

Research on Written Witness Statements
When and how it is used

CHARTERED INSTITUTE OF ARBITRATORS – CIARB BRAZIL BRANCH

RESEARCH ON WRITTEN WITNESS STATEMENTS FROM FACT WITNESSES

REPORT TO CIARB HEADQUARTERS

MAY 2025

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1. OBJECTIVES AND METHODOLOGY

Throughout 2024, the Chartered Institute of Arbitrators – CIArb Brazil Branch carried out a research project dedicated to studying the use of written witness testimony from fact witnesses. The project sought to better understand this procedural tool, particularly considering that Brazil has been increasingly adopting it over the last years.

The project was carried out both through meetings and online surveys aimed at identifying and discussing when and how written statements are used in domestic and international arbitration.

CIArb Brazil Branch organized a total of 4 meetings, each focusing on different sub-topics. There was an average number of 35 participants per meeting. Official reports were prepared for each meeting, keeping the contributors anonymous to promote an open debate. The results of those meetings are summarized below.

A final seminar was held on 16 October 2024, in which some early findings were discussed, with perspectives from Brazil, Portugal, Germany and the United States.

Separately, CIArb Brazil Branch carried out an online anonymous survey. First, a preliminary form was sent in July 2024 anticipating the topics to be covered by the main survey, asking the public to submit any other topics that might be considered relevant. This preliminary assessment also aimed at identifying existing established practices relating to the topic.

After considering these preliminary results, CIArb Brazil Branch prepared the questions for the main survey. The form had a total of 77 questions, 55 of them aimed at assessing how and when written witness statements were being used. The other 12 questions aimed at identifying the respondents' legal experience and whether further guidelines on this topic were welcomed.

The main research was carried out between August and October 2024, having been distributed to the CIArb Branches around the world and to individuals in jurisdictions from every continent. CIArb HQ also publicized the research on its August 2024 eSolver.

The result of the online research is available in full as **Annexes 1 and 3** to this report. Some considerations regarding these results are made below.

The cooperation of the Young Members Group was invaluable in conducting the online survey, having contributed to its international reach (by inviting individuals in different jurisdictions) and to the assessment of its results (by helping to filter the

data, compare results from common and civil law respondents, and prepare this report). In particular, we would like to express our gratitude to Beatriz Estill, Julia Menta, Mateus Barbosa and Sophia Pellegrini.

2. MEETINGS RESULTS

CIArb Brazil Branch held 4 meetings in 2024 to discuss written witness statements, each with a different focus:

- Meeting 1: Preliminary survey of the main issues related to the use of written statements.
- Meeting 2: Comparative analysis of its use in Brazil and other American countries.
- Meeting 3: Procedural hurdles and the relationship between testimony and the hearing.
- Meeting 4: Interaction between written statements, documentary and expert evidence.

Reports of the meetings were prepared in the language they were carried out and were made publicly available online (Portuguese for meetings [1](#), [3](#) and [4](#), English

for meeting [2](#)). We thank our Official *Rapporteurs*, Joana Egito, Julia Menta and Sophia Pelegrini.

While CIArb Brazil Branch briefly summarizes the meetings below, it invites full consideration of the reports when assessing further improvements to the use of witness statements. The discussions were quite engaging and raised several issues that may be relevant in future initiatives regarding this topic.

a. *Determination of the use of written witness statements*

Participants discussed the power of the parties and the arbitrators to determine the use of written witness statements. Some believed the parties must determine the use of this tool, ideally at the beginning of the proceedings. Others believed it could also be determined by arbitrators, according to their procedural powers and ensuring further flexibility.

A repeated theme of the meetings were the advantages and disadvantages of written witness statements, there being a clear preponderance of those favorable to its use.

b. *Preparation of the witness statement*

There were also discussions regarding the risks and advantages of counsel being actively involved in the preparation of witness statements. On the one hand, some participants held that this was crucial to avoid surprises and ensure that witnesses present clear and coherent testimony. It was also stated that, absent abuse, no general ethical considerations barred this interaction (though there may be relevant mandatory ethical rules applicable in some circumstances). On the other hand, some feared that it could lead to manipulation or undue influence of witnesses, compromising the truthfulness or credibility of the testimony and the integrity of the proceedings.

c. *How the witness statement interacts with documentary and expert evidence*

The meetings also discussed whether the use of witness statements also require affording parties the possibility of requesting the production of documents. Some said there is an inherent need for document production, which is essential for contextualizing and validating the testimony, enabling more effective cross-examination. Others understood it to be an unnecessary step and, sometimes, a delaying tactic, advocating for a leaner process focused on testimonial evidence.

d. *Impact of the witness statement at the hearing*

A major topic of discussion was the interaction between witness statements and the hearing, particularly the impact on direct and cross-examination.

