



The Current State and Future of International Arbitration: Regional Perspectives

IBA Arb 40 Subcommittee



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Preface

Catherine Amirfar, US State Department and Julien Fouret, Betto Seraglini
Co-Chairs, IBA Arb40 Subcommittee.

The IBA Arb40 Subcommittee was created to meet the IBA Arbitration Committee's goal of engaging actively with younger members of the arbitration community. Created in 2014, the Subcommittee provides a platform for the younger members of the global arbitration community to meet, exchange ideas and learn from peers and more experienced practitioners. With the support of the IBA Arbitration Committee Co-Chairs, Paul Friedland and Anne-Veronique Schlaepfer, the IBA Arb40 Subcommittee has worked to galvanise its members around issues important to the future of the international arbitration community.

We were fortunate to have been appointed as the first two Co-Chairs. We were also fortunate to be able to recruit a tremendously talented Steering Committee composed of 16 individuals representing the next generation of leaders in the field, drawn from all over the world and from all aspects of international arbitration, both public and private practice. This Report illustrates their exceptional commitment to the work of the Subcommittee over the past two years.

The present Report is the first publication by the Subcommittee and considers regional perspectives on the primary issues facing arbitration in the next five years in six regions: Africa, Asia-Pacific, Europe, Latin America, Middle East and North Africa and North America. While not intended to be an empirical survey, this Project provided a singular opportunity for over 160 arbitration practitioners in more than 40 countries to voice their ideas, concerns, proposals and perspectives on the evolution of international arbitration in their respective regions. We hope you find their insights as useful as they are unexpected.

While all the members of the Steering Committee of the Subcommittee should be thanked for their input in the early phase of this project in suggesting questions and key themes to be developed, special thanks need to be offered to Angeline Welsh, Allen & Overy. Since the very outset of the project, Angeline has been its mastermind and then its conductor.

The team of Steering Committee members in charge of each of the regions described in the Report also must be thanked for their efforts to identify individuals in each region and to organise the input for the Report:

- For Africa: Tunde Ogunseitan, ICC
- For Asia-Pacific: Swee Yen Koh, WongPartnership, Sue Hyun Kim, Bae, Kim & Lee and James Morrison, Allens.
- For Europe: Christopher Harris, 3 Verulam Buildings and Sarah Morton, Shell.
- For Latin America: André de A. Cavalcanti Abbud, Barbosa Müssnich Aragão and Ignacio Minorini Lima, Bruchou, Fernández Madero & Lombardi.
- For Middle East and North Africa: Amani Khalifa, Khalifa Associates.
- For North America: John Siwec, Perley-Robertson, Hill & McDougall and Patrick Pearsall, US State Department.

Finally, we would also like to extend our thanks to those practitioners who gave up their valuable time to participate in this project.

We look forward to the conversations we hope this Report will spark.

Chapter 1: Executive Summary

By Angeline Welsh

1.1 The background

The IBA Arb 40 Subcommittee set out to discover what difference, if any, a regional perspective would make to practitioners' assessment of the issues and challenges facing international arbitration, with particular emphasis on those which may impact the next generation of arbitration practitioners.

The Subcommittee surveyed arbitration practitioners from six different regions: Africa; Asia-Pacific; Europe; Latin America; the Middle East and North Africa (MENA) and North America.¹ While the results involve a certain degree of generalisation given the number and diversity of jurisdictions covered by each region, interesting observations can be made about the development of arbitration in each region and how this compares between them.

All eyes in the arbitration community are on the future, or at least they appear to be. As this report shows, the future means something different depending on where you are in the world. In Europe and North America, where international arbitration has been prevalent for many years, a number of well-respected arbitral seats and institutions developed which dominated the world of international arbitration for many years and, arguably, still do. However, the rise of international arbitration in Asia-Pacific means that Asian arbitral seats and institutions are now dominant in Asia-Pacific and are expected to continue to take market share away from seats and institutions in Europe and North America. Will other regions follow Asia-Pacific by seeing the rise of regional arbitral seats and rules for international arbitration? On the whole, the practitioners surveyed are not predicting this will happen in the immediate future. In Africa and Latin America, international arbitration is still often conducted outside the region, predominantly in Europe and North America. As a result of the differing stages of development across the regions, different regions face different issues and challenges, which are described in more detail below.

Nevertheless, international arbitration is on the rise in all six regions, generating an increasing interest in the practice of it as well as concerns about some core issues. As the practice of international arbitration begins to develop globally, two broad trends may be observed.

First, there is a growing standardisation of international arbitration practice. The biggest indicators of this are the convergence of arbitral institutional rules and a greater number of arbitral seats where parties can expect a modern and pro-arbitration approach from the judiciary.

Secondly, as international arbitration practice becomes more standardised, the handling of international arbitration disputes tends to stay within a particular region as certainty and confidence in the arbitration process within that region grows.

Practitioners are generally happy with the development of international arbitration within this structure. There is little appetite for a truly international framework, with a near universal rejection

¹ The methodology adopted is set out in Chapter 8 of this report. High-level summaries for each of the regions surveyed can be found in Chapters 2–7 of this report. More detailed summaries can be found in the Appendices found in Chapter 9.

of concepts such as an a-national award and a supranational body to oversee the arbitration process and arbitral awards.

The bad news for the future generation of arbitration lawyers from regions where arbitration is well-developed is that there is expected to be greater competition in the field. But there is better news for those practising in regions where the practice of international arbitration is still developing and the pool of specialised international arbitration practitioners is much smaller.

This introduction seeks to bring together and compare the key issues and challenges identified by the practitioners surveyed. It features a number of key observations, which are explored in greater detail in the chapters which follow, such as:

- Arbitration as a dispute resolution mechanism is on the rise in all regions.
- Common factors exist in all regions which are regarded as key to growth.
- Common factors exist in all regions which are regarded as hurdles to growth.
- Arbitral institutions were commonly regarded as playing a key role in effecting change to the arbitration process.
- As the practice of international arbitration becomes more established in a region, seats within that region begin to dominate. But there is no appetite for an a-national award (an award that is not governed by any country's domestic arbitration law).
- The trend among institutions is towards regionalism and arbitration rules becoming more homogenous. However, practitioners ruled out the development of a supranational body – to oversee arbitration – as a realistic prospect.
- Where arbitration practice is developing, greater specialism in arbitration procedure was generally regarded as a good thing. In more developed regions, views were mixed with some practitioners considering more subspecialisation in a type of arbitration to be important, while others were wary of overspecialisation. All participants welcomed specialisation in sector knowledge.
- Increasing competition was perceived to be the main hurdle for young arbitration practitioners.
- There are a number of interesting developments in international arbitration, such as:
 - Interim relief and emergency arbitrators: it remains to be seen whether this will be a significant development.
 - Third-party funding: in many jurisdictions this is prohibited or there is legal uncertainty as to whether this is permissible. In those jurisdictions where it is permitted, practitioners predict a rise.
 - Issue conflict: This is an issue most prevalent in investment treaty arbitration, and may be alleviated by the expansion of the available pool of arbitrators in the future.
- Advancement in technology will support, not radically change, the arbitration process.
- Predictions for key trends in terms of jurisprudence focus on investment treaty arbitration and arbitral awards.

1.2 Rise in arbitration as a dispute resolution mechanism

All regions reported a rise in arbitration as a dispute resolution mechanism, even those where it has long been established such as North America. In Latin America, Africa and certain parts of Asia-Pacific, national court litigation is still the most commonly used dispute resolution method, but growth in international arbitration is anticipated.

1.3 Common factors identified as key to growth

Factors which were generally regarded as key to growth include:

- *Legislative reform.* Government support was seen as playing an important role in the development of arbitration in Asia-Pacific, particularly Hong Kong and Singapore, and more recently Malaysia and South Korea. Recent changes in legislation in Italy, Belgium and Finland were also seen as contributing to a rise in arbitrations in those jurisdictions. Practitioners identify the following jurisdictions where legislative reform could have a significant impact: Qatar, the United Arab Emirates (UAE), India, South Africa, Myanmar, Colombia, Argentina, Brazil, China and California in the United States.
- *Party autonomy.* The ability of the parties to control the process through appointment of arbitrators and procedural flexibility.
- *Enforcement regime.* The importance of being able to enforce awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'). This was seen as particularly compelling for users in Asia-Pacific given the diversity of legal systems, levels of economic development and challenges within legal systems and enforcement regions.
- *Time and cost inefficiencies associated with national courts.* This is especially a factor in Latin America, MENA, Africa and Asia-Pacific where, with some exceptions, significant concerns were reported in relation to the national court system. In MENA, political unrest had frustrated the ability of some courts to operate effectively. In Europe and North America, the costs and time involved with national proceedings are beginning to be regarded as a neutral factor when compared to arbitration, although this is not true for all jurisdictions in Europe (eg, Belgium, Finland and Italy).
- *Expertise.* Lack of cross-border dispute and sector expertise in the national court system was reported as a factor driving parties towards arbitration.
- *Neutrality.* International arbitration is regarded as being particularly suited to the rise of cross-border transactions where parties may not be accustomed to the culture and language of the national courts of their counterparty. This is of particular importance where the national court system does not use English as a foreign language; for example, the courts in Japan and South Korea.
- *Confidentiality.* This is still regarded as a 'push factor' in favour of arbitration, especially in certain sensitive industry sectors such as pharmaceuticals.

1.4 Common factors identified as hurdles to growth

Hurdles to future growth identified include:

- *Legislative reform and court support.* This was seen as essential to establishing a pro-arbitration jurisdiction and predictions for legislative reform are coupled with predications that, in future, arbitrations will be referred to seats within the region. Legislative reform is a particular issue for regions where international arbitration is not as prevalent or those where arbitrations still tend to be seated outside the jurisdiction, such as Latin America, MENA and Africa. Court intervention in the arbitral process was identified as a particular issue in some jurisdictions (eg, Ukraine and Russia). In Africa, it was observed in many jurisdictions that there is often a lack of support generally from the courts, if not hostility on occasions. In MENA, some concerns were expressed about court support for arbitration and the enforcement of arbitral awards.
- *Increasing costs.* This was of particular concern to practitioners in Europe and North America, and was seen as the result of the import of more burdensome processes into arbitration, such as extensive disclosure and lengthy submissions. However, cautious optimism was also expressed that this challenge would be met through the use of expedited timetables and cost guidelines. In Africa and in certain parts of Asia-Pacific, the cost of arbitration was seen as one of the factors that inhibited its growth, especially where court fees are likely to be lower.
- *Limited pool of arbitrators.* This was of particular concern to practitioners in Europe, North America and Asia-Pacific. Primarily, the concern expressed was that a limited pool of arbitrators is leading to delays in the proceedings and awards being rendered. However, other concerns were expressed including that arbitrators were not being proactive enough by identifying preliminary issues, were not prepared for hearings, were too biased in favour of the appointing party and were not producing quality arbitral awards.
- *Concerns relating to enforceability of the award.* While the New York Convention in theory imposes a broad geographical pro-arbitration structure for enforcement of awards, concerns were still raised about the robustness of national courts in enforcing arbitral awards. For example, in Vietnam, Indonesia, Argentina, Mexico and in many African jurisdictions, practitioners had encountered difficulties in enforcing awards.
- *Court reform.* In Europe and Asia-Pacific in particular, it was noted that arbitration faces increased competition from national courts that have set their sights on re-establishing their pre-eminence in cross-border dispute resolution for example, through developments like the bringing in of Judges with specialist and international expertise, the making of legislative amendments allowing for wider jurisdiction to hear cross border disputes, the setting up of commercial courts, the use of foreign language and the simplification of court procedure.
- *Transparency.* Some practitioners in Europe expressed the view that calls for transparency may lead to arbitration becoming less confidential.

1.5 The role of arbitral institutions in arbitration procedures

Practitioners in Asia-Pacific, Europe and MENA believe that the arbitral institutions will play a key role in driving change in arbitration procedures by monitoring tribunal availability and introducing time-saving features such as summary judgment and arbitrator declarations of availability.

While it was also generally recognised that counsel could do more in terms of putting pressure on tribunals to act more efficiently, it was also accepted that counsel was reluctant to do this for fear of upsetting the tribunal. Some practitioners expressed the view that if requirements for speed and efficiency were codified in arbitral institutional rules, this would give counsel a legitimate basis for pressing for reform in these areas – which reinforces the general view of the role which arbitral institutions have to play.

Few practitioners identified arbitrators as being the catalyst of change although, as noted below, many practitioners believed that there should be a greater pool of arbitrators. This might, in turn, lead to a change in arbitral practice.

1.6 Lack of appetite for an a-national award

As the practice of international arbitration becomes more established as a dispute resolution option, seats within that region begin to dominate.

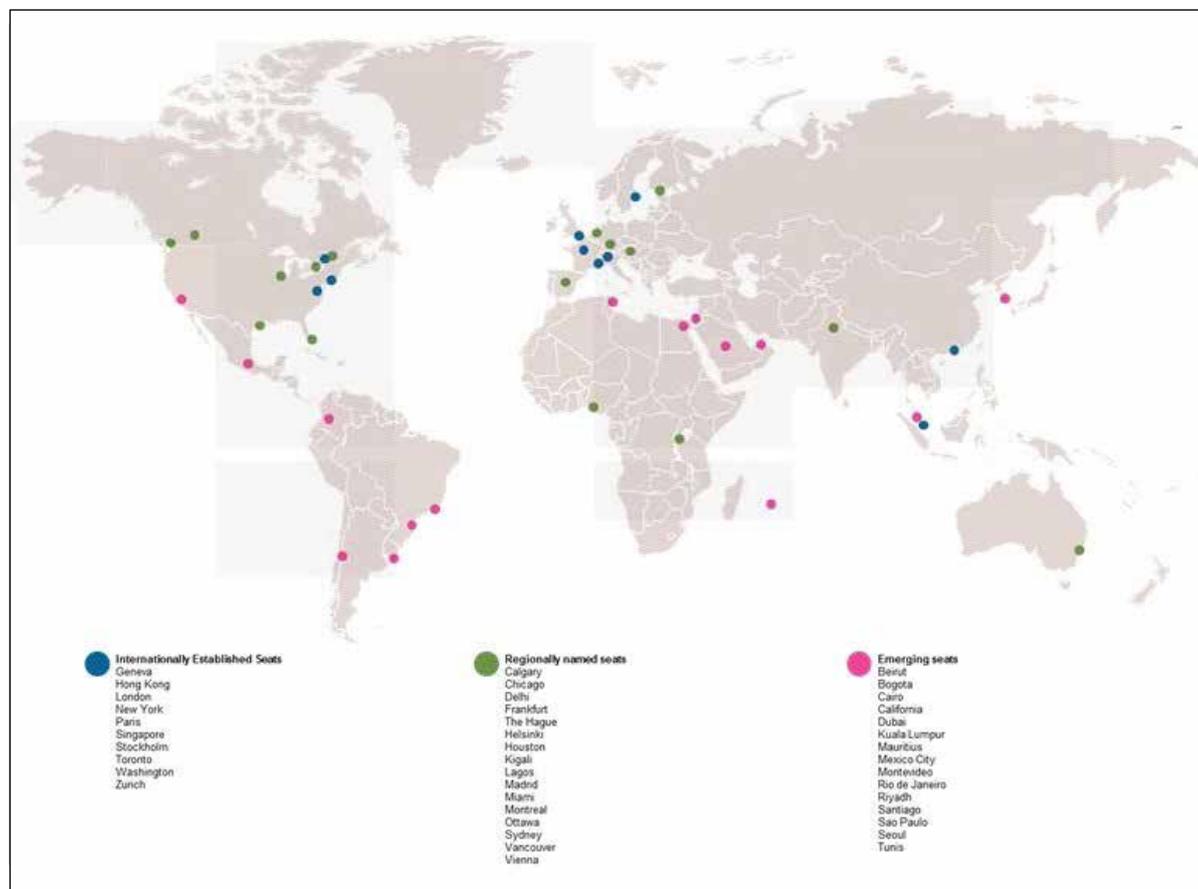
- As arbitration has taken hold in Asia, the seats of Hong Kong and Singapore have become well established, with the consequence that disputes within Asia-Pacific are predominantly referred to arbitrations seated in Asia rather than Europe or the US. This trend is expected to increase and may take in new Asian seats such as Malaysia.
- There are a number of well-established and respected seats in Europe and North America. Paris, London, Geneva, Zurich, Stockholm, New York, Washington DC, Miami, Houston, Toronto and Vancouver appear to dominate. Perhaps of greater interest is the awareness of European and US practitioners of seats outside these regions, particularly the Asian seats. This tends to suggest that a greater proportion of disputes from the Europe and North America regions are being referred to Asian-seated arbitration.
- Latin America and Africa still often look towards more established seats in Europe and the US. Predictions on the rise of ‘safe’ seats in these jurisdictions are cautious, and will depend on a significant leap forward in terms of legislative reform.
- MENA has the well-established seat of Dubai but still looks to London, Paris and Geneva. Generally speaking, it is optimistic about reform in other jurisdictions within the region, notwithstanding recent political instability in some places.
- In Africa, parties still look to London, Paris and Geneva, with Mauritius as a potential upcoming alternative. However, Johannesburg, Kigali and Lagos are all expected to become rival seats for international arbitration within the next five to ten years.

Practitioners in all regions reject the idea of an a-national award with no seat. A major objection was one of practicality; it would require amendments to the New York Convention to be agreed by

the contracting states and a transnational *lex arbitri*. This was seen as difficult, if not impossible, to achieve. In any event, the majority of practitioners did not consider a-national awards to be desirable. In particular, it was considered that parties benefit from having the stability provided by state control over arbitration proceedings. Having a seat as a point of reference creates certainty, as parties know where they need to go to get interim relief and to review or to challenge an award.

1.7 International, regional and emerging seats

Map of international, regional and emerging seats according to those surveyed



Africa

- Safe seats for international arbitration were regarded as London, Paris and Geneva, with Mauritius as an upcoming alternative.
- Seats within the region (eg, Johannesburg, Kigali and Lagos) are expected to be rivals as seats for international arbitration within the next five to ten years.

Asia-Pacific

- Singapore and Hong Kong are regarded as the safest seats in the region. Singapore appears to be emerging as the preferred seat for Southeast Asia and India-related disputes, and Hong Kong for China-related disputes.

- London and Paris are also regarded as safe seats but the trend is for disputes to shift away from these centres to Singapore and Hong Kong.
- Regionally established seats include Delhi and Sydney.
- Seats to watch for include Kuala Lumpur and Seoul.

Europe

- Paris, London, Geneva and Zurich were still the most prevalent. Stockholm was also mentioned for the Nordic countries and disputes related to Russia and China.
- Vienna, Helsinki, The Hague and Frankfurt were also mentioned, and Madrid in relation to Latin America- and Spain-related disputes.

Latin America

- Practitioners still often look to established seats outside the region, such as Paris and New York. There is an array of emerging seats in the region (São Paulo, Rio de Janeiro, Mexico City, Montevideo, Santiago de Chile and Bogotá), with no clear frontrunner.

Middle East

- Paris, London and Geneva are still regarded as the predominant seats.
- Seats to watch out for include Dubai, Cairo, Tunis, Beirut and Riyadh. The Dubai International Financial Centre (DIFC) was regarded as an up-and-coming seat.

North America

- In Canada, Toronto was regarded as an internationally established seat. For regional disputes, Vancouver, Calgary, Montreal and Ottawa were named.
- Internationally established US seats include New York and Washington DC. Miami, Chicago and Houston were regionally named seats. It is expected that California may become a popular seat in the future if there is legislative reform.

1.8 Institutions – key trends

Regionalism

Different regions have a preference for different rules, although the International Chamber of Commerce (ICC) appears to have a presence in all regions.

Practitioners in all regions report widespread use of the ICC Rules of Arbitration.

In Europe, North America and Asia-Pacific, other institutions are also well established and widely used. For Europe these are the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), the Swiss

Arbitration Association (ASA), the Vienna International Arbitral Centre (VIAC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). For North America these are the LCIA and the ICDR. For Asia-Pacific, the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) are now well established, something which drew comment from not only practitioners within that region but also in North America and Europe. Asia-Pacific practitioners predict that users will continue to favour arbitration within the region rather than Paris and London.

In China, Africa and MENA, national arbitral institutions are still the most commonly used, above other arbitral institutions which might be considered more global in their reach, such as the ICC and the LCIA. This appears to be, in part, a reflection of a greater number of domestic arbitrations in these regions.

In MENA, in particular, practitioners expressed a preference for the LCIA or the ICC for high-value cases, and specialist institutions for certain sectors such as the Court of Arbitration for Sport or the London Maritime Arbitrators Association (LMAA).

In Latin America, the ICC is the dominant arbitral institution, alongside other national institutions, but the latter is more likely to handle domestic arbitration.

Overall, some practitioners predict a growth in regional arbitral institutions, while others thought that it was not likely that the less-established arbitral institutions would gain in market share over the more established institutions.

Arbitration rules are becoming more homogenous

Many of the practitioners surveyed agreed that institutional rules were becoming more homogenous. Overall this was seen as a good thing; a reflection of international best practice and a willingness to meet the demands of users through, for example, expedited procedure. It was also observed that the homogenisation of institutional rules is likely to support the trend towards regionalisation, as this increases the likelihood that a counterparty will accept an institution in a different jurisdiction. However, there remained a sense that arbitral institutions could still be differentiated on the basis of culture, cost structure and certain unique features, such as the different variations of joinder/consolidation provisions and scrutiny of the award.

Development of a supranational body to oversee arbitration is an unrealistic prospect

We asked those surveyed whether there was any appetite for a supranational body to oversee international arbitration to address uniformity, predictability and ethical conduct in the field. The near consensus, across all regions, was that this was not a real possibility in the near future. Primarily, this was due to a lack of political will and consensus.

Those in favour of a supranational body cited the following advantages: the removal of unsupportive court intervention; uniformity over annulment proceedings; and regulation of ethical issues and quality.

Those against, or sceptical of, a supranational body thought that it would be impractical, unwieldy and bureaucratic. Many also questioned whether uniformity is desired or needed.

1.9 Specialism in arbitration

Where arbitration practice is developing, greater specialism in arbitration procedure was generally regarded as a good thing. In more developed regions, views were mixed, with some practitioners considering greater subspecialisation in a type of arbitration as important, and others wary of overspecialisation. All welcomed specialisation in sector knowledge.

In Africa and MENA, practitioners reported a general need for greater specialism in arbitration procedure. Practitioners in both regions observed that the lack of specialism in the area contributed towards a limited pool of arbitrators, which had a knock-on effect on the efficiency of the process in their jurisdictions. In Latin America, many practitioners also reported an increasing demand for lawyers who are specialised in international arbitration, although some were also wary of overspecialisation.

In Asia-Pacific, specialisation in arbitration procedure was regarded on the whole as a good thing – up to a point. There are a number of jurisdictions within the region where it was felt that greater specialism is required (eg, Myanmar, Indonesia, the Philippines and Thailand). Greater specialism was regarded as a positive development in order to avoid the import of national court procedures which might result in inefficiencies. However, practitioners also observed that it should not become so specialised that arbitration became inaccessible to non-specialists.

In North America, the consensus was that practitioners were not specialised enough, and increasing specialism would enhance the quality of practitioners and resulting awards generally. However, like Asia-Pacific, there were concerns that an overspecialised group of practitioners would make it less accessible to other practitioners and that this, in turn, would give rise to potential legitimacy issues. Concerns were expressed that it would be difficult for practitioners to focus purely on arbitration in some jurisdictions due to lack of a market for those skills.

In Europe, in some jurisdictions such as England, practitioners were comfortable with a distinction between those who specialise in court litigation and those who specialise in arbitration, and that this was positive in that it contributed to consistency and certainty of arbitration procedure and decisions. Elsewhere in Europe, such as in the Nordic countries and Poland, practitioners considered that it was beneficial to be competent in both disciplines and suggested that grounding in the domestic legal system and court procedure is undervalued.

Generally, all regions thought that there should be greater specialism by counsel in industry sectors.

1.10 Increasing competition – a hurdle for young arbitration practitioners

In all regions, the main challenge to establishing a career in arbitration was seen to be the increasing competition between lawyers. In regions where arbitration is well established, such as Europe and North America and in some jurisdictions in Asia-Pacific, many practitioners observed that there are not enough opportunities for new entrants. This is, in part, driven by the trend towards greater

specialism in arbitration procedure, making it harder for those who are in non-specialist practices to gain experience.

In Africa, challenges to building a career were identified as specific to particular jurisdictions. Generally, gaining exposure to international arbitration to build relevant experience was seen as a key challenge.

Advocacy skills were regarded as important but difficult to acquire, particularly if practitioners are forced to specialise too early. Language skills and a broad cultural awareness were also seen as being of particular importance.

1.11 Development of current hot topics

Interim relief and emergency arbitrators

Emergency arbitrator provisions are an example of interim relief available to parties. Commonly, such provisions allow, in the case of an emergency at any time prior to the formation or expedited formation of the arbitral tribunal, either party to apply for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the arbitral tribunal.

Such measures have been adopted in the various institutional rules in recent years:

- **2006** – International Centre for Dispute Resolution (ICDR)
- **2010** – Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC)
- **2011** – Australian Centre for International Commercial Arbitration (ACICA)
- **2012** – ICC, Swiss Rules of International Arbitration, PRIME Finance
- **2013** – Hong Kong International Arbitration Centre (HKIAC), the Belgian Centre for Arbitration and Mediation (CEPANI)
- **2014** – London Court of International Arbitration (LCIA)*

*Parties who concluded their arbitration agreement before 1 October 2014 must agree in writing to 'opt in' to emergency arbitrator provisions.

It remains to be seen whether interim relief and emergency arbitration will be a significant development.

