

The background features large, semi-transparent orange numbers '2021' overlaid on a dark grey gradient. Behind the numbers are faint, light-colored silhouettes of construction cranes and structural steel frameworks. The overall color palette is dominated by orange and grey.

CONSTRUCTION
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Improving Efficiency in Construction Disputes post COVID

An In-Depth View of the November 2019 Queen Mary University London (QMUL) / Pinsent Masons (PM) International Arbitration Survey and COVID's Impact on Arbitration

S25 :Wednesday, December 8, 8:30 a.m. - 9:45 a.m.

Moderator:

- **Jason Hambury**
 - Co-Head International Arbitration, Pinsent Masons

Panelists:

- **Jenn Shafer**
 - Associate V.P. of Dispute Resolution, Black & Veatch
- **Scott Hollingsworth**
 - Partner, HKA
- **Steve Stallings**
 - Former Sr. Director Litigation and Disputes, McDermott, Int'l. (Retired)
- **Gurmukh Riyat**
 - Partner, Pinsent Masons
- **Logan Hollobaugh**
 - Senior Legal Counsel, Clough North America

The 2019 Queen Mary University London (QMUL) / Pinsent Masons (PM) International Arbitration Survey

1. Efficiency in international construction arbitration was the survey's principal focus. The survey authors sought to identify whether efficiency (primarily time and cost concerns) was a prominent concern among respondents and how concerns of efficiency created incentives for and against the use of international arbitration in the construction sector.
2. International arbitration is preferred dispute resolution mechanism (67%)
 - a) Why not higher?

QMUL / Pinsent Masons Survey

- 1. Overview of the 2019 International Arbitration Survey**
 - a) 646 Participants
 - b) 52 Questions
 - c) 66 Interviews

- 2. Predominantly Europe (33%) and Middle East (26%)**

- 3. Split of Legal Systems:**
 - a) Civil Law (42%)
 - b) Common Law (40%)
 - c) Mixed (18%)

Industry Changes since QMUL Survey

1. Global impact of Covid 19 on the construction sector:

- a) Supply chain disruption, cash flow problems

2. Impact of Covid 19 on causes of dispute:

- a) Force majeure, termination, suspension, more extreme behaviors; indication from counsel as to types of inquiries that have come through as a result of the pandemic and anticipating future types of disputes that are likely to arise

3. Potential for increase of:

- a) Treaty claims to arise in construction / infrastructure space as a result of state measures taken in the context of managing the pandemic and climate change mitigation
- b) Change in Law claims as a result of state measures

Inefficiency in Arbitration

1. What makes arbitrations inefficient?

- a) Poor case management
- b) Party tactics
- c) 'Due process paranoia'
- d) Adopting US discovery rules/unlimited discovery
- e) Motion practice
- f) Lack of page limits on Statements
- g) Bringing litigation mentality to arbitration

2. 2020 AAA Survey of Arbitrators – what increased costs/time?

- a) Discovery
- b) Motion Practice
- c) Difficult or uncooperative party(ies)

Overview

1. Arbitration Post-COVID
2. Management by Clients/Users
3. Procedural Issues
4. Arbitrator Selection
5. Selection of Counsel
6. Selection of Experts
7. Use of Technology

Arbitration – Post COVID

What does the future of arbitration look like post COVID?

The Users' view:

1. Shifts in attitude (particularly regarding technology) since time of the QMUL Survey
2. Less due process concerns
 - Largely around remote hearings but also other implications (bifurcation by stealth, evidence gathering – if witnesses cannot be proofed in person...)

