



# **The Inaugural Aotearoa New Zealand Arbitration Survey**

**Royden Hindle and Dr Anna Kirk**  
Assisted by Diana Qiu

**In collaboration with NZDRC**



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# Foreword

HON PAUL HEATH QC

The ability to resolve civil disputes in private is an important advantage of arbitration. The ability, subject to limited exceptions, to keep the content of an arbitration confidential is an allied advantage. Unfortunately, privacy and confidentiality are the enemies of those who seek to understand the extent to which arbitration can be seen as complementing the court system in resolving disputes through enforceable decisions.

Royden Hindle and Anna Kirk have endeavoured to unmask the arbitral process to a point where reliable data can be extracted about the number of arbitrations that are being conducted in New Zealand on an annual basis, the types of cases that are being referred to arbitration, the costs involved in using this dispute resolution mechanism and the time taken to complete the task. In addition, valuable information has been obtained to identify demographic information, including the ages, gender and ethnicity of arbitrators. They deserve great credit for the work they have done, as does NZDRC for the collaborative work undertaken in presenting the data in a meaningful way. They have more than achieved their objectives.

The methodology employed, a survey of those known to be undertaking work as arbitrators, while capable of producing statistically significant information will always likely under-report the number of arbitrations that are being held each year. A number of arbitrators may not have responded; others may not have provided all relevant information sought. So, the information presented in this Inaugural Arbitration Survey must be taken to reveal the minimum extent to which arbitration is being used.

That said, trends do emerge about the number of arbitrations, the types of disputes, the amounts at stake, the cost of the process, and demographics involving age, gender and ethnicity. If, as I hope, this survey is continued on an annual or biennial basis, the existence of those trends will either be confirmed or any unreliable information from the present research exposed.

In summary, the research is to be welcomed. Not only will it assist those involved in the private dispute resolution community to consider ways of improving the delivery of arbitral services, but it may also have benefits to those responsible for the workings of the court system to see how arbitration is complementing the important work done in the courts.

# Introductory Note from NZDRC

The settlement of disputes by arbitration is an important feature of the domestic commercial and legal landscape. Arbitration is respected and thrives in this jurisdiction as a matter of party autonomy and choice within a tolerant, light-touch statutory supervisory regime and with the assistance of a supportive court system. It was not always so.

When we established what is now The ADR Centre more than thirty years ago, arbitration in New Zealand was a markedly different process. Its use was largely confined to building and construction disputes. It closely mirrored litigation procedurally to the point there was no appreciable difference nor benefit to be gained from its use, save for subject matter expertise and confidentiality – although pre the 1996 Arbitration Act reforms even confidentiality was not assured as the courts sought to maintain supervisory control over the process. The suggestion that the parties to an arbitration agreement could exclude the court's jurisdiction to correct errors of law was famously dismissed by Scrutton LJ with the memorable phrase: “there must be no *Alsatia* in England where the King's writ does not run”.

Due to the confidential nature of the arbitration process and the often-siloed way in which arbitration has traditionally been delivered, much of what we previously knew about arbitration in the New Zealand context was largely anecdotal.

In 2021, we embarked on a joint project with two of our arbitration panellists, Royden Hindle and Dr Anna Kirk, to survey and report on the number of arbitrations being conducted in New Zealand, the nature of those arbitrations, and the characteristics of the arbitrators conducting them.

While almost certainly under-reported in times of COVID-induced lethargy and consultation/survey weariness, the utility of the Survey Report is that it nonetheless highlights how the arbitration market in New Zealand has matured and expanded over the last few decades. It is no longer dominated by construction disputes and is regularly used to resolve a wide range of commercial/contractual disputes including in relation to property, rural, relationship property, trusts, IT, and disputes arising in relation to non-contractual legal relations including Treaty Settlements and other areas of conflict.

Arbitration is increasingly being viewed as a viable alternative to litigation and a mechanism that can



alleviate the pressure on our Courts and provide access to justice in relation to civil disputes. In many cases, arbitration can be a cheaper, quicker and confidential option.

A concerning feature of the survey has been to highlight the lack of gender and ethnic diversity in party-appointed arbitrators. For arbitration to truly play its part in improving access to justice for all New Zealanders, we must address the issue constructively and with confidence. Any failure to embrace diversity will only serve to undermine confidence in arbitration as an accessible dispute resolution service.

We must have arbitrators who reflect our diverse community. We need to address the challenge and make the right choices to overcome it. There is no room for complacency if we are to create a more equitable and diverse arbitration community better placed to make a stronger contribution to the rule of law. I am delighted to report that we at the ADR Centre are doing very well by global standards. Our most recent analysis of appointments disclosed that 47% of all determinative appointments made by the ADR Centre-related registries (Building Disputes Tribunal (BDT), New Zealand Dispute Resolution Centre (NZDRC), New Zealand International Arbitration Centre (NZIAC), the Family Dispute Resolution Centre (FDR Centre), and the

Independent Complaint and Review Authority (ICRA)) were women.

We must also take advantage of the benefits of technology to modernise the delivery of arbitration, domestically and internationally, in a manner fit for today's times and in keeping with market demand. Given that the survey data was captured for the period 1 January 2019 to 31 December 2020, much of it predates the effects of the pandemic in New Zealand. It will be interesting to see how the next Survey results reflect the now almost universal adoption of AVL technology following COVID.

The survey data that we have collected, and the comprehensive Report that Royden and Anna have painstakingly compiled, support our view that New Zealand can position itself as a truly global centre of arbitration excellence. We have world-class practitioners getting world-class results and a supportive judiciary, but there is work to be done. By the time the next Report is published, my hopes are that 50% of arbitral appointments will be women and that appointees across the board will better reflect the diverse ethnic community that we live in and that we seek to serve.

**John Green**

C.Arb, F.CI Arb, F.AMINZ(Arb/Med)

**Director, The ADR Centre**



# Overview

The confidential nature of arbitration makes it inherently difficult to know how often it is used in New Zealand. Until now, discussion has largely been anecdotal.

In 2021, we embarked on a project to survey and report on the number of arbitrations being conducted in New Zealand, the nature of those arbitrations, and the characteristics of the arbitrators conducting them.

Our attempt to provide some empirical data about the nature and extent of arbitration in New Zealand is based on our own observation that arbitration is more entrenched, and more often used, than may be apparent to the broader legal community. The results of our survey certainly demonstrate that arbitration is a staple of the modern dispute resolution landscape. It makes up a significant part of determinative dispute resolution in New Zealand and works in a complementary way to alleviate the workload of the courts in respect of civil disputes.

*“The new-found emphasis on party autonomy represents a far cry from the days when Scrutton LJ recoiled from the thought that an English arbitration could be conducted without the possibility of the court being entitled to exercise its statutory power to require arbitrators to state a special case. In his famous analysis of Alsatia the Lord Justice likened an area of arbitration immune from that power as a haunt of thieves. Since then the pressures of judicial workloads have led the courts to entertain towards arbitrators a sense of gratitude rather than rivalry, of respect rather than contest.”*

Lord Cooke of Thorndon, “Party Autonomy” (1999) VUWLR 275 at 258-259.

We conclude from the survey results that there has been a maturing of the arbitration market in New Zealand. We have found a spread of disputes that are conducted by a range of arbitrators in a broad cross-section of legal areas. Arbitration is no longer dominated by construction disputes, but covers contractual and commercial disputes, property disputes, Treaty settlement cases, and many other subjects besides.

We hope you will find the information in this report useful. It is intended to provide a resource for encouraging and enhancing the practice of arbitration in New Zealand. It justifies confidence in a system that is found to be working well.

We wish to express our sincere thanks to NZDRC, and in particular to Natalia Villa, who provided all of the technical support to enable the survey to happen, and to assemble the raw data into a useable form. We would not have been able to conduct the survey without the support of NZDRC.

We also wish to express our sincere thanks to Diana Qiu, who provided invaluable assistance in the preparation of this report and in turning the raw data into reportable information.



Royden Hindle



Anna Kirk

# Methodology

Our survey was addressed to arbitrators only. That was a deliberate choice, as we wanted to avoid the risk of duplication of reported arbitrations. We were conscious that surveying arbitrators (rather than counsel or even parties) would risk missing some arbitrations.

As a result of our approach, however, we think it can be said with some confidence that the data we have collected are a minimum. With respect to the overall number of arbitrations that took place in New Zealand during the survey period, for example, it seems very likely that there were more than what we have reported (reflecting arbitrators who did not know of or respond to the survey, or who did not provide details for each arbitration in the survey period). That was unavoidable, but we are confident that we have not double-counted reported arbitrations. We are certain that there were at least as many arbitrations in New Zealand during the survey period as are reported here.