Views on whether we would see an increasing number of interim relief applications, particularly to emergency arbitrators, were mixed. Overall, the consensus seemed to be that while emergency provisions are here to stay, it is not yet clear how well established they will become. Many practitioners reported concerns about whether interim orders would be as effective as court orders, and about the quality of service from emergency arbitrators.

In Asia-Pacific, where leading arbitral rules provided for emergency arbitrators and where legislation in Hong Kong and Singapore had been amended to take account of this, practitioners were more optimistic about the use of the emergency arbitrator. In China and Japan however, where arbitral rules had recently been amended to include emergency arbitrator provisions, practitioners were more cautious about their potential use. Changes to the arbitration law in India are also being considered to recognise emergency arbitrators.

In Europe and North America, the reaction was mixed. Generally, it was accepted that emergency arbitrator provisions are here to stay, but some practitioners predicted that their popularity would

plateau, pointing to the limited number of emergency arbitrator cases reported by the ICC since it adopted emergency arbitrator provisions in the 2012 ICC Rules of Arbitration. They also voiced concerns regarding the quality of the service and the effectiveness of the relief.

There are some regions where awareness and use of the emergency arbitrator provisions was low, such as MENA and parts of Africa. This appeared to reflect the fact that many of the arbitral rules in those jurisdictions did not include emergency arbitrator provisions. In some jurisdictions, interim relief was seen as the preserve of the court; for example, in Indonesia, Thailand, the Philippines and South Africa.

In Latin America, responses were driven by jurisdiction and specific regulation of interim relief within that jurisdiction, with those whose national laws recognised interim relief granted by arbitrators being more positive. Also, overall, the national arbitral institutions do not have emergency arbitrator provisions. In some jurisdictions (eg, Uruguay) the courts have exclusive jurisdiction to grant interim relief; in others there was uncertainty (eg, Mexico, Venezuela and Ecuador), while in others interim relief granted by arbitrators was recognised (eg, Brazil, Chile, Colombia and Panama).

Third-party funding

Third-party funding is the provision of funds by someone not involved in the arbitration to one of the parties to the dispute. Typically, the funding will cover counsel's fees, experts' and miscellaneous expenses and an indemnity against any liability for adverse costs (eg, security for costs). In return, the provider will receive a negotiated share of any recovery on the claim, whether by award, collection or settlement. Typical third-party funders include venture capital funds, bank affiliates, commercial providers and even publicly listed companies.

In many jurisdictions, third-party-funding is prohibited or there is legal uncertainty as to whether this is permissible. In those jurisdictions where it is permitted, practitioners predict a rise.

In those regions where third-party funding is permitted and is more established (eg, Europe and certain jurisdictions within Asia-Pacific and North America), the majority of practitioners predicted that third-party funding would increase in the next five years with increasingly diverse third-party funding options and fee arrangements. However, concerns were expressed, particularly in relation to potential conflicts, coupled with a call for greater accountability and transparency of third-party funders. In response to these concerns, practitioners predicted that the imposition of disclosure requirements and orders for security of costs, where it is established that the claimant is unable to pay, will arise.

There are a number of regions where there remains very little use of third-party funding and this is not expected to change in the next five years (eg, Africa, MENA, Thailand, Indonesia, Malaysia, China, Japan, South Korea, India and Latin America). Generally speaking in those regions, third-party funding is prohibited or there is uncertainty as to whether it is permitted.

Issue conflict

Issue conflict can arise when an arbitrator has taken, or gives the appearance of having taken, a particular stance on an issue to be decided in the case before him. In such circumstances, concerns might be raised as to his ability to address the issue with an open mind. Issue conflict is, therefore, a form of conflict of interest stemming from the arbitrator's relationship to the subject matter of the dispute (as opposed to his relationship with the disputing parties). In recent years, accusations of issue conflict have become a popular choice for parties pursuing the disqualification of allegedly biased arbitrators in investor-state arbitrations.

Generally, practitioners across all regions considered this to be an issue for investment treaty arbitration, and not for commercial arbitration. This is because investment treaty disputes often present very similar, if not identical, issues which particular arbitrators may have decided in previous cases. This is compounded by the fact that many investment treaty decisions are publicly available. Practitioners observed that this could be addressed by the expansion of the pool of arbitrators determining investment treaty cases and by arbitrators no longer appearing as counsel.

1.12 Advancements in technology

Practitioners from all regions reported using technology to streamline current arbitration procedures, such as virtual case management systems. Despite this, a view was expressed (in Asia-Pacific) that the adoption of a state-of-the-art US domestic litigation-type electronic document collection and sorting system incurred unnecessary cost and burden, and could create an undesired monopoly by large firms with the resources to conduct arbitrations in this way. There was also widespread acceptance that interim and procedural hearings could be conducted virtually via videoconference.

However, practitioners were generally conservative about their predictions for the future. Many saw technology as aiding aspects of arbitration rather than replacing the status quo. Technology was not seen as a substitute for decision-making and many expressed preferences for final oral hearings. In particular, the view was pressed that videoconferencing was not suitable for cross-examination.

Uneven advancement of technology, and the reliability of it, is still considered to be a challenge in certain regions (eg, Africa).

1.13 Predictions for key trends in jurisprudence

Few common specific predictions were given for key trends, in terms of jurisprudence. However, many of the suggestions made by practitioners focused on either investment treaty jurisprudence or on developing court jurisprudence in relation to setting aside or enforcement of arbitral awards.

For investment treaty claims it was predicted that there would be:

- a growing number of investment treaty claims in jurisdictions where there has been political unrest, conflict and regime change, especially in MENA, Ukraine and Greece;
- an increasing number of investment treaty cases before national courts;
- dual nationality from the investor side;
- a discussion of most-favoured-nation (MFN) provisions as applied to procedural rights;
- discounts for political risk to be applied to the assessment of damages; and
- greater cross-fertilisation between international human rights law and investment treaty law.

It was predicted that the following would arise in relation to arbitral awards:

- A form of governance through a 'review by peers' of arbitral awards to give apparent legitimacy to those awards (in a form similar to the review undertaken by the ICC Court of Arbitration).
- Publication of arbitral awards being supported by an arbitral institution, which will provide valuable 'soft-law' (albeit non-binding) to the corpus of the law relating to international arbitration, especially on matters of procedure.
- Courts becoming more interventionist in setting aside awards, including at the seat of the arbitration.
- Further development of the current trend towards comparative citation of law in international cases, ie. Citation of cases from a variety of (relevant) jurisdictions as well as international conventions and private international law sources, in an effort to show that the desired approach is broadly supported across multiple jurisdictions.
- Increased jurisprudence in enforcement and recognition of arbitral awards in various jurisdictions, including 'competition' / consistency of decisions between seats and places of enforcement with regard to 'validity' of awards for enforcement.

The following prediction was made in relation to arbitrators:

- There will be more jurisprudence regarding the immunities and liabilities of arbitrators.

Chapter 2: Africa

By Tunde Ogunseitan

2.1 Current state of arbitration in the region

Arbitration, while in a development phase, is growing rapidly across sub-Saharan Africa, which might be broadly spilt into three groups: East Africa, West and Central Africa, and Southern Africa. (North Africa is considered in the report on MENA).

While arbitration is well established in some parts of West and Central and Southern Africa such as Ghana, Nigeria and South Africa, various other countries in the continent have only recently been seen to support and embrace arbitration. In East Africa, arbitration is reported to be increasing in the jurisdictions of Kenya, Tanzania and Rwanda in particular. Users from these particular jurisdictions foresee a significant upturn in arbitration in the next five years.

2.2 Increased use of arbitration

The reason for the increased use of arbitration across sub-Saharan Africa as a whole lies not only with the parties' control over the process but also primarily with their ownership of the pace of the proceedings and the confidentiality afforded by arbitration. In a continent where the perception of lack of commercial sensitivity by the courts is an issue, considerations such as costs, neutrality, expertise of arbitrators and finality have been pointed out as additional advantages. Consequently, participants also indicated that international arbitration affords a dispute resolution mechanism independent of the political and bureaucratic issues. It was noted that, while much of the demand for international arbitration is driven by international companies investing in Africa, local entrepreneurs are beginning to embrace international arbitration.

There are also some country-specific reasons for the growth of arbitration. For example, participants from Nigeria cited the absence of a discovery process as one of the advantages of arbitration over litigation and could lead to an increased use of arbitration.

However, despite the increased use of arbitration, practitioners and users of arbitration commonly point to costs as a significant disadvantage, with some remarking on the discouraging effect this has on the settlement of lower-value disputes through arbitration. Perhaps in response to this, there appears to be a drive by many African states to appear arbitration-friendly, with courts taking arbitration-friendly positions and governments updating old arbitration legislation to comply with modern norms.

2.3 Seats

In general, most contributors consider their home jurisdictions to be safe seats for the settlement of small commercial disputes, while some referenced the United Kingdom, France and Switzerland as safe seats when dealing with large and sensitive commercial disputes. Across sub-Saharan Africa, four jurisdictions are now bidding to establish themselves as international seats in the next five to ten

years. Johannesburg, Kigali and Lagos are seen as the growing contenders, with Mauritius making substantial gains over the past three years. The viability of these jurisdictions as international seats is dependent on whether there is confidence in the legal infrastructure in these jurisdictions, and whether this confidence will tempt international parties and investors to use them as opposed to the traditional well-heelled destinations. What is clear is that these jurisdictions have begun to develop a body of competent practitioners and, when critical mass is achieved, parties will no longer feel obliged to leave the region in order to resolve their disputes.

2.4 Institutions

National arbitration institutions are at different stages of development across the region. While arbitration is relatively developed in Ghana, Nigeria and South Africa (as evidenced by the presence of national arbitration institutions, namely: the Ghana Arbitration Centre, the Association of Arbitrators (South Africa), the Lagos Court of Arbitration and the Chartered Institute of Arbitrators UK (Nigeria)), this is reportedly not so in other jurisdictions in West and Southern Africa. Practitioners from these other jurisdictions do not foresee a significant change in this regard in the next five years. In East Africa, Rwanda's creation of the Kigali International Arbitration Centre (KIAC) has substantially transformed the perception of arbitration in the region, with more parties willing to agree to institution-administered arbitration and move away from ad hoc arbitrations.

However, the ICC, the LMAA and the LCIA appear to remain the institutions of choice for multinational companies negotiating agreements, and this is likely to be the case until confidence and experience are built in local institutions over the next five years.

2.5 Tribunals

Participants in Africa report a general concern for the arbitrators' accountability. The solutions proposed vary from the introduction of a payment system that is dependent on the achievement of certain milestones in the proceedings, to the introduction of guidelines similar to ICC techniques for controlling the time and costs of arbitration.

To enhance the quality of awards, contributors propose two major solutions, namely: the scrutiny of awards by the relevant arbitral institution; and a screening process by arbitral institutions to ensure that arbitrators possess the requisite skills and experience.

2.6 Career development

Overall, a need for greater specialisation among arbitrators and the lack of experienced arbitrators were highlighted as necessary to promote arbitration in Africa.

In West Africa, participants cite various factors which may affect the career prospects of arbitration practitioners. In Nigeria, for example, the proposed creation of the National Alternative Dispute Resolution Regulatory Commission to regulate the processes of accreditation, the institutions and individuals involved in alternative dispute resolution (ADR), was regarded as a key challenge because it gives rise to concerns that this will undermine parties' freedom to select counsel and arbitrators.

The Ghanaian contributors cite the requirement that arbitrators must have ten years' experience as a challenge for younger arbitration practitioners.

South African participants suggested that until the current complicated and antiquated legal system for international arbitration is reformed in their jurisdiction, it will limit the ability of lawyers in the jurisdiction to develop specialist international arbitration practices.

In Rwanda, practitioners are becoming specialised quickly as parties are reluctant to appoint practitioners without any proven accreditation or experience in arbitration.

2.7 Final thoughts on developments in the region

There is definitely change taking place in Africa. There have been various legal developments in the region which are, in turn, driving the implementation of legal frameworks in keeping with modern norms. For example, the establishment of the Organisation for Harmonisation of Business Law in Africa (OHADA) is marshalling the French-speaking countries in West and Central Africa, and it is only a matter of time before this extends to the development of a more modern legal infrastructure for international arbitration in the region. Some signs of this have already been seen in, for example, Rwanda or Mauritius where there has been a government support drive to provide an arbitration infrastructure through changes to arbitration legislation, the training of the judiciary and the establishment of an international arbitration centre. In the common law jurisdictions, which are essentially English-speaking countries, the development of arbitration has been boosted by changes to the legal framework in order to support arbitration. For example, Nigeria, Ghana and Rwanda have seen either new pro-arbitration legislation or judicial precedent.

However, there is still a lot of investment required in the legal infrastructure in order to give parties sufficient confidence to agree to have their arbitrations seated in many African jurisdictions. South Africa is a case in point, as statute requires permission from the Minister of Economic Affairs for the enforcement of broad categories of foreign arbitral awards. Concerns were expressed that in many jurisdictions the courts are not as supportive of arbitration as they might be; for example, key principles of arbitration law which are reflected in the New York Convention still risk being interpreted in a way which is not in keeping with modern norms. Some participants hoped that pressure from large commercial corporations might propel the creation of a supranational arbitration centre. OHADA has established a blueprint for this.

Chapter 3: Asia-Pacific

By Swee Yen Koh, Sue Hyun Lim and James Morrison

3.1 Current state of arbitration in the region

Arbitration is, without question, a popular and effective form of dispute resolution in the Asia-Pacific region, especially in relation to cross-border disputes. Parties choose arbitration over court litigation mainly due to its advantages in enforcement, neutrality and party autonomy. In certain countries, arbitration is also viewed as more suitable than court litigation due to the specialised knowledge and expertise that arbitrators have in comparison to the judges in the domestic courts. Arbitration also has an advantage in some jurisdictions where it is perceived as being faster and more efficient than the domestic courts.

The rise in arbitration in Asia is also due to the rise in safe seats within the region – namely, Singapore and Hong Kong – which not only have the benefit of robust judicial and legislative support, but also that of renowned institutions which have already crossed the hurdle of building up a trusted reputation in the region.

Nevertheless, arbitration in the Asia-Pacific region still faces setbacks, which include increasing costs and delay, risks to enforcement of arbitral awards in certain jurisdictions and a shortage of skilled arbitrators or legal counsel to meet the growing demand for arbitration services, as well as the continuing uncertainty surrounding the ethical conduct of arbitrators. Also, in some jurisdictions, such as India, there can be a propensity for arbitrators and legal counsel to replicate or be heavily influenced by domestic litigation rules and procedures in conducting international arbitrations. Further, practitioners in countries in Northeast Asia sometimes find it challenging to harmonise the practices and norms under their civil-law-based court practices with the common-law-based procedural aspects (eg, production of documents and examination of witnesses, which can be perceived as overly burdensome or adversarial) deployed in international arbitration.

3.2 The next five years

The future is optimistic for arbitration in the Asia-Pacific region. In addition to a regional increase in disputes going to arbitration as a whole, arbitration is expected to grow notably in Indonesia, Myanmar, South Korea and Australia, while more gradually in Japan. More safe seats and reputable institutions are also expected to emerge in the next five years, which will increase the range of choices available to potential disputants.

A wide array of developments has also been predicted for the next five years to address the current setbacks to effective arbitration. This includes increasing the number and availability of arbitrators, introducing fee caps and time limits, streamlining procedures, increasing the use of technology, providing guidance for the ethical conduct of arbitrators, introducing legal amendments permitting contingency-fee arrangements and increasing government and court support for arbitration.

At the same time, it is foreseen that there will be a rise in litigation using specialised courts, with the establishment of new commercial and construction courts that are specially tailored to suit disputes

of a commercial and/or international character, such as the Singapore International Commercial Court. While it is by no means suggested that this will lead to a decrease in arbitration or a preference for litigation, the extent of this development could be magnified if and when the Association of Southeast Asian Nations (ASEAN) members successfully implement a treaty on the enforcement of court judgments, though this is not likely to come to fruition within the next five years.

3.3 Seats

Singapore and Hong Kong are regarded as the safest seats within the region, with Singapore being seen as the seat of the future due to its supportive national laws, well-developed infrastructure and its strong position as a financial and commercial centre. Practitioners variously cited Kuala Lumpur and Seoul as being increasingly popular, while Chinese practitioners stated that mainland China is the preferred seat among users in China. However, none of these seats compared to Singapore and Hong Kong in terms of popularity. Outside the region, practitioners recognised London, Paris and Geneva as important seats. However, many expected these to diminish in popularity as Singapore and Hong Kong continue to grow. In light of recent decisions of the Indian Supreme Court, India (and specifically Delhi) was also increasingly considered a safe place to seat an international arbitration, particularly in cases where the subject matter of the dispute is situated in India. Practitioners also viewed Sydney as a regionally established seat and expected both a growth in international arbitrations seated there and in disputes involving Australian parties.

Asia-Pacific practitioners regarded the possibility of an a-national award system as slim. They cited the fact that the idea of the seat is well ingrained in national legislation, court decisions and interpretations of international documents such as the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') and the New York Convention. Without uniformity of rules and their interpretation, there was scepticism as to the feasibility of the idea. Further, many deemed the idea of a-national awards to be undesirable. Established seats were said to create certainty and enable parties to seek interim relief and review or challenge awards within a clear legal framework.

3.4 Institutions

The ICC continues to be popular among users in the region but is closely followed by the SIAC and the HKIAC for their efficient case management and innovative features. Other arbitration institutions in the region, such as the Kuala Lumpur Regional Centre for Arbitration (KLRCA) (especially for its niche area in Islamic-law-related disputes), the Japan Commercial Arbitration Association (JCAA) (which had its rules recently revised) and the Korean Commercial Arbitration Board (KCAB) (which has recently seen an increase in the use of its international rules), were also expected to gain more popularity. In Australia, the Australian Centre for International Commercial Arbitration (ACICA) has been gaining recognition. LCIA India is often recommended for arbitrations seated in India and is preferred due to its location (Delhi) and its hourly fee structure.

Participants identified an ongoing trend for parties in Asia to choose institutions within their own region (rather than institutions which were traditionally popular, such as the LCIA and the ICC).

As to the question of whether the institutional rules were becoming too homogenised, the general

response was that this was a positive development, as it adds to predictability, familiarity and more competition among the institutions.

3.5 Tribunals

In Asia, most practitioners are of the opinion that the increased specialisation of arbitrators, both in the practice of arbitration and in industry sectors, is desirable as it leads to greater efficiency and more effective servicing of client needs. The consensus is that arbitration practitioners are not becoming too specialised. Interestingly, some participants viewed specialisation in terms of distinguishing a practitioner's arbitration practice from a domestic litigation practice. Others considered specialisation as being an issue for industry sectors (eg, intellectual property, construction, maritime, etc).

A consistent theme among participants was the need to increase the pool of available, credible and high-quality arbitrators in the region. This was concomitant with the view that tribunals should be held to account more in terms of speed, efficiency and quality of decision-making, especially in view of the finality of arbitral awards, and that this would deal with the problem of a lack of accountability in the arbitration process. Some practitioners, however, did not believe that additional mechanisms should be made available for parties and institutions in this regard. Rather, existing self-regulation mechanisms in the arbitration community were seen as sufficient to hold arbitrators to account.

Finally, issue conflict did not appear to be a widespread problem in Asia-Pacific and, in any event, the IBA Guidelines on Conflicts of Interest in International Arbitration provided a helpful means of preventing or resolving them. Even in the context of investment treaty arbitration, where issue conflicts were considered most likely to occur, participants were optimistic that they would occur less frequently, especially in light of these guidelines.

3.6 Career development

Generally in the Asia-Pacific region, and consistent with the globalisation of legal services, the practice of international commercial arbitration has attracted considerable interest not just among the new entrants at the junior end but also crossover lawyers from litigation to international arbitration practice. However, with the dramatic increase in competition among lawyers interested in practising international arbitration, there were concerns regarding competition and a saturated market in the Asia-Pacific region.

A lack of education, knowledge of arbitration laws, and experience was reported in some jurisdictions that had less development arbitration jurisprudence. To develop the practice in these jurisdictions, there needs to be more education and training of the arbitration counsel as well as tribunals. In some jurisdictions, such as India and Australia, arbitration has traditionally been viewed as merely a sub-practice within court litigation, which has presented difficulties in terms of opportunities to develop a true specialisation in arbitration. Practitioners from civil law jurisdictions in the Asia-Pacific region reported as a challenge, their limited exposure to arbitration-style advocacy, which is closer to the manner in which domestic litigation is conducted in common law jurisdictions such as Singapore, Hong Kong and Australia.

3.7 Final thoughts on development in the region

Commentators identified a number of key areas of jurisprudence to watch out for in the coming years. One such key area was that of enforcement and the setting aside of awards. Some feared that courts would continue to become more interventionist in the setting aside of arbitral awards, even in established seats such as Singapore. Two decisions by the South Korean courts denying the enforcement of two final ICC awards were seen by some as further evidencing this development, although others viewed these as isolated instances that are unlikely to be repeated. Others cited national court decisions in India and China on enforcement as interesting areas to watch, especially in the light of a trend of pro-arbitration judgments in India.

Developments relating to interim measures and emergency arbitration were expected. Practitioners expected their popularity to continue to grow in Singapore and Hong Kong, as evidenced by the SIAC statistics cited by one commentator showing the rapid rise in their use. Some practitioners mentioned the presence of LCIA India and the proposed amendments to the Indian Arbitration and Conciliation Act as potentially important developments in this area. Practitioners from countries with less-developed arbitration jurisprudence such as Indonesia, Thailand and the Philippines feared that interim relief would not be enforced by national courts.

Observations regarding the future of third-party funding also varied across the region. In Australia, practitioners recognised that there was an established history of third-party funding in litigation and this would increasingly be mirrored in arbitration. In Hong Kong and Singapore, third-party funding was similarly expected to grow, albeit in a regulated manner. However, in India, Thailand, Indonesia and Malaysia, third-party funding is not allowed and practitioners did not expect this to change.

Chapter 4: Europe

By Christopher Harris and Sarah Morton

4.1 Current state of arbitration in the region

Europe presents perhaps the widest range of sophistication and experience of arbitration. At one end of the spectrum, it is home to many of the leading arbitral institutions in the world, such as the ICC in Paris, the LCIA in London, the Permanent Court of Arbitration (PCA) in The Hague and the SCC in Stockholm. It is also home to a range of fairly specialised national courts with a wide experience of supporting arbitral proceedings, such as the Commercial Court in London, the Paris Cour d'Appel and the Svea Court of Appeal in Stockholm.

At the other end of the spectrum, there are a number of countries, especially in the eastern part of the region, where arbitration is still in its infancy and where local courts are not regarded as being supportive of arbitral proceedings; in some cases, they have been criticised for undermining arbitrations.

Reflecting this distribution, there are countries within the region where arbitration is, effectively, the default dispute resolution mechanism for disputes in a number of sectors such as oil and gas and other countries where litigation remains strongly dominant and there are real prospects for growth.

4.2 The next five years

Most respondents regarded there to be significant prospects for the growth of arbitration in the region as a whole. Particular importance was ascribed to sector expertise in the financial and energy sectors, while the confidentiality of proceedings remained critical for sensitive industrial areas such as pharmaceuticals. New arbitration laws in Belgium and Finland are expected to generate growth in arbitration, while Italy has resolved to use arbitration to ease the backlog in its courts, which should lead to a significant upswing in arbitration awards there.

Practitioners viewed there to be multiple threats to growth, however, ranging from external factors such as the rise of Asian arbitration centres and the impact of Russian sanctions, to internal factors such as the reinvention of specialised national courts with more streamlined procedures and the perceived lack of success in addressing the delay and costs of arbitral proceedings.

4.3 Seats

The most highly regarded seats were, perhaps unsurprisingly, Paris, London, Geneva and Zurich. Stockholm is also a key seat, especially for disputes involving Russian and Chinese parties. Most respondents considered that these were likely to remain the dominant seats for the next five years, driven largely by their strong institutions, good hearing venues and infrastructure and, most importantly, sophisticated and experienced local courts and legislation supportive of international arbitrations.

A number of respondents considered that the established hierarchy will be challenged increasingly

over the coming years by other seats both within and outside the region. Vienna, Helsinki and The Hague were the most frequently mentioned European growth seats, with Madrid highly regarded for Latin American cases. Outside Europe, practitioners felt that Singapore, Hong Kong and Malaysia offered the greatest competition. It was particularly highlighted that the impact of sanctions was driving Russian parties to seek new venues for the resolution of their disputes away from the region.

Support for a-national awards among European practitioners was limited, with many viewing these as unrealistic. Others highlighted the importance of national courts in enforcement and doubted that a-national awards would assist in that regard. A strong theme that emerged from the responses was that a-national awards are not really desirable, since parties benefited from the stability of a supervisory court exercising control over arbitral proceedings. Several respondents noted that recent criticisms of the Transatlantic Trade and Investment Partnership (TTIP) on the grounds that it left important questions too far removed from national courts to review suggests that public sentiment is not in favour of delocalised proceedings.

4.4 Institutions

The ICC and the LCIA received numerous mentions as leading institutions, closely followed by the Swiss Chambers, the VIAC and the SCC. The ICC was the preferred choice, with commentators noting that it was particularly well suited to large-scale international disputes. However, it was also regarded as high-cost and less time efficient than some of the smaller institutions.

A number of those consulted predicted a growth in the use of regional and/or sectoral institutions as the reliability of their governing bodies is perceived to increase and their ability to offer lower arbitration costs and faster decisions becomes more attractive. The Belgian Centre for Arbitration and Mediation (CEPANI), the Arbitration Institute of the Finland Chamber of Commerce (FAI), PRIME Finance and the Hungarian Energy Arbitration Court were among those mentioned in this regard. Most respondents believed that the large institutions were likely to remain in a position of dominance in relation to large-scale, high-value disputes for the foreseeable future.