The Institutions' view:

1. How the major arbitral institutions have responded
 - Comparative review of US (ICDR-AAA) and ICC, LCIA, SIAC
2. Institutional guides for virtual hearings (ICDR-AAA, ICC); SIAC open letter

The Arbitrators' view:

1. Impetus towards tighter procedure, more efficiency, approach to volume and use of documents (e.g. Prague Rules)?

Arbitration – Post COVID

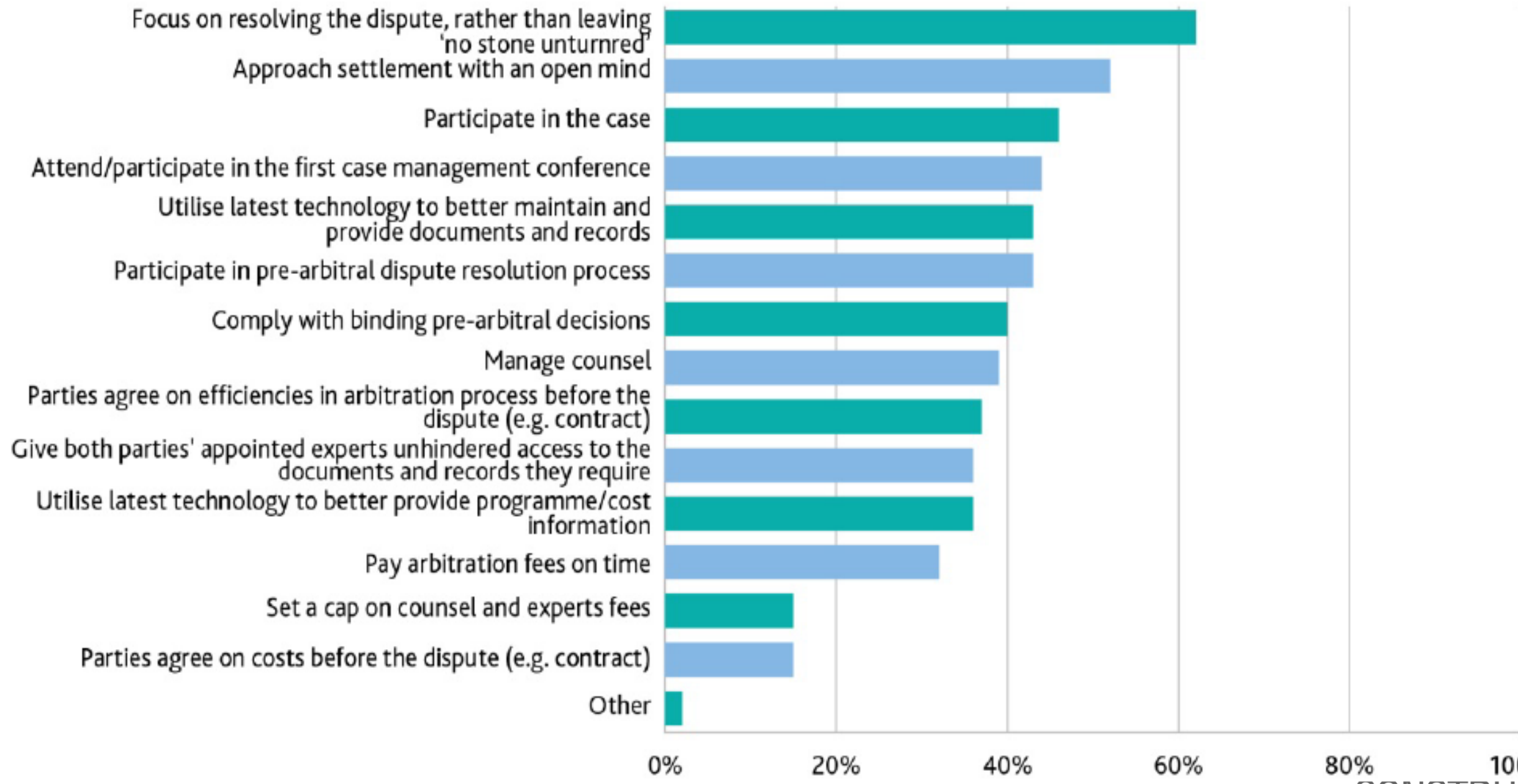
1. Will arbitrations be more efficient going forward?

