

The Role of Technology in Arbitration, and other ADR

WHAT DO ARBITRATORS AND
PRACTITIONERS REALLY WANT?



A. Introduction

The tide of technology and innovation has been changing our work and personal lives for many years. The rate of change continues to accelerate. Most individuals in the Western world now own multiple internet-enabled devices capable of sending vast amounts of data and enabling high-speed video calling, at low cost, from any location.

A mere ten years ago, it would have been seen as inconceivable that approximately 99% of meetings would happen online or that platforms such as Zoom, Skype, or Teams would each clock up over one billion hours of usage time per week. Collectively, humans are spending more and more time interacting in virtual spaces.

The COVID-19 pandemic, and the government restrictions implemented to slow viral spread, dramatically accelerated change in the way companies in all sectors and regions undertook business. A 2021 Gartner survey revealed an increase of 44% in the use of corporate collaboration tools between 2019 and 2021.¹ In Asia-Pacific, it has been estimated that the COVID-19 crisis accelerated the digitisation of commercial interactions by four years.² The Australian government asserts that in the first eight weeks of the COVID-19 crisis, consumer and business technology adoption moved forward by five years.³

Google trends data provide evidence for significant change in online-platform use. Measured acceleration has been particularly high in areas of economic activity that do not require physical proximity for product and service delivery.⁴ Evidence is emerging that the crisis, and government response, has triggered large changes in the use of digital technologies by people, businesses and governments. Significantly, demand for broadband communication has soared, with some operators experiencing 60% increase in Internet traffic as the result of this demand.⁵

In digitally advanced countries, technological economic development, access to digital infrastructure, and digital literacy enabled businesses and individuals to start using online platforms (and more generally to adopt digital technologies to support business activity) when lockdowns were imposed.⁶

¹ (Gartner, 2021)

² (McKinsey & Company, 2020)

³ (Commonwealth of Australia, 2021)

⁴ (Organisation for Economic Co-operation and Development, 2021)

⁵ (Organisation for Economic Co-operation and Development, 2020)

⁶ (Organisation for Economic Co-operation and Development, 2021)

B. Impact on Arbitration and other ADR

Given the nature of arbitration, mediation, and other alternative dispute resolution (**ADR**) processes, it is reasonable to assume that this broad increase in the adoption of supportive digital technologies will have impacted ADR processes.

Arbitration and other ADR processes do not require physical proximity for service delivery. Australia is a digitally advanced country with supportive structural characteristics and policies associated with the diffusion of online platforms. Given that 90% of Australian business adopted new technology to support business continuity during the pandemic⁷, it was expected that acceleration of online-platform use occurred to support ADR processes during 2020-2021.

In December 2021, technological enabler, Delium, partnered with the Chartered Institute of Arbitrators (Australia) (**CI Arb Au**) to conduct research into this sector. The research aimed to understand better the rate of adoption of digital processes, the manner of adopted solutions, any issues of concern, and to glean further insights from participants.

The research comprised both quantitative and qualitative elements via a questionnaire distributed to critical players in the ADR sector, including CI Arb Au members, and an open, panel-led discussion via a webinar hosted by Global Arbitration Review. It aimed to provide a macro-view of how sector participants adapt to new technologies and new ways of working – the challenges they face, any identified opportunities for experience enhancement, and their future intentions.

This whitepaper presents research findings along with analysis and opinions from members of the sector. It is hoped that the insights captured will assist other sector participants in their transition to a digital model by highlighting areas of perceived inadequacy in some current approaches and opportunities for solution improvement.

C. Research Findings

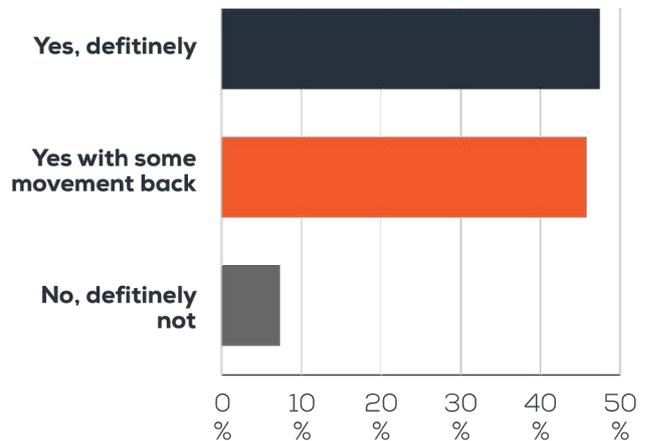
1. Here To Stay

Of 60 key participants who took part in the quantitative research, 93% agree that virtual ADR hearings and mediations will continue to increase over the coming years, even as the impact of Covid reduces (Figure 1).