In respect of homogeneity, while most commentators believed the rules of the main centres to be fairly homogenous, views were divided as to the merits of this. While some considered this to be a reflection of an emerging international consensus of best practice, others believed that this should not be an aim in itself and should not stifle innovation. One of the key areas of distinction highlighted was the method of charging, namely the distinction between the ad valorem method adopted by the ICC and others, and the hourly rate approach of the LCIA, inter alia.

4.5 Tribunals

In Europe, many respondents viewed the experience and specialisation of arbitrators as an advantage. However, many argued that there is a need for both specialists and generalists to deal with the range of cases, including those with a background in litigation. Respondents did complain that in areas such as finance there is a real need for arbitrators with a higher level of background in the instruments and practices of the market.

The main criticism levelled at tribunals was, perhaps unsurprisingly, delay and lack of efficiency in

the conduct of proceedings. Respondents acknowledged that parties and counsel were also to blame in this regard, but focused on arbitrators' availability and a perceived unwillingness to be directive and hands-on in driving a dispute, including making tough case management orders. Particularly in the pro-arbitration jurisdictions, it was felt that arbitrators could afford to be stronger without fear of having their decisions overturned by the courts.

4.6 Career development

There is a clear split in the region between (principally) London and Paris and the other centres as regards specialisation: in the former, there are a number of large firms with specialist arbitration groups, as well as boutique firms focusing on arbitration, and the specialisation is seen as a good thing; in most other jurisdictions, practitioners undertake a mixture of litigation and arbitration work and this is also perceived to be a benefit. Indeed, respondents from the Nordic countries strongly believed that it was best for practitioners to have a mixed practice.

Arbitration is a small and competitive area in all European jurisdictions, which raises the bar for entry to the profession. Commentators believe that versatility as to location and language skills is one key metric of success for those seeking a career in the area. The difficulty of obtaining practical experience, and of advocacy experience in particular, was highlighted by respondents.

4.7 Final thoughts on development in the region

In amongst the predictable areas of concern to European practitioners – with TTIP inevitably rating a number of mentions – there were a number of surprising responses. In a region dominated by civil law jurisdictions, there was a marked preference for oral hearings and examination of witnesses in person. Further, interim relief was viewed as highly desirable both in those countries with strong procedures already in place, and also in jurisdictions where there is no current ability to obtain such measures.

Commentators are expecting a wide range of developments in the jurisprudence over the coming years. In particular, many referred to the growth of third-party funding, increasing challenges to arbitrators and moves to greater transparency in respect of awards as key trends to observe. And, of course, one could not end without mentioning the TTIP negotiations and public reaction thereto, which seem likely to remain critical issues for arbitration in the political sphere.

Chapter 5: Latin America

By André de A. Cavalcanti Abbud and Ignacio Minorini Lima

5.1 Current state of arbitration in the region

Arbitration is a growing means of dispute resolution in Latin America. However, as is often the case in the region, it is difficult to generalise in many aspects since each country has its own particularities. While many countries have established a decisive pro-arbitration approach, others show legal trends that do not foster arbitration.

State court litigation is still consistently the most commonly used dispute settlement method. The perceived performance of the different state courts varied greatly among the diverse countries. However, in general, complaints of sluggishness, inefficiency and high costs are commonplace.

Parties have come to recognise these key deficiencies in the justice system, which drive them to attempt to solve their disputes through alternative mechanisms. Arbitration appears in the eyes of users as a method which offers many attractions: neutrality, speed, expertise, confidentiality and flexibility.

In recent years, most countries have witnessed important advances in the field, with several adopting more arbitration-friendly laws and judges willing to cooperate closely with arbitrators. On the other hand, there are other Latin American countries whose judiciary is often represented as an obstacle to arbitral proceedings or the enforcement of awards.

5.2 Increased use of arbitration

Practitioners almost unanimously predict growth in arbitration in Latin America over the next five years. This trend is driven by the general expansion of the economies and supported (in general) by pro-arbitration legislative reforms (eg, Colombia and Brazil). The classic advantages of arbitration are noted as key drivers (eg, enforcement regime, flexibility of procedure and neutrality). Practitioners note, in particular, the benefits of expert decision-makers and confidential judgments as being particularly important in establishing arbitration as a mechanism suitable for complex matters and the preferred choice of sophisticated companies.

On the other hand, the advancement of arbitration in certain parts of the region has to overcome certain setbacks. Arbitration is hindered in various countries by a lack of court support, judicial interference – especially in cases involving the state or state-owned companies – or, in some cases, by undermining legislation. Some jurisdictions have the added challenge of delays in award enforcement. In general, there is also a concern or uncertainty regarding interim remedies.

5.3 Seats

Latin American parties do not always choose Latin American seats, with many opting for the customary options of Paris or New York. Following the global trend, foreign parties often prefer well-known international seats.

Within the region, the safest seats are considered to be São Paulo or Rio de Janeiro in Brazil, Mexico City, Montevideo, Santiago de Chile and Bogotá, with no clear frontrunner. Most practitioners do not expect this to change drastically in the near future, though there are some legislative proposals which could foster a change.

5.4 Institutions

Parties tend to choose institutional arbitration over ad hoc procedures. The region has over 100 local arbitral institutions that are commonly used, with each country establishing several institutions, often associated with the local chamber of commerce. Among these are the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (CAC-CCB), the Centro de Arbitraje de México (Arbitration Centre of Mexico) (CAM), and the Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canada (Centre of Arbitration and Mediation of the Brazil-Canada Chamber of Commerce) (CAM-CCBC).

On a global level, Latin American parties hold the ICC in high esteem and often choose it to administer their dispute resolution. Though this predominance is not expected to change greatly in the near future, regional institutions are silently strengthening their position and the forthcoming establishment of the UNASUR Arbitration Centre (the seat of which is yet to be determined) is anticipated by many.

In general, homogenisation of the applicable rules is seen as a positive outcome, which will make parties resort to local rather than international institutions. However, the degree to which the various institutions have homogenised their rules is a disputed topic.

5.5 Tribunals

There was a generalised tendency towards thinking that users ought to do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making.

Practitioners expressed concern over the small circle of available arbitrators in Latin America as well as the need to make the process more transparent. According to experts and users, the arbitral institutions should focus their efforts to cope with these two issues by enhancing the availability of arbitrators with particular knowledge of the region and by making the appointment processes more transparent. The ultimate goals of efficiency and quality of decision-making would be supported if the arbitration institution offered a larger pool of arbitrators and secured transparency.

With respect to the performance of tribunals, the powers of arbitrators throughout the process have triggered controversy. For instance, Latin American countries have taken very different approaches with respect to interim relief and emergency arbitration. Some jurisdictions allow arbitrators to grant interim relief (eg, Brazil, Colombia), others ban this outright (eg, Uruguay), some are in the midst of reforming the issue (eg, Mexico, Argentina) and in some countries the topic presents much uncertainty (eg, Chile, Mexico). As regards to emergency arbitration, the vast majority of Latin American countries have not adopted legislation on this mechanism and experts are in disagreement regarding the immediate future of the subject.

5.6 Career development

In Latin America it is not usual for practitioners to dedicate themselves exclusively to arbitration, with most of them practising civil or commercial litigation in substantive areas of law. This is due, in part, to the relatively small regional market for arbitral litigation. There are a limited number of arbitration firms and it is rare even for the larger firms to have their own exclusive arbitration department.

The arbitration circle is small and competitive, thus presenting a challenge for young lawyers to gain entry. That said, the growing regional market (especially in regard to foreign investment) is triggering a growing demand for trained arbitration practitioners, leading to more local educational and work opportunities.

However, in practice, this matter has not turned out to be a major problem: it has not given rise to many challenges or obstructions to arbitration procedures.

5.7 Final thoughts on development in the region

Experts and practitioners are keeping a keen eye on a number of jurisprudential trends and await the settlement of various uncertain areas of law. Among these are the concepts of public order and arbitrability (fundamental to the recognition and enforcement of awards as well as the non-intrusion of the judiciary), the extension of arbitral agreements to nonsignatories and the courts' interpretations of recent arbitral legislation.

Chapter 6: Middle East and North Africa

By Amani Khalifa

6.1 Current state of arbitration in the region

Arbitration has become the ‘normal’ means of resolving complex commercial disputes in MENA. The growth in recent years is reflected by the overall increase in the number of cases registered with institutions throughout the region.

6.2 Increased use of arbitration

The increase in the use of arbitration has been driven by a number of factors including the widespread ratification of the New York Convention within the region, as well as the perceived disadvantages of court litigation which include delay and a perceived lack of neutrality where a foreign party is involved.

Practitioners and users from jurisdictions that have witnessed political unrest or armed conflict noted the effect of these events on the ability of national courts to function effectively, and such events are a contributing factor to the increased use of arbitration.

Experts identified the increasing familiarity with the arbitral process among users and an increase in the number of disputes in industries requiring specialist knowledge as further causes for the increased use of arbitration.

Perhaps the most significant change predicted for the development of international arbitration in the coming five years is the improvement and/or modernisation of outdated arbitration legislation in Qatar and the UAE. Participants anticipated that the modernisation of this legislation could lead to a change in the current preference for seating arbitrations in the major arbitration destinations, with more arbitrations being seated in MENA rather than Europe in future.

6.3 Seats

Many contracts with counterparties in MENA still provide for arbitration in the major arbitration centres of Dubai, Paris and London. However, it is anticipated that there will be an emergence of other safe seats in MENA.

Egypt and Tunisia were perceived as safe seats by participants in those jurisdictions due to the adoption of Model Law-inspired arbitration legislation and the increasing familiarity of the local courts with the arbitral process. The DIFC was also perceived by respondents to be an up-and-coming safe seat.

Lebanon was perceived as another safe seat by those familiar with that jurisdiction. For example, the Lebanese courts apply Lebanese law over the terms of the New York Convention because the former is considered more favourable concerning the enforcement of foreign awards. Lebanese courts are also of the view that arbitral awards set aside in the seat are nevertheless enforceable in Lebanon.

Saudi Arabia's adoption of more modern arbitration legislation in 2012 could result in more frequent selection of Saudi Arabia as a seat. However, although the law is based on the Model Law, closer examination of its provisions has yielded some cause for concern.

Any future reform of the UAE's outdated arbitration legislation is anticipated to yield a significant increase in the selection of Dubai as a seat.

Practitioners view certain recent decisions of the Qatari courts as unfortunate and in contradiction with the New York Convention. However, anticipated changes to Qatari arbitration legislation are expected to have a positive impact.

6.4 Institutions

Respondents listed the Dubai International Arbitration Centre (DIAC), the CRCICA and the Dubai International Financial Centre – London Court of International Arbitration (DIFC –LCIA) as the most popular in the region.

Regional institutions including the Cairo Regional Centre for International Commercial Arbitration (CRCICA) were praised as having competitive fee schedules that allow parties to bring small- and medium-value claims efficiently, but there appeared to be a preference for more established, global institutions such as the ICC or the LCIA in potentially high-value cases.

Some practitioners anticipate the establishment of industry-specific arbitration institutions such as the LMAA for different industry sectors.

CRCICA's increased caseload was cited by some as evidence for the increasing use of regional arbitration institutions, while others felt that the distinction between regional and non-regional institutions was becoming less important and that institutions will be judged instead on their own merits.

6.5 Tribunals

Users in the region still do not do very much to hold arbitral tribunals to account. Some practitioners attributed this to the relative efficiency of the arbitral process when compared with the delays normally encountered in the course of litigation before the severely backlogged national courts.

The majority view is that the principal responsibility for holding arbitral tribunals to account lies with arbitral institutions.

6.6 Career development

Noting that smaller, 'family', full-service law firms are common throughout the region, many suggested that a greater degree of specialisation was needed to ensure the highest standards of practice.

Respondents from Qatar and the UAE observed that the presence of expatriate international arbitration practitioners brought a higher degree of specialisation into the local legal market, which was desirable. In other jurisdictions, respondents cited restrictions on the practice of foreign lawyers

as a barrier to the expansion of the pool of specialist practitioners.

Achieving fluency in English was cited as a key challenge to establishing a successful career in arbitration for Middle Eastern lawyers.

6.7 Final thoughts on development in the region

There is potential for an increase in investment claims in the coming years as a result of the political unrest, conflict and regime change throughout the region.

Other changes that were anticipated include an increase in the number of arbitrations seated in free-zone jurisdictions and increased interest in regional multilateral investment protection treaties.

Chapter 7: North America

By John Siwiec and Patrick Pearsall

7.1 Current state of arbitration in the region

Arbitration has continued to grow as a preferred means of resolving international disputes in North America. Participants commonly noted that international arbitration is the only international dispute resolution mechanism that can consistently provide fair, unbiased and effective adjudication regardless of the location of the dispute.

The use of international arbitration is well developed in North America. The primary reasons for its continued use and development include the ability to choose arbitrators, and the flexibility parties have to choose the seat of arbitration, the arbitration rules and the applicable law. Other advantages include privacy and confidentiality as well as the enforceability of awards under the New York Convention.

7.2 Increased use of arbitration

Arbitration is likely to continue its prevalence in North America over the next five years. In Canada, in particular, there seems to be an increased awareness of arbitration as well as a shift from ad hoc to institutional arbitration.

Practitioners noted a number of hurdles associated with arbitration that may impede its continued growth in the next five years, including:

- increasing costs, particularly with respect to complex cases, as a result of litigation procedures being imported into the arbitration process, such as extensive document production and lengthy submissions;
- the use of a limited pool of busy arbitrators on a tribunal, which can delay proceedings and the rendering of the award; and
- uncertainty associated with the following matters: whether the tribunal will be reliable and able to ensure the arbitration runs efficiently; whether a party may end up in court in order for an award to be enforced; and whether the award will be enforceable.

7.3 Seats

North American safe seats include New York, Washington DC, Miami, Chicago and Houston in the US and Toronto, Vancouver, Calgary and Montreal and Ottawa in Canada.

Perceived safe seats from around the world include London, Geneva, Zurich and Singapore. Although the participants generally included Paris in the list, there is a slight unease that Paris can be influenced by local culture and practices at times.

Participants from North America also expressed an interest in which credible seats will emerge in Latin America, South Asia and Africa over the next five years.

7.4 Institutions

Participants noted that three major institutions figure prominently: the LCIA, the ICC and the ICDR. For US-Canada disputes, the ICDR is perhaps the most prevalent, though the ICC is likely to become more competitive following the recent establishment of its New York office (SICANA).

With respect to investment arbitration, the International Centre for Settlement of Investment Disputes (ICSID) remains preferable to other institutions or ad hoc arbitrations, particularly in the light of Canada's recent ratification of the ICSID Convention.

Many participants believe that greater use of regional institutions outside of North America is likely in the international sphere. Participants noted that the success of regional institutions will likely lie in their ability to avoid any appearance of favouritism in the way cases are administered and decided. In this regard, regional institutions should have credible panels of arbitrators with recognised names from other regions.

With respect to the trend of convergence in institutional rules, participants noted that it follows that the rules of various institutions become less distinguishable as best practices emerge. After all, institutions seek to serve the same needs.

7.5 Tribunals

The majority of participants believe that users should do more to hold tribunals accountable for speed, efficiency and quality of decision-making. Participants generally believe that this may be achieved by:

- institutions playing an increased role in putting pressure on arbitrators by imposing monetary sanctions such as returning a greater portion of an advance on costs to the parties, and withholding fees to arbitrators;
- ensuring that there are more disclosure obligations on arbitrators before accepting appointments;
- publishing more awards and making them more accessible to the public to encourage greater quality of decision-making;
- encouraging diversity and a greater number of arbitrators in order to increase competition among arbitrators;
- ensuring that the parties specify their procedural expectations at the outset; and
- encouraging arbitrators to adjust their fees in accordance with their level of speed and efficiency.

There seems to be a consensus that emergency arbitration proceedings will increasingly become important over the next five years as US and Canadian courts have been supportive of emergency relief regarding arbitration proceedings in relation to challenges to such relief. The development of case law where the North American courts have upheld orders made by emergency arbitrators has

had the effect of legitimising the emergency arbitration process. However, there is a concern over: (a) the quality of emergency arbitrators given the difficulties in obtaining a well-established arbitrator at short notice who would be willing to take on the role of emergency arbitrator; and (b) the risk that the emergency arbitrator's interim relief has the practical effect of finally determining the dispute.

7.6 Career development

The most commonly cited challenge with respect to developing a career in international arbitration is the increasing competition among lawyers – there are too many entrants chasing too few opportunities. Participants noted that competition may be further increased in light of a potential decline in investment treaty cases, and a backlog of associates in international firms with fewer partnership promotions.

The second-most-common response was the challenge of gaining quality experience – there is simply not enough work in some markets, particularly in Canada, where only a small number of firms are regularly engaged in international arbitration work, for a practitioner to become an expert in the field.

7.7 Final thoughts on development in the region

Participants noted a number of different trends to watch out for in international arbitration jurisprudence, including:

- the enforcement of emergency arbitrator decisions;
- costs ordered for frivolous challenges to awards;
- a further tightening of procedural fairness grounds for setting aside/refusing enforcement of awards, particularly on the 'public policy' ground;
- more guidelines regarding the enforceability of awards that have been set aside at the seat;
- increased judicial scrutiny and interventionism to ensure consistency and quality of awards; and
- greater cross-fertilisation between international human rights law and investment treaty law.

Chapter 8: Methodology

The following approach was adopted by the IBA Arb 40 Subcommittee in order to compile feedback from arbitration practitioners for the purposes of this report:

1. Arbitration practitioners were consulted on the basis of six different regions: (1) Africa; (2) Asia-Pacific; (3) Europe; (4) Latin America; (5) Middle East and North Africa; and (6) North America.
2. Members of the Subcommittee contacted practitioners in these regions who act as arbitrators, senior arbitration counsel and young arbitration practitioners. The number of practitioners who responded and the jurisdictions in which they practice is noted in the relevant appendix for each region.
3. Those who participated in the survey were each asked the same questions, which are set out in the appendices to this report. This was largely done by email requests, although some members of the Subcommittee spoke directly to participants.
4. The IBA Arb 40 Subcommittee compiled summaries of the responses received for each region, and these are contained in the Appendices found in Chapter 9. A high-level version of the responses is set out in Chapters 2–7.

Chapter 9: Appendices

9.1 Africa

Nine participants in eight different countries answered the questionnaire.

Countries: Nigeria, Ghana, Senegal, Rwanda, Kenya, Tanzania, Uganda and South Africa.

1. What are the reasons that users choose arbitration over court litigation and how might this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

1.1 The advantages cited for arbitration were generally uniform among the different survey participants. The main reasons put forward for choosing arbitration over court litigation were speed, confidentiality and the ability of parties to have control over the procedure. Other traditional features cited included costs, neutrality, expertise of arbitrators and finality. Participants from Nigeria also cited the absence of discovery process as an advantage of arbitration over court litigation. In contrast, ease of enforceability was not cited as an advantage of arbitration, whether in respect of local or international awards. Participants from East Africa, especially Rwanda, remarked that the supportive attitude of the courts and the government towards arbitration had been important factors in increasing its usage. For example, in 2014 the Office of the Attorney-General of Rwanda issued ministerial instructions setting up, among other things, model dispute resolution clauses which promote the use of alternative dispute resolution in contracts involving public institutions in Rwanda.

1.2 While arbitration is clearly on the rise in Africa, the responses received appeared to suggest that the speed of development is jurisdiction-specific. For example, in Nigeria participants expressed the view that an increasing number of parties would select arbitration over litigation in Nigeria over the next five years. As already noted, Rwanda has seen a growth of arbitration as a result of changes to its legal infrastructure. In South Africa, the increasing number of agreements concluded between South African companies and international companies is seen as a drive to an increased use of arbitration by creating demand for a neutral forum.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

2.1 Generally, it was perceived that a significant obstacle to the growth of arbitration in Africa is the cost. This had the result that many lower-value disputes which would be suited to arbitration were not being referred to arbitration. In countries where domestic commercial courts provide effective dispute resolution, such as Rwanda and South Africa, practitioners reported that domestic commercial courts were preferred over arbitration due to the costs involved. A further significant obstacle to the growth of arbitration in the region is the lack of support for – if not hostility towards – arbitration, which is prevalent in some courts.

2.2 Other shortcomings that were identified – primarily in West Africa – include the risk of

conflicting awards and the lack of coercive powers, as well as the difficulties in joining new parties to existing proceedings. Also mentioned was a local preference for mediation or settlement of a claim through informal means, which can sometimes inhibit arbitration proceedings.

2.3 Some participants expressed the opinion that the final and binding nature of an award and the difficulties in setting it aside are sometimes a disincentive because there is no guarantee as to the award's quality.

3. Which arbitration institutions are popular in the region and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are institutions becoming too homogenised and, if so, should they try to differentiate themselves?

3.1 Most contributors cited their home jurisdiction as a safe seat, particularly for domestic commercial transactions. Other safe seats included traditionally designated locations such as the UK, France and Switzerland. Hong Kong was also indicated as an acceptable seat, though it was noted that it is not frequently designated in the region. In addition, Mauritius and Rwanda were cited as safe seats by participants from other jurisdictions.

3.2 The use of national arbitration centres appears to be prevalent according to contributions received from West and Southern Africa. The main national arbitration centres cited were the Lagos Court of Arbitration, the Chartered Institute of Arbitrators UK (Nigeria), the Arbitration Foundation of South Africa, the Association of Arbitrators (Southern Africa) and the Ghana Arbitration Centre. KIAC, which was inaugurated in 2012, also observes an increase in visibility in the East African region.

3.3 Many participants observed that they did not have arbitration institutions in their jurisdictions, and that they did not expect this to change in the next five years, given that arbitration as an alternative dispute resolution mechanism is not sufficiently developed in their jurisdiction.

3.4 In Nigeria, it was noted that there is an array of national arbitral institutions to choose from, including specialised institutions. In Nigeria, participants noted that while there was a trend towards using national arbitration institutions, this would not lead to a convergence of the rules of those arbitration institutions. This is because those institutions were developing differences in terms of fees and the degree of involvement in the proceedings in order to differentiate themselves.

4. What are currently considered to be the 'safe' seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?

4.1 None of the participants observed any signs of a move towards a-national awards within their jurisdictions. There was no suggestion from participants that actions in the seat of arbitration, such as the annulment of an award, prevented enforcement of the award in other jurisdictions within the region.

5. Are arbitration practitioners becoming too specialised or are they not specialised enough?

- 5.1 Participants overwhelmingly reported a need for greater specialisation of arbitration practitioners. Certain participants pointed to the small number of arbitrators available in their home jurisdiction, many of whom are lawyers first and arbitrators second, and to the discernible gap between the number of disputes referred to arbitration and the availability of experienced arbitrators to settle such disputes. Demand for specialised arbitrators is also reflected in the parties' appointment of arbitrators. Parties are now careful to ensure that the arbitrators they select have a proven record of accreditation in arbitration as well as practical experience.
- 5.2 Others pointed to the lack of sectoral or technical expertise among arbitrators. In that respect, contributions from South Africa suggested that certain types of disputes such as insurance claims would be particularly well suited to an increased specialisation on the part of arbitrators.

6. What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years' time?

- 6.1 A majority of the participants reported that there are no emergency arbitrator provisions in the institutional rules in their national jurisdiction. Participants from South Africa reported that it is usual to apply to the court for interim relief during the course of the arbitration, and pointed to the shortfalls of this practice, which include time and expense as well as the occasional unwillingness of certain judges to grant the relief. Consequently, many participants expressed the view that provisions for an emergency arbitrator would be a most welcome development, although they admitted that such a mechanism would probably still require recognition from the national courts before it could be effectively enforced, and concluded that 'it is doubtful that within the foreseeable future this is achievable'.
- 6.2 In contrast, participants from Nigeria and Rwanda were more optimistic. A participant from Nigeria responded that 'emergency arbitrators will certainly be in place in the Nigerian arbitration environment in five years', citing that the Lagos Court of Arbitration provides for the possibility of appointing a special measures arbitrator to issue urgent interim or conservatory measures prior to the constitution of the tribunal.
- 6.3 Participants from Rwanda emphasised the importance of interim relief and noted that the Rwandan Arbitration Act of 2008 provides for arbitral tribunal and the courts to order such relief. One participant also referred to the 2012 KIAC arbitration rules which include an emergency arbitrator provision. It was also noted that a 2014 order of an emergency arbitrator was voluntarily complied with.

7. Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?

- 7.1 Most participants were of the view that there is indeed a need for greater accountability from arbitrators, but the concerns expressed and the solutions proposed were not uniform.
- 7.2 One concern, which featured predominantly in the answers received, was the need to control the costs associated with arbitration. Some participants reported that it is common practice in their jurisdiction for an arbitrator to receive fees on the basis of work done in a particular

month, which is not conducive to the rapid resolution of disputes and increases the general costs of the proceedings. A solution proposed in this respect was the introduction of a payment system dependent on the achievement of certain milestones in the conduct of the proceedings. Participants from other jurisdictions expressed the wish that in the next five years, it will have become the norm for arbitral institutions to develop guidelines similar to the ICC Techniques for Controlling the Time and Costs of Arbitration.

7.3 Another concern was the quality of arbitrators' decision-making. Many participants noted that awards can, on occasion, be of poor quality and can even seem 'confusing to the winning party'. Two different mechanisms were envisioned as safeguards against this risk: (i) ensuring the internal scrutiny of awards by the relevant arbitral institution; and (ii) developing a process whereby prospective arbitrators would be required to satisfy the relevant arbitral institution that they meet the required skills, expertise and experience to conduct proceedings.

8. Do you predict any key trends in terms of jurisprudence?

8.1 The survey participants did not identify any key trends to watch out for in their home jurisdictions.

8.2 Some participants cited as a reason the fact that arbitration is still in its early developmental stages in their respective countries, while others, particularly in South Africa, expressed the view that the major jurisprudential developments in the field of arbitration have already taken place, with the recognition of the binding nature of arbitration agreements and the enforceability of awards. Accordingly, they saw little scope for further development of the legal landscape, though a shift in attitude from the judiciary towards a greater acceptance of arbitration is possible.

