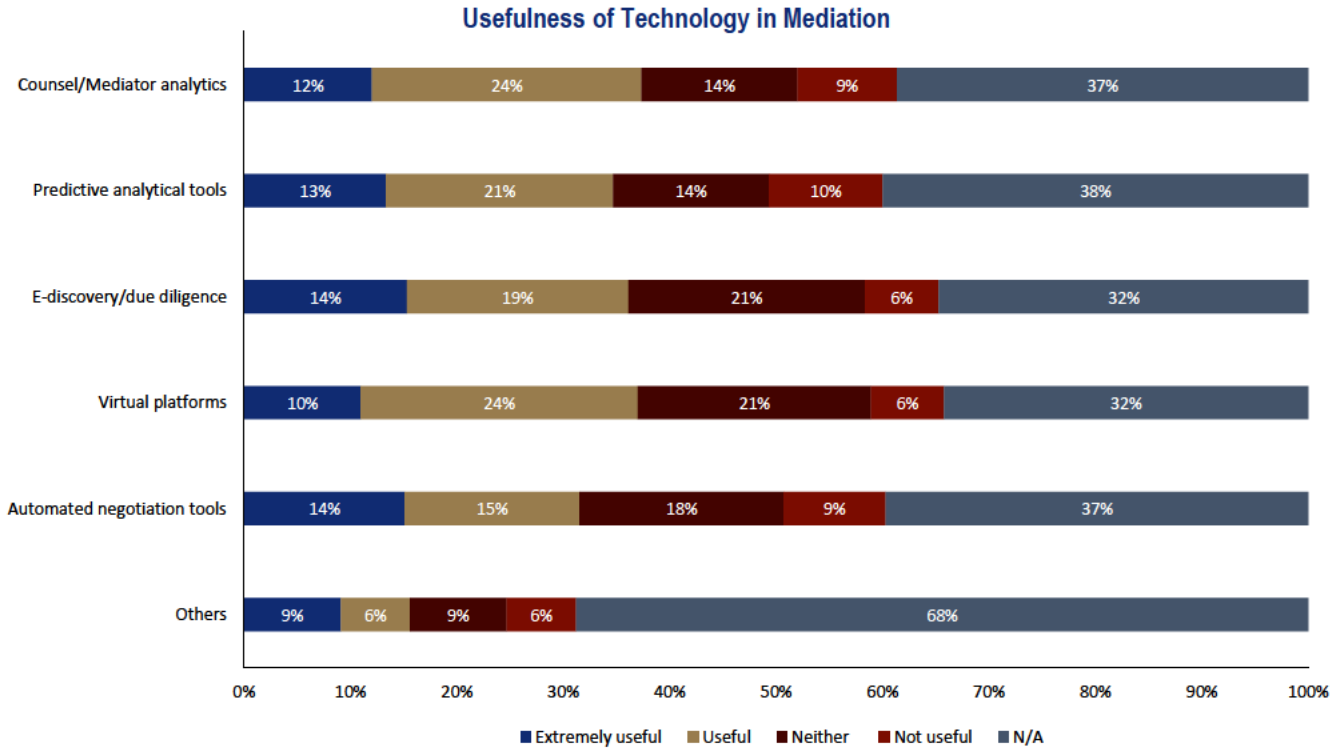
Choice of mediator

Turning to the choice of mediators, good ethics (67%) and dispute resolution experience (56%) were factors most frequently rated as 'absolutely crucial' by users. Industry knowledge ranked fourth alongside efficiency (42%), trailing the factor of language (47%). In terms of satisfaction with mediators the same factors ranked most highly again and the results were split between 'very satisfied' and 'somewhat satisfied'.