There is explicit acceptance of the inevitability of virtual or hybrid practices continuing as Australia transitions out of the pandemic and into a 'living with COVID' reality.

Survey and webinar participants confirmed that technology assisted ADR process is their preferred mode of practice in most cases. They do not expect ADR processes will return to pre-COVID norms, even as national and international borders reopen. The research shows that an overwhelming majority of participants in the sector are on board with new ways of working.

Figure 1



Will the increase in virtual ADR continue beyond 2021?

Moreover, there is a very clear anticipation (by 87% of respondents) that the next generation of dispute adjudicators will prefer virtual practices.

Concerningly, however, only 12% of respondents agree that in general, dispute resolution processes are keeping pace with technological progress and the increasing digitisation of information, products, and services.

2. General challenges

Critically for the sector, more than a third of respondents perceive there is a general lack of understanding of how best to conduct a virtual hearing or mediation. Separately, but relatedly, 25% of respondents report that they are unaware of suitable technology solutions to support virtual hearings and mediations.

This lack of understanding of best practices and of the availability of suitable technology impacts the range of key challenges that respondents report in their experience of virtual practice.

As noted in Figure 2, respondents identify the following as 'main challenges' for the sector:

- Suitable solutions for evidence presentation (73%)
- Familiarity with the hearing platform (such as Zoom, Teams, Blue Jeans) (56%)
- Witness management and examination (70%)

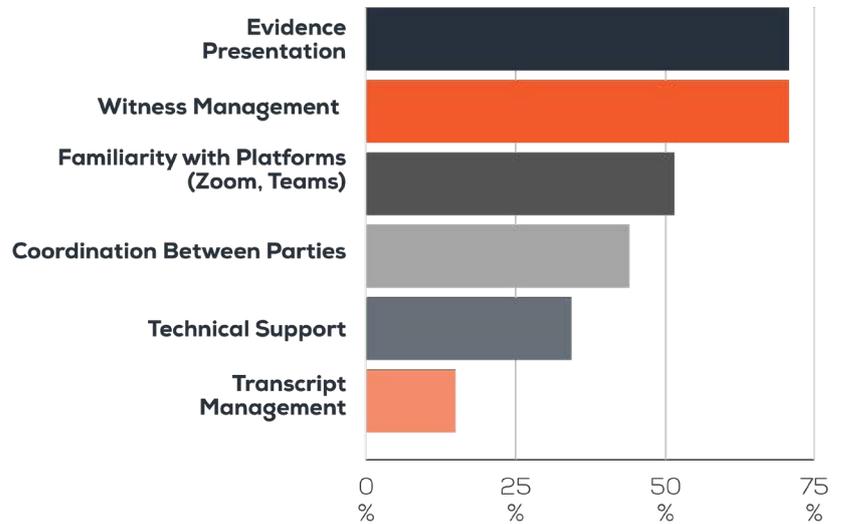
Secondary challenges for respondents are:

- Coordination between the parties (44%)
- Technical support (36%)
- Transcript management (20%).

Figure 2

WHAT ARE THE MAIN CHALLENGES FACING VIRTUALS HEARING/MEDIATIONS?

Interestingly, and perhaps surprisingly, given the nature of the data involved, only 12% of respondents identify 'security' as a challenge.