2. Broader use of remote hearings?

- a) Where attendance in person is not essential
- b) Fully remote
- c) Disparate legal / client teams and Tribunals
- d) Communications between advocates and teams
- e) Cross-examination / witness credibility
- f) Complexity of evidence
- g) Time differences
- h) Translation
- i) Equality of technological facilities

3. Do remote hearings diminish the possibility of settlements being reached?

How Can Clients/Users Help Increase The Efficiency of an International Construction Arbitration?



Management by Clients / Users

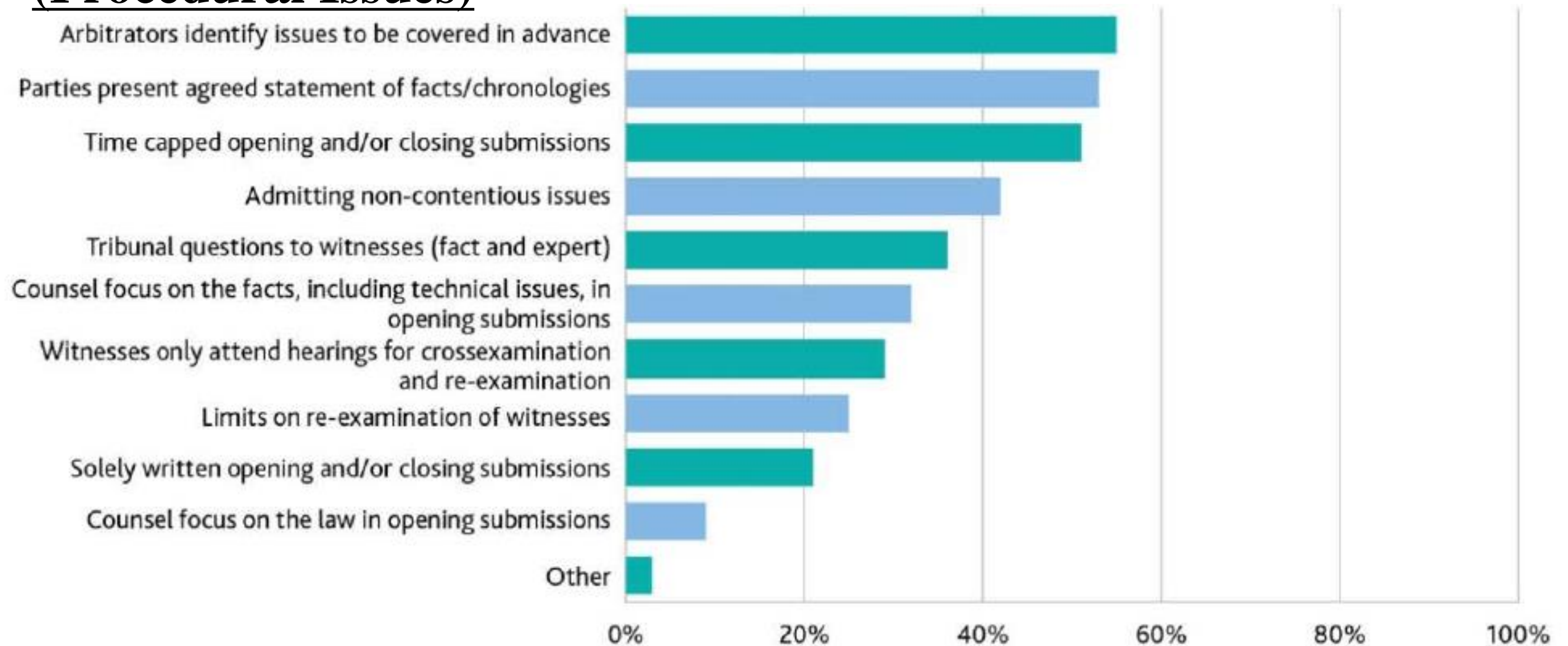
1. How can clients/users better drive efficiency?

