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Innovative solutions for contractors to manage and finance arbitration processes and costs

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Overview

- Current perception of construction arbitration
- Solutions
 - Technology / project management
 - Risk transfer agreements with lawyers
- Third party funding for construction arbitrations



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Queen Mary University & Pinsent Masons 2019 International Arbitration Survey

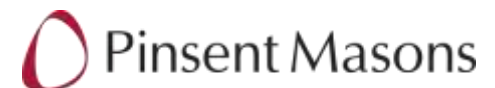
- Survey considers how international construction disputes can be resolved more **efficiently** whilst maintaining **fairness** and **access to justice**
- Global survey - energy and infrastructure sectors
- Respondents - international disputes in last 5 years
- Report published 21 November 2019



<https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>



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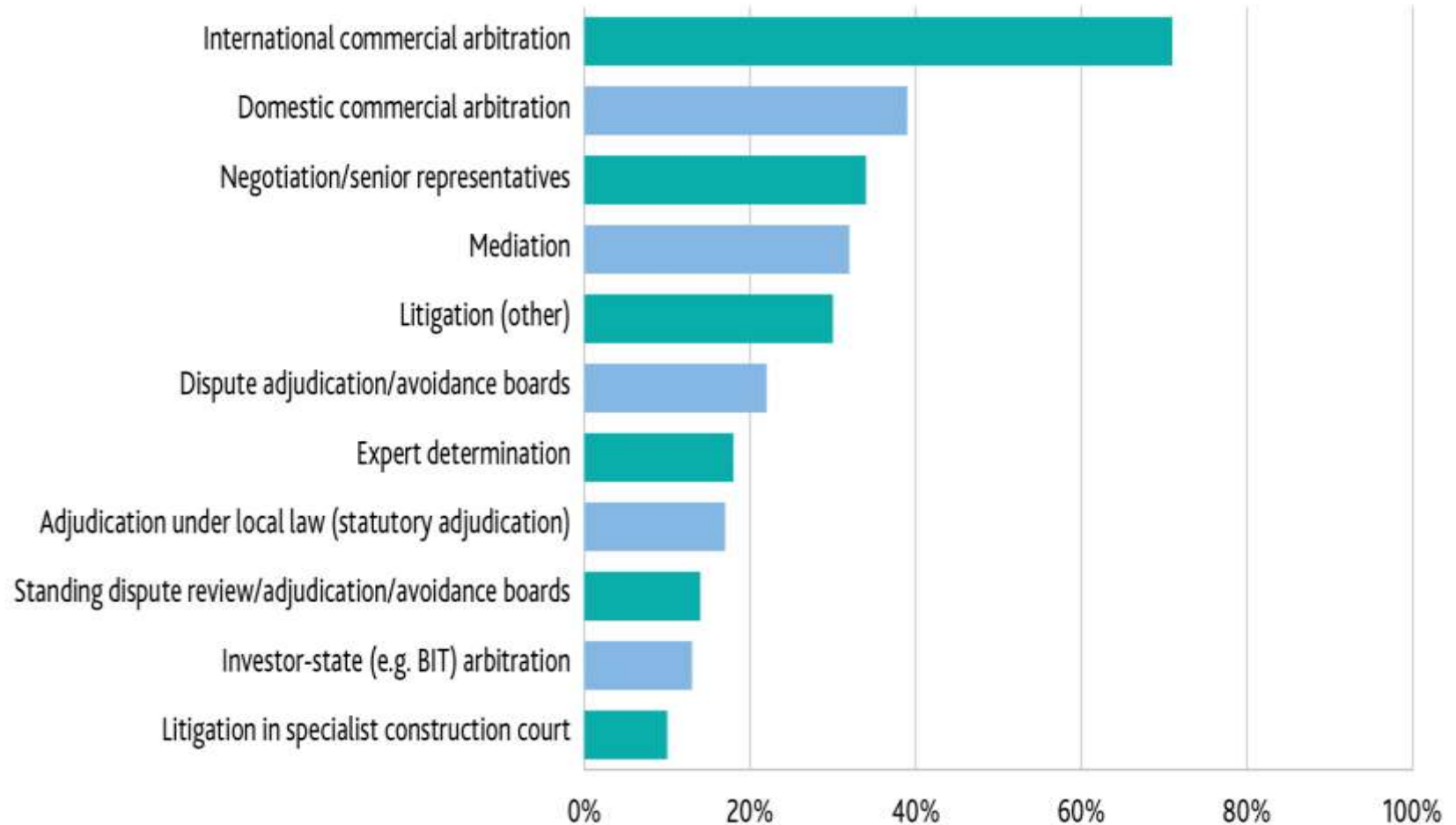
Key Features - International Construction Disputes