9. Where will third-party funding go over the next five years?

9.1 The majority of participants reported that third-party funding is not, or is minimally, used in their jurisdictions, and indicated that third-party funding is not regulated. Participants from West and Central Africa, however, concluded that third-party funding may grow in the next five years, in particular in investment arbitrations.

10. What will be the key challenges to establishing a career in arbitration over the next five years?

10.1 The challenges identified by the participants were often specific to their jurisdiction.

10.2 In Nigeria, the key challenge identified was the possible adoption of a bill to establish a National Alternative Dispute Resolution Regulatory Commission, which is expected to regulate the processes of accreditation, the institutions and individuals involved in ADR. Participants from this jurisdiction expressed concern over the bill's implication for the future of arbitration in Nigeria and indicated that the projected bill would severely undermine party autonomy; moreover, it would also mean that alternative dispute resolution mechanisms are no longer self-regulated. However, they also reported that the bill has been the subject of much opposition.

10.3 In other parts of West, Eastern and Southern Africa, the low demand for arbitration was seen as the primary challenge to establishing a career in arbitration, so that only certain individuals in specific situations such as retired judges can sustain a career in arbitration alone. Local legal or

institutional requirements were also cited, such as the Ghana Arbitration Centre's requirement that arbitrators have at least ten years' experience at the Bar.

10.4 In Rwanda, Kenya and Tanzania, the availability of training in arbitration was seen as essential to building up capability. However, it was also widely observed that the training offered is often very expensive.

11. Following the advancement of technology in international arbitration, can we expect virtual arbitration proceedings to transcend national borders with ease? Can we expect an increase in decision-making through technology beyond what we see today? In terms of addressing this from regional perspectives, would the uneven advancement of technology in developing and developed countries pose an issue?

11.1 Some participants responded that despite continuing development in this respect and a greater availability of technology, it is not always reliable, and would therefore remain a challenge in the region.

11.2 Other participants reported a greater availability of technology in their jurisdictions, and indicated that national courts were increasingly utilising technological tools to assist in the resolution of disputes, such as videoconferencing, particularly in South Africa. However, scepticism was expressed as to the possibility of recognising 'virtual decision-making', particularly in light of the right to be heard by a court or other impartial tribunal.

11.3 Participants from West and Eastern Africa took a very pro-online dispute resolution position, with its increase in use allowing for savings of time and costs. However, they pointed to the fact that, globally, the uneven advancement of technology presents a challenge to the spread and the success of online dispute resolution.

12. There exists the possibility for a supranational body to oversee international arbitration to address, for example, uniformity, predictability and ethical conduct in the field. Would different countries/regions be willing to form such a body?

12.1 Participants cited the Common Court of Justice and Arbitration, which exists under the auspices of OHADA, as an established supranational body administering arbitrations brought under the OHADA Arbitration Rules. Participants, however, also noted that the institution has faced challenges, notably the hurdles which non-French-speaking participants face in the absence of dialogue between OHADA and the African Union and Economic Community for Western African States (ECOWAS). The main objective of the African Union and ECOWAS is to promote cooperation and integration in the context of an economic union in West Africa.

12.2 According to the responses received, other regional efforts to create a supranational arbitral body have not been successful. A key challenge identified in regard to the establishment of a supranational body is the ability of member states to enforce the relevant rules 'uniformly and fairly' across their different jurisdictions.

12.3 Certain participants expressed the view that the call for the establishment of a supranational arbitration centre could be driven by large corporations, which would be most likely to feel a commercial need for such an institution.

9.2 Asia-Pacific

Fifty-five participants in 14 countries answered the questionnaire.

Countries: Australia, China, Hong Kong, Indonesia, India, Japan, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea, Thailand and Vietnam.

1. **What are the reasons that users choose arbitration over court litigation and how might this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?**

1.1 The most commonly cited reason is the international enforceability of arbitral awards:

- a) The availability of enforcement of arbitral awards under the New York Convention in over 150 countries places arbitral awards in a far superior position to court judgments.
- b) This is a particularly compelling factor for users in Asia-Pacific, with its cultural diversity, different levels of economic development, different legal traditions and challenges within legal systems and enforcement regimes.
- c) Although one may still face difficulties with the enforcement of arbitral awards in certain jurisdictions, it is better to have the force of an international convention rather than no legislation supporting an application for enforcement.

1.2 The second most commonly cited reason is that of neutrality:

- a) There has been a significant increase in cross-border transactions involving parties from different jurisdictions, thereby leading to the need for dispute resolution at a forum that is perceived by parties as neutral, and not favouring or belonging to any of the parties involved.
- b) There is some level of mistrust in the legal and judicial systems of certain jurisdictions. Foreign entities are generally reluctant to submit themselves to the jurisdiction of a national court due to the perception that they might be the victim of a decision that favours the locals. International arbitration, however, allows a neutral tribunal to be appointed, where the sole arbitrator or chairman does not possess the nationality of either party.

1.3 Another reason cited by users is that of confidentiality:

- a) Disputants generally try to avoid public scrutiny, especially when it concerns joint-venture disputes or companies that prefer to keep a low public profile.
- b) Confidentiality is also important when there are sensitive commercial issues or trade secrets involved.

1.4 Other reasons mentioned for favouring arbitration include the scope for tailoring the procedure and process of the arbitration to suit the case and the choice of arbitrators, as well as the ability to engage foreign counsel and have the counsel of choice.

1.5 Practitioners in the Philippines, Indonesia, Malaysia and Thailand also mentioned other reasons such as speed in resolving disputes, the specialised knowledge and skills of the arbitrators

resulting in greater subject matter expertise and the quality of the decisions of the tribunals compared to those obtained through the court system.

1.6 Perceived changes in the near future include the following:

- a) The advantage that arbitration has over litigation in enforceability may be eroded if ASEAN integration leads to a treaty on enforcement of court judgments, but this is not likely to take place within the next five years.
- b) There is a shift towards litigation in specialised courts, the emergence of international commercial courts and increased awareness of other alternative dispute resolution options such as mediation, which will provide users with more options.
 - i) One example of this is the recent establishment of the Singapore International Commercial Court (SICC), which taps into the expertise of international judges with industry speciality knowledge (parties do not have the right to choose the judges to hear their cases in the SICC). The SICC also has streamlined procedures (which are intended to enhance the efficiency of the process), relatively low court filing fees, and even allows for parties to apply for proceedings to be confidential. It should be noted, however, that the key advantages that an arbitral award has over an SICC judgment are that of enforceability and finality.
 - ii) Another example is the existence of specialised courts in Malaysia (such as the Construction Court and the Technology Court) which include specialised judges and court facilities to assist in the presentation and management of technical evidence and have drawn some users away from arbitration.
- c) Some courts have streamlined their procedures and are taking active steps to reform civil procedure through, for example, the introduction of docketed systems to increase the speed of the conclusion of cases, both at first instance and on appeal.
- d) The growth of arbitration in Indonesia is expected with increasing cross-border transactions and outbound investments. More Indonesian parties are becoming aware of arbitration as a mode of dispute resolution, and the Indonesian courts are also becoming more familiar with arbitration. In addition, there is a positive trend of the Indonesian courts intervening less in arbitration. There is already an established Indonesian National Board of Arbitration (BANI) for domestic arbitrations, and the arbitration process (at least for domestic arbitrations) is generally regarded as being more efficient than that in the national courts.
- e) In relation to China: China amended its Civil Procedure Law in 2013 and the Chinese Supreme Court (SPC) issued the Interpretations on Implementing the Chinese Civil Procedure Law in 2014. According to the new Civil Procedure Law and SPC Interpretations, the Chinese courts have fairly limited reasons to annul an arbitral award or to refuse to enforce one. In practice, only a few awards have been annulled or refused enforcement. From 2003 to 2010, only 6.81 per cent of the applications for annulment accepted by the courts were granted, which represents only around 0.49 per cent of the total arbitration cases accepted by Chinese arbitration institutions.

- f) Growth of arbitration in Myanmar is expected with the imminent passing of the Myanmar Arbitration Bill and the growth of foreign investment into the country.
- g) In Thailand, a 2009 cabinet resolution prohibited arbitration in contracts between administrative agencies and private parties unless prior approval from the cabinet is obtained. The industry sectors involved in arbitration are insurance, construction, management and international transactions, and that is expected to remain the case unless the law is amended.
- h) Japanese companies and individuals were expected to continue to favour the court process for domestic disputes, as the court process is generally regarded as more cost efficient and credible. However, where cross-border transactions are involved, there is a general feeling that Japanese companies and individuals would be more open to arbitration.
- i) Survey participants from South Korea observed that international arbitration for complex, cross-border disputes is an inevitable route rather than a choice, because high-value international commercial contracts more often than not include arbitration clauses. In a somewhat related but separate note, some participants cited language as the reason for selecting arbitration as a dispute forum. Unlike jurisdictions where English is used as an official language in the judiciary, the courts in Japan and South Korea offer very limited language assistance to those who do not speak the national language. At the same time, South Korean companies and individuals also saw the high costs of arbitration as a potential pitfall for arbitration, and noted that domestic litigation is much cheaper and sometimes even faster.
- j) Survey participants from Australia expect that, in the next five years, there will be an increase in the number of international arbitrations seated in Australia and involving Australian parties (which have previously been low in number). This is supported by the initiatives of some state and federal courts to establish dedicated commercial arbitration lists, with judges having specific experience and expertise in international arbitration so as to further build confidence in judicial support for the arbitration process and the enforceability of awards.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

2.1 The two most commonly cited pitfalls are that of increased costs and delay:

- a) Arbitrators' fees and expenses can be very high, compared to the court process whereby parties do not have to pay for judges' fees and expenses. Japanese practitioners have cited this as a key reason why Japanese parties would turn to court litigation over arbitration for domestic disputes.
- b) Arbitral institution fees may be higher than court filing fees.
- c) There is an increased scope for guerrilla tactics and unfair conduct by parties in an attempt to delay and derail arbitrations, and there is insufficient control by the arbitral tribunals against such tactics.

- d) There are fewer procedural rules and less compulsion with regard to timing, with the result that proceedings are often pushed back.
- e) The pool of experienced arbitrators in the region is small and is inadequate to deal with demand. As a result, the same arbitrators are often appointed, leading to difficulties in fixing hearing dates before them, which leads to delay in the resolution of disputes.
- f) Furthermore, arbitrations involving eminent three-member tribunals and well-known counsel on both sides are extremely difficult to schedule at short notice, especially with regard to hearings on the merits. They must be scheduled at least 12–18 months in advance.
- g) At times, the attempts to expedite the proceedings may result in an insufficient number of hearing dates being allocated, with the result that parties may not feel that they have had a full and proper hearing of their dispute, especially in those that involve numerous witnesses and voluminous documents.
- h) As the problem of increased costs and delay in arbitration appears to be a perennial complaint, steps need to be taken to address it; otherwise, arbitration may lose its attractiveness to users. It was observed that certain arbitral institutions have taken steps to address this issue. For instance, the SIAC was the first Asian arbitral institution to provide for expedited arbitration. Recently, the Singapore High Court rejected an attempt to set aside an arbitral award obtained through this expedited process, thereby reinforcing the expedited process procedure under the SIAC Rules. The KLRCA assures its users that its fees and costs are approximately 20 per cent less than those of other arbitral institutions. Under the HKIAC Rules, parties are free to choose the method of payment of arbitrators' fees (hourly rates or fee schedule). The HKIAC Rules also provide default terms of appointment and a fee cap or hourly rate cap. The HKIAC has started to provide tribunal secretary services (the tribunal secretary's hourly rate is much less than the arbitrator's hourly rate) so that arbitrators need not bill time for less substantive or administrative work. Similar innovations are expected to be adopted in other institutional arbitration rules.

2.2 Another pitfall cited by practitioners is the lack of a good, dedicated pool of arbitrators in Asia-Pacific suitable for large and complex arbitration cases, which also leads to delay in the process:

- a) This has been due to the rapid growth of arbitration outpacing the availability of experienced and effective arbitrators.
- b) This leads to the repeat appointment of arbitrators, conflicts of interest and delays in both the appointment of arbitrators and the arbitration process itself.

2.3 There continues to be a concern over the continuing risks to enforcement of arbitral awards, especially with regard to the lack of education and familiarity in countries that are relatively new to arbitration. Arbitration relies on the efficacy and support of the local court system, and inexperienced local judiciaries, corruption and the inherent risks of non-enforcement all play a role in affecting its popularity. The track record of certain countries suggests that it may be some time before the national courts align themselves with international best practice. For example, in Indonesia and Thailand, there is little guidance on the public policy grounds on which an arbitral award can be set aside. Practitioners in Myanmar have stated that there

is a lack of education and familiarity within its jurisdiction as to the practice of international commercial arbitration, especially since the draft Arbitration Law has not yet been passed. There are also concerns raised in certain jurisdictions of corruption within the national legal systems and inexperience among national judiciaries with regard to the enforcement of foreign arbitral awards.

- 2.4 Another concern raised was the uncertainty surrounding the ethical conduct of arbitrators, coupled with the fact that arbitration generally has no appeal mechanism. There have been questions regarding the lack of transparency in various aspects of the arbitration process, including unjustified costs, low-quality and poorly reasoned decisions and the partisan nature of certain party-nominated arbitrators who focus too much on advancing the interests of their nominating party.
- 2.5 Specific issues were also raised by survey participants in certain jurisdictions:
- a) Chinese practitioners note that coordination between courts and arbitration institutions is still a problem in China, as unnecessary delays are still being created. New civil procedural law permits asset preservation 30 days before a party formally initiates arbitration, but the law has not been seriously enforced nationwide. Occasional reports have been heard that a certain court has enforced the law when the arbitration institution copied the court on the formal filing of the arbitration. Lack of clarity on whether foreign arbitration institutions, such as the ICC, can conduct arbitration within mainland China is still a problem that needs to be addressed. Civil Procedure Law and Arbitration Law are silent on this point, but the Chinese Supreme Court showed some optimistic signs in a recent case.
 - b) Common-law-based procedural traits or evidence rules were mentioned as pitfalls of arbitration by practitioners in China, Japan and South Korea with local Bar qualifications. These include:
 - (i) Parties can sometimes be surprised by unfamiliar Western-style advocacy or rules on evidence during arbitration.
 - (ii) The issue of scope and sufficiency of document disclosure (privilege, accusations of non-compliance with ‘litigation holds’ or discovery requests) is something that practitioners in some parts of this region continue to grapple with. Difficulties sometimes arise when managing expectations of clients who believe internal corporate documents should not be disclosed, much less to the opponent.
 - (iii) The need for extensive cross-examination of not only fact witnesses but also of technical/legal experts poses challenges, as there is a limited number of such experts with experience of testifying in similar procedural settings. This leads to reliance on foreign experts from international consulting firms who sometimes do not fully understand the peculiarities of the region or the corporate culture of the clients.
 - (iv) Due to the fact that many of the ultimate clients are non-English-speakers and, local clients maintain corporate documents in their native language, translation and interpretation of evidence (and disputes over the accuracy of such) always prove problematic.

- c) Australian survey participants noted that domestic courts in Australia would, realistically, probably be just as quick, if not quicker, than international arbitration, and perhaps cheaper too.

2.6 Other issues raised include:

- a) There is no right of appeal.
- b) It is not possible to join third parties to the arbitration.
- c) The limited bases on which to challenge arbitral awards leads to a lack of accountability and poor-quality and badly reasoned awards.
- d) Lack of experienced arbitrators and counsel and unfamiliarity with the arbitration process may give the appearance that international arbitration favours the more experienced international counterparty.
- e) Lack of clarity surrounding the applicable professional conduct rules in arbitration can contribute to legitimacy issues.

2.7 Some changes that are predicted in the next five years include:

- a) The streamlining of arbitration procedures (more reliance on documents, fewer oral hearings) and the use of technology (such as videoconferencing and better support services) in arbitral institutions, which can help to reduce costs.
- b) Users moving towards seeking fee estimates or even fee caps from counsel in order to foresee the costs of arbitration from its inception to the rendering of the final award.
- c) The greater use of expedited procedures in arbitration proceedings or developments in institutional rules to require the rendering of an award within a particular period of time, with sanctions applicable for failure to do so.
- d) The greater recognition among practitioners and arbitration institutions of the need to provide stricter guidance regarding the ethical conduct of arbitrators as well as of parties.
- e) An increase in the pool of available experienced arbitrators.
- f) A greater demand for alternative fee proposals, including contingency fees and third-party funding. In jurisdictions where such arrangements are prohibited, law reforms may be introduced in the area of international arbitration at the very least.
- g) An increase in arbitration-friendly courts and judges in the region, due to the increasing awareness of the rubrics of international arbitration.

3. Which arbitration institutions are popular in the region, and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are institutions becoming too homogenised and, if so, should they try to differentiate themselves?

3.1 The SIAC was cited as the leading and most popular Asian arbitration institution in the Asia-Pacific region. Among the advantages of the SIAC cited were its neutrality, administrative efficiency and increasing internationalisation.

- 3.2 Outside Asia, the most popular arbitration institution referred to by participants was the International Court of Arbitration of the ICC. The ICC is widely known and will continue to have a foothold, as it is an easy compromise for parties to agree on. The ICDR (the international arm of the AAA) and the LCIA were also reported as institutions being used in the Asia-Pacific region.
- 3.3 The HKIAC was noted by participants as also being a popular choice, particularly in cases involving parties from China. However, due to a perceived association with China, some respondents observed a decline in the popularity of the use of the HKIAC. Otherwise, in international contracts involving Chinese parties, the China International Economic and Trade Commission (CIETAC) was often used. In this regard, respondents noted that the dispute between CIETAC and certain of its sub-commissions in Shanghai and Shenzhen, and CIETAC's subsequent reorganisation, had adversely affected CIETAC's use by parties.
- 3.4 LCIA India is often recommended for arbitrations seated in India and is preferred due to its location (Delhi) and its hourly fee structure.
- 3.5 Generally, participants reported a continuing trend for parties in Asia to seek to refer disputes to arbitration seated in and administered by institutions in their own region (rather than in jurisdictions in Europe such as London or Paris). Other institutions that were mentioned in this regard include the KCAB, the JCAA, the KLRCA (especially for its niche area in Islamic-law-related disputes), the Thai Arbitration Institute (TAI) (for Thailand domestic disputes) and BANI (for Indonesian domestic disputes). Current rule revisions at the KCAB and the JCAA were also considered to impact positively in terms of the number of cases referred to those institutions. In Australia, respondents reported that, in recent years, there has been a growing awareness of the services offered by ACICA, with more and more contracts referring disputes to that institution.
- 3.6 Most practitioners see homogenisation of procedural rules among arbitral institutions as a positive development, particularly in so far as it means that they are striving to improve or provide the same level of service. Competition was perceived as being conducive to improvements in the rules and standard of the services provided, as well as reducing the institutional costs involved. Differentiation was not seen as an advantage in so far as an institution sought to differentiate itself just for the sake of being different. Additionally, it was felt that homogenisation contributed to greater predictability and familiarity. However, some differentiation in institutional rules was identified where local rules required, for instance, that institutions use the national language (such as CIETAC and BANI).
- 4. What are currently considered to be the 'safe' seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?**

4.1 Safe seats:

- a) Singapore and Hong Kong are considered the safe seats of the region, although the consensus is that Singapore would be the preferred seat of the future. Singapore is especially known for its excellent court system, supportive national laws, lack of corruption, first-world infrastructure, favourable geographic position and strong financial and commercial centre.
- b) Other safe seats are regarded as London, Paris and Geneva, although the observation is that there would be a greater shift from these seats to Singapore and Hong Kong.
- c) In light of recent decisions of the Indian Supreme Court, India (and more specifically Delhi) was also considered a safe place to seat an international arbitration, particularly in cases where the subject matter of the dispute is situated in India. In Australia, Sydney was seen as a regionally established seat where growth was expected in the future in terms of both the number of international arbitrations seated in Sydney and the number of disputes involving Australian parties.
- d) Malaysian practitioners have opined that Kuala Lumpur will be increasingly seen as a safe seat, as there is a push to adopt a pro-arbitration approach in its national laws and court decisions. Another seat to watch for the future is Seoul, which has a modern international arbitration law and a supportive judiciary and legal fraternity. It has also recently invested in an impressive new hearing facility. There is also some interest in the establishment of seats in currently under-serviced jurisdictions such as India. However, the consensus is still that there would be no discernible change in Singapore and Hong Kong as the preferred seats in the next five years, with Singapore having a slight edge.
- e) For users in China, whether the arbitration is domestic or international, the preferred seat of arbitration is within mainland China when it is handled by a China-based arbitration institution. In the case of an arbitration accepted and handled by foreign arbitration institutions, the preferred seat of arbitration is outside of mainland China. There was also mention of a decision from the Chinese Supreme Court which refused to enforce an award from an arbitral tribunal that was seated within mainland China and handled by a foreign arbitration institution.
- f) A good number of South Korean practitioners strongly recommended that Seoul International Dispute Resolution Centre is used more, which could be a factor to elect Seoul as the place/seat of arbitration in the substantive contract.

4.2 Views on the possibility of an a-national award with no seat:

- a) There were not many responses to this question. Those who did respond stated that the seat of arbitration that would be regarded as safe would be that which has supportive national laws and court decisions.
- b) The arbitration seat or the place of arbitration will remain relevant as it will continue to determine the procedure or rules which govern the arbitration. This principle is well ingrained in national legislation, court decisions and interpretations of international

documents such as the Model Law and the New York Convention. Consequently, the possibility of having an a-national award appears to be slim. Unless uniformity of rules and interpretation of rules is met across all nations, an a-national award does not appear to be feasible.

- c) The main challenge has always been the inconsistent decisions at the seat of the arbitration, as well as inconsistent decisions at various courts of enforcement. The latter can be illustrated by the decision in *Astro v Lippo* where the Singapore Court of Appeal and the Hong Kong High Court came to different decisions on the question of enforcement. A similar conundrum was observed in *Dallah v Government of Pakistan*, *IMC Aviation Solutions Pte Ltd v Altain Khuder LLC*, *Putrabali v Rena* and *Chromalloy Aeroservices Inc. v The Arab Republic of Egypt*.
- d) It remains to be seen whether an a-national award in international commercial arbitration (under the Model Law and New York Convention regime) would evolve to mirror the position under ICSID arbitrations. Completely delocalised arbitration without seats creates unnecessary chaos and uncertainty; this was rejected by the drafters of the New York Convention, and even today, the feeling is that there is limited benefit to abolishing the seat. Having a seat as point of reference creates certainty – parties know where they need to go to get interim relief and where to go to review or challenge an award.

5. Are arbitration practitioners becoming too specialised or are they not specialised enough?

5.1 Most practitioners are of the opinion that the increased specialisation of arbitrators, both in the practice of arbitration and in industry sectors, is desirable as it leads to greater efficiency and better service of client needs. The consensus is that arbitration practitioners are not becoming too specialised.

- a) It is important for arbitration practitioners to have a thorough knowledge of the law, procedures and customs of arbitration. The current level of specialisation in this area is generally present in jurisdictions with an active arbitration practice (such as Singapore and Hong Kong). It is, however, observed that there are still some arbitration practitioners who regularly incorporate litigation paradigms into their conduct of arbitration, which results in inefficiency and delays.
- b) Most arbitration counsel have a generalised practice, although there are arbitrators with specialised industry knowledge in areas such as marine, insurance, construction, intellectual property, commodities, public international law, investment treaty, oil and gas and financial services.
- c) There is a general sense in certain jurisdictions where arbitration is less developed (eg, Myanmar, Indonesia, the Philippines and Thailand) that arbitration practitioners were not specialised enough.
- d) Japanese practitioners expressed the view that arbitration needs to be promoted to increase its popularity as well as to increase the specialisation and expertise in arbitration generally.
- e) Some have expressed the belief that it would damage the wider acceptance of arbitration

if it is too specialised, and the challenge is to evolve a process that benefits from expertise while still being accessible and accommodating to non-specialists.

- 5.2 It is observed that the current level of specialisation among active arbitration practitioners is healthy, but there is a need to increase the pool of available, credible and high-quality arbitrators in the region.
- 5.3 The responses to this topic diverged in relation to the understanding of the term 'specialised'. Some spoke of specialisation in arbitration as a separate practice area from domestic litigation, while others spoke of specialisation in regard to certain practice areas (IP, construction, maritime, etc).
- 5.4 In terms of specialisation of practice areas, the general view was that there is not, and there need not be, particular specialisation required to be competent in handling arbitration cases. For party representatives in larger firms, arbitration cases are handled by practice groups that specialise in arbitration, in collaboration with colleagues with specialisation in the subject matter of the dispute. Clients and technical experts can also assist on a case. For arbitrators, appointment may depend on arbitrators' experience in certain types of disputes, or their background (eg, accountant, engineer, IT expert, architect, etc) but this is not always a critical factor in the selection of arbitrators. Sound judicial reasoning, confidence and control over proceedings, independence and impartiality, and a strong sense of commercial reasoning are considered more important than practice area expertise.
- 5.5 Practitioners in South Korea observed that there is a trend among younger arbitration lawyers to try to sub-specialise in a particular subject, such as construction arbitrations or treaty arbitrations.
- 5.6 In terms of specialisation in the art of arbitration, practitioners coming from civil law backgrounds seemed to be more conscious of the fact that specialisation means the ability to understand and adapt to procedural rules that are unique to arbitration and different from local litigation practice. Becoming familiar with basic reference tools (such as the IBA Rules on the Taking of Evidence in International Arbitration, or arbitration rules in frequently used arbitration institutions) is considered an entry point in being specialised in arbitration. However, it has been observed that some local lawyers who occasionally take on arbitration cases do not bother to gain the basic level of knowledge and, instead, try to run the case like local litigation.
- 5.7 Practitioners in common law jurisdictions in the Asia-Pacific region, such as Australia, Hong Kong and Singapore tend not to be specialised only in international arbitration; they are also specialised in litigation and other forms of dispute resolution.