- a) Participation
 - i. Attend preliminary case management conference
 - ii. Push external counsel to set limits/think about case early
- b) Set budgets
- c) Understand and be critical of time extension requests

2. What are challenges to client management?

- a) Opposing side
- b) Panel
- c) Uneducated and inexperienced clients

What Would Improve Efficiency of Hearings and Submissions? (Procedural Issues)



Procedural Issues

1. Arbitrator Identification of Issues or Agreed Issues

- a) How often do arbitrators identify issues early?
 - More likely in International context?
 - Domestic
- b) Should parties request this?

2. Agreed Facts

- a) How often do you see agreement on statement of facts?
- b) Should arbitrators require this?
- c) Should the Rules require this?

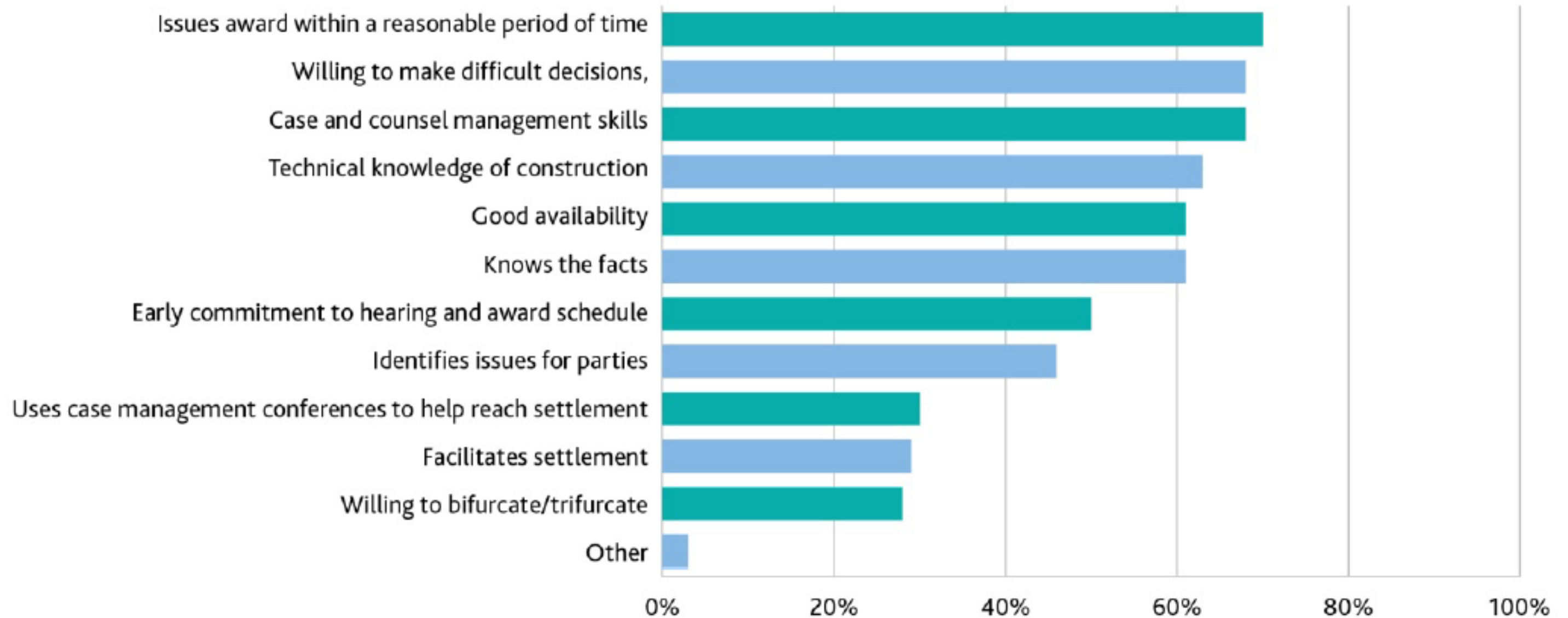
3. Use of time-caps

- a) How often?
- b) Does it make it more efficient?