In addition to disclosing their lack of understanding of best practices and available technology, respondents are unaware of freely available published guidelines and other resources that may enhance their knowledge. Only 6% of respondents know of, and can remember, any published guidance on the use of new technologies in ADR. The research disclosed:

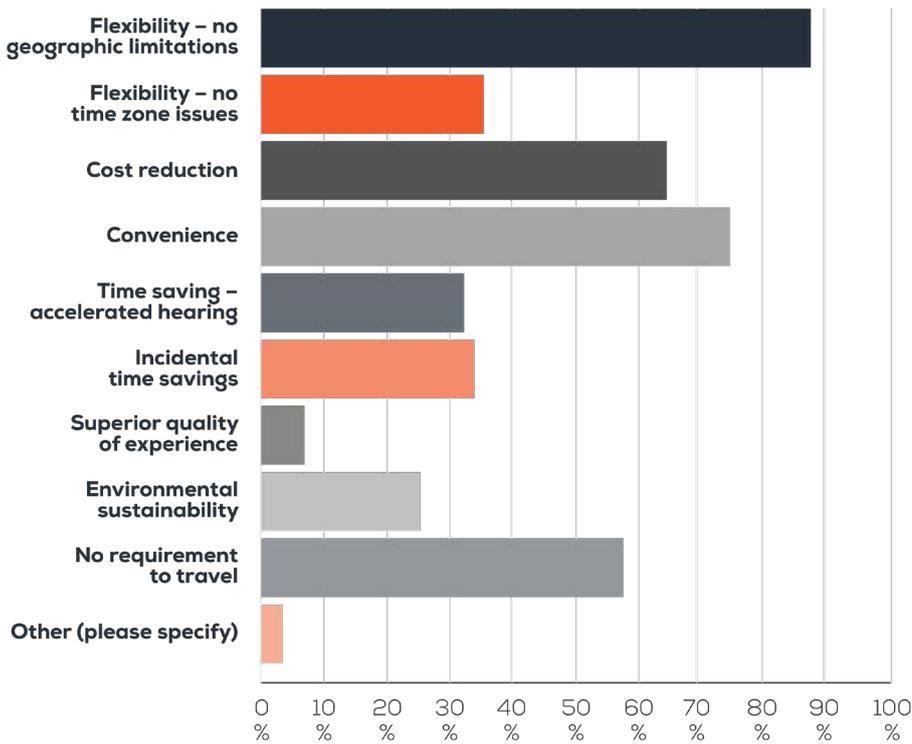
- 84% of respondents have not read the globally recognised 'Seoul Protocol on Video Conferencing In International Arbitration' introduced at the Asia Pacific ADR Conference in Seoul, Korea, in November 2018. This Protocol compiles and synthesises a panel of leading arbitration practitioners' best practices for planning, testing, and performing video conferencing for international arbitrations.
- 93% of respondents have not used or heard of www.virtualarbitration.info, an award-winning forum for news and recent developments in the law and practice of arbitrating on web-based meeting platforms using online communications technology.
- 68% of participants do not know of the '2020 Cybersecurity Protocol for International Arbitration', developed by representatives of the International Council for Commercial Arbitration, the New York City Bar Association, and the International Institute for Conflict Prevention & Resolution. The Protocol provides practical guidance for counsel, arbitrators, institutions, and arbitrating parties.

In terms of perceived disadvantages of current virtual processes, respondents believe that the credibility of witnesses is more difficult to assess in remote hearings (56%) and are also concerned about the integrity of witness examination (55%). Almost half (43%) have experienced difficulties or delays resulting from use of the supporting technology, reporting that 'there is always somebody with inadequate technical capability'. It is not known whether this reflection relates to hardware or software difficulties.

3. Broad benefits

Respondents recognise a multitude of benefits delivered by virtual hearings and mediations. Beyond the obvious geographic flexibility of virtual process, key identified benefits are convenience (75%) and cost reduction (64%). In addition, several related benefits are identified, including no requirement to travel, time zone flexibility, time savings, and environmental sustainability (Figure 3).

Figure 3

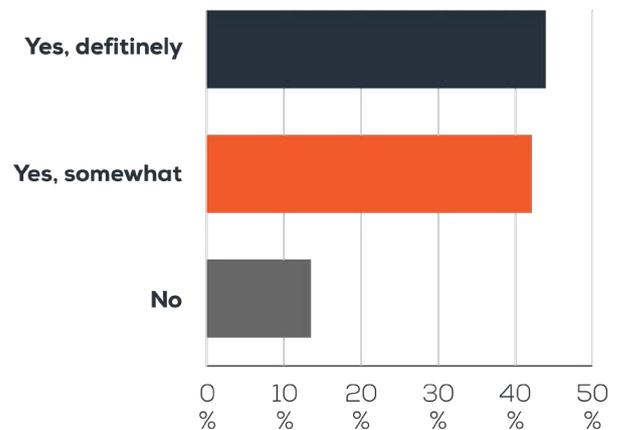


What are the main benefits of virtual ADR?