6. What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years' time?

- 6.1 The consensus among arbitration practitioners from jurisdictions with developed arbitration jurisprudence is that interim relief is generally accepted in arbitration proceedings, and would be here to stay. There are three reasons for this:
 - a) Most leading arbitral rules provide for interim relief, including the emergency arbitrator

provisions. In fact, investment treaty arbitrations have led to the invocation of the emergency arbitrator provisions.

- b) Less court support would be available, as major seats of arbitration (eg, Singapore and Hong Kong) provide in their national legislation that if interim relief is available from the arbitral tribunal, recourse must be had to the tribunal, and the courts would thus be less willing to grant interim relief.
- c) Emergency arbitrator orders are becoming commonplace, and more legal systems have recognised and enforced emergency arbitrator orders. For instance, Singapore and Hong Kong both provide for direct enforcement of emergency arbitrator orders.

6.2 Recent statistics from the SIAC show that the number of emergency arbitrator applications is increasing rapidly.

6.3 India will be interesting to watch; the proposed amendments to the Indian Arbitration and Conciliation Act touch on some of the enforcement issues.

6.4 Practitioners from the jurisdictions with less-developed arbitration jurisprudence (for example, Indonesia, Thailand and the Philippines) continue to express concern in regard to the enforceability of interim relief from arbitral tribunals, as they regard the granting of interim relief as the sole responsibility of the Court. In such instances, parties may continue to have recourse to the courts for its powers in granting interim relief. Even in Japan, even though the concept of emergency arbitration has been introduced in the JCAA Rules, most users may find that the court procedure in Japan is much more efficient and effective for obtaining interim relief. In Malaysia, even though the emergency arbitrator provisions have been introduced in the KLRCA Arbitration Rules, it remains to be seen whether these provisions would be employed, as the issue of enforceability of emergency arbitrators orders has not been tested before the Malaysian courts.

6.5 In relation to Hong Kong:

- a) Interim relief will remain an important part of arbitration proceedings and the rules of the HKIAC, SIAC and ICC all provide for emergency arbitrators, although with slightly differing variations.
- b) As regards enforcement, Hong Kong and Singapore arbitration laws already provide for recognition of emergency arbitrator orders/awards. Hong Kong expressly recognises those issued outside of Hong Kong. In the next five years, it is anticipated that there will be more certainty as regards enforcement in other jurisdictions, especially in jurisdictions that have not yet adopted the Model Law 2006.
- c) Generally, the utility of interim relief and emergency arbitration looked to be well received in the region, and there were reports that it is already in use, and that it will be increasingly used.

6.6 In relation to China:

- a) The new rules of both CIETAC and the Shanghai International Economic and Trade

Arbitration Commission (SHIAC) allow interim relief and emergency arbitrators. However any interim order issued by an emergency arbitrator will only be useful in those jurisdictions where it can be enforced, and they cannot currently be enforced in China. Therefore, such provisions in the new rules only have extra-territorial effect, rather than having effect within China. One is therefore unable to currently predict that these rules shall also apply in mainland China in five years' time.

- b) CIETAC has recently updated its arbitration rules, adding interim measures (emergency relief) in Article 23 of its 2015 Arbitration Rules. As for the types of emergency measures, the new CIETAC Rules contain no explicit provisions. The measures that the emergency arbitrator could take might go beyond the measures that the courts could take, which is a necessary supplement to the courts' emergency measures; and one of its benefits is that it immediately protects the parties' legitimate interests and reduces losses. Besides, in contrast to the notarisation and legalisation requirement under civil procedure law, no overseas notarisation and legalisation is required in the application for emergency relief in CIETAC arbitration proceedings, which is therefore more convenient and time-saving compared with the court procedure. We expect there will be a trend for other Chinese arbitration institutions to add this interim relief provision in their respective rules. However, to what extent the courts would enforce such interim measures still needs to be tested in practice and remains to be seen.

6.7 In relation to Japan:

- a) Recently, the JCAA introduced its new rules, including emergency arbitrator provisions. It is yet to be seen whether this will be promoted among users.
- b) The function and role of interim relief – whether it is only to preserve the status quo, or more than that (ie, practically functioning as a preliminary determination of the case) – is viewed as an issue. By way of example, orders rendered by the Japanese courts under the Civil Provisional Remedies Act provide reasoning from the courts, in a fair amount of detail, and as a matter of practice are given much more weight by the parties in deciding how to proceed with their dispute, because the success rate of overturning the orders upon proceeding to the formal suit is not so high (although there have been many instances where the judgment under the formal suit reaches a different conclusion). This will ultimately be the users' choice. If parties become unhappy with the decisions of emergency arbitrators basically predetermining the dispute, they might decide to opt out of the process.

6.8 In relation to South Korea:

- a) Interim relief by either a tribunal or emergency arbitrator is considered a feature worthy of development so that arbitration proceedings are a serious alternative to court litigation. More success stories from Hong Kong and Singapore regarding the use of emergency arbitrators may embolden parties in South Korea to embrace the concept.
- b) There is an increase in demand for legal advice on the possibility of freezing calls on performance bonds in overseas construction cases.

- c) Applications for emergency arbitrators would be more popular in arbitration because provisional measures can be dealt with in the same arbitration procedure. Also, the range of provisional measures is perceived to be broader than the range that local courts can grant.
- d) There were observations that the effectiveness of interim relief or preliminary measures rendered by arbitral tribunals or emergency arbitrators will continue to depend on the willingness of the judiciary to support and actively enforce them, and there is only so much the arbitral institutions can do about it. Even among the countries that have adopted the Model Law and are signatories to the New York Convention, the practice in relation to the enforcement of interim orders or awards differs widely from one jurisdiction to another, and the indifferent or apprehensive attitude displayed by many courts is something that needs to be changed.
- e) Other comments:
 - (i) ‘Regarding the emergency arbitrator, as recent statistics suggest, I believe the demand will actually continue to grow as users become more familiar with the procedure. The convergence of institutional rules would also nurture its growth.’
 - (ii) ‘There are limits to interim relief and emergency arbitration due to the fact that it is not a final award under the New York Convention. However, if local courts in more jurisdictions recognise the enforcement of interim measures, then I can see this being used more often.’
 - (iii) ‘They will be here, or at least the provisions that created them will remain in the various arbitral rules. The question is whether anyone will be using them. My guess is that they will be, but only where there is no court that is willing or able (or can be trusted) to provide such relief.’

6.9 In Australia, participants reported that innovative provisions for interim relief issued by international arbitral tribunals are provided in legislation and rules:

- a) For example, provisions for emergency arbitrators are now found in the ACICA Arbitration Rules.
- b) In light of such developments, participants expected that there would likely be further discussions in Australia in the next five years in terms of further developing the legal and procedural frameworks for supporting interim relief in international arbitration.

7. Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?

7.1 Most practitioners are of the view that tribunals should be held to account in terms of speed, efficiency and quality of decision-making, especially in light of the finality of arbitral awards, and this would deal with the problem of a lack of accountability in the arbitration process.

7.2 Some of the suggestions to hold tribunals accountable include:

- a) Arbitral institutions taking a more active role and initiative in overseeing the entire arbitration process, from the time of commencement through to the progression of the

arbitration, the hearing dates and the timelines for rendering of the arbitral award.

- b) Party-imposed time limits in their arbitration agreements.
- c) Drafting a code of conduct for arbitrators, which should include references to speed, efficiency and quality of decision-making.
- d) Guidelines for the drafting of awards to ensure a minimum standard in the quality and reasoning of the arbitral award.
- e) Users' feedback on a tribunal's performance, including constructive comments and feedback by parties themselves.
- f) A merits system and ranking for tribunals.
- g) Limiting the number of cases that an arbitrator can handle in a year.
- h) A review of arbitral awards by a court of arbitration consisting of eminent arbitration practitioners.
- i) Increasing the pool and diversity of available arbitrators.

7.3 Some users, however, feel that the tribunal need not be held to account, as there is general self-regulation within the relatively small arbitral community:

- a) The risk of over-enthusiastic regulation of arbitrators and arbitration should be avoided, because arbitration is a relatively well self-regulated system, given its organic and transnational nature.
- b) The best barometer of a tribunal's efficacy is the number of repeat appointments; the prospect of repeat appointments for a job well done is enough.
- c) Reputation within the small community will be a key incentive to uphold quality and standards.
- d) Increased liability for arbitrators may result in them subscribing to professional insurance, which will only increase parties' costs.
- e) Instances where parties themselves are to blame for delays due to guerrilla tactics, unnecessary lengthy submissions or over-voluminous documents should not be blamed on the tribunal.
- f) Some have also expressed the view that not only do tribunals need to be held accountable, but also counsel and parties.

7.4 At the same time, many respondents expressed the realistic difficulty faced by parties in raising issues with the tribunal's conduct of the proceedings or delays in awards, for fear of negative repercussions on the outcome of the case. Among those that expressed this difficulty, the general response was that arbitral institutions should take the lead in setting up systems that hold tribunals more accountable.

7.5 In general, speed, efficiency and quality of decision-making by tribunals were identified as areas

of concern by participants, all of whom agreed that users should do more to hold tribunals to account in these regards. However, some participants believed that speed and efficiency should not take precedence over quality of decision-making.

- 7.6 In terms of what should be acceptable, participants were generally reluctant to impose a strict timeline on a tribunal because, reasonably, some cases take longer than others. Where a timeline was suggested, participants indicated that a substantive award should be issued within six to nine months from the post-hearing briefs.
- 7.7 Some suggestions in terms of what users could do to hold tribunals to account in terms of speed, efficiency and quality of decision-making were advising clients not to appoint the arbitrator in future cases, informing the arbitral institution of concerns (should any exist) and, subject to applicable confidentiality obligations, ‘word of mouth’.

8. How will issue conflict affect the field in the next five years?

- 8.1 The responses to this question generally fall into two distinct categories: either there was no response or the response was that issue conflict does not generally present a problem in international commercial arbitration.
- 8.2 Most of the survey participants thought that issue conflict relates mainly to investment arbitration, where awards are made public so that quasi-jurisprudence can be formed. Some contributors admit they were not even aware of this issue. While the question of issue conflict has been debated in the field of investment disputes over the years, any challenges based on a pre-existing view of an arbitrator will continue to have only a limited appeal in international commercial arbitration. Apparently, this is in part due to the confidential nature of commercial arbitrations, which makes it virtually impossible to track each potential arbitrator’s view on a specific legal issue, and is also attributable to the diverse nature of legal issues that arbitrators in the commercial field have to deal with.
- 8.3 This is not to say that issue conflict does not exist in the region – practitioners in Hong Kong report it as a problem. (*‘There is unlikely to be an easy solution in the next five years, and it is unlikely that arbitrators/counsel will accept that they can only act on either side of the divide. Parties will have to continue to exercise caution in making appointments.’*)
- 8.4 Some observe that issue conflict is nothing more than a tactic to delay proceedings. Due to the fact that there are a number of legal issues that can arise in international commercial arbitrations which are not necessarily repeated in other arbitrations, the views of practitioners on legal issues expressed in academic writing can hardly form the basis of legitimate issue conflict. Challenges based on issue conflict will continue to be raised in investment arbitrations, and the principles governing challenges are provided in the recently revised IBA Guidelines on Conflicts of Interest in International Arbitration. Hope was expressed that these developments will deter unmeritorious challenges aimed at delaying proceedings.
- 8.5 A good number of respondents seemed aware of the existence of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration and felt that these adequately dealt with the subject.

- 8.6 Issue conflict is more problematic in the situation where an arbitrator is deciding on an issue that he or she has previously advocated on as counsel or vice versa. However, such conflict tends to arise more in investment arbitration cases than international commercial arbitration cases. This is due to the publication of opinions and awards in international investment arbitration, which tends to attract more public opinion.
- 8.7 Challenges based on issue conflicts will continue to be raised in investment arbitrations, and the principles governing challenges are provided in the recently revised IBA Guidelines on Conflicts of Interest in International Arbitration; hopefully, these developments will deter unmeritorious challenges aimed at delaying proceedings.
- 8.8 There was also an observation made that challenges caused by issue conflicts in international investment arbitration may also decline due to a growing community of counsel, which has resulted in parties being less reliant on a limited pool of experts who dominate the field and play the role of both counsel and arbitrators. The growth in the number of full-time independent professional arbitrators may also reduce the problem of issue conflict.
- 8.9 There seems to be a consensus that disclosure is key, and that parties, as long as they are satisfied of the arbitrator's impartiality, can decide whether to waive or challenge. It is lack of disclosure that causes problems.
- 8.10 The manner in which the arbitrator frames the issue in published material could also affect the perception of the parties. If the arbitrator has used a neutral and academic tone, it will probably pose no problem. However, if the arbitrator has used strong language or expresses opinionated views, this may well give rise to doubts as to his or her impartiality.
- 8.11 There was at least one respondent who raised the concern that if issue conflict becomes a more serious problem, this could stifle (potential) arbitrators' willingness to publish their opinions, and could be detrimental to the development of the law.
- 8.12 The response from participants in Australia was that issue conflict arises mainly in the investment arbitration context, although it might be possible that it arises in separate but related commercial arbitration proceedings with one or more common arbitrators and the same or similar legal or factual issues. Issue conflict in international arbitration was not commonly encountered in Australia. However, one participant noted that given that international arbitration in Australia is used in the construction and energy resources sectors, where multiple related contracts can often be found on a project, there was undoubtedly scope for issue conflict to arise.

9. Do you predict any key trends in terms of jurisprudence?

- 9.1 The responses across the Asia-Pacific region were varied and included:
- a) Further development of the current trend towards comparative citation of law in international cases in the Asia-Pacific region, including the citation of cases from a variety of different jurisdictions (particularly those adopting the Model Law) as well as international conventions and private international law sources, in an effort to show that the desired approach is broadly supported across multiple jurisdictions.

- b) Courts becoming more interventionist in the setting aside of arbitral awards, including courts in preferred seats of arbitration, and relevant jurisprudence on this, including from the SICC.
- c) Jurisprudence in enforcement and recognition of arbitral awards in various jurisdictions in the Asia-Pacific region, including competition and consistency of decisions between seats and places of enforcement with regard to the validity of awards for enforcement.
- d) Confidentiality and whether it is a fundamental concept of arbitration in Japan.
- e) The possibility of arbitrating an administrative contract and enforcing a subsequent arbitral award in Thailand.
- f) Jurisprudence relating to the public policy grounds for refusal to enforce arbitral awards and the enforcement of interim relief in Indonesia.
- g) The construction of arbitration agreements, interim relief in aid of foreign arbitrations (eg, injunctive relief, discovery, subpoenas), stay of court proceedings and enforceability of settlement agreements resulting from international commercial conciliation in Malaysia.
- h) Increasing jurisprudence concerning investor-state arbitrations that are seated in Singapore.
- i) More cases involving bilateral investment treaties before national courts, such as *BG Group v Argentina* and *Sanum Investments v Laos*, including issues of applicable law and the standard of review by the courts at the seat of arbitration and by enforcement courts, and whether investment treaty arbitral awards have any legally relevant differences from commercial arbitration awards.
- j) National court decisions on enforcement and setting aside in India and China will also be interesting to watch in the next few years, especially in light of the discernible trend of pro-arbitration judgments in India.
- k) Greater harmonisation between the different State, Territory and Federal courts in Australia in terms of interpretation of the Model Law and the New York Convention, especially in light of the increasing number of international arbitration-related issues coming before Australian courts and the introduction of specialist arbitration court lists.
- l) Arbitration institutions are trying to internationalise themselves through their practices, their rules and selection of candidate arbitrators in China. The extent to which this conflicts with arbitration law in China will be worthy of note.
- m) Interpretations and replies of the Chinese Supreme Court (eg, concerning whether or not foreign arbitration institutions can conduct arbitrations in mainland China).
- n) Debate in Japan concerning courts' jurisdiction to issue preliminary injunctions (not preliminary freezing orders), such as an order to maintain the supply of goods in connection with a dispute concerning termination of supply agreements, when the seat is outside of Japan.
- o) Debate over the meaning and implication of decisions by South Korean courts that denied enforcement of two ICC final awards.

- p) Jurisprudence arising from the revisions to the Korean Arbitration Act incorporating the amended version of the Model Law 2006, especially in terms of how the courts deal with interim measures and the decisions of emergency arbitrators.

10. Where will third-party funding go over the next five years?

- 10.1 Participants from Australia noted that their jurisdiction had an established and long history of third-party funding in the context of litigation and expected that, as the number of international arbitrations in Australia increased, third-party funding would be increasingly used in that context.
- 10.2 Elsewhere in Asia, most practitioners from jurisdictions with more developed arbitration jurisprudence (such as Singapore and Hong Kong²) were of the view that third-party funding will be increasingly used in the next five years, with varying degrees of regulation, including in terms of disclosure requirements and orders for security for costs where it is established the claimant will be unable to pay.
- 10.3 In jurisdictions where third-party funding is prohibited (eg, in Thailand, Indonesia and Malaysia) or where it is simply unclear whether it is permitted or not (eg, China, Japan and Korea) and is therefore uncommon, participants did not see any scope for change in the landscape regarding third-party funding in the next five years.

11. What will be the key challenges to establishing a career in arbitration over the next five years?

- 11.1 Generally in the Asia-Pacific region, and consistent with the globalisation of legal services, the practice of international commercial arbitration has attracted significant interest among not only new entrants at the junior end, but also crossover lawyers from litigation to international arbitration practice. This has dramatically increased competition among lawyers interested in international arbitration, where opportunities have not increased to the same degree, and the increase in the value of disputes may not necessarily involve a proportionate increase in the numbers of lawyers attending to such disputes. There is, therefore, concern regarding competition and a saturated market in the Asia-Pacific region.
- 11.2 In some jurisdictions within the region with less-developed arbitration jurisprudence, there is a lack of education and knowledge of arbitration laws, and a lack of experience among the practitioners in international arbitration. To develop the practice in these jurisdictions, there needs to be more education and training of both the arbitration counsel and tribunals. There may also be difficulties in certain jurisdictions with obtaining work permits or licences for foreign arbitrators, tribunals and relevant professionals (eg, in Thailand).
- 11.3 In Japan, there is a need to promote expertise in international arbitration, and to dispel the concerns of users that arbitration would result in the application of rules in common law jurisdictions, which would be unfamiliar to the Japanese, especially in document production and attorney-client privilege. Language differences were also considered to pose a challenge for younger practitioners in Japan. This is in contrast with the position of younger practitioners in South Korea, where language differences seemed to be considered less of a hurdle.

² Although it is debatable whether third party funder is prohibited in arbitration.

- 11.4 Participants reported that Australian lawyers, particularly with language skills in addition to English, were increasingly successful in establishing careers in international arbitration overseas. However, the key challenge for Australian lawyers is establishing an arbitration career in Australia without first obtaining experience overseas; similarly, it can prove difficult for lawyers working overseas to return to Australia and continue practising in this area. Participants also expected that it would be very difficult in the foreseeable future for many Australian lawyers based in Australia to practise exclusively in international arbitration, although that may change with the increasing number of international arbitration disputes in Australia or disputes involving Australian parties. This was also true of India, where, arbitration has also traditionally been viewed as a sub-practice within court litigation.
- 11.5 In China, understanding the difference between arbitration and domestic litigation was cited as a challenge, the reason being that there was not enough education or training opportunities for those wanting to enter the arbitration market. The limited number of local firms that have dedicated arbitration practice groups is another cited reason.
- 11.6 Another challenge for practitioners coming from civil law jurisdictions in the Asia-Pacific region was the limited exposure to arbitration-style advocacy, which is closer to the manner in which domestic litigation is conducted in common law jurisdictions such as Singapore, Hong Kong and Australia.
- 12. Following the advancement of technology in international arbitration, can we expect virtual arbitration proceedings to transcend national borders with ease? Can we expect an increase in decision-making through technology beyond what we see today? In terms of addressing this from regional perspectives, would the uneven advancement of technology in developing and developed countries pose an issue?**
- 12.1 Participants reported having increasingly positive experiences using videoconferencing facilities during hearings and for interlocutory matters, in terms of reliability and quality of facilities. However, witness examination through videoconferencing was generally not considered a satisfactory substitute for actual cross-examination in a hearing room. Otherwise, apart from increasing reliance on email for the purposes of communication and file transfer, participants did not report widespread use of other technology in arbitration. Indeed, many responded that it would be very difficult to imagine, even in the distant future, a situation where parties rely solely on technology to make legal decisions, since technology is meant to aid and improve human decision-making, not to replace it altogether.
- 12.2 The idea of going paperless (eg, saving documents to the cloud) generally seemed to elicit positive reactions. In contrast, adoption of state-of-the-art US domestic litigation-type electronic document collection and sorting systems was cited as some as creating unnecessary costs and burden, which could create an undesired monopoly by large firms with enough resources to handle complex cases with large volumes of documents.
- 12.3 As for the uneven advancement of technology, one view is that technology tends to be a great leveller; if anything, it can help underdeveloped jurisdictions catch up. Otherwise, concerns over uneven advancement did not seem to be considered serious, as users expect arbitrators to consider this factor in procedural orders and ensure that both parties are given equal footing.

13. There exists the possibility for a supranational body to oversee international arbitration to address, for example, uniformity, predictability and ethical conduct in the field. Would different countries/regions be willing to form such a body?

13.1 Participants were generally sceptical about the possibility but some believed that the discussion of the idea was helpful in bringing into focus the importance of the objectives of greater uniformity in some areas and encouraging ethical conduct in arbitration. Obstacles to such a supranational body included a divergence of the domestic laws of different jurisdictions on arbitration laws, the inequality of levels of development in various jurisdictions and the different perspectives concerning the settlement of a dispute by arbitration in each country.

13.2 The only positive response to this topic came from Hong Kong, where the legal community is watching ASEAN's proposal to form a body that would pre-approve arbitral awards to ensure enforcement within the ASEAN region.

13.3 Otherwise, there were some responses that industry-specific arbitration (eg, shipping or insurance) could be subject to a supranational body, but the possibility is still remote. Commercial contracts are so varied, and so case-specific, that the utility of a supranational body to create a jurisprudence to ensure consistency is greatly diminished.

13.4 The best source for promoting uniformity was considered most likely to be through the continual updating and improvement of institutional rules and guidelines by bodies such as the IBA, which then become accepted as general standards in the arbitration field (eg, the IBA Guidelines on the Taking of Evidence in International Arbitration).

9.3 Europe

Forty-two participants from 15 countries answered the questionnaire.

Countries: Belgium, France, Germany, Hungary, Switzerland, England, Sweden, Ukraine, Russia, the Netherlands, Italy, Finland, Hungary, Poland and Spain.

1. What are the reasons that users choose arbitration over court litigation and how might this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

1.1 Practitioners offered a variety of views. Nevertheless, in general terms, a number of points were reiterated:

- a) Sector focus and the expertise of arbitrators
 - (i) Sector focus was identified as important in particular fields, namely banking and finance, energy, construction, engineering, shipping and insurance. Practitioners generally found genuine understanding and experience could better be found in arbitration than court proceedings.
 - (ii) The ability for parties to have a say in the selection of arbitrators with particular specialisation was seen as playing a significant role in the preference for arbitration over litigation. Parties seeking commercially aware, business-minded arbitrators with

expertise in the relevant area were said to have this need met in arbitration.

- b) The costs and delays of state court litigation
 - (i) Some state courts were seen as less efficient and slower than arbitration proceedings. Some practitioners reported backlogs in the court system (eg, Belgium, Finland and Italy). In Hungary, institutional rules set time limits for the completion of arbitrations that are much shorter than court proceedings.
 - (ii) Many practitioners disputed whether arbitration was still quicker and cheaper than litigation, and had witnessed increasing arbitration costs and timetables.
 - (iii) The US and the UK were some of the jurisdictions where state courts were seen to be just as expedient as arbitration.
- c) Neutrality, independence and credibility of arbitral tribunals
 - (i) Many practitioners stressed that the international nature of users' transactions was most suited to the cross-border dispute resolution mechanism that arbitration provides.
 - (ii) Parties enjoyed the freedom to choose a neutral venue for their disputes to be heard as opposed to courts situated in one of the parties' domiciles. There was a perception among practitioners that there was sometimes a danger of bias in some local courts whereas arbitral tribunals were more impartial and independent from the State.
 - (iii) Choice of arbitral seat could also overcome barriers of language, culture and local customs. Arbitral tribunals were also seen as preferable to the jurisdictional and choice of law difficulties associated with litigation.
- d) Confidentiality, finality and enforceability of awards
 - (i) The opportunity for parties to pursue dispute resolution in private was held in high regard among most practitioners. This was highlighted as being especially important in areas such as pharmaceuticals and sensitive industrial sectors.
 - (ii) The finality of arbitral awards was seen as beneficial as opposed to the multiple levels of appeal processes in litigation.
 - (iii) Several practitioners mentioned the problem of enforcing local court judgments as opposed to the enforceability provisions of the New York Convention.
- e) Flexibility and wider courses of action
 - (i) In addition to choosing the arbitrator as mentioned above, practitioners cited choice of language and applicable procedural rules as a benefit of arbitration.
 - (ii) Some practitioners stated that they perceived arbitrators looked for compromise between parties rather than applying the law in a rigid manner, which was seen as a positive factor.
 - (iii) Arbitration is essential for investor-state disputes as wider protections are available

under bilateral investment treaties than a claimant would have under litigation.