Our survey requested information about arbitrations where the appointment of the tribunal took place within the two-year period between 1 January 2019 and 31 December 2020. This means that arbitrations where the substantive procedure took place in the survey period, but where the tribunal was appointed prior to 1 January 2019, were excluded. Similarly, arbitrations in which appointments took place in late 2020, but where the substantive procedures took place after the survey period, were captured.

The survey was anonymous and confidential. We asked questions in a way that would avoid identifying arbitrators or arbitrations. We have made no attempt to identify survey respondents, particular cases, or to second guess any of the information provided (aside from the few instances in which responses were patently incorrect).

In this report, we make our observations based on the accumulated data and any apparent trends, rather than by singling out individual arbitrations or arbitrators.

The survey was designed in two Parts. The first Part asked for information about the arbitrator. It was completed once by each responding arbitrator. This included information about age, gender, ethnicity, qualifications and total number of appointments during the survey period. As noted above, the survey was anonymous and did not request the name of the individual who completed the survey.

The second Part asked for information about individual arbitrations. This Part was more detailed and asked for information ranging from the appointment process, fees, and subject matter, to procedural issues, remedies and costs. Due to the detailed nature of the survey, the questionnaire took some time to complete. We are very grateful to all who did so. Responses to Part 2 show that not all arbitrators completed Part 2 for all of their arbitrations. This is likely due to time restraints, or where an arbitrator may not have been able to remember all the detail for each arbitration (especially if the file had since been destroyed).

Part 1 information was deliberately collected separately from Part 2 information. This was to ensure that an arbitrator who might be unable to provide all the detail of every arbitration was at least able to provide his or her information as to the total number of appointments received during the survey period. This ensured that we collected information about the number of arbitrations, and the characteristics of the people conducting them, even if we did not manage to collect all the details for each arbitration.

We very much appreciate the considerable effort all arbitrators took to provide as much information as possible. The Part 1 information alone sheds considerable light on the extent of arbitration in New Zealand.

Some question in Part 2 could not be answered for every arbitration. For example, information about costs and duration could not be provided for those arbitrations that were still in progress at the time of the survey. Some of the data and analysis in this report therefore takes account of a smaller subset of information. We have indicated this where relevant.

Unfortunately, due to technical limitations, we were unable to link the information provided about each individual arbitration in Part 2 to the information about the arbitrators in Part 1. This resulted in some limitations on the level of analysis we were able to conduct on the data. We hope to rectify this issue in future surveys.

We opened the survey on 25 August 2021, with a closing date of 30 September 2021. We extended the closing date until 8 October 2021. Several reminders were sent to encourage arbitrators to complete the survey.

The survey was sent out to all members and arbitration panellists of NZDRC and the Arbitrators' and Mediators' Institute of New Zealand (AMINZ). The New Zealand Bar Association, the New Zealand Society of Construction Law and the Resolution Institute also disseminated the survey link to their members. We also personally contacted individual arbitrators known to us to be active in the market, with encouragement to them to fill out the survey.

We made specific efforts to contact non-lawyer arbitrators through various societies (including Engineering New Zealand | Te Ao Rangahau, the New Zealand Institute of Chartered Accountants, the Property Institute of New Zealand, the New Zealand Institute of Architects | Te Kāhui Whaihanga, and the Real Estate Institute of New Zealand), some of whom agreed to disseminate the survey link.

While there is no way of knowing the extent to which all relevant data was captured in this survey, we are confident that we reached a large proportion of the sector. Arbitrators have been very responsive to the survey. We thank them all for the time they spent providing data, which we consider to be invaluable to the assessment of the state of arbitration in New Zealand.

The survey itself was published on a platform provided by NZDRC, and NZDRC has also collected and checked the raw data to remove any obvious duplications or anomalies (although there were very few responses of this nature). NZDRC also prepared a spreadsheet showing the data for us to analyse and provided some preliminary charts and graphics based on the data.

*All results are derived from data provided by survey respondents and are therefore subject to any errors and omissions in the original data.*



# Highlights

We set out below the key statistics from the report:

56

**Number of arbitrators that responded:**  
56 arbitrators.

213

**Number of appointments:**  
213 appointments.

13%

**Diversity (gender):** Of the arbitrators who responded almost 20% were women. Women were appointed in around 13% of arbitrations.

93%

**Diversity (ethnicity):** 93% of the arbitrators who responded to the survey identified as New Zealand European/Pākehā.

113

**Number of arbitrations for which Part 2 (detailed) information was provided:** 113 arbitrations.

85%

**Domestic arbitration:**  
85% of the reported arbitrations were domestic.

80%

**Use of arbitral rules:** 80% of arbitrations were conducted under the Arbitration Act 1996, without using any additional arbitral rules or institutional supervision.

34

**Subject matter of arbitrations (most common):** 34 company/commercial/contract matters; 31 lease-related matters; 20 building/construction matters; and 11 property-related matters.

41%

**Average amount in dispute:** 41% involved amounts in dispute between \$30,000 and \$350,000 and 39% involved amounts in dispute between \$350,000 and \$3 million.

10.85

**Average time for disposal of disputes between \$30,000 – \$3 million:** 10.85 months.

3.32

**Average hearing length:**  
3.32 days.

# Arbitral appointments in 2019–2020

We received responses from 56 arbitrators who reported a total of 213 arbitral appointments between 1 January 2019 and 31 December 2020.

For these 213 appointments, respondents provided us with detailed information about 113 arbitrations.

We were very pleased with this response as it suggests that we captured a considerable portion of the market in the survey.

We consider that the data establishes that arbitration plays a prominent and important role in determinative dispute resolution in New Zealand.

The data set compares well to arbitration survey data collected in Australia for the three-year period from 2016–2019.<sup>1</sup> The Australian survey received responses from 111 practitioners<sup>2</sup> reporting a total of 223 arbitrations in Australia that were commenced, concluded or conducted during that period.

## Arbitrations per Year

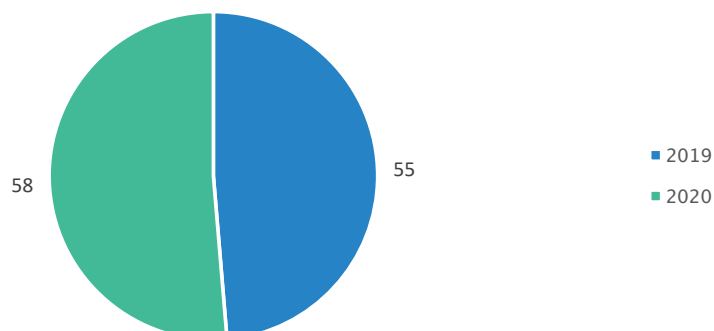
We asked respondent to provide the month and year in which they were appointed.

Of the 113 arbitrations for which detailed information was provided, there was a reasonably even split between appointments in 2019 and 2020, as shown in Figure 1.

This data shows that the COVID-19 pandemic in 2020 appeared to have no measurable effect on the prevalence of arbitration.

Across both years, we found that while appointments were made at all times during the year, more appointments tended to be made in the second half of each year (46 appointments were made in the months January to June, whereas 63 appointments were made in the months July to December).<sup>3</sup>

FIG 1: NUMBER OF APPOINTMENTS PER YEAR



<sup>1</sup> Australian Centre for International Commercial Arbitration (ACICA) *2020 Australian Arbitration Report* (2020).

<sup>2</sup> While most of the respondents to the Australian survey were arbitrators, a large number also held other roles, including counsel: see ACICA, above n 1, at 32–35.

<sup>3</sup> Four survey respondents indicated that, while they could remember the year in which their appointment occurred, they could not recall the exact month.

# Part 1: The Arbitrators

The data collected in Part 1 of the survey has allowed us to take a deeper look at who is being appointed as arbitrators in New Zealand. We asked arbitrators to indicate their age bracket, gender identity, ethnicity, any qualifications held and any relevant professional associations or bodies to which they belong.

## Age of Arbitrators

Figure 2 shows the spread of ages amongst those who received arbitral appointments during the survey period:

The single largest age bracket for respondents was the “Over 70” category, closely followed by the “60 to 70” category. Arbitrators aged over 60 years old accounted for 37 (66%) of the respondents to the survey. While this likely arises as a result of experienced practitioners and retired judges being more likely to practice as arbitrators, it was encouraging to see a number of arbitrators falling within the 40 to 60 years age bracket (15 in total). Also of interest is that 1 arbitrator was under 30 years old, suggesting very senior practitioners are not always required or desired when resolving disputes.

Less encouraging, however, is that only 2 of the 37 arbitrators in the 60 years or over age bracket were women. As shown in Figure 3, arbitrators aged over 60 years old received the vast majority of appointments during the survey period (160 appointments) — approximately 75%. The two female arbitrators in this age bracket, shown in Figure 4, received only 2 of these 160 appointments. This data was disappointing from a gender diversity perspective and is a clear reminder that there is still significant work to be done to address the gender divide in arbitration.