The research probed further into cost, asking how quickly the set-up costs necessary for virtual ADR offset travel and accommodation savings. 49% of respondents assess that set-up cost is offset very quickly and that remote hearings are immediately cheaper, while 38% take the view that virtual ADR is cheaper only for more substantial cases.

Figure 4

Identifying a wider societal benefit, 86% of respondents believe virtual ADR increases parties' access to dispute resolution services (Figure 4).



Do you believe that virtual ADR increases parties' access to dispute resolution services?

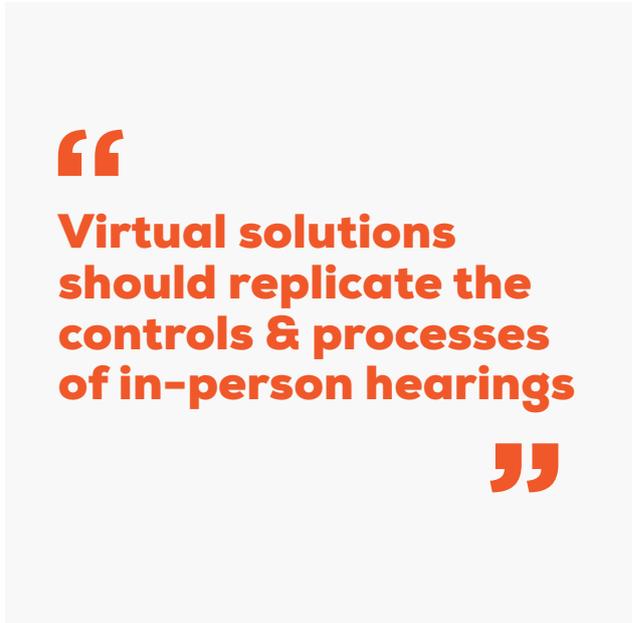
4. Participants want more, not less

Thematically, the research identifies that participants currently find that virtual ADR compromises some of the core capabilities of in-person hearings.

These capabilities include evidentiary control, presentation, and interrogation. 25% of respondents agree that screen sharing is an inadequate tool for evidence presentation needs.

Participants desire that virtual processes should at least match, if not exceed, the capabilities delivered by in-person hearings.

These requirements are considered further in the following sections addressing evidence presentation and witness management.



5. Evidence presentation

As noted in section 2, the key challenge respondents identify with virtual ADR is evidence presentation (73% - see Figure 2).

Participants were asked to identify challenges they currently face with remote evidence presentation.

- 66% of respondents believe there isn't a technological solution that replicates the controls and processes of face-to-face evidence presentation.
- 47% say that evidence presentation technologies do not support interactivity.
- 44% nominate that, when working with evidence, most new technologies do not support the ability to annotate, make comments, or pass materials selectively to other participants.
- 24% say that they lack control of the process and that using technology may distance them from the evidence, placing control in others' hands (Figure 5).

Figure 5

WHAT CHALLENGES DO YOU CURRENTLY FACE WITH REMOTE EVIDENCE PRESENTATION?