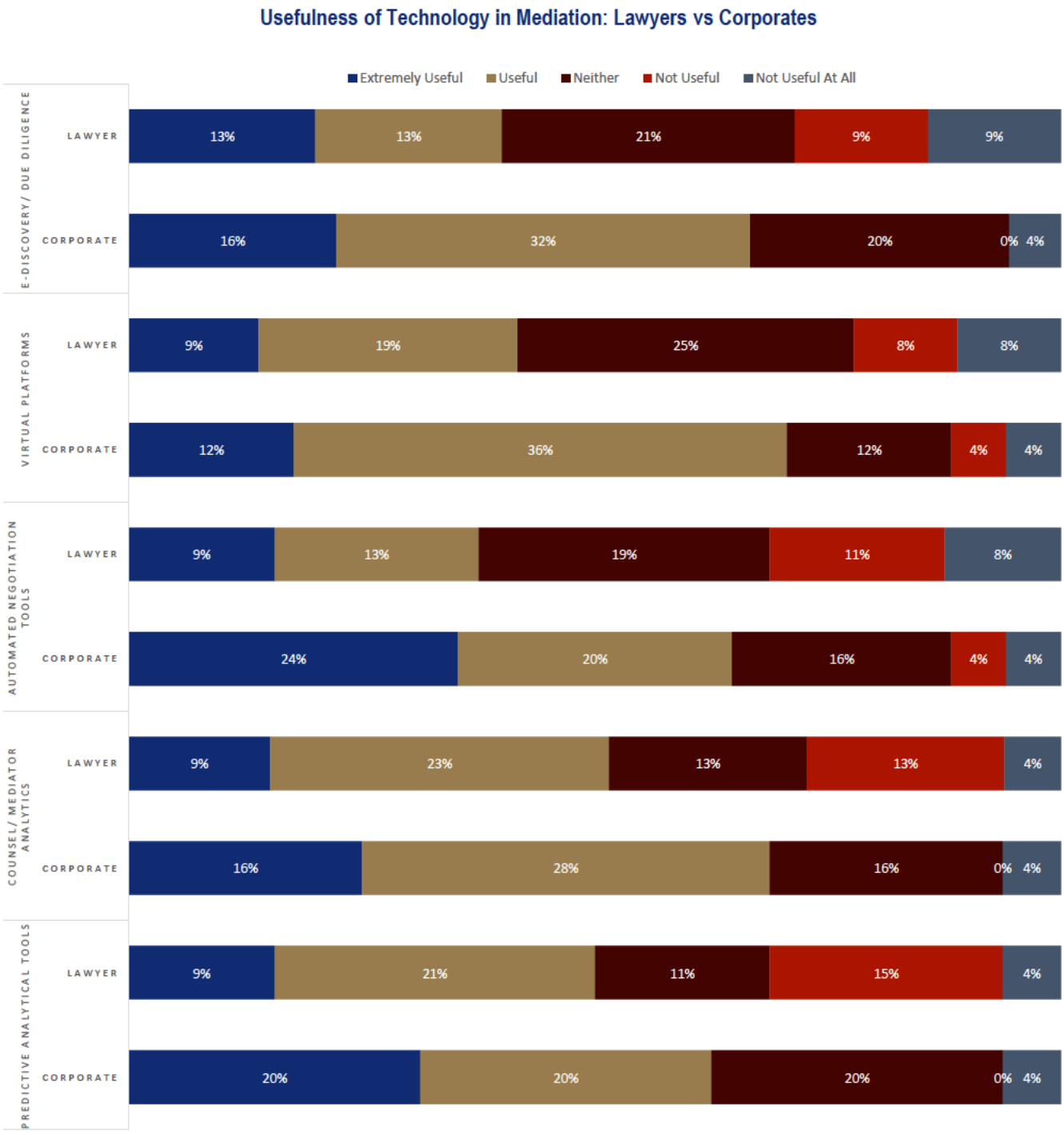


Technology in mediation

In terms of how useful technology is to the forum, such as predictive analytical tools, negotiation support systems, e-discovery, analytics for mediator appointments and online platforms in supporting mediation processes, approximately one third of user respondents indicated that these were 'extremely useful' or 'useful'. However, an equal number responded to the question with 'not applicable', suggesting that the use of artificial intelligence and technology in mediation practice is still in a nascent stage.



A closer look at the respondent profile reveals that corporates were more likely to recognise specific technology as 'extremely useful' or 'useful' as compared to lawyers.