- f) There was some disagreement as to perceived changes in the next five years:
- (i) Europe was largely seen as a region with developed arbitral jurisdictions where arbitration would continue to grow. There was particular focus on arbitration in specific sectors growing due to the demand for sector expertise; for example, energy and finance. Many saw features of arbitration such as confidentiality, neutrality and expertise continuing to be of great importance in causing parties to choose arbitration.
 - (ii) Several practitioners thought that domestic arbitration in their specific jurisdictions would increase. This was largely down to the positive impact of domestic legislation. In Italy, it was predicted that a law approved in 2014 aimed at alleviating the backlog in courts by allowing arbitral tribunals to hear cases currently pending before Italian courts would lead to a rise in arbitration. In Belgium and Finland, respective laws passed in 2013 were seen as improving arbitration's efficiency. In Poland, practitioners noticed that arbitration case-management is becoming more effective.
 - (iii) However, some practitioners saw arbitration diminishing. Greater competition was expected from some countries' court systems as such courts became more professional, business aware and set sights on re-establishing pre-eminence in trans-border dispute resolution; that is, by allowing foreign languages and simplifying procedure. Judicial training could increase business confidence in the European Union (EU) courts, and the establishment of industry-specific courts such as the Technology and Construction Court in London could turn users back to the courts.
 - (iv) Arbitration was also seen to be under threat as costs rise and duration increases. Some predicted a return to courts or ADR methods such as mediation. However, many practitioners believed that arbitration would meet the challenge posed by rising costs and lengthy timetables by offering expedited procedures and proposing cost guidelines. In some jurisdictions such as England, increasing court costs were perceived as likely to lead to less criticism of arbitrator and institutional costs. Others believed that there may be a rise in ad hoc arbitrations to meet the challenges posed by institutional costs.
 - (v) Practitioners were unsure as to the effect political and economic uncertainty and market volatility could have. Some saw it as an opportunity for an increase in the number of disputes referred to arbitration (Italy), while others warned of a negative impact (the Netherlands). Russia predicted that sanctions imposed by the US/EU on Russian companies and/or sectors of the economy could result in Russian companies opting for the Asian arbitration centres (Hong Kong and Singapore) or choosing Russian state courts.
 - (vi) Some believed that calls for greater transparency could lead to arbitration as a process becoming less confidential. Several commented that much depends on the outcome of discussions regarding arbitration provisions in the TTIP.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

2.1 The concern most frequently mentioned was that arbitration is becoming longer, more costly and less efficient:

- a) Procedural complexities and delay were mentioned by most practitioners. Various opinions were put forward as to the cause of delay. One was the unfocused and lengthy advocacy, while others suggested arbitration was taking on the characteristics of litigation in relation to document production/disclosure. Several practitioners found poor case management or abuse of procedural rights to be a problem. Delay was also said to be caused by the unavailability of arbitrators and the fact that they are often too busy.
- b) Costs were also mentioned by the vast majority of respondents. At the same time, there were a number of practitioners who thought that costs were not a significant issue. In Poland, Finland and England, for example, arbitration costs were seen as a neutral factor when compared to relatively expensive litigation costs.

2.2 Another frequently cited concern was arbitrators themselves. Many practitioners reported that they did not direct proceedings as effectively as they might and were reluctant to simplify disputes early on for fear of challenge on the grounds of prejudice. Others thought arbitrators were not properly prepared for hearings and were not as knowledgeable regarding the issues as desired. Further, there were calls for more impartiality among arbitrators, rather than bias towards the appointing party. Some questioned the quality of arbitral decisions, which is apparently made worse by the fact that good arbitrators are too busy. Calls were made for a greater pool of arbitrators to choose from.

2.3 Other factors included:

- a) Limited injunctive relief (eg, a lack of ex parte interim relief), failure to enforce interim remedies issued by arbitral tribunals and the lack of summary decisions.
- b) Lack of appeal process. Support for the arbitration process in jurisdictions such as the UK and the Netherlands means that it is very difficult for awards to be challenged. Many practitioners saw this as a downside.
- c) Problems associated with enforcement. This was perceived as a problem by many practitioners, but was of particular concern in Russia, where the state courts appeared more willing to set aside arbitral decisions, and Italy, where challenges to an award can lead to a wait of many years in the courts to decide on the issue.
- d) Negative public and scholarly opinion. Of particular concern were the TTIP/investor-state dispute settlement discussions, which were seen to have harmed the reputation of arbitration and its perceived lack of transparency. Also mentioned was the threat of legislative hostility caused by a perception that arbitration sidesteps the mandatory forums provided for by the Brussels Recast Regulation.
- e) Possibility of state intervention in some jurisdictions. This was identified as a problem in

Ukraine and Russia. Russian state courts were reported to be construing arbitration clauses narrowly and setting aside arbitral decisions. State intervention was also viewed as a problem in England where there is extensive jurisprudence on every feature of the Arbitration Act.

- f) Jurisdictional and practical difficulties in respect of third parties for example, the difficulty in appointing third parties after the process has begun.
- 2.4 It was predicted that in the next five years some of these pitfalls would be addressed while others would get worse. For example, many predicted that costs would continue to increase and that parties would be discouraged from arbitration as a result. However, others believed that the costs would fall due to the introduction of provisions in institutional rules designed to reduce costs. This would be compounded by the fact that there would be increasing competition between arbitral institutions. If costs could not be lowered, some practitioners felt this would harm the field while others did not believe it would.

3. Which arbitration institutions are popular in the region and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are such institutions becoming too homogenised and, if so, should they try to differentiate themselves?

3.1 The ICC was, on the whole, the preferred arbitral institution:

- a) It was seen as structured, reliable and safe and the reputation of its arbitrators was positive. Many noted that it was particularly suitable for large-scale international disputes. However, some suggested its popularity was waning due to high costs. One commentator observed that it was not as time efficient as a smaller institution could be.
- b) Other institutions named include the LCIA, the ASA and the VIAC. Among the Nordic countries, the SCC was the clear leader.

3.2 In the region, consulted experts listed:

- a) In Belgium, CEPANI.
- b) In Denmark, the Danish Institute of Arbitration (DIA).
- c) In Hungary, the Energy Arbitration Court (ECA) and the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry.
- d) In Italy, the Milan Arbitration Chamber (CAM).
- e) In Finland, the FAI.
- f) In France, the ICC, and the Centre for Mediation and Arbitration of Paris (CMAP) attached to the Paris Chamber of Commerce and Industry.
- g) In Germany, the German Institution of Arbitration (DIS).
- h) In the Netherlands, the Netherlands Arbitration Institution (NAI), PRIME Finance and the Raad van Arbitrage voor de Bouw.
- i) In Poland, the Arbitration Court at the Polish Chamber of Commerce and Court of

Arbitration at the Lewiatan Industrial Confederation.

- j) In Russia, the International Commercial Arbitration Court at the Chamber of Commerce and Industry (ICAC) and the Russian Arbitration Association.
- k) In Ukraine, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.

3.3 Predictions regarding the future of arbitration institutions:

- a) Some predicted a growth in the use of regional institutions. This was often seen as being down to their ability to offer lower arbitration costs and faster decisions, as well as the increasing reliability of their governing bodies. Many believed that such regional institutions are increasingly attempting to market themselves as international centres for arbitration.
- b) Asian centres such as the SIAC and the HKIAC were seen as becoming increasingly popular, especially for non-European work. Russian practitioners had witnessed them targeting Russian work as EU sanctions prevent European centres being used. Further, increasing investment in emerging markets was predicted by some to cause growth in use of seats such as Dubai and Mauritius.
- c) Other practitioners did not foresee less-established regional or domestic institutes gaining in market share over more established centres such as the ICC and the LCIA, especially for large-scale international disputes.

3.4 Regarding homogenisation, opinions differed:

- a) Many agreed that arbitration rules are fairly homogenous. The majority of those who agreed viewed this as positive and rejected calls for differentiation. For many, it was seen as recognition of international best practice and as reflecting the willingness to meet the expectations of users in offering services such as the introduction of expedited proceedings. Some even called for greater homogeneity. Some were more negative, arguing that institutions should not be reluctant to offer procedures not seen elsewhere.
- b) Some suggested that there was a level of diversity among institutions (although the perceived level of diversity ranges from 'huge' to 'sufficient'), and that such institutions maintained distinct characteristics dependent on differing cultural/legal backgrounds. One key difference identified related to respective costing mechanisms, with the ICC adopting an ad valorem approach and the LCIA adopting an hourly rate. Another example includes the observation of one Swiss practitioner who cited as different the case management tools proposed by the ICC Rules and the code of conduct for counsel incorporated in the LCIA Rules. Finally, one practitioner cited as evidence of the difference between various institutional rules that they impose different joinder/consolidation provisions.
- c) To differentiate themselves, it was variously suggested that institutions could lower costs, become more efficient, offer greater transparency, offer different services such as online dispute resolution mechanisms and improve levels of professionalism to gain a reputation for quality of services.

4. What are currently considered to be the ‘safe’ seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?

4.1 Within the region:

- a) Most-frequently mentioned were Paris, London and Switzerland (specifically Zurich and Geneva). Stockholm was also a popular choice, especially among the Nordic practitioners, and it was mentioned as being popular for disputes involving Russian and Chinese parties.
- b) Vienna, Helsinki, the Netherlands (The Hague) and Germany (Frankfurt) were also mentioned, and Madrid was referred to in relation to South American and Spanish clients.
- c) Key features of a safe seat were said to be: the level of experience and independence courts had in relation to arbitration (including how developed case law was in the area); whether courts provided support such as interim orders or enforcement powers; and reluctance to set aside arbitral awards and limits on challenge of awards. Also mentioned were neutrality, speed, low corruption levels, good facilities, infrastructure and accessibility.

4.2 Outside Europe:

- a) In Asia, Hong Kong and Singapore were regarded as safe. Malaysia was also mentioned.
- b) In North America, New York was the most commonly cited, although some acknowledged that concern remains as to the practices of US courts, as well as Toronto.

4.3 Regarding the future:

- a) In general, the seats currently viewed as safe were seen as likely to continue to be so. Two practitioners did, however, suggest that recent judicial decisions in England might make London a less-attractive option as they signalled greater court interference.
- b) Some expected more seats to become safe and that users would have more options.
- c) Various new centres were suggested as being ones to watch. Australia was mentioned by one Swiss practitioner who had witnessed great interest in the country owing to its strategic geographical position. Again, some expected a shift to Singapore and Hong Kong, Dubai and Mauritius, while others doubted whether this would happen.
- d) It was noted that the impartiality and reliability of the local judiciary and an arbitration-friendly approach by local courts would continue to influence the parties’ choice, as would length of proceedings.

4.4 Views on the possibility of a-national awards with no seat:

- a) Practitioners had particularly strong views on this question. Most did not see a-national awards as realistic, not least because the concept was refused by the drafters of the New York Convention and by most states consulted. Many doubted the practicality of a-national awards because national courts were needed to give effect to awards and they need a

basis for asserting jurisdiction. Practitioners thought that the legal seat of arbitration would continue to remain important, albeit with differing opinions as to how important. Nordic practitioners, in particular, placed great emphasis on the role of the seat. Several commented that criticism levelled at arbitration in the TTIP context is so far removed from the courts' review that it makes the idea of a-national arbitrations increasingly unlikely.

- b) Some did recognise that a-national awards could be a possibility, but not any time in the near future because it would require transnational *lex arbitri* amendments to the New York Convention and consent of the countries (which was considered unlikely).
- c) Most practitioners implied or expressly stated that an a-national award system was not desirable and that parties benefit from having the stability provided by state control over arbitration proceedings. Indeed, some were quite emphatic in their criticism and said it would be difficult to convince users of the merits of the idea. Only a small number expressed support for the idea.
- d) It was mentioned that some forms of delocalised arbitration do already exist in specific contexts; for example, sports arbitration during the Olympic Games. Further, several practitioners cited France as being the only jurisdiction where an a-national approach was contemplated.

5. Are arbitration practitioners becoming too specialised or are they not specialised enough?

5.1 There was a general lack of consensus regarding the nature of specialisation, as well as whether greater specialisation is a good or bad thing:

- a) A large number of practitioners disagreed with the phrasing of the question and thought that arbitrators were neither too specialised nor not specialised enough. Many argued that there is a need for both general and specialised practitioners which is currently met, and others stated that arbitration practitioners are capable of striking the right balance and can cope with a wide range of disputes. Some denied that it was possible to be too specialised given the inherently wide nature of the work.
- b) Many saw specialisation as a positive factor which leads to smoother conduct in proceedings and reduced fees. It was seen as especially necessary in some fields (eg, energy, finance, technology, insurance, shipping, engineering and construction). Some warned that some practitioners are not specialised enough. This was seen to be because of the sophisticated nature of commercial transactions in evolving industries. There were calls for greater specialisation in areas such as finance, where there were several complaints of a lack of financial literacy.
- c) Others, however, did not see the need for specialisation, especially given the availability of technical experts, and argued that good practitioners have diverse practices and broad commercial knowledge. Some warned that over-specialisation was not desirable because of the need to widen parties' choice and allow greater competition.
- d) There was also disagreement about whether specialisation between litigation and arbitration was beneficial. English practitioners tended to be more comfortable with, and supportive

of, the distinction, whereas practitioners in areas such as Poland and the Nordic countries tended to think that practitioners should do both. Some believed that arbitration focus led to greater certainty and consistency of decisions, while others suggested that grounding in the domestic legal system and court procedure is undervalued.

6. What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years' time?

6.1 There was a clear divide between countries based on their domestic interim relief policies:

- a) In France, Switzerland, the Netherlands, Germany, Sweden and England, there was near consensus that interim relief will continue to develop and become a typical feature of arbitration proceedings across the region due to growing demand. It was projected that interim relief will increasingly be recognised by the courts and that there is scope for it to become more effective. This trend was expected notwithstanding observations that cost is a drawback and court orders are often quicker and easier to obtain.
- b) In many countries, interim relief is not currently available but was often seen as desirable (eg, Poland, Italy and Hungary). In others, interim relief is available but was seen as limited in its utility as compared with court orders (eg, Spain and Finland). In Russia, interim relief remains under state control and this was seen as unlikely to change.

6.2 Opinion on emergency arbitration was evenly split. Some foresaw growth in demand for emergency arbitrators. However, some concluded that the popularity of emergency arbitrators was unlikely to accelerate in the next five years. Further, across the board there were concerns regarding the quality of service provided through such proceedings and some warned that it would take a while for users to get comfortable with the service and/or to move away from court orders.

7 Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?

7.1 Most respondents agreed that users should hold tribunals to account. Of particular concern was a perceived lack of efficiency in proceedings which practitioners felt needed to be addressed.

7.2 Many mentioned that institutions should also do more to monitor arbitral activity and introduce time-saving features such as summary judgment and declarations of availability. Parties and counsel were frequently cited as adding to problems of speed and efficiency and it was suggested they had a part to play in speeding up proceedings by avoiding unnecessarily lengthy submissions, exhibits and document requests.

7.3 Some of the suggestions to hold tribunals accountable included:

- a) Asking for arbitrators to provide confirmation of their availability both before taking on a case and as a continuing disclosure obligation.
- b) Asking for stricter time limits. This could be achieved in part by procedural timetables or by holding a case management conference at the start of proceedings.
- c) Being more vocal in demanding good service and complaining when this is not received.

8. How will issue conflict affect the field in the next five years?

- 8.1 Many practitioners held no view on this question or believed there would be no change. Some thought that there would be greater transparency in five years and that stricter guidelines would develop for investment treaty arbitration. Some called for greater intervention from institutions to address the issue, but several warned that the current trend of greater formal rules was unhelpful.
- 8.2 Suggestions to tackle the issue included calls for greater transparency by imposing strict obligations on arbitrators to disclose potential issue conflicts. Also listed was disclosure of third-party funders and increasing the number of arbitrators. The most commonly cited suggestion was to stop arbitrators from serving as counsel.
- 8.3 Issue conflicts were not particularly relevant in commercial arbitration and it was not expected that they would become more so.

9. Do you predict any key trends in terms of jurisprudence?

- 9.1 Answers to this question were extremely varied. Most commonly cited were third-party funding, harmonisation of substantive laws with international developments and challenges to arbitrators. Others included:
- a) Rise in conditional awards.
 - b) Debate around anti-suit injunctions.
 - c) Debate around setting aside awards and enforcement.
 - d) Higher level of transparency, for example, publication of awards.
 - e) More cases on necessity, for example, Greece and Ukraine.
 - f) Discussion of MFN as applied to procedural rights.
 - g) Double nationality from the investor side.
 - h) Criminal and civil liability of arbitrators.

10. Where will third-party funding go over the next five years?

- 10.1 Most thought third-party funding would increase. There were also predicted to be more diverse third-party funding options and fee arrangements. Some saw this as beneficial to allow parties with limited economic means to bring arbitration claims. However, many were more critical, citing problems such as conflicts and lack of authority. Several practitioners called for greater accountability and transparency of third-party funders, as well as stricter controls to tackle abuses.
- 10.2 Several practitioners did not think third-party funding would play a significant role in the next five years, with one practitioner suggesting it would not exist in five years' time except in exceptional cases.
- 10.3 England, the US and Australia were named as the jurisdictions where third-party funding is most

popular. Third-party funding was reported not to exist in Hungary, Poland, Ukraine, Russia, Italy and the Nordic region, although practitioners within these regions predicted it could become a feature in the future, albeit to varying degrees.

11. What will be the key challenges to establishing a career in arbitration over the next five years?

11.1 Respondents listed a variety of challenges, including the following:

- a) Growing competition.
- b) Costs deterring users.
- c) The problem of conflicts.
- d) The need for litigation and advocacy skills.
- e) The need for gender diversity and female presence at a senior level.
- f) Practical experience.
- g) The increasing need for specialist knowledge.
- h) Familiarity and competence with modern technologies.
- i) Versatility in location and language skills.
- j) Jurisdictional differences and different legal backgrounds.

12. Following the advancement of technology in international arbitration, can we expect virtual arbitration proceedings to transcend national borders with ease? Can we expect an increase in decision-making through technology beyond what we see today? In terms of addressing this from regional perspectives, would the uneven advancement of technology in developing and developed countries pose an issue?

12.1 Many had witnessed advancement of technology such as hearings conducted via video link, case management websites and virtual case rooms and saw this as a key part of future arbitrations. Optimism was expressed that this could reduce costs and increase efficiency.

12.2 Many saw technology as aiding aspects of arbitration rather than replacing the current status quo. Technology was not seen as a substitute for decision-making and many expressed preferences for oral hearings. Examination of witnesses in person was also mentioned as being preferable. Some raised concerns over data protection and storage.

12.3 On uneven advancement across different parts of the region:

- a) Practitioners observed that in some regions local arbitration courts were behind in using modern technology. Fears were expressed, particularly by practitioners from Poland and Hungary, that this could result in the region losing business.
- b) However, there was also optimism that less-developed countries would rise to the challenge, and many stressed that many technologies are interchangeable and relatively cheap.
- c) Some saw developing countries as likely to benefit from a shift to technological processes

because a computer is all that is needed, rather than a physical presence in an established financial centre.

13. There exists the possibility for a supranational body to oversee international arbitration to address, for example, uniformity, predictability and ethical conduct in the field. Would different countries/regions be willing to form such a body?

13.1 There was near consensus that this was not a real possibility, certainly in the near future, because of a perceived lack of political will/consensus.

13.2 Opinion was split as to whether the development of a supranational body was to be desired:

- a) Possible benefits of such a system were seen as ability to ensure uniformity over issues such as annulment proceedings and to remove the influence of local courts, as well as acting as a quality controller. Some suggested that such a body could oversee a binding arbitration code of ethics to govern arbitral proceedings.
- b) Others were less convinced of the merits and some argued very strongly against it. It was stated that it could be impractical, unwieldy, bureaucratic and too formal. Many questioned whether greater uniformity is desired or needed. Others suggested that harmonisation would be a bottom-up process rather than top-down.

9.4 Latin America

Twenty-eight participants from nine countries answered the questionnaire.

Countries: Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Uruguay and Venezuela.

1. What are the reasons that users choose arbitration over court litigation and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

1.1 The practitioners of different countries emphasised different specific advantages owing to the different needs of the legal and business communities they deal with. Nevertheless, in general terms, a number of points were reiterated:

- a) The expertise of arbitrators
 - (i) In some Latin American jurisdictions, disputes submitted to arbitration were most often complex cases requiring a high level of expertise in the decision making process. This cannot be guaranteed in state court litigation.
 - (ii) Many of the fields in which arbitration is most popular (eg, construction, energy and finance) involve highly technical issues.
- b) The costs and delays of state court litigation
 - (i) State courts are usually overwhelmed by their own caseload and can take years or decades to finally decide a dispute (after the appeals process).
 - (ii) The deficiencies of the judicial branch differ greatly in the various jurisdictions. While

some practitioners (eg, Uruguayans) expressed great confidence in their courts, others were much more critical. This greatly affects the degree to which users turn to arbitration as an alternative forum.

(iii) As regards costs, there also seems to be some differences between the diverse jurisdictions. In some countries (eg, Argentina) there is a mandatory court fee which – in disputes for significant sums – can be a considerable deterrent.

c) Neutrality of arbitral tribunals

(i) Practitioners explained that the reputational aspect was important because, often, foreign investors in particular do not see state courts as impartial adjudicators and prefer a neutral forum and international arbitrators to settle any dispute.

(ii) Some also showed concern regarding the higher potential for corruption in state court litigation in some jurisdictions, which has fostered development of arbitration.

d) Confidentiality

Court proceedings are, in principle, public in many Latin American jurisdictions. Users prefer the confidentiality that arbitration may provide if the appropriate provisions are entered into.

e) Other mentioned reasons include:

(i) Flexibility and the possibility to tailor proceedings.

(ii) Sector focus: sectors such as construction and energy have boomed in some jurisdictions due to both foreign direct investment and incentives granted by the state. The particularities of the sector and the global tendency to solve construction and energy disputes via arbitration have made arbitration the rule.

f) Perceived changes in the next five years include:

(i) State court litigation is still the preferred method of dispute resolution but the growth of arbitration was unanimously expressed. Practitioners unanimously predicted a growth in arbitration in the next five years.

(ii) In some jurisdictions, recent legislative amendments were considered to act as potential boosts for arbitration in the near future; for example, the Energy Reform in Mexico and the new Civil and Commercial Code in Argentina which will – practitioners stated – probably improve the way in which arbitration proceedings are conducted there (eg, explicitly regulating and placing on firm ground important institutions such as competence-competence, the separability of arbitration agreements and conferring on arbitrators the power to grant interim measures).

(iii) Other jurisdictions thought that recent legislative developments could be a setback (eg, Colombia's presidential directive limiting arbitration in cases involving public entities).

(iv) Some tied the growth and expansion of arbitration to the behaviour of the economy in the sector and predicted that arbitration will follow the economic path of the region.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

2.1 There were some differences between the diverse jurisdictions, with practitioners emphasising a varied array of pitfalls depending on a multiplicity of factors corresponding to the characteristics of their national contexts.

2.2 The most-mentioned concern was state court intervention:

- a) The advantages of arbitration regarding its efficiency may be frustrated if awards are challenged before state courts as a matter of general rule. Latin American countries showed different judicial attitudes in this sense, spanning from jurisdictions with a historical high regard and respect for arbitral proceedings, to others with worrying cases of court intervention.
- b) Many jurisdictions displayed an increased risk of intervention, in particular when the cases involved political elements or state entities.

2.3 In some jurisdictions, the cost of arbitration was higher than state court litigation:

- a) This is especially so in jurisdictions (eg, Chile) where there is no fee for state court litigation.
- b) Parties often make procedural choices which increase the cost of the proceedings without adding much value to them (eg, appointing expert advisers or technically-trained arbitrators, and choosing a foreign seat – when this is unnecessary to the dispute).

2.4 Delay in implementing interim remedies issued by arbitral tribunals.

2.5 Delay in obtaining the judicial enforcement of awards. In some jurisdictions (eg, Argentina and Mexico) there is a sense that entering into arbitration proceedings could be like deciding to litigate the dispute twice. After a favourable outcome, the enforcement procedures could be lengthy and costly, and there is also the prospect of facing challenges by the defeated party.

2.6 Other factors included:

- a) The negative opinions of some scholars.
- b) The lack of local arbitration associations.
- c) The fact that potential arbitrators to be selected for a given dispute are not numerous and, at the same time, these arbitrators are normally handling many cases, giving rise to potential conflicts of interests and entailing unnecessary delays in rendering the awards.
- d) Some jurisdictions (eg, Argentina and Uruguay) require a submission agreement in addition to the arbitration clause. This requirement has the potential to complicate and (when resisted) lengthen the arbitral procedure a great deal.

2.7 In the next five years, it was predicted that some of these pitfalls would disappear while others would require more time. For instance, the increased demand for arbitration will likely increase

the pool of practitioners, arbitrators, and arbitral associations. Also, the optimism for increased economic activity in some countries in the region and the growth in foreign investment led some to predict that potential changes in legislation could hinder arbitration.

3. Which arbitration institutions are popular in the region and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are such institutions becoming too homogenised and, if so, should they try to differentiate themselves?

3.1 The ICC was by far the most highly regarded and popular arbitral institution:

- a) Consulted experts highlighted its leadership in many regards and its efforts to make itself widely known.
- b) Practitioners doubted that this tendency would change in the near future, at least for international disputes.
- c) Other mentioned international institutions included the ICDR, the LCIA, the Grain and Feed Trade Association (GAFTA), for certain commodities, and ICSID.