However, a marked difference is apparent in the next generation of arbitrators. As shown in Figure 5, 7 of the 15 arbitrators aged between 40 and 60 were women. Figure 4 shows that women in this age group received a total of 24 out of 46 appointments (52%). We suggest that future surveys track whether this far-improved gender split in younger arbitrators leads to improvement in the number of female arbitrators who are appointed in the 60 or over age bracket, where most of the work lies.

FIG 2: NUMBER OF ARBITRATORS PER AGE GROUP

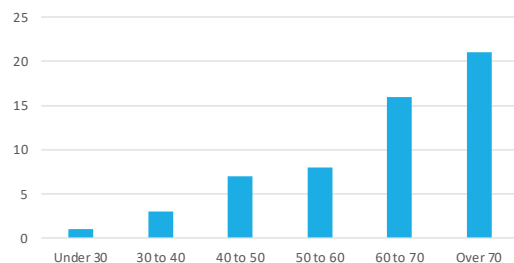


FIG 3: NUMBER OF APPOINTMENTS PER AGE GROUP

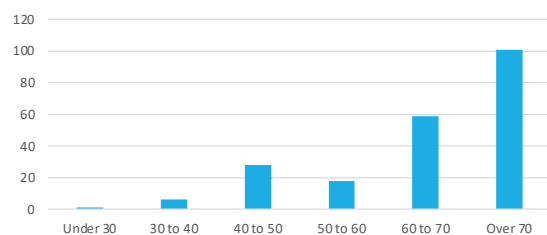
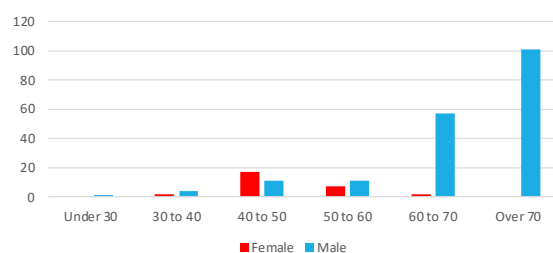


FIG 4: NUMBER OF APPOINTMENTS PER AGE GROUP AND BY GENDER



Appointments of arbitrators under 40 years old accounted for 7 appointments (or 3% of the total appointments).

## Arbitrator Gender

Almost 20% of the arbitrators who responded to the survey were female (11 out of 56), as demonstrated in Figure 6.

More than half of female arbitrators were under 50 years old. As noted above, 2 female arbitrators were over 60 years old, 3 were aged between 50 and 60 years old, and the remaining 6 arbitrators were under 50 years old.

Female arbitrators received a total of 28 out of 213 appointments during the survey period, which equates to 13% of the total appointments. This is shown in Figure 7.

We were interested to find out who had appointed the female arbitrators but, due to technical limitations preventing us from matching all the arbitrators in Part 1 to arbitrations in Part 2, we are unable to state this accurately. We will seek to remedy this in future surveys.

We were, however, able to identify 8 arbitrations in which the arbitrator was female. Of these arbitrations, 7 appointments were made by an institution, with just 1 appointment having been made by the parties.

This accords with the significant effort institutions are making to diversify the pool of arbitrators — both in terms of age and gender (recalling that women feature more strongly in the younger age groups).<sup>4</sup> It is also similar to the experience in Australia — the 2020 Australian Arbitration Report found that “tribunal members were more than twice as likely to be women if they were nominated by an institution rather than nominated by the parties”.<sup>5</sup> Alarming, the Australian data records that no female arbitrators were appointed between 2016 and 2019 to arbitrations under the Resolution Institute Arbitration Rules, which are by far the dominant rules applied to domestic arbitrations in Australia. The Australian report concluded that the tendency to appoint well-known arbitrators “diminished

FIG 5: NUMBER OF ARBITRATORS PER AGE GROUP AND BY GENDER

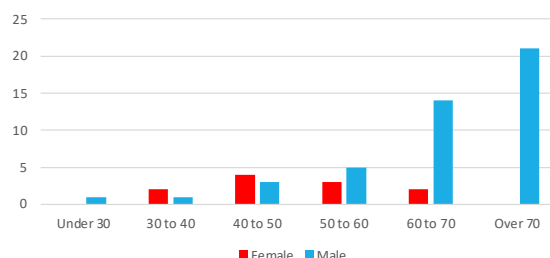


FIG 6: NUMBER OF ARBITRATORS BY GENDER

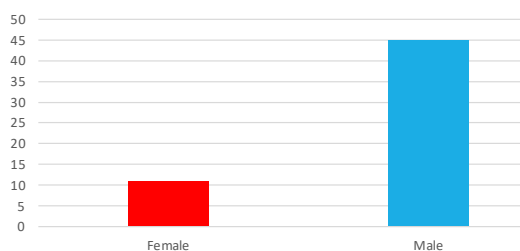
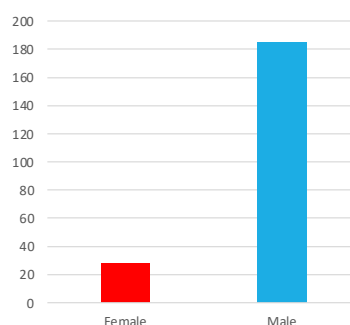


FIG 7: TOTAL APPOINTMENTS BY GENDER



<sup>4</sup> See, for example, Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ) *The Gender Diversity Pledge* (23 April 2018).

<sup>5</sup> ACICA, above n 1, at 26

[the] pool of experienced arbitrators and contribute[d] to the narrow demographic represented”.<sup>6</sup> Similar observations may be made about the New Zealand market, given the clear tendency of parties to appoint Pākehā males who are over 60 years old.

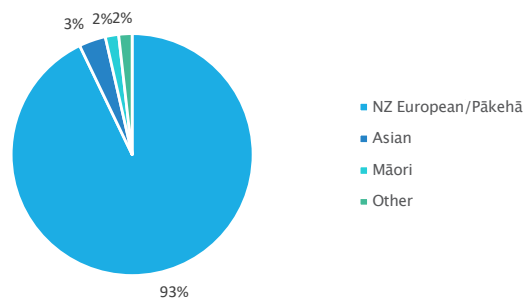
For AMINZ, in 2019 and 2020, appointments of female arbitrators accounted for 22% of all arbitral appointments.<sup>7</sup> The New Zealand Law Society reports that, in 2020, 47% of all arbitral appointments were female arbitrators and female practitioners were appointed in 44% of total appointments made, including mediators, experts, adjudicators, referees, umpires, consultants, experienced property lawyers or trustees.<sup>8</sup>

## Arbitrator Ethnicity

The survey results demonstrate what we expected: the vast majority of arbitrators appointed in the survey period were European/Pākehā (93%). One arbitrator was Māori, and 2 were of Asian descent. There is very little ethnic diversity amongst arbitrators, as Figure 8 shows.

It is clear from these statistics that there is significant work to do to redress the strong ethnic imbalance in commercial arbitration. We have reflected on whether there may be other institutions to which we should have sent the survey in order to ensure that non-Pākehā arbitrators had an opportunity to fill it in. For the next survey, we will engage with Te Hunga Rōia Māori o Aotearoa, the Pacific Lawyers Association, and NZ Asian Lawyers to ensure that the survey reaches different ethnic groups. However, we suspect that the results reflect the reality of the lack of ethnic diversity in arbitration in New Zealand, rather than arbitrators of different ethnicities being unaware of the survey. These results are clearly disappointing, even if unsurprising.

FIG 8: PROPORTION OF ARBITRATORS BY ETHNICITY



*The survey results show that there is still a long way to go to achieve true diversity amongst arbitrators in New Zealand. The vast majority of arbitral appointments (74%) were of white, male arbitrators over 60 years old.*

*Nonetheless, it is encouraging to see that 20% of the arbitrators responding to the survey were women, albeit that they received only 13% of the appointments. The number of arbitrations being conducted by female arbitrators in New Zealand is slightly higher than has been reported in Australia, where the 2020 Australian Arbitration Report recorded that only 10% of arbitral appointments were of female arbitrators.<sup>9</sup> However, it is lower than appointments being made by institutions – both in New Zealand and overseas.<sup>10</sup> It is clear that institutions have played the major role in increasing the pool of female arbitrators in the market. The ICC recently reported that female arbitrators account for 23.4% of all appointments in ICC cases (whether by the parties, the co-arbitrators or the institution).<sup>11</sup>*

*Less encouraging, but not surprising, is the lack of ethnic diversity in those being appointed as arbitrators. This is partly reflective of the lack of ethnic diversity in the law in general, and particularly in commercial law in New Zealand. Conscious effort will be required to make any material progress on ethnic diversity. There has been a focus recently on the potential for arbitration to be used in resolving disputes under tikanga. If appropriate protocols can be developed for such arbitrations and capacity building initiatives put in place, there is significant opportunity to increase the pool of Māori arbitrators who will hopefully be appointed in a broad range of arbitral disputes.*

<sup>6</sup> At 26.