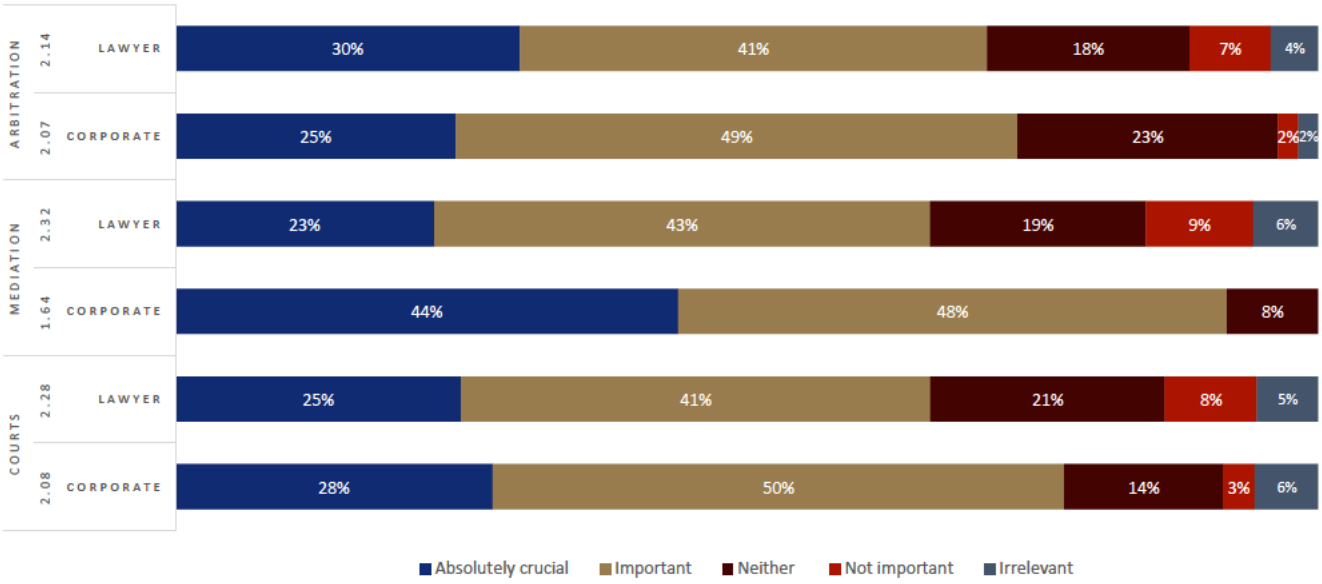


International Commercial Mediation Key Findings

Why choose mediation?

Users select mediation for a range of reasons including impartiality of the forum, confidentiality and speed. They are also largely satisfied with their experience with mediation, considering factors such as cost (see for example, **Chart: Satisfaction with Costs Across Dispute Resolution Section**, above p. 7)

Importance of Costs in Dispute Resolution Institution



Unlike users of arbitration, mediation users do not rank enforceability very high on their list of reasons to mediate. This likely reflects the fact that unlike foreign arbitral awards, at the time of writing, mediated settlement agreements lack an internationally recognised expedited enforcement mechanism. Accordingly, where compliance with the outcome of a dispute resolution process is a concern and enforcement mechanisms are a priority, mediation is less likely to be selected. Based on this reasoning, the new Singapore Convention on Mediation is likely to influence user selection of dispute resolution processes. Once the Convention is ratified it will offer expedited enforceability mechanisms for mediated settlement agreements and likely attract current users of litigation and arbitration for whom enforceability is a significant factor in dispute resolution forum selection.

Ethical mediators

Across a range of factors, most users are satisfied with their experience of mediators and mediation institutions. 'Good ethics' was most frequently selected as 'absolutely crucial' in the selection of mediators followed by 'experience'. This finding reflects the importance users place on professionalism and accountability in confidential dispute resolution processes in which procedural flexibility gives mediators considerable power. New regulatory developments in international mediation, such as Article 5(1)(e) and (f) of the Singapore Convention, place the spotlight on professional standards for mediation practice and in this regard are congruent with users' priorities.

Technology

While only one third of users overall ranked the utility of specific technologies highly, corporate respondents are way ahead of lawyers in terms of recognising the utility of technology in cross-border mediation. This finding suggests an opportunity for lawyers to consider a greater use of technology in mediation and address client expectations at the same time.