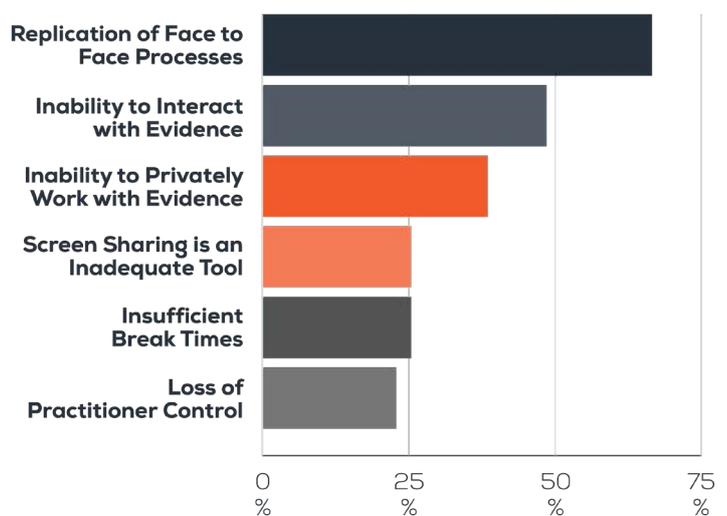
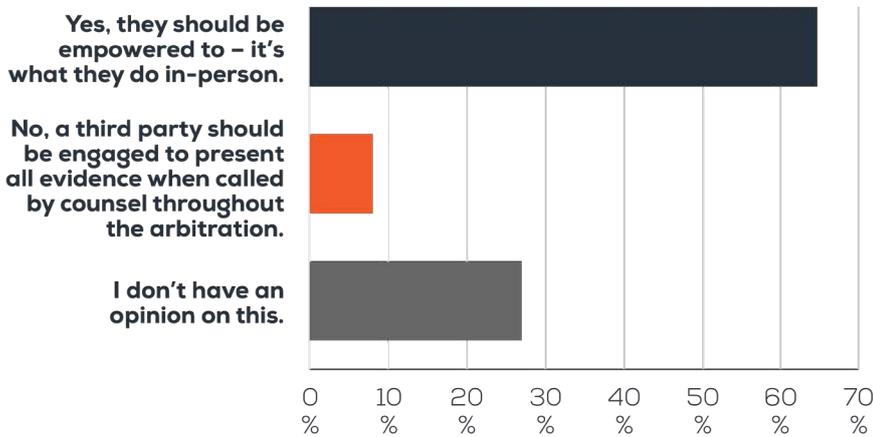


Figure 6



Respondents were asked if legal practitioners should be able to present their own evidence in virtual hearings. 65% believe that they should and only 8% believe 'a third party should be engaged to present evidence when called by Counsel throughout the arbitration' (Figure 6).

In the panel-led discussion, participants noted that ‘even if I don’t want to click the button myself, I want someone on my team who understands the evidence to do so’ and ‘it’s not ideal having to call out long Document IDs and then waiting for a service provider to find that document. Sometimes they make mistakes in entering the Document ID’.

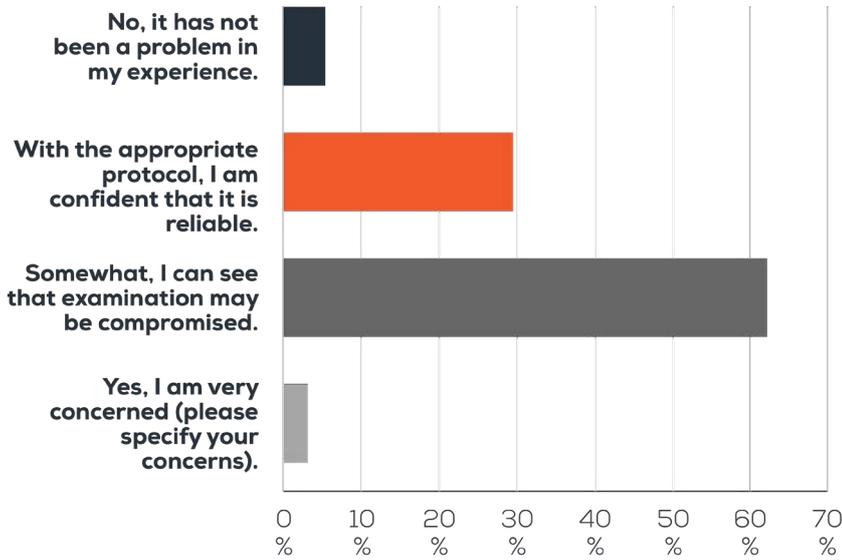
Evidence formats can also be problematic. Participants at the panel-led discussion bemoaned the lack of usability of evidence as presented by some third-party service providers. One Counsel lamented virtual arbitrations in which evidence was presented as ‘a single, continuous, consolidated .pdf’, forcing practitioners to rely upon their own collections of electronic files to review presented evidence.