<sup>7</sup> For 2021, appointments of female arbitrators by AMINZ accounted for 35% of all arbitral appointments.

<sup>8</sup> It is noted that appointments of female arbitrators by the Law Society dropped to 20% in 2021. The average percentage of female appointments across the 2 years was 33%. As noted by John Green at p.5 above, the ADR Centre's most recent appointments statistics show that 47% of all determinative appointments made by the ADR Centre were women.

<sup>9</sup> ACICA Survey, above n 1, at 28.

<sup>10</sup> As mentioned above, AMINZ appointed female arbitrators in 22% of arbitrations and the New Zealand Law Society appointed female arbitrators in 33% of cases across 2020-2021. See also, Hong Kong International Arbitration Centre *Annual Report: 2021 Reflections* (2021) at 8 (21.8%); Singapore International Arbitration Centre *Where the World Arbitrates: Annual Report 2021* (2021) at 24 (35.8%); and London Court of International Arbitration *2021 Annual Casework Report* (2021) at 20 (32%).

<sup>11</sup> International Chamber of Commerce ICC Dispute Resolution 2020 Statistics (2020) at 14 (23.4%).

AMINZ and the New Zealand International Arbitration Centre (NZIAC) have both taken the Gender Diversity Pledge. The Pledge states:

*As a group of counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration, we are committed to improving the profile and representation of women in arbitration. In particular, we consider that women should be appointed as arbitrators on an equal opportunity basis. To achieve this, we will take the steps reasonably available to us – and we will encourage other participants in the arbitral process to do likewise – to ensure that, wherever possible:*

- *committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;*
- *lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;*
- *states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;*
- *where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;*
- *gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and*
- *senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.*

## Arbitrator Qualifications/Affiliations

The survey results showed that the vast majority of arbitrators are legally qualified, with 45 of the 56 respondents having law degrees (80%). The remaining respondents either did not have any legal qualifications (14%) or had completed a business-related dispute resolution qualification (5%).

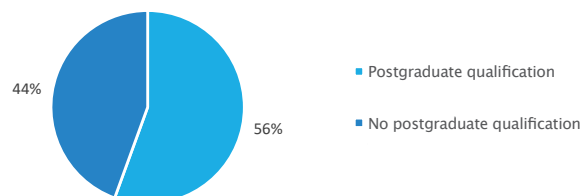
Of the arbitrators who are legally qualified, many (41%) had a post-graduate legal qualification, as demonstrated in Figure 9. The majority of post-graduate qualifications tended to be LLMs (80%), with the remaining postgraduate qualifications being Doctorates, Masters in Science, Masters in Business Studies, Masters in Dispute Resolution, and Postgraduate Diplomas in Law.

It is perhaps not surprising that parties tend to look for legally qualified arbitrators, given the importance for the enforceability of an award of compliance with the mandatory provisions of the Arbitration Act, and overall procedural considerations. The predominance of legally qualified arbitrators may also reflect that fact that most arbitrations in New Zealand are determined by sole arbitrators, rather than by three-member tribunals. A party may be more inclined to appoint a co-arbitrator with technical expertise if they know the presiding arbitrator is a lawyer.

The vast majority of arbitrators (96%) were Associates or Fellows of AMINZ or the Chartered Institute of Arbitrators based in London, meaning they are subject to the ethical obligations and codes of conduct of those institutions, which protect the procedural rights of parties. Institutional affiliation also provides an avenue for parties to file a complaint if there has been a breach of an ethical obligation.

Most arbitrators were members of NZDRC and/or AMINZ arbitration panels (as well as various other panels and lists operated by these organisations). A number of arbitrators were also members of a variety of international arbitration panels. Other panels that featured included the Immediation Global Panel and the Construction Disputes Resolution Board.

FIG 9: PROPORTION OF LEGALLY QUALIFIED ARBITRATORS WITH POSTGRADUATE QUALIFICATIONS



# Part 2:

## The Arbitrations

### A. INFORMATION ABOUT DISPUTES

#### Appointments

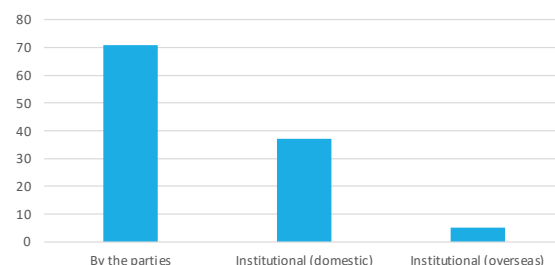
We asked the arbitrators for information about who appointed them — the parties or an institution? Of the 113 reported arbitrations, 72 had appointments made by the parties (64%) and 41 appointments were made by institutions (of which 35 were made by domestic institutions and 1 by court order). These results are shown in Figure 10.

Of the 5 appointments made by international institutions, 4 appointments were of female arbitrators. We were unable to link a sufficient amount of the data in Parts 1 and 2 to make any meaningful assessment of the gender split in domestic appointments.

Domestic-appointing institutions included the New Zealand Law Society (NZLS) (15 appointments); AMINZ (14 appointments); Immediation (2 appointments); NZDRC (1 appointment); the Building Disputes Tribunal (1 appointment); the Auckland District Law Society (1 appointment); and a construction dispute resolution board (1 appointment).

On 1 March 2017, AMINZ became the default appointing authority under the Arbitration Act.<sup>12</sup> AMINZ reported for 2021 that it had made 23 appointments, suggesting that AMINZ now likely makes more appointments than the NZLS. Nonetheless, the NZLS is a significant appointing body in New Zealand. We note that 10 of the NZLS appointments were in relation to lease or property disputes and the remaining appointments related mostly to general contractual disputes, with one dispute concerning relationship property.

FIG 10: NUMBER OF APPOINTMENTS MADE BY THE PARTIES AND BY INSTITUTIONS



<sup>12</sup> The old “quick draw” process, whereby the first party’s proposed arbitrator was deemed to be accepted if the other party did not respond within a specified period of time, was not repealed until 8 May 2019, after which AMINZ was the default appointing body if the parties could not agree an arbitrator and had not selected an alternative appointing body. So, for the first five months of our survey, parties could still invoke the quick draw procedure (Clause 1 of Schedule 2 to the Arbitration Act).

## Domestic v International

The survey results showed that 96 of the 113 arbitral appointments in the survey period were in relation to domestic arbitrations (85%) whereas the remaining 17 were international arbitrations (15 %). Figure 11 shows these results.

Of the international arbitrations, 6 were conducted under the Arbitration Act and 10 were conducted under the auspices of international institutions, with 1 being by special agreement of the parties.

The vast majority of the domestic arbitrations were conducted under the Arbitration Act, with no institutional rules.

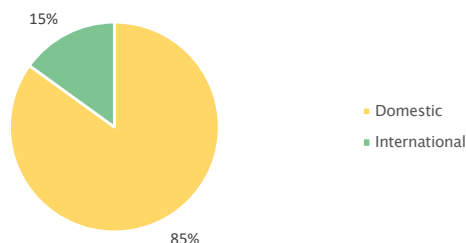
## Sole Arb v Three Member Tribunal

Of the 113 arbitral appointments made in the survey period, 8 were of appointments made to a three-person tribunal (7%), including one that involved an “umpire”. The remaining appointments, bar one, were of a sole arbitrator.<sup>13</sup>

Four of the 8 appointments made to a three-person tribunal concerned a domestic arbitration, with the other 4 concerning international arbitrations. Consequently, of the 96 domestic arbitrations in the survey period, around 4% of them were run by three-person tribunals.

All 4 domestic arbitrations run by three-person tribunals concerned lease-related disputes (including rent review). Two of these disputes involved a sum of money claimed of between \$350,000 and \$3 million. However, for the most part, domestic arbitrations concerning disputed sums of between \$350,000 and \$3 million were decided by a sole arbitrator (23 out of 25). The amount claimed in the other two domestic arbitrations run by three-person tribunals was not specified.