3.2 In the region, consulted experts listed:

- a) In Argentina, the Buenos Aires Stock Exchange Arbitration Tribunal and the Buenos Aires Chamber of Cereals Tribunal.
- b) In Brazil, the Brazil-Canada Chamber of Commerce (CCBC), the FGV Chamber of Conciliation and Arbitration, the Chamber of Conciliation, Mediation and Arbitration of São Paulo (CIESP/FIESP), the Brazilian Mediation and Arbitration Centre (CBMA), the AmCham Arbitration Centre in São Paulo, the BOVESPA Market Chamber, the Chamber of Business Arbitration (CAMARB) and the Arbitration and Mediation Centre of the Parana Chamber of Commerce (ARBITAC).
- c) In Uruguay, the Uruguayan Stock Exchange Arbitral Tribunal for Mercosur.
- d) In Chile, the Centro de Arbitraje y Mediación de Santiago (CAM Santiago).
- e) In Peru, the Centro de Arbitraje de la Cámara de Comercio de Lima (CCL) and the Centro Internacional de Arbitraje de la Cámara de Comercio Americana del Perú (AmCham Perú).
- f) In Colombia, the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá (CAC Bogotá, popular on both a regional and national level).
- g) In Panama, the Centro de Conciliación y Arbitraje de la Cámara de Comercio, Industria y Agricultura de Panamá (Cecap), Centro de Solución de Conflictos de la Cámara de Comercio de Panamá (Cescon) and Centro de Arbitraje de la Corte Internacional de Arbitraje de la Cámara de Comercio Internacional (ICC) in Panama City.
- h) In Mexico, the Mexico City National Chamber of Commerce (CANACO) and the Arbitration Centre of Mexico (CAM).

3.3 Predictions for the future of arbitration institutions:

- a) Most predicted that the ICC would keep its overall dominance but with regional institutions silently strengthening their positions and more and more users turning to regional institutions first (considering, among other factors, the reduced costs involved).
- b) Some made reference to the forthcoming establishment of the UNASUR Arbitration Centre and predicted that it may become quite popular, especially for investor-state disputes given many countries' mistrust of ICSID.
- c) Some expected to see a rise in popularity of Asian arbitration centres in the region, considering the growing importance of Chinese investments in Latin America and a certain tendency towards doing business and resolving disputes in different ways.

3.4 Regarding homogenisation, opinions differed:

- a) In general, institutions provide services that are substantially similar and, therefore, if possible, they should try to differentiate themselves. It was argued that globalisation and international cooperation have led to some degree of standardisation and the adoption of similar arbitral practices (with the ICC paving the way).
- b) However, certain attempts by local institutions go against homogenisation. Sometimes local arbitral institutions try so hard to be innovative that they end up creating complex (or at least quite different) rules, which users are not familiar with, and are uncertain how they will be interpreted. Therefore – some argued – Latin American institutions should probably follow the same line of the most widely used global institutions and try to grow by gaining the confidence of users, instead of by creating distinct rules.

4. **What are currently considered to be the 'safe' seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?**

4.1 Outside Latin America:

- a) Most mentioned Paris as the safest seat for international disputes. This was especially so for disputes involving state instrumentalities. Reasons given included: enforcement of awards under the New York Convention is likely to be allowed without limitations; local courts tend not to interfere in arbitral proceedings; broad grounds to challenge the award are not accepted; and Paris has a civil law system and is, therefore, closer to Latin American reasoning.
- b) Also commonly listed was the US (especially New York for corporate and financial disputes, and Houston for energy-related matters).
- c) Lesser-listed seats included London and Geneva, Washington, The Hague, Zurich, Singapore and Hong Kong.

4.2 Within the region:

- a) Rio de Janeiro, São Paulo and Belo Horizonte in Brazil. Though some warned that Brazil

was more popular than strictly safe and that it derived some of its demand from its sheer economic power.

- b) Mexican practitioners, in particular, considered Mexico City as a safe seat, considering that its courts had knowledge and experience regarding arbitration.
- c) Other commonly mentioned seats included Santiago de Chile, Lima and Bogotá.
- d) Uruguayan practitioners had confidence in Montevideo as a seat, arguing that its solid tradition in the respect of legal institutions, international law and its current status as seat of the Mercosur Parliament and other international institutions indicated that it was safe.

4.3 Regarding the future:

- a) Most did not expect any significant modifications in the foreseeable future in this regard.
- b) Some mentioned that Miami and Madrid were becoming increasingly popular.

5. **Are arbitration practitioners becoming too specialised or are they not specialised enough?**

5.1 There was consensus on this question. Consulted experts generally agreed that, currently, practitioners were not particularly specialised due to a number of factors:

- a) There is an insufficient number of cases warranting a demand for such specialisation in a great number of practitioners, with only a small pool sufficing.
- b) It is uncommon for lawyers in the region to dedicate themselves exclusively to arbitration and so most also advocate themselves to civil and commercial court litigation.
- c) There are not many educational opportunities in the region and, often, interested professionals must travel abroad to immerse themselves in the specificities of arbitration.

5.2 There was also general agreement that the growing number of cases was creating an increasing demand for lawyers specialising in arbitration. Some highlighted how local law universities were including arbitration within their syllabi, offered postgraduate courses on the subject (along with local arbitration centres) and how international moot competitions were also generating interest early on.

5.3 Some mentioned how certain specific branches of the law demand more expertise in arbitration than others (eg, oil and gas, telecommunications and consumer law).

5.4 A considerable number of consulted experts even warned of overspecialisation, saying that when practitioners focus too much on the arbitral issues they may leave aside other relevant areas important to the disputes which require equal dedication; for example, private and public international law issues and substantive issues involved in the dispute.

6. **What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years' time?**

6.1 The answers to this question largely depended on the country and its specific regulation of interim relief. The current scenario for interim relief among Latin American jurisdictions seems to vary greatly and to be rapidly evolving. While some practitioners state that their jurisdictions

allow arbitrators to grant interim measures (such as Brazil, Chile, Colombia and Panama), others report a scenario of uncertainty (Mexico, Venezuela and Ecuador) or where judicial courts have exclusive jurisdiction to grant interim relief (Uruguay).

- 6.2 Also, most practitioners reported the lack of provisions on emergency arbitrators in the arbitration rules of local institutions (with the exception of Brazil).
- 6.3 That said, most practitioners believe that regulation and use of interim relief, granted both by the judiciary and arbitrators, will increase in the near future.
- 6.4 Some practitioners expressed concern over the judicial enforcement of interim measures granted by foreign tribunals in their countries. They reported that courts tend to deny exequatur to those measures, which are granted only to decisions considered not to be final.
- 6.5 Argentinian practitioners highlighted the results of the new Civil and Commercial Code coming into effect in August 2015. In that regard, before its enactment, it was not clear whether arbitrators were empowered to grant preliminary measures or interim measures (like Uruguayan courts to this day) and had to request the aid of local state courts to that effect. The Procedural Code allowed only judicial courts to grant preliminary or interim measures, while the New Code specifically and expressly empowers the arbitrators to grant these types of measures.
- 6.6 Mexican practitioners expressed the opinion that there was a lack of certainty regarding the adoption, recognition and enforcement of interim measures related to arbitration proceedings since the reform of the Commerce Code dated 27 January 2011.
- 6.7 Chilean experts said local courts have generally supported interim relief measures ordered by arbitrators, though some practitioners highlighted how the Chilean Supreme Court has been reluctant to grant such measures granted by foreign courts, 'based on the fact that they are not final decisions and therefore are not subject to exequatur, because they can be modified by the Court granting the measure'. Chilean experts thus keep a careful eye on case law in this regard.
- 6.8 Regarding emergency arbitration, most of the local laws and institutional rules do not contain any provision on the matter. However, some consulted experts argued that if the new ICC Rules were chosen as applicable, then they would be permitted.
- 6.9 Regarding the future, practitioners were in disagreement:
 - a) Some believe that an amendment to local institutional rules will be made to incorporate emergency arbitrators. This would follow the global trend among leading arbitral institutions.
 - b) Other experts were of the opinion that the current practice will not change any time soon.
- 7. Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?**
- 7.1 Most respondents understand that users should do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making. However, some made the remark that there is no fundamental concern over those issues because the arbitration process is considered to be advantageous when compared to local court proceedings. Practitioners also put a heavy weight

on the role to be played by arbitral institutions in holding tribunals accountable.

7.2 The two most commonly mentioned concerns are: the availability of arbitrators, who come from a relatively small pool of practitioners in many Latin American countries and are therefore generally busy; and the need for more transparency to improve the decision-making process in arbitration.

7.3 Some of the suggestions to hold tribunals accountable include:

- a) Creating methods for evaluating the performance of arbitrators, such as scrutiny processes.
- b) Developing transparent and objective criteria for creating lists of arbitrators, and for continuously reforming it.
- c) Arbitration institutions making sure that the prospective arbitrator is actually available before appointing him/her.
- d) Making more arbitral awards public.

8. How will issue conflict affect the field in the next five years?

8.1 There is a broad consensus among respondents that issue conflicts are not a major concern; they report little discussion and practice on the topic in their jurisdictions. Also, it seems that local laws do not address or regulate issue conflicts in particular, only conflicts of interest in general.

8.2 Some practitioners from different jurisdictions associated the subject of issue conflict with unfounded challenges to arbitrators, against which the arbitration community should react. Others mentioned that a perceived trend of expansion in the number of arbitrators, with the entry of a younger generation into the market, may help solve issue conflicts and other conflicts in the near future.

9. Do you predict any key trends in terms of jurisprudence?

9.1 Answers to this question were extremely varied. They included:

- a) Extension of arbitration agreements to non-signatories.
- b) Recognition and enforcement of foreign interim measures and partial awards.
- c) The use of the amparo remedy against arbitral awards.
- d) Anti-suit and anti-arbitration injunctions.
- e) Arbitration involving state entities.
- f) Governmental reactions against arbitration in Venezuela and Ecuador.
- g) The concepts of public order and arbitrability.

10. Where will third-party funding go over the next five years?

10.1 All the respondents reported that third-party funding is not a common practice in their respective jurisdictions. Moreover, there seems to be no legal provision regulating third-party funding in the region – or forbidding its practice.

10.2 As a result, most practitioners found it hard to predict where third-party funding will be in five years' time. But some believe it will increase in the near future, alongside the development of the arbitration market and the deepening presence of international companies in the local economies.

10.3 Many practitioners remarked that if third-party funding takes off in the future it will be necessary to adopt new regulations to address disclosure duties and conflicts of interest.

11. What will be the key challenges to establishing a career in arbitration over the next five years?

11.1 Almost all respondents point to growing competition as a key challenge to establishing a career in arbitration over the next five years. There were two commonly mentioned reasons. First, arbitration is a relatively small market in their jurisdictions. Secondly, there are increasing numbers of professionals attempting to enter the arbitration market, but this is not matched by a growing number of arbitral disputes. A few respondents expressed further the feeling that arbitration practitioners belong to a somewhat closed circle, making it difficult for newcomers to break into the market.

11.2 Many respondents also listed the following challenges:

- a) The need for a higher degree of specialisation in the practice area.
- b) Having to keep constantly updated in developments in the field, for example, by attending conferences and participating in networking activities.
- c) Acquiring international experience, both academic and professional.

11.3 Other challenges mentioned by some practitioners included:

- a) The need to be familiar with different legal systems and cultures, or to be able to work 'detached' from one's own local law and culture.
- b) Educating clients about arbitration and its advantages, in order to increase the number of cases.
- c) The requirement for proficiency in the English language.
- d) In Ecuador, overcoming political restrictions on arbitration.

9.5 Middle East and North Africa

Ten practitioners from five countries answered the questionnaire.

Countries: Egypt, Tunisia, Lebanon, the UAE and Qatar.

1. What are the reasons that users choose arbitration over court litigation and how could this change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

1.1 The answers to this question were fairly consistent across jurisdictions within the region.

1.2 The most commonly cited reasons for choosing arbitration were the following:

- a) Perceived neutrality of decision-makers in disputes involving a foreign party.
 - b) Enforceability of awards both within the region and further afield. All jurisdictions in MENA are signatories to the New York Convention except for Libya, Yemen and Iraq. Participants did concede that court support for arbitration varied substantially within the region, with some jurisdictions taking a conflicting, contradictory and, therefore, sometimes unpredictable approach to the annulment of awards.
 - c) Procedural flexibility. This reason was given particular emphasis in jurisdictions where the rules governing the conduct of civil proceedings were perceived to be outdated, overcomplicated or opaque.
 - d) Party autonomy. The ability to constitute a tribunal including industry specialists, especially in the construction industry – a major user of arbitration throughout the region.
 - e) One-stop shop. The length of the appeals process was cited as a major disadvantage of court litigation in almost all jurisdictions surveyed.
 - f) Speed. State courts suffer from a large backlog of cases, are thinly staffed and insufficiently modernised.
- 1.3 Participants from jurisdictions that have witnessed political unrest or armed conflict noted the effect of these events on the ability of national courts to function effectively. In particular:
- a) In Egypt, court documents were destroyed during political unrest that commenced in 2011.
 - b) Lebanon still suffers from administrative problems stemming from the 1975–1990 civil wars during which many official documents were lost and the training and hiring of judges was suspended.
 - c) In Tunisia, Lebanon and Egypt political unrest caused a perceived increase in litigation before the national courts which, in turn, increased the backlog of cases.
- 1.4 Some participants indicated that there was a general feeling of mistrust towards the judiciary in some jurisdictions due to the delay in the resolution of disputes and the perceived lack of transparency in judicial decision-making. Participants also noted the perceived bias in certain jurisdictions towards nationals in disputes involving a foreign party.
- 1.5 A minority of survey participants cited the ability to select the language of proceedings as an advantage of arbitration over litigation and identified that this factor was of particular importance in arbitration proceedings involving a foreign party.
- 1.6 A few participants cited the confidentiality of proceedings as an advantage of arbitration. However, this was qualified by the observation that, in practice, high-stakes arbitrations often lead to annulment applications before the local courts which places the case in the public domain.
- 1.7 Survey participants noted the following trends that are likely to influence arbitration in the region in the next five years:
- a) An increase of the use of arbitration across the region due to increasing familiarity with the

process among users and an increase in the number of disputes in industries that require specialist industry knowledge, including construction and oil and gas.

- b) Increased court support for arbitration as members of the judiciary increasingly appreciate the potential for arbitration and ADR to alleviate the backlog of cases before the courts.
- c) The improvement and/or modernisation of outdated arbitration legislation in Qatar and the UAE. Participants anticipated that the modernisation of this legislation could lead to a change in the current preference for seating arbitrations in major arbitration destinations including Paris, London and Geneva.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region, for example, sector focus or court support for arbitration?

2.1 Respondents' main concern was the lack of consistency and predictability in judicial decision making with regard to arbitration throughout the region. Some jurisdictions complained of a lingering suspicion of the arbitral process among a minority judges. In particular, respondents noted that:

- a) Different jurisdictions throughout the region offer different levels of support to international arbitration but that, overall, support has increased significantly in recent years.
- b) Governmental support for arbitration at the policy level is improving which is likely to yield improved arbitration legislation in the UAE and Qatar in the coming five years.
- c) Local courts, in particular in the UAE, which sees a large number of high-value arbitrations, have rendered a number of unfortunate judgments, some of which are grounded in an overly broad notion of public policy. A recent case casts doubt on whether claims that touch upon questions of public policy are even arbitrable (in that case, the requirement to register a sale of property). In another judgment, the Dubai Court of First Instance refused enforcement of a foreign award because the award debtor was not legally domiciled in the UAE. Both the Dubai Court of Appeal and the Dubai Court of Cassation upheld the judgment.
- d) There is an absence of clear standards for when an arbitration agreement will be upheld in certain jurisdictions. For example, it was noted that in Qatar, the arbitration legislation currently in force exposes both arbitration clauses and arbitral awards to an unacceptably high level of risk.

2.2 A few survey respondents complained of the high cost of arbitration when compared with litigation. However, the same respondents also noted that in high-stakes disputes, arbitration is preferable because it is perceived to be more neutral and as ensuring predictability in decision making.

2.3 Survey participants also noted the fairly limited pool of arbitrators with both extensive international experience and the ability to conduct proceedings and draft awards in Arabic. This, in turn, creates the following problems:

- a) A lack of arbitrators with sufficient availability resulting in delay at the constitution stage and also

at the hearing and award stages.

- b) Repeat appointments by counsel resulting in concerns relating to conflict of interest as well as a general lack of diversity.
- c) Increasingly, issue conflicts, especially among arbitrators who also act as counsel.

2.4 Some changes that are predicted in the next five years include:

- a) An increase in the number of arbitrations seated in free-zone jurisdictions throughout the region, including the DIFC.
- b) Increased interest in multilateral investment protection treaties that apply throughout the region. These include the 1980 Unified Agreement for the Investment of Arab Capital in Arab Countries which provides for the resolution of disputes by ad hoc arbitration or by the Arab Investment Court and the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of Islamic Cooperation, which also provides for ad hoc arbitration. However, one respondent encountered administrative difficulties in their dealings with the Organisation of Islamic Cooperation's secretariat.
- c) A move away from arbitration solely in the 'classic' sectors including construction, oil and gas, telecommunications and investment to 'emerging' industries including media, entertainment and sport.
- d) An increase in the number of claimants from Gulf States in investment disputes owing to the increase in the outward flow of investment from these jurisdictions.
- e) Increased awareness in the region of the protections available under bilateral and multilateral investment treaties resulting from the dramatic increase in investment disputes in recent years.
- f) Increased awareness of, and familiarity with, the arbitral process among practising lawyers and within the business community, resulting in an overall increase in the number of disputes being referred to arbitration.
- g) An increase in the pool of available, experienced arbitrators who are bilingual.
- h) A few respondents predicted the establishment of specialised arbitration courts.

3. Which arbitration institutions are popular in the region and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are such institutions becoming too homogenised and, if so, should they try to differentiate themselves?

3.1 Most respondents listed the following institutions as being the most popular within the region:

- a) The Dubai International Arbitration Centre (DIAC).
- b) The Cairo Regional Centre for International Commercial Arbitration (CRCICA).
- c) The Dubai International Financial Centre–London Court of International Arbitration (DIFC-LCIA).

- d) The Bahrain Chamber for Dispute Resolution in association with the American Arbitration Association (BCDR-AAA).
 - e) The Qatar International Centre for Conciliation and Arbitration (QICCA).
 - f) The Chamber of Commerce and Industry and Agriculture of Beirut and Mount Lebanon (BCCI).
- 3.2 A few respondents noted that institutions within the region were more likely to have competitive fee schedules (for arbitrator fees and secretariat costs) thus lowering the overall cost of arbitration. They anticipated an increase in the use of these institutions for small- and medium-value cases.
- 3.3 Other respondents noted a preference in their own jurisdiction for selecting the more established global institutions, especially in high-value cases, including the LCIA and the ICC.
- 3.4 Some respondents anticipated the establishment of specialised arbitration institutions which focus on specific types of dispute similar to the Court of Arbitration for Sport (CAS) or the LMAA.
- 3.5 A few respondents cited CRCICA's increasing caseload as evidence for the increase in the use of regional arbitration institutions. However, others felt that the distinction between regional and non-regional institutions was becoming less important and that all arbitral institutions were in fact 'competing' with ad hoc arbitration.
- 3.6 Most practitioners see homogenisation of procedural rules among arbitral institutions as a positive development. They noted that this homogenisation could be traced, in part, to the strategic partnerships of global institutions such as the AAA and the LCIA with regional centres and the adoption by other institutions of arbitration rules inspired by the UNCITRAL Arbitration Rules.
- 4. What are currently considered the 'safe' seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?**
- 4.1 Egypt and Tunisia were perceived as safe seats due to the adoption of Model Law-inspired arbitration legislation and the increasing familiarity of the local courts with the arbitral process. The DIFC was also perceived by respondents to be an up-and-coming safe seat.
- 4.2 Lebanon was also perceived as a safe seat by respondents who were familiar with that jurisdiction. They cited the application by Lebanese courts of Lebanese law over the terms of the New York Convention because the former was considered to be more favourable in relation to the enforcement of foreign awards. In this regard, the Lebanese Court of Cassation has held that awards may only be set aside for violations of international public policy. Moreover, under Lebanese law, arbitration clauses exist within an autonomous transnational legal order independent from domestic legal norms and, therefore, the validity of an arbitration clause may not be determined by reference to a national law. Lebanese courts are also of the view that an

arbitral award set aside in the seat is still enforceable in Lebanon.

- 4.3 Some respondents were encouraged by Saudi Arabia's adoption of more modern arbitration legislation in 2012 and anticipated an increase in the selection of Saudi Arabia as a seat. Others noted that although the law is based on the Model Law, closer examination of its provisions has yielded some cause for concern. First, the applicability of the new legislation to the enforcement of foreign awards is doubtful. Secondly, it appears on the face of it to confer jurisdiction on the Court of Appeal of Riyadh to hear petitions to annul non-Saudi awards and, finally, it provides for the courts to ensure arbitral awards are Sharia-compliant.
- 4.4 Many respondents anticipated that any future reform of the UAE's outdated arbitration legislation would yield a significant increase in the selection of Dubai as a seat.
- 4.5 Some respondents noted unfortunate trends in Qatari jurisprudence which are in contention with the New York Convention. They cited the decision in *International Trading v Dyncorp* in which a Qatari party, which was unsuccessful in an ICC arbitration seated in Paris, petitioned the Qatari courts to review the award de novo on the basis that the Arabic version of the arbitration agreement did not state that the arbitration would be final and binding. The Qatari Court of Cassation held that it was competent to hear an application to set aside a foreign award and that the parties had not waived their right to appeal, and, after a full review of the merits of the case, set the award aside. There was also some uncertainty regarding the requirement for arbitral awards to be rendered in the name of the Emir or risk violating Qatari public policy and being set aside.

5. Are arbitration practitioners becoming too specialised or are they not specialised enough?

- 5.1 Many practitioners noted the historic tendency in some jurisdictions towards smaller, 'family' full-service law firms. Traditionally, in these jurisdictions, the same lawyer handles both advisory and contentious work for all their clients. The same respondents thought that a greater degree of specialisation was needed to ensure the highest standards of practice and to increase overall familiarity with arbitration among potential users.
- 5.2 Most respondents identified the need for more specialised practitioners as a first step towards increasing the pool of experienced arbitrators in the region and the quality of arbitrator decision-making.
- 5.3 Respondents from Qatar and the UAE observed that the presence of expatriate international arbitration practitioners brought a higher degree of specialisation to the local legal market, which was desirable. In other jurisdictions, respondents cited restrictions on the practice of foreign lawyers as a barrier to the expansion of the pool of specialist practitioners.

6. What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years' time?

- 6.1 Most jurisdictions reported that the ability of parties to seek interim and conservatory measures from arbitral tribunals was well established, as was their ability to seek interim measures from local courts.
- 6.2 Many practitioners in the region were not yet familiar with and/or were sceptical regarding the

use of emergency arbitrators. They noted the absence of provisions similar to those in the 2012 ICC Rules in the arbitration rules of institutions throughout the region.

6.3 Some practitioners suggested that they were unlikely to resort to emergency arbitrators because of the overlapping ability to seek interim relief on a summary basis from the local courts. Others doubted the enforceability of interim measures ordered by an emergency arbitrator under local law.

7. Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?

7.1 Many respondents felt that users in the region still do not do very much to hold arbitral tribunals to account. Some practitioners attributed this to the relative efficiency of the arbitral process when compared with the delays normally encountered in the course of litigation before the severely backlogged national courts.

7.2 Some practitioners felt that principal responsibility for holding arbitral tribunals to account still lies with arbitral institutions. They noted that institutions have become more active in recent years and are, for example, placing greater emphasis on arbitrator availability and not just independence and impartiality.

7.3 A few respondents reported that users in the region are generally reluctant to hold arbitral tribunals to account for excessive delay for fear of turning the tribunal against them. In this regard, a number of practitioners called for the requirements of speed, efficiency and quality of decision-making to be codified in arbitration rules in order for users to be more at ease seeking compliance with the same.

8. How will issue conflict affect the field in the next five years?

8.1 Most respondents took the view that scholarship and case law on issue conflict within the region are insufficiently developed and that arbitrators sitting throughout the region were therefore unlikely to be successfully challenged on the basis of an issue conflict in the near future.

8.2 The same respondents indicated that the current trend on issue conflicts will likely be confined to investment arbitration.

9. Do you predict any key trends in terms of jurisprudence?

9.1 Respondents identified the potential for an increase in investment claims in the coming years as a result of the political unrest, conflict and regime change throughout the region. For example, a large number of investment claims have been brought against Egypt since the 2011 revolution including several claims at ICSID. Broadly speaking, the claims can be classified as follows:

- a) Cases that involve allegations of corruption by officials, resulting in the invalidity of contracts entered into with state-controlled entities. This may be followed by national court proceedings to consider the legality of the transaction, giving rise to ‘denial of justice’ claims.
- b) Claims arising from the privatisation of state assets. Many of the related contracts were subjected to third-party challenges before the national courts after the revolution. Despite

the fact that, in some cases, the transactions took place many years before, the courts proceeded to nullify the underlying contracts on the basis that they were tainted by corruption or illegality.

- c) 'Executive paralysis'. The imprisonment of a number of high-ranking state officials on corruption charges has led to a problematic freeze in executive decision-making.

9.2 Many respondents anticipate an improvement in the arbitration-friendliness and consistency of court judgments throughout the region, citing increased awareness of arbitration generally and better judicial training. Other respondents felt that state courts were likely to take a narrower view of public policy in the future.

10. Where will third-party funding go over the next five years?

10.1 The enforceability of third-party funding arrangements remains unclear in some jurisdictions. In Egypt, an assigned claim is extinguished if the party against whom the claim has been assigned (the putative respondent in the arbitration) pays the assignee (in this case the third-party funder) the actual price the assignee paid for the claim. It remains to be seen whether using alternative structures for third-party funding arrangements will allow parties to circumvent this rule. If such a case fell to be decided by the courts, it would probably be heard in the context of an application to annul an arbitral award that upheld a third-party funding agreement.

10.2 Some respondents in other jurisdictions anticipated an increase in the use of third-party funding throughout the region driven by the anticipated increase in Middle-Eastern claimants in investment proceedings.