- 5 defining features
 - Factually and technically complex (73%)
 - Large amounts of evidence (66%)
 - Multiple claims and/or parties (49%)
 - Large sums in dispute (41%)
 - Range of related issues (31%)
- Contributing factors to inefficiencies



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Context - Dispute Resolution Processes



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Key features - When is International Arbitration Commercially Viable?

- Current arbitral processes seen as a barrier to fair resolution of lower value disputes
 - Commercially viable **US\$ 1-10 million?**
 - In-house counsel view **US\$ 11-25 million**
- If international arbitration wants to serve the construction industry for lower value disputes, it requires
 - More efficiency (cost and time)
 - Greater flexibility




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There is a need for change

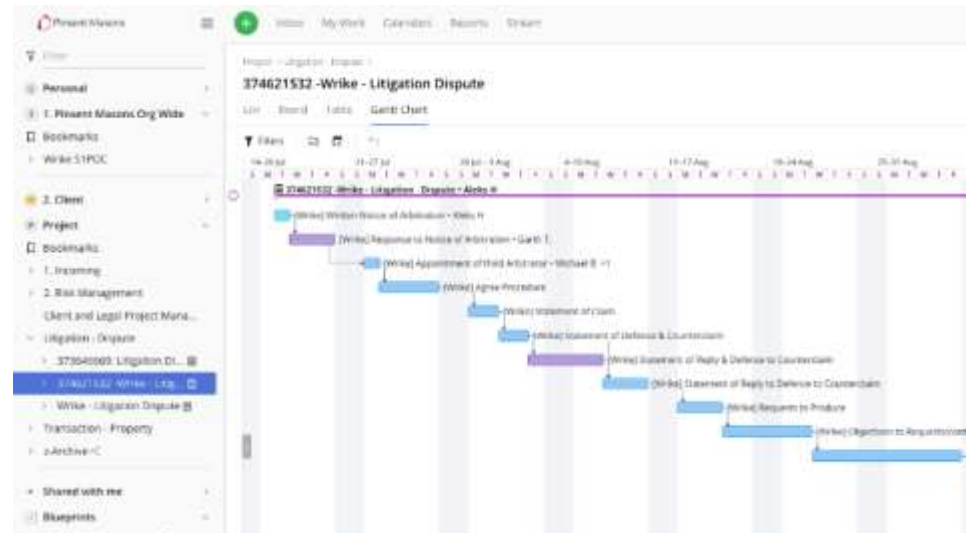


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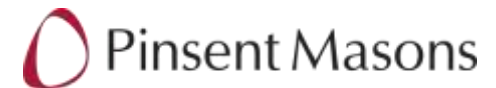
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Solutions – technology/project management

- Document management platforms
- Automation
- Project management



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Funding options

- Various ways of funding disputes:-
 - Arbitration risk transfer agreements with lawyers
 - Legal expenses insurance
 - Third party funding



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Risk transfer agreements with lawyers

- Fixed price arbitration / target fees - for low value disputes
 - Depends on complexity of dispute etc
 - Requires due diligence – early case analysis
- Response from survey:
 - 25% thought it would lead to a significant increase in efficiency and 19% to a minor increase.
 - 44% considered fixed fees would be positive for efficiency.
 - 22% considered that fixed fees would not affect efficiency.
 - 21% undecided.
 - 13% thought that fixed fees would decrease efficiency



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Risk transfer agreements with lawyers

- Share in risk with fees contingent on successful outcome
- Response from survey:-
 - 42% thought contingency fees would increase efficiency.
 - 25% were undecided.
 - 22% considered contingency fees to have no impact.
 - 11% considered contingency fees would decrease efficiency
- Conditional fee agreement / Damage Based Agreements – depends on jurisdiction



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Legal expenses insurance

- After the event legal expenses insurance
 - Generally cover liability for adverse costs (eg protects against opponent's costs)
 - Can cover own legal fees – though substantial premium
- Before the event legal expenses insurance



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Legal expenses Insurance

❖ Where is it available?