FIG 11: PROPORTION OF DOMESTIC AND INTERNATIONAL ARBITRATIONS



13 One result indicated “Other” in the question asked about appointment type.

## Rules v Ad Hoc (What Rules are Being Used)

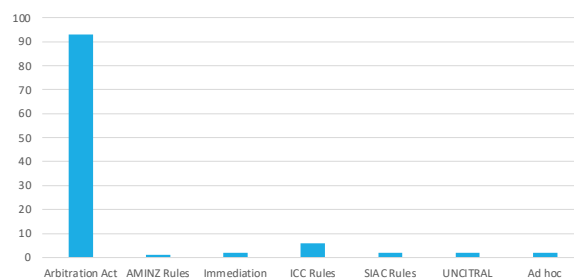
As noted above, very few domestic arbitrations are conducted under any form of arbitration rules. This accords with anecdotal evidence that parties prefer to use the Arbitration Act and most domestic practitioners are not used to (nor familiar with) arbitration rules.

Of the 113 arbitrations in Part 2, 85 were domestic arbitrations conducted under the Arbitration Act. One domestic arbitration was conducted under the AMINZ Rules and two were conducted under the Immediation Rules. One domestic arbitration was conducted pursuant to an ad hoc agreement negotiated by the parties. Some arbitrators indicated they were unsure of the rules used, or that it was inapplicable, for 5 arbitrations. However, it is likely these arbitrations were also conducted pursuant to the Arbitration Act.

As previously noted, of the 17 international arbitrations, 6 were conducted under the Arbitration Act. Ten were conducted under the arbitral rules of the International Chamber of Commerce (ICC) (6 arbitrations), the Singapore International Arbitration Centre (SIAC) (2 arbitrations), and the United Nations Commission on International Trade Law (UNCITRAL) (2 arbitrations). The remaining arbitration was conducted under an ad hoc agreement negotiated by the parties. These results are shown together in Figure 12.

The New Zealand data differs markedly from that of domestic arbitration in Australia, where the use of arbitral rules is far more common. A large number of domestic arbitrations in Australia use the Resolution Institute Rules and a smaller number use the Australian Centre for International Commercial Arbitration Rules, the UNCITRAL Rules and even the ICC Rules. This may simply be a reflection of those who chose to respond to the Australian survey. It should also be recalled that Australia, unlike New Zealand, has different statutes governing domestic arbitration (at the state level) and international arbitration (at the federal level).

FIG 12: NUMBER OF ARBITRATIONS CONDUCTED UNDER EACH SET OF RULES



## Amounts in Dispute

Of the 96 domestic arbitrations that reported the amount in dispute, 3 had a sum of money claimed of less than \$30,000, 32 had claims of between \$30,000 and \$350,000, 25 had claims of between \$350,000 and \$3 million, and 6 had claims of over \$3 million.<sup>14</sup> The amount claimed in the remaining 30 domestic arbitrations was reported as either uncertain or inapplicable. Leaving this latest category aside, the amounts in dispute across all the other domestic arbitrations are shown in Figure 13.<sup>15</sup>

In domestic arbitrations, 29 featured counterclaims (30%). Of the respondents who indicated the amount of the counterclaims, these ranged from less than \$30,000 (2 arbitrations), between \$30,000 and \$350,000 (14 arbitrations), between \$350,000 and \$3 million (6 arbitrations) and over \$3 million (1 arbitration).

Of the 17 international arbitrations, 2 had a sum of money claimed of between \$30,000 and \$350,000, 7 had claims of between \$350,000 and \$3 million, and 7 had claims of over \$3 million.<sup>16</sup> The amount claimed in the 1 remaining international arbitration was reported as either uncertain or inapplicable. Again leaving aside this latest category, the amounts in dispute across all the other international arbitrations are shown in Figure 14.

In these international arbitrations, 6 featured counterclaims (35%). Of the respondents who indicated the amount of the counterclaims, these ranged from between \$30,000 and \$350,000 (2 arbitrations) and between \$350,000 and \$3 million (4 arbitrations).

FIG 13: PROPORTION OF DOMESTIC ARBITRATIONS INVOLVING CERTAIN AMOUNTS IN DISPUTE

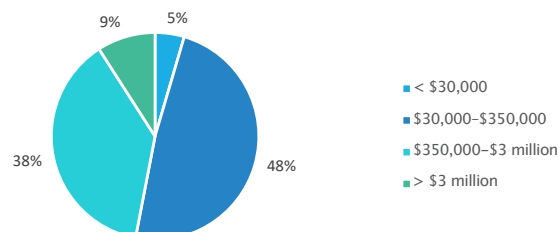
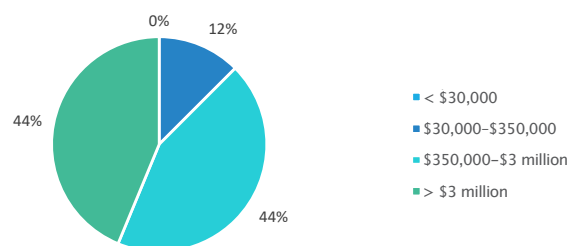


FIG 14: PROPORTION OF INTERNATIONAL ARBITRATIONS INVOLVING CERTAIN AMOUNTS IN DISPUTE



<sup>14</sup> The reported amounts claimed in some domestic arbitrations over \$3 million were: \$6 million, \$7 million, \$26 million, \$40 million and \$50 million.

<sup>15</sup> The value ranges used in this part of the survey were deliberately chosen to reflect the monetary jurisdiction of the Disputes Tribunal, the District Court and the High Court.

<sup>16</sup> The reported amounts claimed in some international arbitrations over \$3 million were: \$5 million, \$15 million, \$63 million, \$213 million, \$570 million, \$1.4 billion, and USD 4 million. Besides the USD 4 million entry, the other entries did not specify their currencies. They are therefore taken to be in NZD.

## Reported Number of Cases by Industry

The subject matter of the reported arbitrations were varied. Altogether, there were:

- (i) 34 arbitrations concerning company/commercial/contract matters (including 1 involving an IT dispute);
- (ii) 31 lease-related (including rent review) arbitrations (including 1 arbitration involving a dairy farm dispute);
- (iii) 20 building/construction arbitrations;
- (iv) 11 property arbitrations;
- (v) 3 arbitrations involving the Treaty/Māori issues;
- (vi) 2 arbitrations concerning natural resources;
- (vii) 2 arbitrations concerning joint ventures;
- (viii) 2 investment treaty arbitrations;
- (ix) 2 arbitrations concerning cross leases;
- (x) 1 arbitration about sport;
- (xi) 1 banking/finance arbitration;
- (xii) 1 arbitration concerning electricity generation;
- (xiii) 1 relationship property arbitration;
- (xiv) 1 arbitration concerning a share-milking dispute; and
- (xv) 1 arbitration concerning a maritime dispute.

Of the 17 international arbitrations, there were 4 building/construction arbitrations, 4 arbitrations concerning company/commercial/contract matters, 2 arbitrations concerning natural resources, 2 investment treaty arbitrations, 1 property arbitration, 1 lease-related (including rent review) arbitration, 1 arbitration about sport, 1 banking/finance arbitration and 1 arbitration concerning a maritime dispute.

Of the 13 most expensive arbitrations (being those involving claims of over \$3 million), the subject matter was also varied. These 13 arbitrations comprised 4 building/construction arbitrations, 3 arbitrations concerning company/commercial/contract matters, 2 investment treaty arbitrations (perhaps unsurprising), and 1 each about sport, natural resources, Treaty/Māori issues, and a lease-related (including rent review) dispute.

This demonstrates the broad use of arbitration not only in a range of subject matters, but also in a wide range of claimed amounts within each subject matter.

The 3 arbitrations involving amounts of less than \$30,000 were concerned with a share-milking dispute, a property dispute and a lease-related (including rent review) dispute.

# Reflection from Diana Qiu: *A Junior Practitioner's Perspective*

**T**his report paints a definitive picture of the landscape of arbitral practice in Aotearoa New Zealand. It demonstrates that arbitration is being practised widely and across a variety of sectors. The results of the survey now provide the numbers to support what have hitherto been anecdotal observations. This information is useful generally, but especially for junior practitioners, who can now see the extent to which arbitration features in dispute resolution in this country and, as a consequence, are probably more incentivised to pursue opportunities within it.

It is pleasantly surprising to see that not an insignificant proportion of total arbitrations – 15% – are international ones. This represents huge potential for junior practitioners to gain experience in, and exposure to, best practice from arbitrations administered by well-established institutions overseas. If more junior practitioners were involved in this work, it would enable the rapid development of key arbitral and adjudication skills which, when brought back to New Zealand, would help to improve the country's growing reputation as a reliable dispute-resolution hub.

Just as important as encouraging junior practitioners into arbitration is the need to attract diverse practitioners more broadly. There is evident talent already in this space, with there being a greater number of junior female arbitrators compared to their male counterparts, and with women

aged between 40 and 60 years receiving just over half of total appointments in that age range. These are promising statistics, which will hopefully turn into more positive trends over time through the help of institutionally led mentorship programmes and informal support networks. More diverse appointments to the judiciary may also assist in this enterprise, given the number of arbitrators who are past the mandatory judicial retirement age of 70, and the transferability of skills across the two disciplines of judging and arbitrating.