4. Detailed Provision in Contract

5. Inclusion of Experts in Strategy/Procedural Discussions

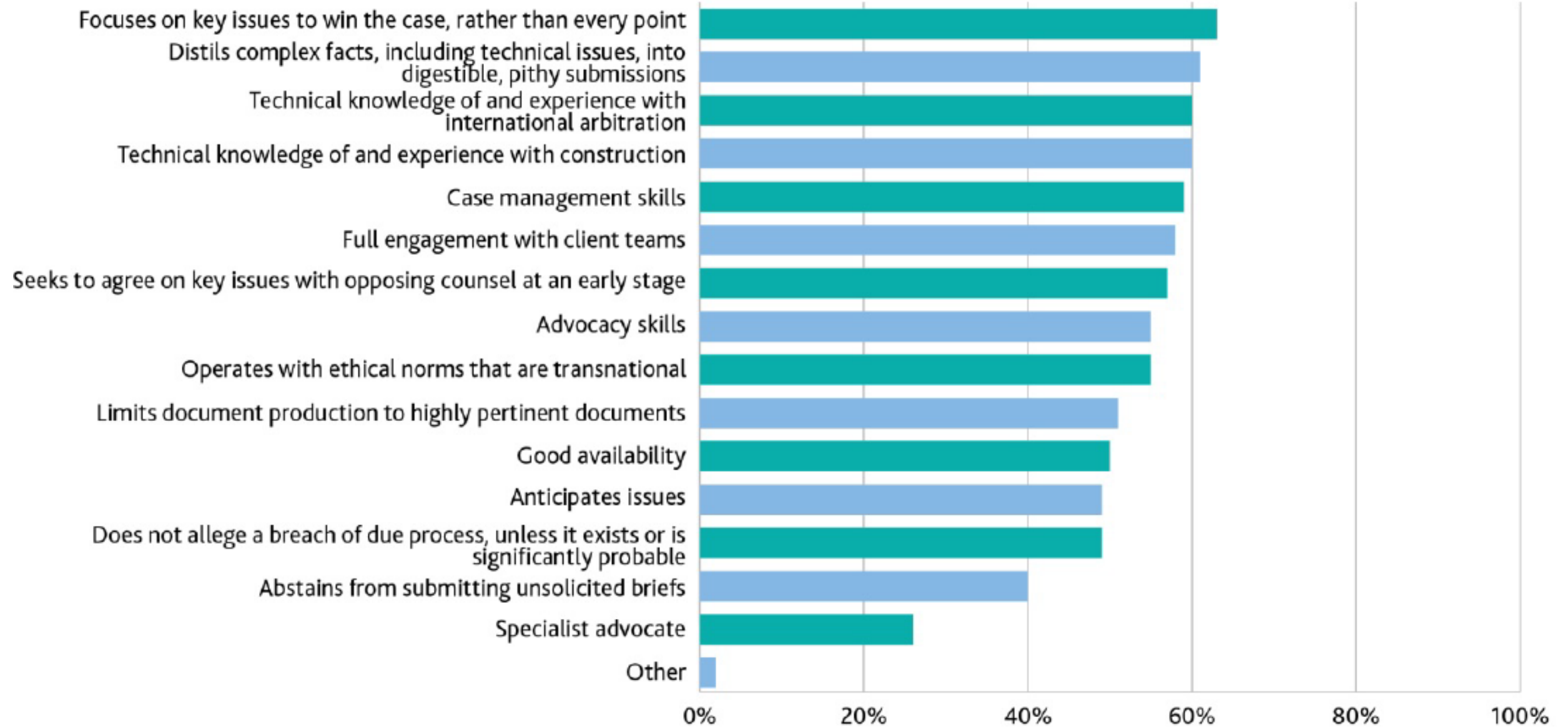
What Are or Should Be The Characteristics of an Efficient Arbitrator? (Arbitrator Selection)



Arbitrator Selection

- 1. How important is arbitrator selection?**
- 2. Key issues / factors on selection?**
 - a) International
 - b) Domestic
- 3. Preference on sole arbitrator vs. panel?**
- 4. Experience/knowledge of potential arbitrators?**
 - a) Closely connected to Counsel (discussed later)
- 5. Expert input on arbitrator selection?**