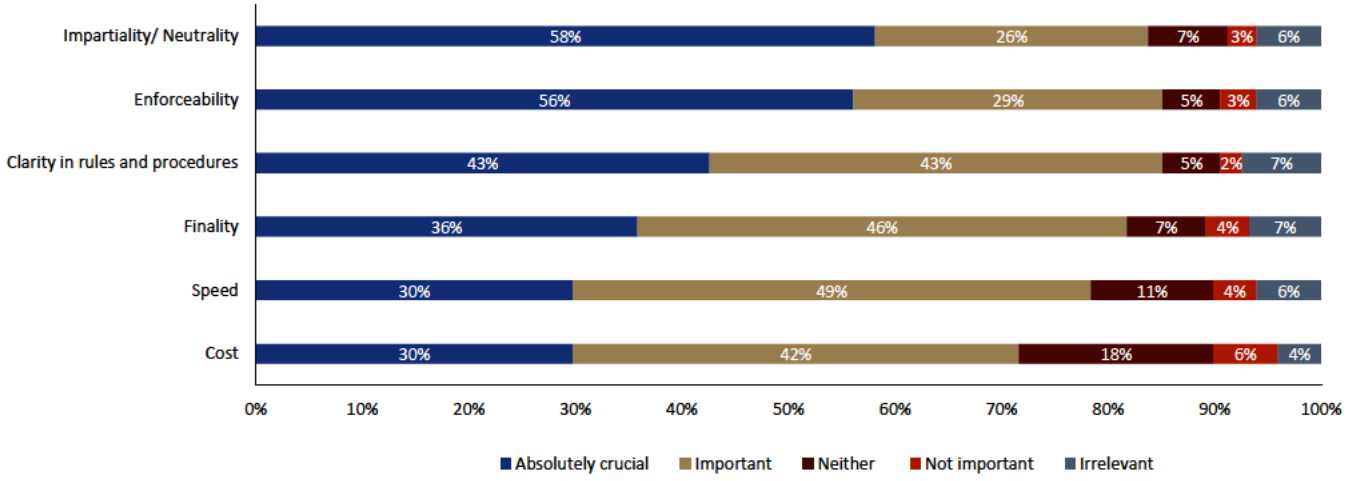
International Commercial Litigation

At a Glance:

- More than 80% of international commercial litigation users consider enforceability, clarity in rules, impartiality and neutrality as 'important' or 'absolutely crucial', when deciding to take a dispute to litigation.
- The (lack of) speed of litigation was the greatest source of dissatisfaction with litigation.
- In the choice of courts, more than 80% of respondents have indicated that efficiency is 'important' or 'absolutely crucial' in their consideration, but only 45% were satisfied.
- International commercial courts have an opportunity to enhance efficiency to increase their attractiveness as dispute resolution forums.

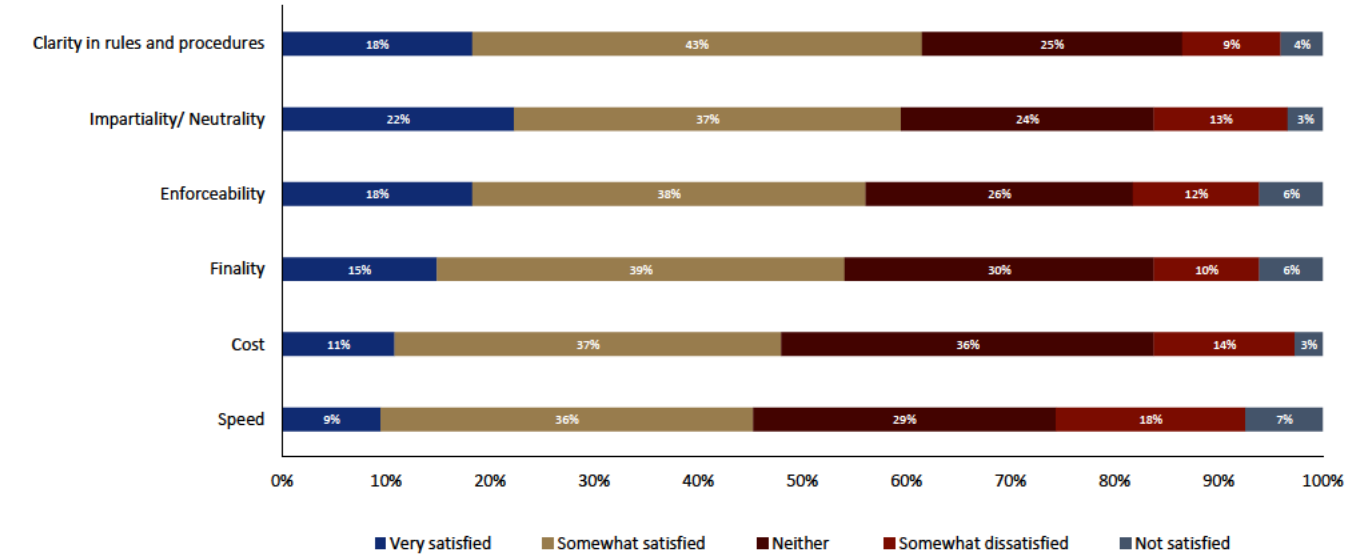
Factors influencing the choice of litigation

The key factors that influence parties' preferences to litigate cross-border disputes are enforceability of the resulting court judgment, clarity in rules and procedures of the forum, and forum impartiality and neutrality. More than 80% of users consider these factors 'important' or 'absolutely crucial' when deciding to take a dispute to litigation.