Efforts should also be focused on bringing in Māori and practitioners from cultural minority backgrounds. This is not least because it appears that arbitration is beginning to step into subject areas affecting especially those groups. Cultural minorities have historically been underrepresented in the law, and the survey results now illustrate the expanse of that under representation in arbitration.

Overall, the report has firmly put arbitration onto the map of legal practice in New Zealand. It offers a strong starting point in the domestic long-term project of ensuring equity and equality of opportunity in dispute resolution. I look forward to the results of future surveys, and how they compare to those summarised here, which may allow us to assess whether current diversity initiatives are working.

**Diana Qiu**  
LLB (Hons)/BA (Auckland)



## B. PROCEDURE

### Legal Representation

The vast majority of parties in the reported arbitrations were legally represented. All parties were represented in 102 of the 113 arbitrations (90%). In 7 arbitrations, one or some of the parties were not represented (6%), and none of the parties was legally represented in only 4 arbitrations (3.5%).

While the 7 arbitrations in which not all the parties were represented concerned a range of subject matters and amounts in dispute (with 4 concerning claims of between \$30,000 and \$350,000, and 2 concerning claims of between \$350,000 and \$3 million<sup>17</sup>), the vast majority of them were domestic arbitrations (6 out of 7) in which the parties themselves had appointed the arbitrator (5 out of 7, with 1 of the 7 being an NZLS-appointed arbitrator). It is likely that some of these arbitrations involved self-represented parties, but others (particularly the international arbitration) may have involved parties that did not participate in the arbitration at all.

Of the 4 arbitrations in which there was no legal representation whatsoever, these all concerned relatively small amounts in dispute of between \$30,000 and \$350,000. The sole arbitrator in 2 of these arbitrations was appointed by the parties. In the remaining 2 arbitrations, the appointments were made by an institution (NZLS and Immediation respectively). The subject matter of these 4 arbitrations concerned company/commercial/contract disputes (2), a dispute related to rent relief during the COVID-19 pandemic, and a property-related dispute.

### Number of Counterclaims

Of the 113 arbitrations for which details are available, 34 were reported to have had counterclaims (30%).<sup>18</sup> Six of the 34 arbitrations having counterclaims were international arbitrations (18%). Or, put another way, just over one third of the 17 international arbitrations had counterclaims (35%).

<sup>17</sup> The remaining 1 arbitration did not specify the amount claimed.

<sup>18</sup> Three of the reported arbitrations had "Not sure/Not applicable" in the counterclaims field.

In terms of the amounts counterclaimed, there were 30 responses. Of these, the majority were amounts of between \$30,000 and \$350,000 (53%), and \$350,000 and \$3 million (37%). Two arbitrations had counterclaimed amounts of less than \$30,000, and only 1 arbitration had a counterclaimed amount of over \$3 million (\$4.6 million).

The disputes in the reported arbitrations with counterclaims concerned a range of subject matters, including building/construction (38%), company/commercial/contract (26%), leases (including rent review) (15%, including 1 dairy farm lease dispute and 1 cross lease dispute), property (9%), relationship property (3%), sharemilking (3%), banking/finance (3%), and maritime (3%).

These trends continue to reflect the wide applicability and use of arbitration as a dispute resolution process to a range of disputes involving different amounts and subject matters.

### **Bifurcation/Interim Measures/Jurisdiction**

One hundred of the 113 arbitrations reported followed straightforward, non-bifurcated processes (88.5%). Of the remaining 13 that involved bifurcation of issues, 4 were international arbitrations. That means almost a quarter of the 17 reported international arbitrations involved bifurcation of some kind.

The 13 arbitrations involving bifurcation concerned disputes spanning a wide range of subject matters, including company/commercial/contract (4 arbitrations, including 1 commercial contract dispute concerning an IT agreement), building/construction (2 arbitrations), property (2 arbitrations), leases (including rent review) (2 arbitrations), banking/finance (1 arbitration), sport (1 arbitration) and sharemilking (1 arbitration).

The 13 bifurcated arbitrations involved a range of amounts in dispute, with 4 arbitrations involving claimed amounts of between \$30,000 and \$350,000, 3 involving amounts of between \$350,000 and \$3 million, and 1 arbitration each involving amounts of less than \$30,000 and, on the other side of the spectrum, over \$3 million.<sup>19</sup> It therefore does not appear that there is any clear correlation between the amount in dispute and the likelihood of bifurcation.

Seven of the 13 bifurcated arbitrations were completed, and an award rendered, within the survey period. The average time these arbitrations took was 9.1 months, with the median being 7 months. The shortest amount of time was 3 months, and the longest was 24 months (this being one of the international arbitrations). These figures suggest that bifurcated arbitrations remain efficient and that some of these arbitrations probably did not require the second phase to be undertaken. This suggests that bifurcation is working as it should to make arbitration more efficient and cost effective by not address claims unnecessarily.

### **Separate Analysis of Interim Measures/Preliminary Orders**

Interim measures were sought in 12 of the 113 reported arbitrations (including in 2 international arbitrations) (11%). Of these 12 applications, interim measures were granted in one third of cases.

In addition, Preliminary Orders were sought in 12 of the 113 reported arbitrations (11%). These also included 2 international arbitrations. Of these 12 applications, preliminary orders were granted in two thirds of cases.

Only in 3 arbitrations (including 1 international arbitration) were both interim measures and preliminary orders applied for (2.7%). Preliminary orders were granted in two of these cases, and interim measures granted in one case.

None of the reported arbitrations indicated that there was early settlement as a result of any interim orders or preliminary measures granted.<sup>20</sup>

We did not ask respondents whether interim measures had been sought from the court in support of the arbitration. This may be a question to include in future surveys as it would be interesting to compare the rate of requests for interim measures of tribunals as compared to requests of the court.

We asked arbitrators about emergency arbitrations. There was only one emergency arbitration reported during the survey period, which related to an international case.

<sup>19</sup> The amounts claimed in the 5 remaining bifurcated arbitrations were not specified.

<sup>20</sup> 13 survey respondents responded with "No" to the "Early resolution due to PO or interim measures" question. Of the remaining 100, 99 did not leave a response, and 1 indicated "Unsure/Not applicable".

## Hearing vs Documents-only

In the vast majority of arbitrations, oral hearings were held in addition to written submissions. Arbitrations took place “on the papers” in only 17 of the 113 arbitrations reported for the survey period (15%), as shown in Figure 15.<sup>21</sup> Two of these were international arbitrations, while the remaining 15 were domestic arbitrations.

Of the 17 arbitrations done on the papers, an approximate dispute value was provided for 12 of those arbitrations. They reveal that most of the on-the-papers arbitrations (7 arbitrations) fell within the value range of between \$30,000 and \$350,000. Two arbitrations involved amounts of less than \$30,000, 2 involved amounts of between \$350,000 and \$3 million, and 1 involved an amount over \$3 million.<sup>22</sup> These results are represented in Figure 16.

Hearings were held (or due to be held) in 80 arbitrations and no information was provided for the remaining 16 arbitrations.

For those 64 arbitrations where a hearing was held: 24 arbitrations involved amounts of between \$30,000 and \$350,000 (38%), 27 involved amounts of between \$350,000 and \$3 million (42%), 10 involved amounts over \$3 million (16%), and 1 involved an amount of less than \$30,000 (2%).<sup>23</sup>

Perhaps unsurprisingly, these results indicate that parties are more likely to opt for an on-the-papers hearing when the disputed amounts involved are (relatively) low.

There was no obvious correlation between subject matter and an on-the-papers arbitration. Of the 17 on-the-papers arbitrations, 5 involved building/construction matters, another 5 involved lease-related (including rent review) matters, 3 were property matters, 3 were company/commercial/contract matters and the final dispute involved natural resources.

Of the completed arbitrations in the survey period, the average amount of time an on-the-papers arbitration took was 6.8 months. The average amount of time an arbitration with an oral hearing took was 8.4 months.