What Are or Should Be The Characteristics of an Efficient Counsel? (Selection of External Counsel)



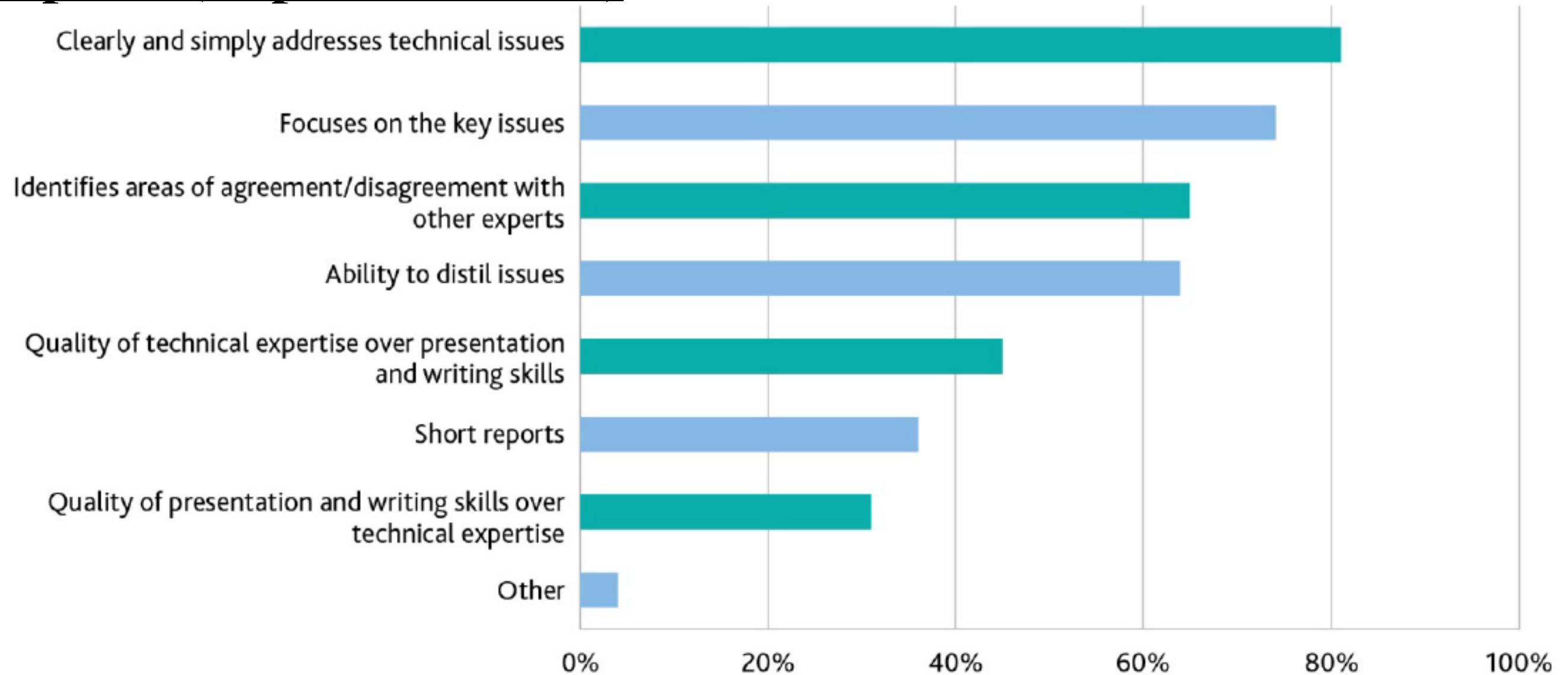
Selection of External Counsel

1. What factors are most important to in-house panelists in selecting external counsel for arbitration?

- a) Experience with arbitration
- b) Technical construction knowledge
- c) Style
- d) Case Management Skills

2. Notice what's missing from the list?

What Are or Should Be The Characteristics of an Efficient Expert? (Expert Selection)