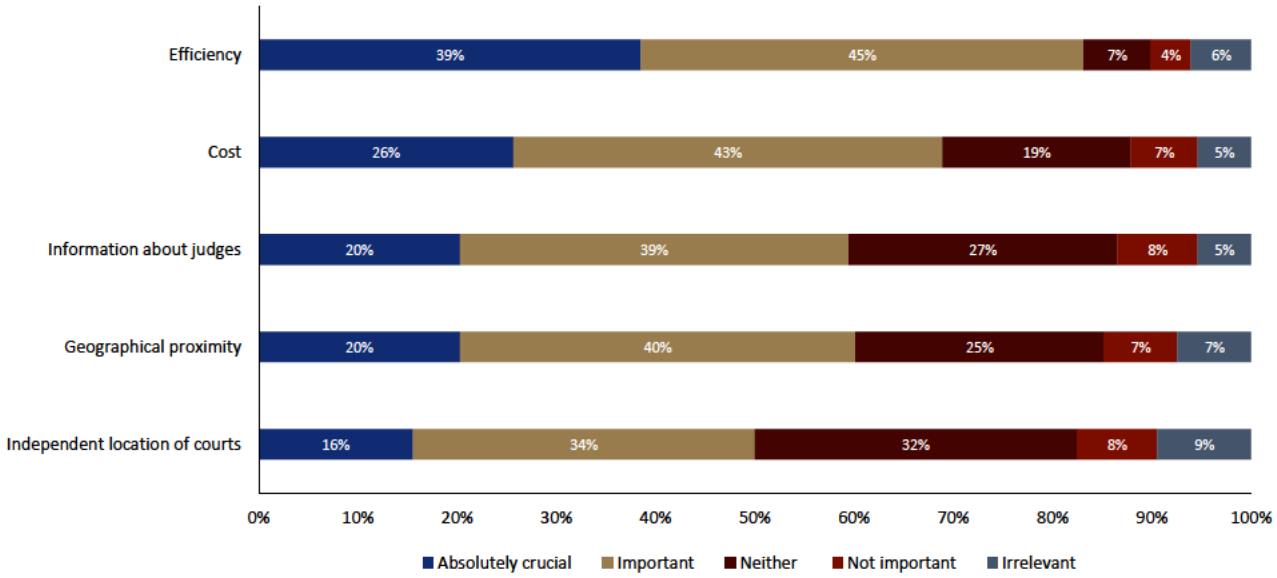
User satisfaction with litigation

More than 50% of respondents indicated that they were 'somewhat satisfied' or 'very satisfied' with the clarity in rules and procedures of court (61%), impartiality and neutrality of courts (59%), and the enforceability of court judgments (56%). More than 45% of respondents indicated that they were 'somewhat satisfied' or 'very satisfied' with the speed (45%) and cost (48%) of litigation.



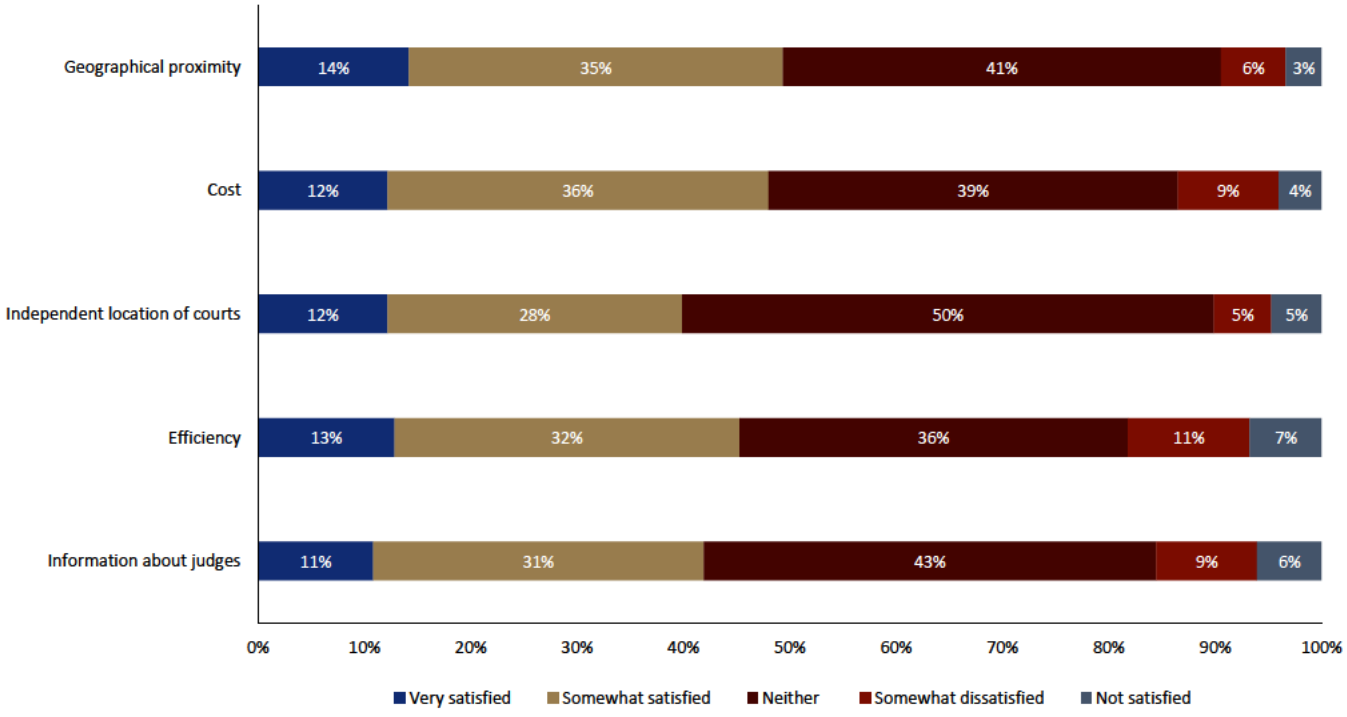
Factors influencing the choice of international commercial courts