The research tells us that replicating the evidence presentation controls and processes of in-person hearings is considered important and currently lacking. In the current stage of virtual practice adoption by the sector, evidence presentation is overwhelmingly considered to be neglected in virtual hearing solutions.

6. Witness management

Respondents express clear concerns about the management, interrogation, testimony, and assessment of witnesses in virtual proceedings. 69% of respondents agree that ‘witness management and examination’ is a key challenge facing virtual hearings and mediations. When asked ‘which disadvantages you identify when conducting virtual hearings/ mediations,’ 57% of respondents nominate ‘the credibility of witnesses is more difficult to assess’ and 55% nominate ‘I am concerned about the integrity of witness examination.’

Figure 7

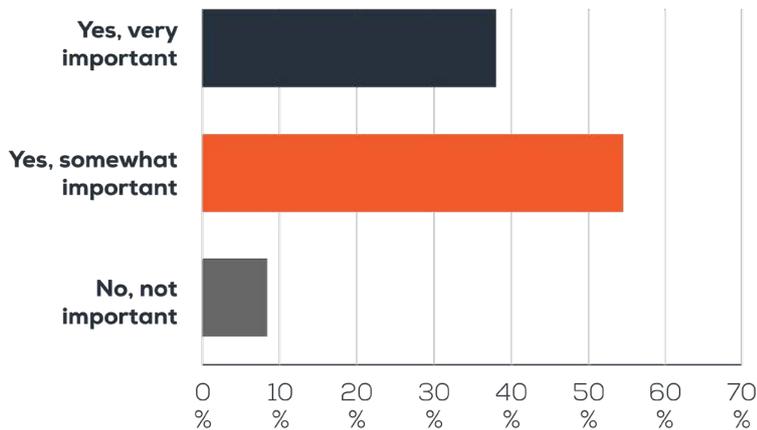


When asked directly about the integrity of witness examination, only one-third believe that 'with the appropriate protocol, I am confident that it is reliable' (30%).

Around two-thirds remain somewhat concerned that examination may be compromised (64%) (Figure 7).

Moreover, respondents consider that witnesses are often compromised in their ability to interact with evidence in virtual ADR. Reflecting on the fact that, frequently, witnesses are only shown a 'callout' from evidence (being a portion or a page only when being examined), respondents were asked whether they consider that this practice potentially disadvantages a witness or party. **92% of respondents agree that is very or somewhat important that the whole page or document should be shown (Figure 8).**

Figure 8



Should a witness be shown the whole page or document on examination?

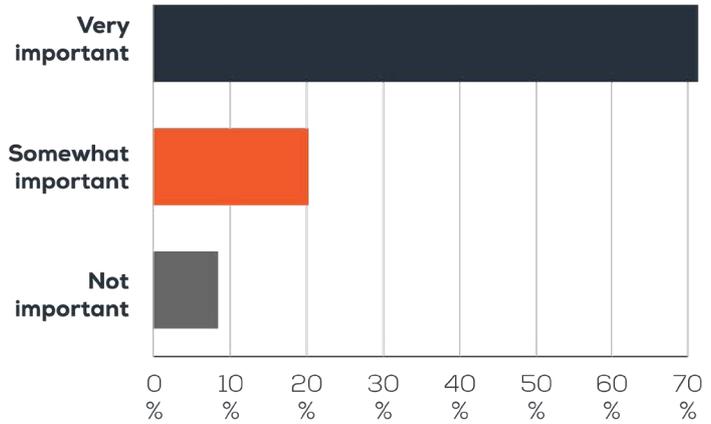
7. Ongoing access and recordkeeping

Figure 9

71% of respondents believe that it is 'very important', and 20% agree it is 'somewhat important' that virtual hearing platforms automatically keep a detailed record of the evidence presented, including the specific part of each document referenced (Figure 9).

During panel-led discussions, it was noted that record keeping capability is generally reliant on the human efforts of service providers and that this is an area in need of improvement.

Following virtual or technology-assisted hearings, 100% of respondents believe it is useful for the arbitrator to have ongoing access to the integrated record (witness testimony linked to evidence) for the purpose of writing the arbitral award.



How important is it that the virtual hearing platform automatically keeps a detailed record of the evidence?