FIG 15: PROPORTION OF ARBITRATIONS CONDUCTED VIVA VOCE AND ON-THE-PAPERS

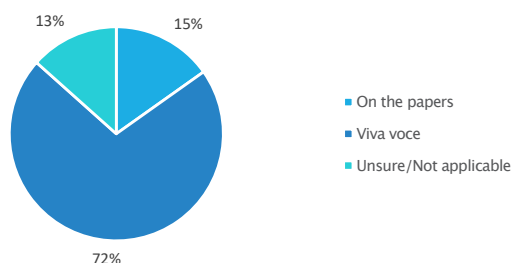
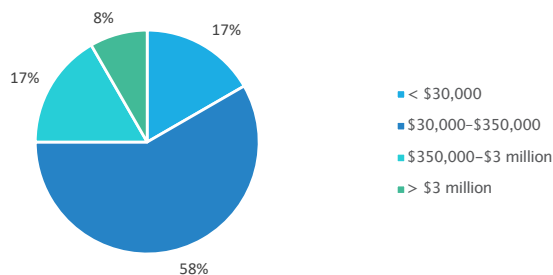


FIG 16: PROPORTION OF ON-THE-PAPERS ARBITRATIONS INVOLVING CERTAIN AMOUNTS IN DISPUTE



<sup>21</sup> 15 survey respondents indicated they were either unsure of whether their arbitration was dealt with on the papers, or that it was not applicable. One additional survey respondent said their matter had settled.

<sup>22</sup> 5 arbitrators indicated they were unsure of the amount in dispute in the on-the-papers arbitration, or that it was not applicable.

<sup>23</sup> 18 arbitrators indicated they were unsure of the amount in dispute in the viva voce arbitration, or that it was not applicable.

## Average Hearing Length

The length of the hearing was provided for 46 arbitrations. The average hearing length of those arbitrations was 3.32 days. There were 5 arbitrations where the hearing was more than 5 days long. Of these 5 arbitrations, 3 were international arbitrations and 2 were domestic. Three of the arbitrations (2 international and 1 domestic) involved amounts in dispute of more than \$3 million, while the remaining 2 arbitrations involved amounts in dispute of between \$350,000 and \$3 million. We asked the arbitrators to specify the exact number of hearing days for the arbitrations where a hearing was more than five days – 2 of those arbitrations had 14-day hearings, 1 arbitration had a 13-day hearing and 1 arbitration had a 7-day hearing. For the final arbitration, the exact number of days was not specified.<sup>24</sup>

Of the arbitration hearings that were 5 days or less, 5 were half a day or less. Four of these arbitrations were domestic and 1 was international. Three of these arbitrations were lease-related (including rent reviews) and one involved property issues. The remaining (international) arbitration related to company/commercial/contract issues. In one case the relief sought was an injunction and in another the relief was a finding as to legal obligations.

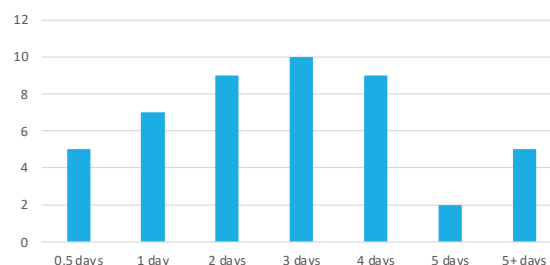
Figure 17 demonstrates the spread of hearing days:

## Hearing Mode

Of the 80 arbitrations that included oral hearings, 33 reported using some form of AVL during the process (41%). Twenty-six arbitrations used AVL technology for case management matters. AVL technology was used for 9 procedural or interlocutory hearings and was used for all or part of the main (substantive) hearing in 11 arbitrations (14%). Four of the arbitrations where the main hearing was fully or partly online were 5 days long or more.

The survey period covered included one year (2019) prior to the pandemic and one year during the pandemic (2020). However, we did not ask arbitrators when the hearing or conferences occurred, so it is not possible to say whether AVL technology was used

FIG 17: NUMBER OF ARBITRATIONS LASTING CERTAIN AMOUNT OF HEARING DAYS



because of pandemic-related issues. However, AVL was used in 19 arbitrations where the appointment of the arbitrator occurred in 2020, in 11 arbitrations where the appointment of the arbitrator occurred between July and December 2019 and in only 3 arbitrations where the appointment of the arbitration occurred between January and June 2019. As expected, this would suggest that the use of AVL technology in arbitration has increased because of the pandemic.

<sup>24</sup> In calculating the average number of hearing days, we assumed five days for this arbitration.



## C. AWARDS & RELIEF SOUGHT

### Settlement v Award

Twenty-four arbitrations were reported as having settled in the survey period. This is as against 38 arbitrations that were completed, and 51 arbitrations contemporaneously in progress.

Of the 24 arbitrations that were settled, only 1 was an international arbitration. 13 of the settled arbitrations reported the amounts in dispute and, of these, 8 involved amounts in dispute of between \$350,000 and \$3 million, 4 involved amounts of between \$30,000 and \$350,000, and the remaining 1 involved an amount of less than \$30,000.

Of the 38 completed arbitrations, 5 were international arbitrations. Twenty-five of the completed arbitrations reported the amounts in dispute and, of these, 8 involved amounts in dispute of between \$350,000 and \$3 million, 13 involved amounts of between \$30,000 and \$350,000, 4 involved amounts over \$3 million, and 2 involved amounts of less than \$30,000.

### Relief Sought

We asked the arbitrators to specify the nature of the relief sought in the arbitration. We had 49 responses. Of these arbitrations, 15 involved claims for damages or monetary relief. However, we note that for many arbitrations where the monetary value of the dispute was provided, no relief was specified. It is probable therefore that the number of arbitrations where damages or monetary relief was sought was much higher.

In 26 arbitrations declarations or findings as to legal obligations (including under leases) were sought. Three of the arbitrations where declarations were sought concerned Treaty/Māori issues.

Other relief sought included 1 arbitration for Covid-19 rental relief, 1 arbitration for the modification of an easement and 4 arbitrations where rent reviews were requested. Two arbitrations involved the valuation of property and 1 involved the valuation of shares. Finally, injunctive relief was sought in 4 arbitrations.

## Average Length of Arbitration

In the survey period, 62 arbitrations were reported as having either been settled or completed, leaving 51 arbitrations contemporaneously in progress.

Of the completed arbitrations that included an oral hearing, information regarding the length of the arbitration was provided for 29 cases. By the claimed amounts in dispute, the average time these arbitrations took to complete was:

AMOUNT IN DISPUTE	AVERAGE TIME TO COMPLETE
< \$30,000	N/A
\$30,000 – \$350,000	11 months
\$350,000 – \$3 million	10.7 months
> \$3 million	6.2 months

Breaking this down into domestic and international arbitrations:

AMOUNT IN DISPUTE	AVERAGE TIME TO COMPLETE (DOMESTIC AND INTERNATIONAL)	DOMESTIC	INTERNATIONAL
< \$30,000	N/A	N/A	N/A
\$30,000 – \$350,000	11 months	9.5 months	24 months <sup>25</sup>
\$350,000 – \$3 million	10.7 months	10.4 months	11.5 months
> \$3 million	6.2 months	9 months	0.5 months <sup>26</sup>

We note that the survey period coincided with the beginning of the COVID-19 pandemic. This may have impacted the completion of some arbitrations where hearings were delayed until they could be held in person or until arrangements for a virtual hearing could be made. The timeframes for completion should be viewed in this light. It would be useful to compare data collected from future surveys to see if there is a material difference in the time taken to complete arbitrations which include an oral hearing.

Overall, disposal times for arbitration compare well to the High Court.

In the High Court in 2020, the median waiting time to trial for active general proceedings was 391 days (12.9 months), a decrease of 15 days compared to 406 days in 2019 (13.3 months).<sup>27</sup> As at 30 June 2021 the waiting time was 403 days (13.2 months).<sup>28</sup>

In the 2020 year, the average age at disposal for general proceedings trial adjudication disposals was 735 days (24.2 months) compared to the previous year where the average age at disposal was 765 days (25.1 months).<sup>29</sup>

<sup>25</sup> This was the only international arbitration completed during the survey period that was worth between \$30,000 and \$350,000.

<sup>26</sup> This was the only international arbitration completed during the survey period that was worth over \$3 million.

<sup>27</sup> "Annual statistics for the High Court 31 December 2020" Courts of New Zealand | Ngā Kōti o Aotearoa <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

<sup>28</sup> "High Court – general proceedings – waiting time for scheduled hearings as at 30 June 2021" Courts of New Zealand | Ngā Kōti o Aotearoa <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

<sup>29</sup> Hon Justice Susan Thomas 2020 – *The Year in Review* (25 June 2021) at 15.

# Reflection from Polly Pope: *Access to Justice*

**T**he survey provides valuable data to help inform and spur action to make sure that arbitration fulfils its potential to help address the barriers to access to civil justice that currently exist in Aotearoa New Zealand. The authors should be commended for their important contribution in this regard.

The survey illustrates the speed advantage of arbitration over court proceedings in New Zealand. Especially notable is the fact that domestic arbitrations with over \$3 million in dispute took just 9 months to complete on average. By comparison, the report notes that court data records that the average age for a court proceeding disposed at trial in 2020 was approximately 2 years. This favourable comparison to court proceedings should make all commercial solicitors sit up and take notice, and to recognise the potential access to justice benefits to their clients of including an arbitration clause when drafting contracts.