The most important factor is efficiency: 84% of respondents indicated that efficiency of the forum for dispute resolution is either an 'absolutely crucial' or 'important' consideration when choosing an international commercial court. 69% of respondents indicated that the cost of litigation at an international commercial court is either an 'absolutely crucial' or 'important' consideration; while 60% of respondents consider the geographical proximity of the court as either an 'absolutely crucial' or 'important' consideration. The availability of information about judges is 'absolutely crucial' or 'important' for 60% of user respondents.



Satisfaction with choice of international courts

As to the user satisfaction indicators in the matter of cost and efficiency of litigating in an international commercial court, many respondents were ambivalent ('neither satisfied nor dissatisfied'), while 48% of respondents indicated that they were 'very satisfied' or 'somewhat satisfied' with the cost of litigating in an international commercial court, and 45% of respondents indicated that they were 'very satisfied' or 'somewhat satisfied' by the efficiency of litigating in an international commercial court. Furthermore, 13% of respondents indicated that they were 'somewhat dissatisfied' or 'not satisfied' with the cost of litigating in an international commercial court, while 17% of respondents indicated that they were 'somewhat dissatisfied' or 'not satisfied' with the efficiency of litigating in an international commercial court.



International Commercial Litigation
Key Findings

Differences between user expectations and user experience

While high percentages of respondents have indicated that they found elements such as enforceability of dispute resolution outcomes and clarity in rules and procedures an 'absolutely crucial' or 'important' factor in considering whether to proceed to litigation, their response in respect to their level of user experience have deferred considerably: generally, fewer respondents indicated that they were 'very satisfied' or 'somewhat satisfied' across all markers.

For instance, while 86% of respondents indicated that clarity in rules and procedures of the forum are 'absolutely crucial' or 'important', 61% indicated that they were 'somewhat satisfied' or 'very satisfied' with this factor. While 79% of respondents indicated that speed of litigation was 'absolutely crucial' or 'important', only 45% indicated that they were 'somewhat satisfied' or 'very satisfied' with this factor. Furthermore, users of litigation appear least likely to indicate their satisfaction for the speed of dispute resolution process, compared with users of arbitration and mediation. In this case, there is an opportunity for the providers of international litigation services to consider aspects of reform to address users' needs in respect to clarity in forum rules and procedures, and speed of litigation.

This is also true when respondents were polled on the matter of efficiency of international commercial courts. The attractiveness of international commercial courts has generally been attributed to their ability to provide an efficient forum for dispute resolution of cross-border business disputes. Our survey confirms this: 83% of respondents have indicated that efficiency of the forum for dispute resolution is either an 'absolutely crucial' or 'important' consideration when choosing an international commercial court. In the last five years, a number of international commercial courts have been established. For instance: the Singapore international Commercial Court (SICC) was launched on 5 January 2015, the First and Second International Commercial Courts of China were established on 29 June 2018, and the Netherlands Commercial Court (NCC) was constituted on 1 January 2019. From the user perspective, it appears that international commercial courts have an opportunity to enhance the efficiency of their case management processes, and courts which successfully improve their efficiency markers may reap substantial benefits flowing from its enhanced attractiveness as a dispute resolution forum.

Comparing user satisfaction: litigation, arbitration and mediation

Users of litigation were least likely to indicate their satisfaction for the speed of dispute resolution process, compared with users of arbitration and mediation.

Users of litigation were least likely to indicate their satisfaction for the impartiality or neutrality of dispute resolution process, compared with users of arbitration and mediation.

Users of litigation were more likely to indicate their satisfaction on the issue of costs compared with users of arbitration, but less likely to do so compared with users of mediation.

Users of litigation were less likely to indicate their satisfaction on the issue of finality of dispute resolution outcomes compared with users of arbitration.