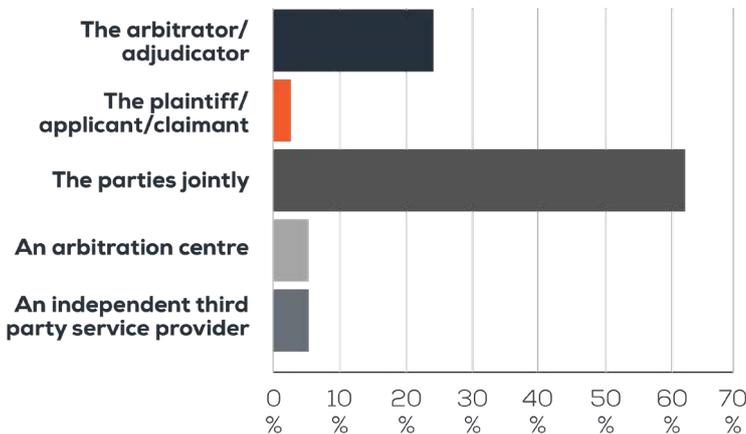
8. Deciding upon, and management of, a virtual platform

So, who should decide whether the ADR process should be virtual?

70% of survey respondents believe this is a decision for the parties, whereas 30% believe that the adjudicator should decide.

Once the decision to proceed virtually is made, the research asked, 'who do you think should be responsible for selecting the hearing platform, evidence presentation, and transcript solution?'. Again, a clear majority of respondents (62%) believe that the parties, jointly, should be responsible for these selections (Figure 10).

Figure 10

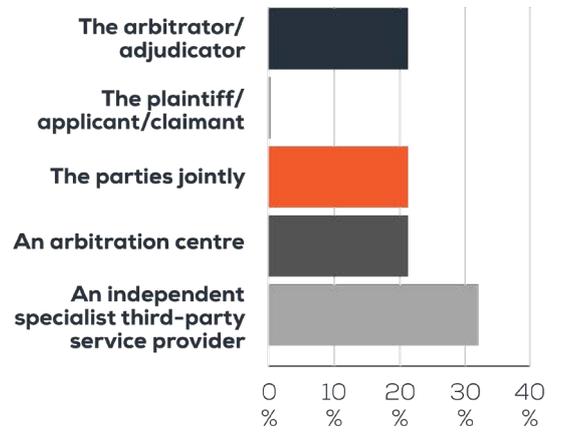


Who should be responsible for selecting the hearing platform, evidence presentation and transcript solution?

Figure 11

However, respondents have mixed views when asked who should be responsible for managing the virtual hearing platform, evidence presentation, and transcript solution. No dominant view is identified (Figure 11).

Who do you think should be responsible for managing the virtual hearing platform, evidence presentation, and transcript solution?



D. Closing remarks and recommendations

The research project showed strong support for the following propositions:

1. There will be no wholesale return to traditional methods; virtual and hybrid arbitrations will become the preferred method over traditional approaches. Many benefits, particularly convenience and cost, are identified.

2. That said, virtual arbitration practice is immature and, adopting current methodologies, some valuable traditional capabilities have been lost. The external pressure to adopt virtual processes has highlighted weaknesses.

3. Methods and technologies for virtual proceedings must be refined to mimic traditional methods better.

4. The prominent virtual arbitration issues and impediments are:
 - Lack of awareness, knowledge, and skills – exposure to support resources, training, and experience will mitigate this issue.
 - Witness management and assessment – enhanced strategies for witness assessment, management, support, and control are required in a virtual context.
 - Evidence presentation and interactivity – greater weight should be given to selecting technology that supports these requirements. Parties should more actively demand access to these tools.
 - Practitioner control – greater weight should be given to selecting available technology that maps to the technological capability and desire of legal practitioners and other participants.
 - Technical immaturity – new technologies with greater functional scope are needed and are emerging.
 - Security – new security standards are emerging which will mitigate this concern. Participants should increase awareness of these standards.

5. There is little argument that, currently, virtual arbitrations are substantially superior to traditional practices in several areas:
 - Geographical flexibility
 - Access to the arbitral process
 - Cost, particularly those associated with travel in international events
 - The virtual arbitration typically provides a significantly superior record when compared with traditional practices – these are usually accompanied by tools that support arbitral award writing.

E. Further information

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