11. What will be the key challenges to establishing a career in arbitration over the next five years?

11.1 Many participants thought that achieving fluency in English is a key challenge to establishing a successful career in arbitration. They noted that relatively few practitioners from the region speak English well enough to conduct English-language arbitrations. The same respondents also noted that some expatriate arbitration counsel practising in the region are insufficiently familiar with domestic law and that, because of the language barrier, do not have unmediated access to case law and academic writings.

11.2 Practitioners from jurisdictions with strong connections to France including Lebanon, Egypt and Tunisia felt that an ability to speak French was also important.

11.3 Participants also noted that since local law firms are often multi-disciplinary practices, it was important for would-be arbitration practitioners to gain experience in specialist arbitration teams located in major firms in Paris, Geneva or London.

9.6 North America

Eighteen participants from two countries answered the questionnaire.

Countries: US and Canada.

1. What are the reasons that users choose arbitration over court litigation and how could this

change in the next five years? Is there anything unique to the region; for example, sector focus or court support for arbitration?

- 1.1 The most commonly cited reason that users choose arbitration instead of court litigation was the perceived neutrality of international arbitration:
 - a) A main reason why neutrality was identified as an important advantage is that arbitration is the only dispute resolution mechanism that can consistently provide fair, unbiased and effective adjudication. International arbitration provides the ability to choose the arbitrators, the seat of arbitration, arbitration rules and applicable law.
 - b) The choice to use arbitration instead of litigation is driven by practical considerations motivated primarily by questions of the appropriateness of the court systems that could be involved if the parties were to litigate a potential dispute. Motivating questions include whether the courts are accessible, non-corrupt and efficient, and whether they would enforce judgments from another court that would be the most likely choice of venue.
 - c) While US and Canadian courts are generally viewed as neutral when local parties are involved, arbitration (both domestically and internationally) is also preferred for reasons of limiting discovery, jury avoidance (primarily in the US), a lower risk of punitive damages (primarily in the US) and the avoidance of class actions.
- 1.2 The second most commonly cited reason was that of privacy and confidentiality.
- 1.3 The third most commonly cited reason was enforceability:
 - a) The enforceability of arbitral awards under the New York Convention provides a major benefit in comparison to the very limited number of reciprocal enforcement conventions for court judgments.
 - b) Enforceability is a significant factor when dealing with a party that has assets in several different jurisdictions that would need to be seized in order to satisfy an award.
- 1.4 Time and costs considerations are also important concerns; however, they are not necessarily a motivating factor:
 - a) Some participants suggested that the increased time and costs recently associated with international arbitration may even serve as a disincentive in coming years.
 - b) Nonetheless, advantages include the parties' ability to set procedural timetables, specify the length and number of written submissions and set a hearing date, which can often be scheduled within one year of starting the claim. This presents a significant advantage over court litigation where an increasing problem is the availability of the relevant court to hear the dispute, which can add time beyond the regular litigation process.
- 1.5 The finality of arbitration awards is another advantage of arbitration when compared to litigation. Arbitration provides for very limited grounds to challenge awards under the New York Convention and the UNCITRAL International Commercial Arbitration Law, which has been implemented across Canada and in a growing number of states in the US.

1.6 Perceived changes in the near future include:

- a) Efforts to regain arbitration's reputation for speed and efficiency.
- b) Canada will likely have new international and domestic arbitration legislation across the country over the next five years. The Uniform Law Commission of Canada (ULCC) has reviewed the existing legislation and developed a number of recommendations for revised uniform legislation largely based on the Model Law 2006. Adoption by Canadian provinces and territories of the revised uniform legislation will promote increased consistency in how Canadian courts review and address arbitration-related matters.
- c) Increasing awareness of the advantages of international arbitration among Canadian users and its increased use for resolving international disputes.
- d) Arbitration continuing to become more user-friendly for both complex arbitrations (see, eg, additions of emergency arbitration provisions and joinder default provisions) and smaller arbitrations (see, eg, addition of opt-out expedited procedures to the ICDR Rules).
- e) Greater convergence between domestic and international arbitration practices.
- f) Growth is expected in the US and Canada in the natural resource sector, primarily in hydrocarbons.

2. What do users perceive to be the pitfalls of arbitration and how could this change in the next five years? Is there anything unique to the region for example, sector focus or court support for arbitration?

2.1 Perceived pitfalls of arbitration include:

- a) Cost: very high upfront costs due to substantive submissions being required early in the process and overall costs that are often comparable to court litigation.
- b) Delays: lengthy delays due to difficulties in scheduling busy arbitrators on a tribunal, which can delay proceedings and delay the receipt of award.
- c) Uncertainty: this includes the risk that: a party will end up in court at the end of the arbitration in order to enforce an award; whether the award will be enforceable; and whether the tribunal will be reliable and able to ensure the arbitration proceeds efficiently.
- d) Discovery: some users want more extensive discovery than what is generally permitted in international arbitration because it can promote earlier settlement.
- e) Summary judgment: there is a lack of summary judgment procedures to eliminate frivolous claims without having to go through costly and time-consuming proceedings.
- f) Litigation style: there is a tendency for counsel to follow their familiar litigation practices without adjusting to the advantages available under arbitration.
- g) Witness testimony: some users want to be able to tell their story at a hearing through direct evidence, and find a hearing focused on cross-examination unnatural and frustrating.
- h) Finality of awards: some users perceive arbitration as too final by creating the risk of being

subjected to ‘rough justice’ by the arbitrators without any meaningful appellate review.

2.2 Changes that are envisioned in the next five years:

As we focus on user frustrations, the system evolves with further innovations and improvements.

3. **Which arbitration institutions are popular in the region and what are the future trends for the selection of arbitral institutions? For example, will there be a move towards greater use of regional arbitral institutions with a trend towards convergence in institutional rules? Are such institutions becoming too homogenised and, if so, should they try to differentiate themselves?**

3.1 There are a number of popular arbitration institutions in the US and Canada:

- a) Three major institutions for international arbitrations figure prominently: the LCIA, the ICC and the ICDR. For US-Canada disputes, the AAA may be more prevalent, though the ICC will likely become more competitive with the recent establishment of its New York office (SICANA). With respect to investment arbitration, ICSID remains preferable to other institutions or ad hoc arbitrations, particularly in light of Canada’s recent ratification of the ICSID Convention.
- b) For domestic arbitrations in the US, the AAA is prominent, as is JAMS (formerly known as the Judicial Arbitration and Mediation Service) and CPR to a lesser extent.
- c) With respect to domestic arbitrations in Canada, the ADR Institute of Canada (ADRIC) is a popular institution that has recently updated its rules to accord with best practices.
- d) The ICDR also recently launched its Canadian Arbitration Rules aimed at Canadian users domestically.
- e) More institutional rules are being used by Canadian parties in contracts providing for international arbitration, including the rules of the ICDR, the ICC, the LCIA, the SIAC and the HKIAC.
- f) In western Canada, the British Columbia International Commercial Arbitration Centre (BCICAC) has been popular in both domestic and international arbitrations. However, its rules are due for an update.

3.2 Many participants believe that greater use of regional institutions seems likely. However, the future is a matter of bargaining power and credibility. Parties from regions that have a credible regional institution (eg, the SIAC) may push for their local institution, though it is often difficult to recommend regional institutions where there is a lack of information as to the institution’s practical record in administering arbitrations. If the rules of that institution are similar to others, there is a greater likelihood that the counterparty will accept them. It may be counterintuitive, but convergence in rules and practices may lead to a more diverse distribution of cases among institutions. The success of regional institutions will likely lie in their ability to avoid any appearance of favouritism in the way cases are administered or decided. In this regard, regional institutions will be wise to have credible rosters with recognised names from other regions.

3.3 With respect to the trend of convergence in institutional rules, the rules of various institutions become less distinguishable as best practices emerge:

- a) After all, institutions seek to serve the same needs.
 - b) However, parties choose institutions largely for other reasons, such as their administrative competence, knowledge and sensitivity in appointing arbitrators, and their acceptability to the other contracting party.
 - c) Meaningful differences still remain between institutions and their rules. For example, although the LCIA recently added emergency arbitrator procedures, it already provided for an expedited formation of the tribunal rule, which may now receive greater attention as an alternative to emergency arbitration. Other differences include the ICC's review process compared to the LCIA's decision to have no review though greater control over arbitrator selection to ensure quality. Additionally, most institutional rules provide the parties and arbitrators with sufficient latitude to adopt procedures as they see fit, which helps to temper any perceived homogenisation.
4. **What are currently considered to be the 'safe' seats and what will be the preferred seats of the future? How do you expect the relevance of the seat to evolve in the coming years, addressing issues such as, for example, whether the actions at the seat (annulment of awards, etc) have a knock-on effect on all other jurisdictions? Might we progress to the possibility of an a-national award having no seat of arbitration?**

4.1 Safe seats:

- a) Canadian seats are generally considered safe, with Canadian courts becoming more consistent in their review of awards and interactions with arbitral procedure. Canadian cities at the top of the list include Toronto and Vancouver, followed by Calgary and Ottawa. While Montreal may be considered a safe seat, local courts have been unpredictable with respect to the granting of interim measures by an arbitral tribunal. In Ontario, it is notable that international arbitration matters are now able to be moved to the Toronto Commercial List where some specialisation among the judiciary is occurring.
- b) A number of US cities are considered safe seats, such as New York, Washington DC, Miami and Houston. Other cities, such as those in California, are perceived as bad seats due to the unpredictability of their courts.
- c) Perceived safe seats in Europe include London, Geneva, Zurich, Brussels and, to a lesser degree, Stockholm. Although North Americans generally like Paris, there is slight unease from some users that it is too influenced by local culture and practices at times.
- d) Perceived safe seats in Asia include Singapore (as a result of the SIAC and favourable court rulings) and, to a lesser extent, Hong Kong, due to doubts over its future depending on Chinese intervention.
- e) Participants believe that Sydney may grow in popularity as an alternative for Asia-Pacific regional disputes. Also, Dubai is likely to continue to grow in popularity.
- f) Participants are interested to see what trends develop in Latin America, South Asia and Africa and whether credible seats will emerge. Many seats that may not be considered safe today may become more common and accepted in the future.

4.2 Possibility of an a-national award:

- a) Although each Canadian province and territory is a separate jurisdiction, the actions of a provincial/territorial court can have a knock-on effect on all Canadian seats.
- b) Participants believe that it is likely that practitioners in California will push to get their laws in line with international standards, particularly with respect to arbitrator conflicts.
- c) However, knock-on effects are somewhat tempered by an increasing number of decisions around the world (including the US) enforcing awards annulled at the seat. Despite this observation, the seat remains very important and how the courts at the seat have dealt with awards in other cases is very much noticed and taken into consideration by arbitration users in choosing a future seat.
- d) Whether an a-national or 'seatless' award would be considered progress is a matter of significant debate. Arbitration often requires judicial support, and having a seat is often a benefit to the arbitral process, not a hindrance. To the extent that awards are treated as a-national in certain jurisdictions is nonetheless a result of the domestic law of those jurisdictions. In this respect, national court supervision, in accordance with the jurisdiction's national laws, is unlikely to change. In order to become globally accepted, a-national awards would likely need a comparable international law framework and institutional support that ICSID provides to investor-state arbitration.
- e) There is doubt that conferring set-aside jurisdiction to multiple jurisdictions (ie, not restricting it to the seat) is feasible. The risk of multiple challenges to awards and differing results is too great as forum shopping would be encouraged. There could be more deference afforded to decisions on set-aside decisions of courts at the seat when the same award is sought to be enforced elsewhere, but it is hard to imagine that there will be significant change. Most national courts will likely want to reserve their de novo consideration of grounds to resist enforcement. This has been observed in England, Singapore, Australia, the US and Canada where courts have shown a willingness to review de novo without any deference to the tribunal's findings on jurisdiction.
- f) However, the relevance of the seat may decline as more states bring their legislation in line with modern standards and more judges are willing to take a less parochial approach.

5. Are arbitration practitioners becoming too specialised or are they not specialised enough?

5.1 The consensus is that practitioners are not specialised enough:

- a) The specialised nature of arbitral practice is an important aspect of arbitration and very often users' interests suffer from inexperienced counsel in international proceedings. Specialisation is therefore important; however, if the number of highly specialised practitioners is overly limited, perception and potential legitimacy issues may surface. Currently, the pool of specialised practitioners appears to be expanding rather than contracting, which should enhance the quality of practitioners and resulting awards globally.
- b) For investor-state arbitration, practitioners (and the system) can probably benefit from more

specialisation in international law rather than purely commercial lawyers dabbling in treaty work.

- c) It is important that practitioners maintain skills and expertise across a range of practice areas, sectors and types of disputes; otherwise they would have too small a practice. While not every counsel in an arbitration has to be an arbitration expert, every counsel team in an arbitration should have at least one person who fully understands the law and practice of international arbitration.
- d) With respect to arbitrators, a mix of experience levels and specialisation in the talent pool is needed to provide users with choice.
- e) It is difficult for a Canadian lawyer practising in Canada to become too specialised as it is almost impossible to practise exclusively as a specialist in arbitration in Canada because the Canadian market is too small.
- f) The number of young practitioners who are developing experience in international arbitration is greater than the future demand for more senior arbitration practitioners. Young practitioners should be careful not to over-specialise until they are confident that they are destined to be leaders in the field.

5.2 Participants also expressed their concern with the consequences of becoming too specialised. Industry-specific expertise is increasingly emphasised, which is understandable because commercial parties prefer counsel and arbitrators who are familiar with their industry. However, arbitration is ultimately – at the parties’ behest – a legal process more than a ‘commercial’ one in terms of how the final decision on the merits is made. In this regard, there is a risk of under-legalisation as counsel and arbitrators heavily focus on commercially reasonable outcomes in the specific industry.

5.3 Some participants expressed the following comments and concerns with respect to over-specialisation:

- a) The learning curve for gaining entry in the field of international arbitration is getting longer and steeper.
- b) Practitioners with top advocacy skills, though lacking arbitration acumen, risk being excluded.
- c) There is even a gap developing between those practising international commercial arbitration and those practising investor-state arbitration.
- d) It is unhealthy for young lawyers to avoid learning general trial skills and focus heavily on nothing but arbitration. However, in the US market, many young practitioners have the opportunity to practise arbitration all the time, sometimes even just commercial or investor-state arbitration.
- e) Advanced degree programmes in international arbitration should not become a prerequisite.

6. What is the future for interim relief? For example, will emergency arbitrators be operating in the region in five years’ time?

- 6.1 Interim relief enjoys widespread support. Participants expressed the view that interim relief, and emergency arbitrators, will remain in demand because:
- a) It serves client needs.
 - b) It can provide a means to getting a quick and early sense of the strengths and weaknesses of one's case and potentially lead to settlement.
 - c) It enjoys support in local courts.
 - d) An increasing number of arbitral institutions have implemented emergency arbitrator provisions and are effectively promoting this service.
- 6.2 There seems to be a consensus among participants that emergency arbitrations are increasingly important and will continue to exist in five years' time.
- 6.3 However, some participants suggested that the future popularity and demand for emergency arbitrators will plateau, while others have downplayed their importance altogether because:
- a) It is too early to assess the need for emergency arbitrators.
 - b) The ICC has reported a total of 15 emergency arbitrations since the 2012 Rules came into effect, which is a small percentage of the total registered cases.
 - c) Parties can go to court to seek emergency relief if it is available instead of resorting to emergency arbitration.
 - d) More institutions may implement rules similar to the LCIA for the expedited formation of the arbitral tribunal.
- 6.4 US and Canadian courts have been supportive of emergency relief related to arbitration proceedings, including where an emergency arbitrator has ordered such relief before seeking court enforcement.
- 6.5 Some participants believe that we may see more opt-out clauses in arbitration agreements or the tightening of rules and procedures. At this time, there is a real concern over both the quality of emergency arbitrators given the great difficulties with obtaining a renowned arbitrator on short notice who would be willing to take only the role of emergency arbitrator; and the risk that the emergency arbitrator's interim relief has the practical effect of finally determining the dispute.
- 7. Should users do more to hold tribunals to account in terms of speed, efficiency and quality of decision-making and, if so, what means of achieving this are desirable over the next five years?**
- 7.1 The majority of participants stated that users should do more to hold tribunals accountable for speed, efficiency and quality of decision-making.
- 7.2 Some participants provided the following suggestions to hold tribunals more accountable:
- a) Institutions playing an increased role in pressuring arbitrators by imposing monetary sanctions such as returning a greater portion of an advance on costs to the parties, and withholding fees to arbitrators.

- b) Taking steps to ensure that there are more disclosure obligations on arbitrators before accepting appointments, which would assist in assessing how much time they actually have to sit as an arbitrator.
- c) Publishing more awards and making them more accessible to the public to encourage greater quality of decision-making.
- d) Encouraging diversity and a greater number of arbitrators in order to increase competition among arbitrators.
- e) Ensuring that the parties specify their procedural expectations at the outset, ideally in an arbitration them.
- f) Encouraging arbitrators to adjust their fees in accordance with their level of speed and efficiency.

7.3 However, some participants believe that the current system of general self-regulation is effective at holding tribunals accountable because users will avoid reappointing slow and inefficient arbitrators that demonstrate poor decision-making:

There is an element of self-policing in current international practice given the development of an expanded and specialised global practice where counsel, parties and arbitrators are reasonably well known to one another. Thus, delays or poor-quality decisions from an arbitrator are more likely to result in fewer appointments for that arbitrator.

7.4 One participant highlighted that an arbitrator's busy schedule leads to the delegation of drafting responsibilities to secretaries, which results in poor-quality decision-making. In their view, this issue will receive a lot of scrutiny and attention in the coming years.

7.5 Another participant believed that it would be difficult to conceive of a way to ensure that arbitrators will make high-quality decisions unless institutions implement built-in review mechanisms (eg, the ICC's review mechanism).

7.6 One participant believed that tribunals' speed, efficiency and quality of decision-making is not a major problem. In their view, the real problem is that users do not hold their lawyers to account and insist on the efficiency and speed that arbitration can deliver.

7.7 Some participants believe that in five years' time, it would be ideal if final awards were consistently rendered within six months after the final hearing, the norm was less than three months, and procedural orders or less substantive partial awards were rendered in no more than one week from final submissions on the point at issue.

8. How will issue conflict affect the field in the next five years?

8.1 The responses to this question generally fell into two categories: either participants generally believe that issue conflict does not present a problem at all, or that it only presents a problem in investor-state arbitration. Some participants believe that issue conflicts rarely arise in commercial cases, and where common law concepts of estoppel (and their civil law counterparts) do arise, the parties generally get what they deserve. However, issue conflicts in investor-state arbitration are a more pressing concern (see, eg, Joint *ICCA-ASIL Task Force on Issue Conflicts in Investor-State*

Arbitration) because they often present very similar, if not identical, issues to prior cases that a particular arbitrator may have decided.

- 8.2 Some participants believe that in five years' time, challenges to arbitrators are likely to become more prevalent as conflicts generally will remain a major issue in arbitration.
- 8.3 One potential benefit of any growth in issue conflict is that the pool of arbitrators for investor-state cases may widen. Similarly, other participants felt that the growth of issue conflict can only be remedied by an expanded pool of arbitrators.

9. Do you predict any key trends in terms of jurisprudence?

9.1 Responses to this question varied markedly. They included:

- a) Enforcement of emergency arbitrator decisions.
- b) Costs ordered for frivolous challenges to awards.
- c) Greater deference given by courts to arbitral tribunals on jurisdictional issues.
- d) The use of the public policy defence to avoid award enforcement by emerging market countries.
- e) Discrepancies, especially in timing, between the enforcement of domestic and international awards.
- f) Court hesitation to refuse to enforce or failure to vacate flawed awards for fear of giving their jurisdiction a reputation for being arbitration-unfriendly, especially in jurisdictions that promote themselves as seats that pressure courts to uphold awards at all costs.
- g) More jurisprudence regarding the immunities and liabilities of arbitrators.
- h) More jurisprudence on the application of IBA Guidelines on Conflicts of Interest in International Arbitration.
- i) Increased judicial scrutiny and interventionism to ensure consistency and quality in decision-making as more practitioners start sitting as arbitrators.
- j) Fewer arbitration-friendly judges in the US.
- k) With respect to commercial arbitration:
 - (i) Further tightening of procedural fairness grounds for setting aside/refusing enforcement of awards under the 'public policy' ground.
 - (ii) Influence of UNIDROIT Principles of Commercial Law.
 - (iii) More concrete rules as to when awards set aside at the seat will still be enforceable elsewhere.
- l) For investment arbitrations:
 - (i) Discounts for political risk to be applied to an assessment of damages.

- (ii) Construction of the increasing number of reservations/exceptions in investment treaties.
- (iii) Greater cross-fertilisation between international human rights law and investment treaty law.

10. Where will third-party funding go over the next five years?

10.1 The majority of participants believe that third-party funding is here to stay and will continue to grow over the next five years as accepted practices are standardised.

10.2 However, participants believe that the increase in third-party funding will result in:

- a) A myriad of disclosure issues.
- b) More restrictions on third-party funding by tribunals, such as requiring security for costs from funded claimants.
- c) Third-party funding becoming accepted as no different from any other financial product available to corporations.
- d) A growing number of investor-state claims as parties recognise the increasing expense involved in sustaining significant challenges to states and the increasing availability of third-party funding.

10.3 A participant questioned whether third-party funding will continue to grow as it is not always clear that arbitration is a good investment for third parties.

11. What will be the key challenges to establishing a career in arbitration over the next five years?

11.1 The most-common challenge cited is the increasing competition among lawyers. Some participants made the following comments:

- a) There are too many new entrants chasing too few opportunities.
- b) There is significant competition among firms, a potential decline in investment treaty cases, and a backlog of associates in international firms with fewer partnership promotions.
- c) Arbitration may result in a profession of part-time practitioners because there is simply not enough work for a practitioner to really become an expert in the field.

11.2 The second-most-common response was the challenge of gaining quality experience. Some participants made the following comments:

- a) Experience at top-tier international firms on complex cases offers the best training, so the biggest challenge to establishing a career in arbitration is getting a foot in the door in these firms.
- b) The greatest challenge is gaining sufficient experience when Canada is not a major hub for international arbitration.

11.3 Some participants identified a number of other challenges to establishing a career in arbitration, including:

- a) Being patient in an increasingly competitive market.
- b) Developing language skills.
- c) Gaining a solid education, acquiring cross-cultural competence, establishing connections in the community, and having some good luck.
- d) Knowledge of the growing body of precedent in the international investment arbitration space.

11.4 A few participants noted that, in Canada, one of the current key challenges that is expected to remain is the balance between becoming specialised enough to be seen as an expert while maintaining a sufficient workload:

- a) Historically, arbitration practitioners in Canada have developed from a litigation practice, where sporadic forays into arbitral practice as cases arose provided the door to a more concentrated practice. As practitioners become increasingly specialised, it will be more difficult for the sporadic interlopers to develop sufficient specialisation to maintain an arbitration practice.
- b) Another challenge is for practitioners with specialised arbitration practices to attract Canadian and foreign clients in substantial international matters that international firms are competing for. Junior and less-experienced lawyers who are able to attach themselves to existing practices and firms targeting arbitration work in Canada are more likely to develop the requisite level of specialisation.

12. Following the advancement of technology in international arbitration, can we expect virtual arbitration proceedings to transcend national borders with ease? Can we expect an increase in decision-making through technology beyond what we see today? In terms of addressing this from regional perspectives, would the uneven advancement of technology in developing and developed countries pose an issue?

12.1 Participants generally believe that the advancement of technology will have a positive effect on international arbitration:

- (i) Video- or telephone-conferencing technology has the potential to reduce cost and time in appropriate cases. In fact, the high quality of some of the videoconferencing technology is making remote cross-examination not only technologically possible, but substantively effective.
- (ii) There may be advancements in software for marking up hearing bundles.
- (iii) Long travel for hearings will likely be removed if videoconferencing technology advanced to the stage that everyone can be in a virtual hearing room as if they were there in person.
- (iv) If a highly accurate, instant electronic translator were developed, arbitrations in multiple languages would become far more seamless than at present.
- (v) If document review technology improves, we may expect to see more document production in arbitration and the costs and inefficiencies associated with them will decrease.

12.2 However, many participants reported that they still prefer to have in-person hearings. They believe that technology cannot replace this method in the foreseeable future, especially in larger and more complex cases.

12.3 One participant sees advancements in technology as enabling the ‘stateless arbitrator’, where an arbitrator will not have to be attached to any particular bricks and mortar chambers to carry on a practice. An arbitrator versed in current technology will also have little need for a secretary or assistant, as technologies increasingly fulfil the same roles.

13. There exists the possibility for a supranational body to oversee international arbitration to address, for example, uniformity, predictability and ethical conduct in the field. Would different countries/regions be willing to form such a body?

13.1 The overwhelming majority of participants believe that there should not be a supranational body to oversee intentional arbitration. They also believe that it is highly unlikely that one will emerge in the foreseeable future.

13.2 Participants provided the following reasons:

- a) The creation of a supranational organisation is just not feasible.
- b) The most efficient and beneficial structure is the ‘free market’.
- c) The institutions that currently exist, especially the IBA, are quite effective at promoting best practices and encouraging a sufficient amount of harmonisation.
- d) Too much homogeneity can be problematic, and some diversity is preferable, especially when one considers that the cultural expectations of dispute resolution processes vary in different regions.
- e) It should be up to arbitral institutions to take a stronger hand in enforcing good practices in the arbitrations they administer, especially with respect to the predictability of the process and of the award, and with respect to ethical regulation.
- f) The decentralised, ad hoc nature of the system is one of its biggest advantages: too many guidelines and rules will result in arbitration looking more like litigation.
- g) States and stakeholders will always be concerned over the propriety, independence and direction of such a body.

13.3 However, a few participants expressed the view that the creation of a supranational organisation could be a positive development, though it is unlikely.



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