Users of litigation were least likely to indicate their satisfaction on the issue of institutional efficiency, compared with users of arbitration and mediation.

Importance of enforceability of judgments

The high percentage (85%) of respondents indicating that enforceability was either an 'absolutely crucial' or 'important' consideration when proceeding to litigation follows conventional wisdom. However, enforcing parties may encounter significant hindrances, especially when seeking enforcement across borders. Such concerns were raised by a considerable number of respondents when they were asked to provide general open-ended comments on international commercial litigation: a common concern raised involves the issue of enforceability of court judgments internationally. While 85% of respondents have indicated that enforceability of the dispute resolution outcome at litigation influences their choice to proceed to litigation, only 56% of respondents indicated that they were 'somewhat satisfied' or 'very satisfied' with the enforceability of court judgements. Compared with users of arbitration, users of litigation were less satisfied on the issue of enforceability of dispute resolution outcomes. It may be difficult for a lawyer trained in the common law tradition to appreciate the significance of reciprocity imposed by many civilian law jurisdictions as a precondition for the enforcement of foreign judgments. Likewise, lawyers trained in the civilian law tradition may be perplexed by the 'monetary' requirement for foreign judgments to be enforced in a common law jurisdiction. Consequently, in respect to enforceability of court judgments – especially when parties endeavour to take that judgment outside of jurisdiction for enforcement – respondents' expectations may become frustrated.

Several initiatives have been undertaken worldwide to overcome this concern. The Hague Conference on Private International Law has for several decades worked on a conventional instrument which facilitates the enforcement of foreign judgments across borders. The Conference's work has materialised so far in a foreign judgments convention adopted on 2 July 2019 by the Conference (Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters), which facilitates the enforcement of relevant foreign judgments across signatory Parties. At the same time, an ambitious research project is being undertaken by the Asian Business Law Institute to produce literature to harmonise the systems of recognition and enforcement of foreign judgments across Asian jurisdictions. In June 2019, the Standing International Forum of Commercial Courts published a non-binding Multilateral Memorandum on Enforcement of Commercial Judgments for Money, which sets out an understanding of the procedures for the enforcement of a monetary judgment by the courts of one jurisdiction obtained from the commercial courts of another.

Hybrid Dispute Resolution Mechanisms

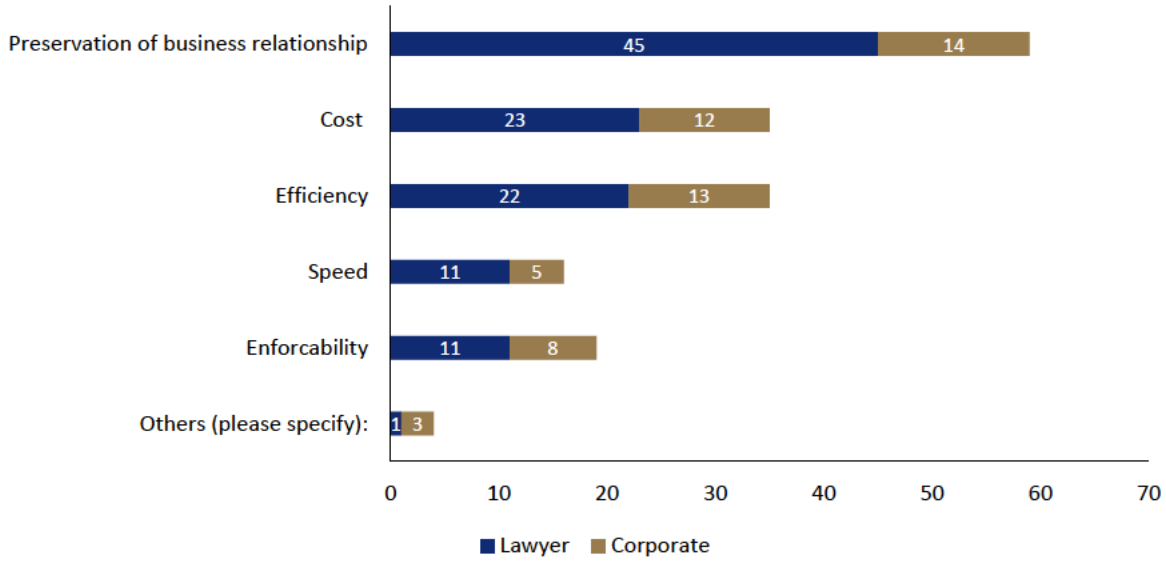
'They are the future.'

Hybrid dispute resolution mechanisms involve two or more dispute resolution processes and, for the purposes of this survey, refers to processes involving a combination of mediation and arbitration.