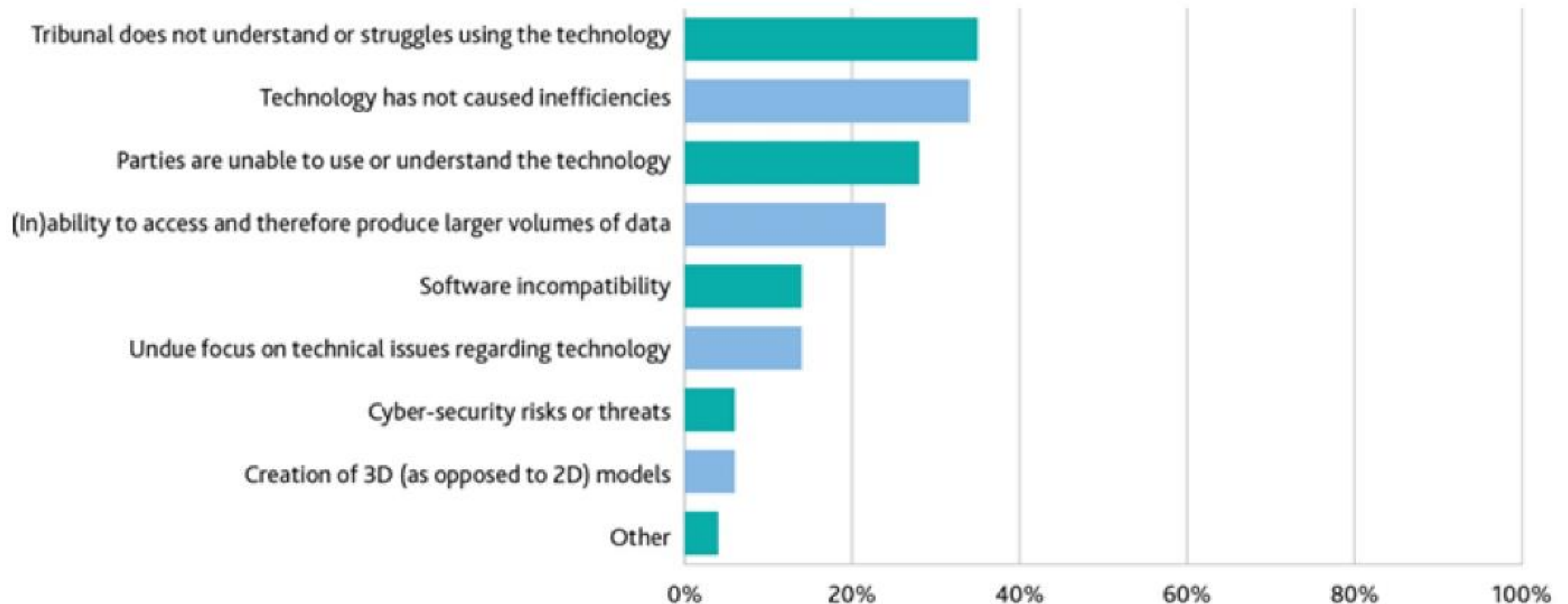
Selection of Experts

- 1. What are most important factors in engaging experts for arbitration?**
 - a) Experience with international arbitration
 - b) Experience with hot-tubbing
 - c) Technical Expertise

- 2. Timing of expert selection?**

- 3. How can experts improve efficiency?**

Do Inefficiencies Occur Because of the Following Technology-Related Issues? (Use of Technology)



Use of Technology

1. How can technology improve efficiency?

- a) Reduce travel costs
- b) Increase witness availability
- c) Save costs on document collection, review, production
- d) Assist arbitrators with award
- e) Streamline hearing/briefing/witness statements

Final Thoughts

- 1. COVID will continue to impact arbitration in a variety of ways**
- 2. Avoid bringing “litigation” mentality to arbitration**
- 3. Selection of Counsel, Arbitrator(s) and Experts are critical**
- 4. Be mindful of differences between:**
 - a) International and Domestic Arbitrations
 - b) Civil vs. Common Law Jurisdictions
- 5. Increased efficiency does not mean sacrificing due process or fairness**



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