However, for arbitration to play its part in improving access to justice for all of Aotearoa, there must be arbitrators who reflect our diverse community. The lack of ethnic diversity in arbitrators identified in this report should be a line in the sand. Priority should be placed on identifying mid-career lawyers from diverse backgrounds and with diverse cultural and language competencies and encouraging them into the AMINZ Fellowship programme, and on to institutional panels and lists.

On gender, female arbitrators received a total of just 28 arbitral appointments out of 213 during the survey period, which equates to just 13% of the total arbitrators. Of the 8 appointments of women arbitrators where the method of appointment could be identified, only 1 of those appointments was made by the parties. Given that it is the legal representatives of the parties who generally suggest potential arbitrators to their clients, this survey should help barristers and solicitors recognise that they need to do more to change the status quo and improve gender diversity.

The analysis in the report suggests that institutions are doing better and making the bulk of the relatively small number of appointments of female arbitrators. However, until parties catch up and begin appointing female arbitrators, institutions must be ambitious about gender diversity.

The experience with efforts to improve gender diversity in arbitral appointments internationally shows that it is institutions who can lead change. With this knowledge, institutions in New Zealand should continue to recognise that they will also need to drive improvements in ethnic diversity in arbitral appointments. Initiatives such as AMINZ's Scholarships are a welcome start in this regard.

**Polly Pope, Russell McVeagh**  
FAMINZ (Arb.), FCI(Arb)

## D. COSTS & FEES

### Fee Structure

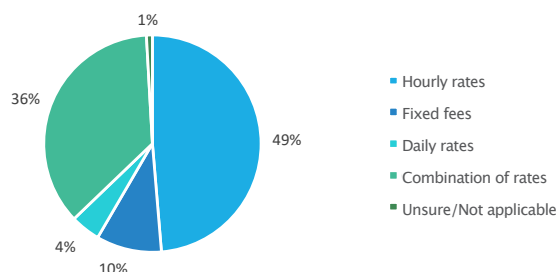
We asked arbitrators how they charged fees in each arbitration. Figure 18 shows that, of the 113 arbitrations reported, 55 arbitrations used hourly rates (49%), 11 used fixed fees (10%), 5 used daily rates (4.4%), and 41 used some combination of these (36%).<sup>30</sup>

Of the 11 fixed fee arbitrations, 8 were international (institutional) arbitrations. The remaining 3 arbitrations were domestic ones. Of the arbitrations using daily rates, all were domestic arbitrations. This was also the case for all except 2 of the arbitrations that used a combination of rates.

It is clear that hourly rates (sometimes together with daily hearing rates) is the usual practice in domestic arbitration. This contrasts with the fixed-fee system used by many overseas arbitral institutions (including the ICC and SIAC). Of the 3 domestic arbitrations where fixed fees were recorded, all concerned property/lease matters, including 2 that were for less than \$30,000.

We also asked arbitrators whether they included a provision for cancellation fees in their terms of appointment. Of the 113 arbitrations reported, 29 allowed for cancellation fees (26%). Three of them were international arbitrations, with the remainder being domestic arbitrations under the Arbitration Act. No cancellation fees were charged, even though 7 of the arbitrations settled.<sup>31</sup> It appears that cancellation fees are not preferred in New Zealand and are seldom enforced, even if they have been agreed. Anecdotally, this accords with a general hesitancy by parties to agree to cancellation fees. It is also not clear from the results whether the cancellation fee clauses applied only where the matter was settled shortly before (or after) the substantive hearing.

FIG 18: PROPORTION OF FEE STRUCTURES USED IN ARBITRATIONS



### Costs Awarded

Forty of the reported arbitrations had been completed in the survey period. Of those 40 arbitrations, costs were awarded in 23 of them. Three of these were international arbitrations and the remaining 21 were domestic arbitrations. Information was not provided for 4 arbitrations and in the remaining arbitrations no costs were awarded. In addition, costs were awarded in 3 settled matters.

We did not request information as to why costs were not awarded in some completed cases, but we infer that the parties most likely settled costs in those cases following receipt of the substantive award.

<sup>30</sup> Only one survey respondent indicated "Unsure/Not Applicable" for "Arbitration Fees".

<sup>31</sup> One response recorded that a cancellation fee had been charged, but then also recorded that the matter was still "in progress". We have therefore not reported the cancellation on the basis that the answer appears to have been an error.

## Average Amount Awarded as Costs

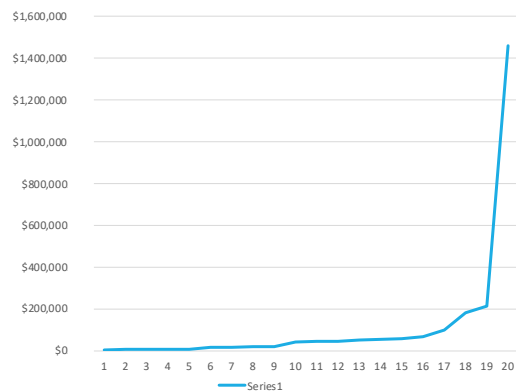
Twenty of the 113 arbitrations reported specified an amount that was awarded as costs (both legal costs and arbitrator fees). These ranged from less than \$5,000 on one end to just under \$1.5 million on the other.

Excluding outlier amounts, the average cost award was around \$52,000 for all arbitrations. The average costs award in a domestic arbitration was around \$44,000.

For those disputes with a value of between \$30,000 and \$350,000 (12 arbitrations), the average costs award was just over \$28,000.<sup>32</sup>

As would be expected, there was a general correlation between the length of an arbitration and the amount of costs awarded, as shown in Figure 19.

**FIG 19: AVERAGE LENGTH OF ARBITRATION VS AVERAGE COSTS**



<sup>32</sup> Some costs were estimated.

# About the Researchers



## ROYDEN HINDLE

LLB (Hons) (Canterbury), LLM (Cambridge), FAMINZ (Arb)

Royden Hindle is an experienced commercial arbitrator, construction adjudicator, and mediator, practising at Bankside Chambers in Auckland.

He is a Past President of AMINZ, and remains as its Director of Professional Studies with responsibility for the delivery of AMINZ's Fellowship Assessment programme.

He is a member of both the Mediation and Arbitration Panels of AMINZ. In August 2021, Royden became an Honorary Life Member of AMINZ.

Royden is also a Principal Arbitrator, Evaluator & Mediator with NZDRC, and is a Resolution Institute-accredited mediator.

From 2002 to 2011 Royden was Chair of the Human Rights Review Tribunal. He is presently serving as a Deputy Chair of the Health Practitioner's Disciplinary Tribunal.

Royden teaches Arbitration at AUT University.



## DR ANNA KIRK

PhD (Cambridge), LLB (Hons)/BA (Waikato), FAMINZ (Arb), FCIArb

Dr Anna Kirk is a barrister, commercial arbitrator and construction adjudicator practising at Bankside Chambers in Auckland and Singapore. She has particular expertise in international arbitration and public international law.

Anna is New Zealand's Member of the ICC Court of International Arbitration. She is a Fellow and Council Member of AMINZ and a Fellow of the Chartered Institute of Arbitrators (London).

Anna regularly acts as arbitrator in international and domestic arbitrations. She has considerable experience in both commercial and investment treaty arbitration, having worked closely with Sir David Williams QC for several years. Prior to joining Bankside Chambers, Anna practised international arbitration in London.

Anna is a member of arbitration panels in New Zealand, Australia, Singapore and Hong Kong. She has been involved in many arbitrations under the ICC, SIAC, LCIA, ICSID and UNCITRAL Rules.

Anna regularly writes and presents on arbitration-related matters. She is a contributing author to Williams & Kawharu on Arbitration, co-lectures an LLM paper on international arbitration at the University of Auckland and holds a PhD in international law from the University of Cambridge.



## DIANA QIU

LLB (Hons)/BA (Auckland)

Diana is a judge's clerk at the New Zealand Court of Appeal | Te Kōti Pira o Aotearoa, and a teaching fellow at the Victoria University of Wellington Law School.

She is the 2022 AMINZ Determinative Scholar and a member of Young AMINZ.

Diana has written a number of papers on arbitration-related topics. Her first article was published in the academic journal of the Chartered Institute of Arbitrators, and included in a General Assembly bibliography of recent writings related to the work of UNCITRAL.

When she was a student, Diana competed successfully in the Willem C Vis International Commercial Arbitration Moot Competition. She has since coached teams for the Vis Moot, and is passionate about demystifying arbitration and making it more accessible to younger and more diverse practitioners.



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