From 2016 to 2018, more respondents have used hybrid mechanisms compared to standalone mediation, but fewer respondents have done so compared to arbitration and litigation. Most users indicated contractual obligations as the main reason for selecting a hybrid process.

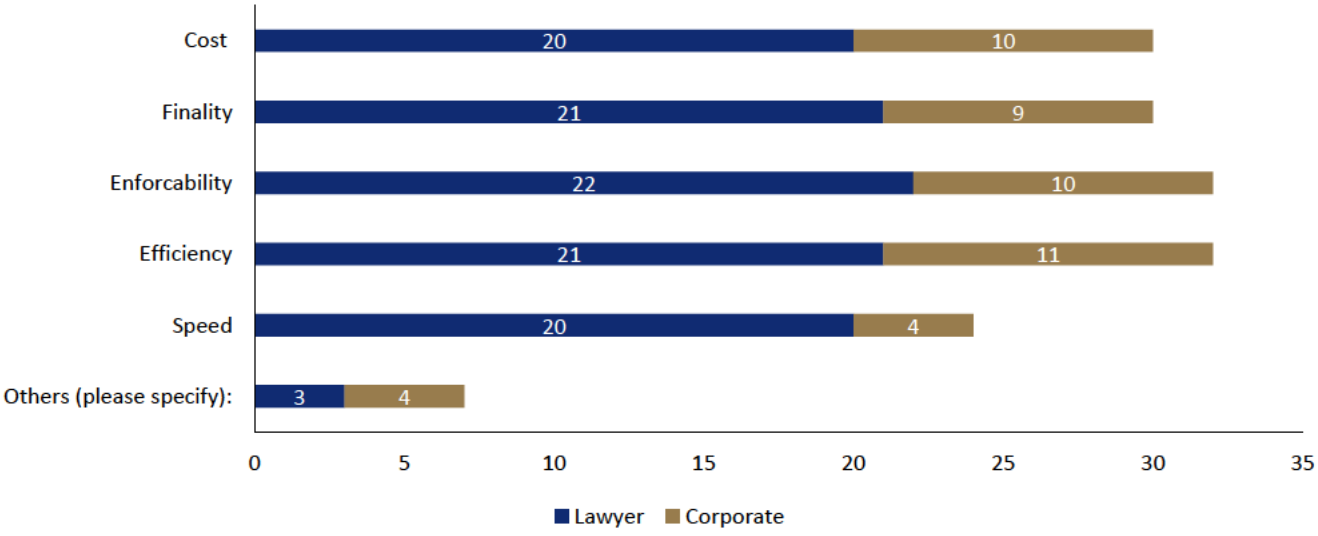
Two comparative questions yielded valuable insights on process choice. As to why users selected hybrid processes over arbitration, by far the most common reason given was for the preservation of business relationships, with cost and efficiency being also highly ranked.

Considerations for Selection of Hybrid Dispute Resolution Compared to Arbitration



In terms of why users selected hybrid mechanisms as compared to standalone mediation, users indicated enforceability, finality, efficiency and cost as the main drivers with speed also being highly ranked. Responses suggest that hybrid processes enjoy better acceptance than mediation on its own.

Considerations for Selection of Hybrid Dispute Resolution Compared to Mediation



Hybrid Dispute Resolution Key Findings

Growing regional interest

The survey provides insight as to why users prefer hybrids rather than standalone mediation or arbitration. The responses confirm the perceived weaknesses of the latter type of dispute resolution mechanism. By way of example, mediation is perceived to be less suitable where compliance with mediated settlement agreements is seen as a potential issue and expedited enforcement mechanisms are desirable; arbitration is perceived to be less suitable where preservation of the parties' business relationship is important and where costs and efficiency are critical process choice considerations. **In these situations, a hybrid can offer certain benefits of mediation, such as focus on preserving the business relationship in addition to cost and efficiency advantages, while at the same time promising the finality and enforceability commonly associated with international arbitration.**

'[Hybrid processes] are the future, especially in relation to the Belt & Road Initiative and Online Dispute Resolution. They need to be embedded in contractual dispute resolution clauses.'

Survey Respondent

Looking to the future, the Singapore Convention on Mediation is likely to go a long way towards addressing enforceability concerns about international mediation. Meanwhile, the preliminary findings suggest that mediation is a main feature of many hybrid mechanisms and, as such, offer mediation another avenue to the world of international commercial dispute resolution. In Singapore alone, the development of the Arb-Med-Arb Protocol (SIAC and SIMC) and the Singapore Infrastructure Dispute Management Protocol (SIMC and SMC) in recent years, signal the growth of this specialised dispute resolution field.

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