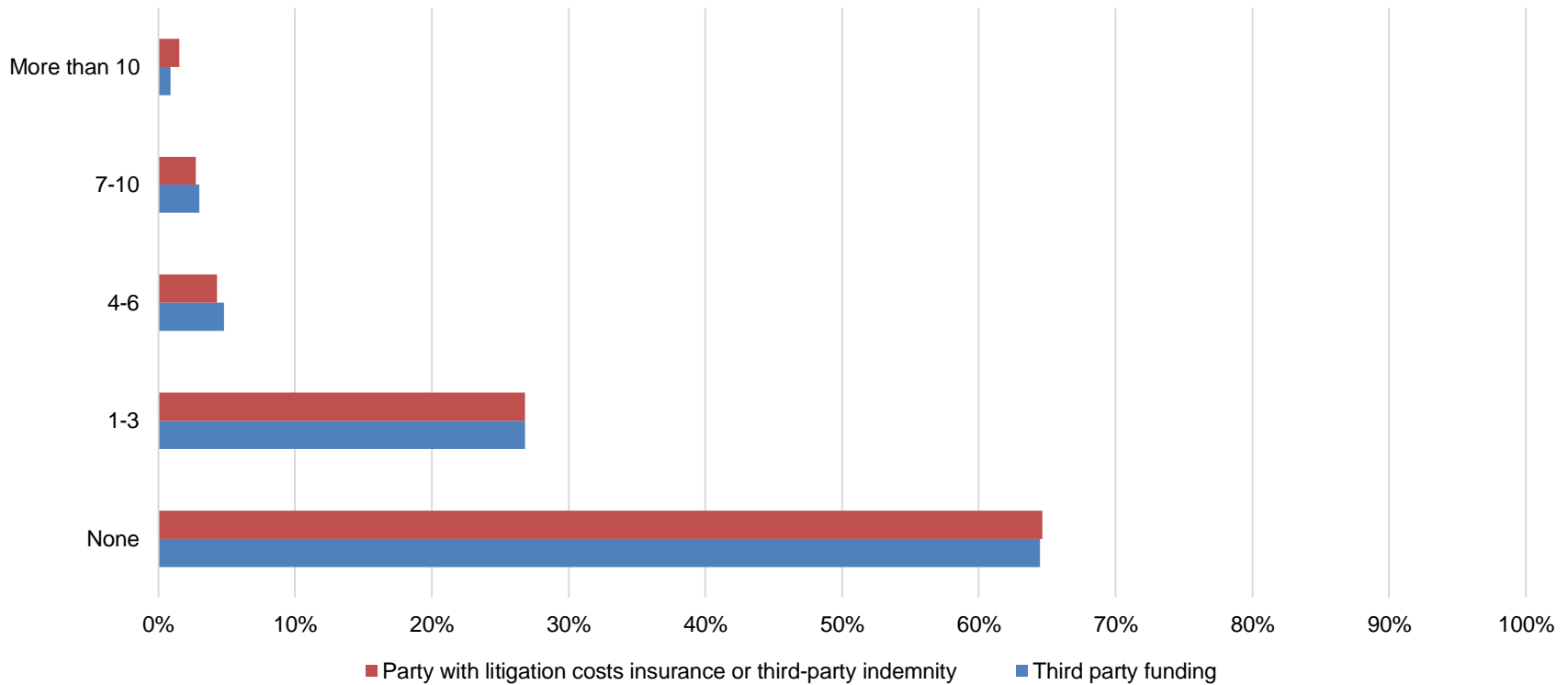
- France
- Germany
- The Netherlands
- Canada
- Japan
- Sweden
- South Africa
- England and Wales
- Scotland
- Australia
- Argentina
- China
- New Zealand
- The Republic of Korea
- Many others to a greater or lesser extent.



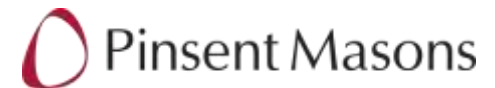
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Third party funding

In the last five years, how many international construction arbitrations of which you are aware have had third party funding or insurance?



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Thank you



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