Most participants agreed that, although the witness statement may be seen as a substitute to direct examination (avoiding surprises and allowing for more efficiency), a brief direct examination should still be allowed. In any event, there seemed to be a consensus that the testimony should adhere to the written statement to maintain credibility.

Some argued that cross-examination should be limited to the content of the written testimony to avoid deviations and maintain focus. Others believed that cross-examination should be allowed to cover documents that are in the record but not mentioned in the testimony, as long as they are relevant to the credibility of the witness. Excessive inflexibility could compromise the search for truth.

While some of the meetings had international practitioners, including from countries other than Brazil, most of the participants were Brazilian practitioners. Thus, the views summarized above likely reflect a Brazilian perspective. However, they indicate that there is still room for improvement in the understanding and use of written witness statements in many jurisdictions and possibly in international practice. We will come back to this at the conclusion.

3. ONLINE RESEARCH RESULTS

Although the results of the online research may be seen in full in **Annexes 1** and **3** of this report, CIArb Brazil Branch provides a few brief considerations below.

First, the survey was filled by 58 respondents, coming from several countries, continents and legal traditions. Most had more than 20 years of legal experience (56%) and had acted in more than 20 arbitral proceedings (65%).

Second, despite the clear contributions of existing guidelines to the use of written witness statements, there are many topics of which the prevailing practice is still unclear. For instance, there was considerable variation in the answers regarding (i) the use of written statements without prior determination; (ii) the possibility of the arbitrator to draw adverse inferences; (iii) the involvement of counsel in the preparation of drafts; (iv) the method for submitting evidence in support of the witness statement; (v) the powers and duties of counsel and arbitrators regarding incorrect, confidential or privileged information brought by a witness; (vi) the power of arbitrators to strike out witness statements deemed irrelevant; (vii) the power of the arbitrator to deny examination of a witness who submitted a written statement; (viii) the impact of written witness statements on direct examination; and (ix) the consequences to the written statement if a witness fails to appear to a hearing.

Third, there is considerable demand for guidelines specifically addressing the use of written statements from fact witnesses. Over 58% of respondents deemed it very useful and other 29% somewhat useful, amounting to nearly 90% of respondents.

Fourth, although 41,4% of respondents answered “No” when asked whether a single set of guidelines could apply effectively to different legal traditions, the results of our research showed little variation between answers from respondents identified with civil and common law traditions.

In order to properly analyze this point, the data set was segregated as shown in **Annex 2**. The only issues where a substantial difference exist between the two groups relate to (i) the admissibility of witness statements submitted without prior agreement regarding its use; (ii) the moment up until which witness statements may be amended; (iii) the need to specify in the witness statement that it was prepared with the support of the submitting party’s counsel; (iv) the need for the translations of witness statements to be certified; (v) the level of discretion given to arbitrators when assessing the consequences to the written statement if a witness fails to appear; and (vi) the possibility to hear witnesses that did not submit witness statements.

Given the full universe of substantial questions (55), differences in only 6 indicate that a single set of guidelines may be feasible if some leeway is kept to accommodate the parties' and arbitrators' personal preferences.

4. CONCLUSIONS AND SUGGESTION

Following the results of this project, CIArb Brazil Branch understands that there is a demand and an opportunity for CIArb to develop guidelines focused on the use of written statements from fact witnesses in international arbitration.

Although the IBA Rules on the Taking of Evidence, the IBA Guidelines on Party Representation and, to a lesser extent, the Prague Rules have provisions that address the use of written statements, they are broad in scope and, thus, do not address more specific and practical issues relating to this matter. CIArb could build on the solid practices already established by those texts by enhancing efficiency and predictability.

From its part, CIArb Brazil Branch will continue to contribute to the public debate of this issue through educational efforts. In particular, it currently plans to constitute a working group to devise best practices for arbitration agreements, terms of reference and procedural orders that may guarantee the proper use of this tool in the Brazilian legal system.

Coordination team



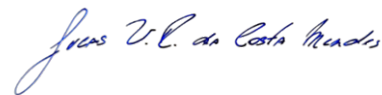
Cristina Mastrobuono

President



Lucila Carvalho

Director of Communications



Lucas V. R. da Costa Mendes

Director of Education



Pedro Martini

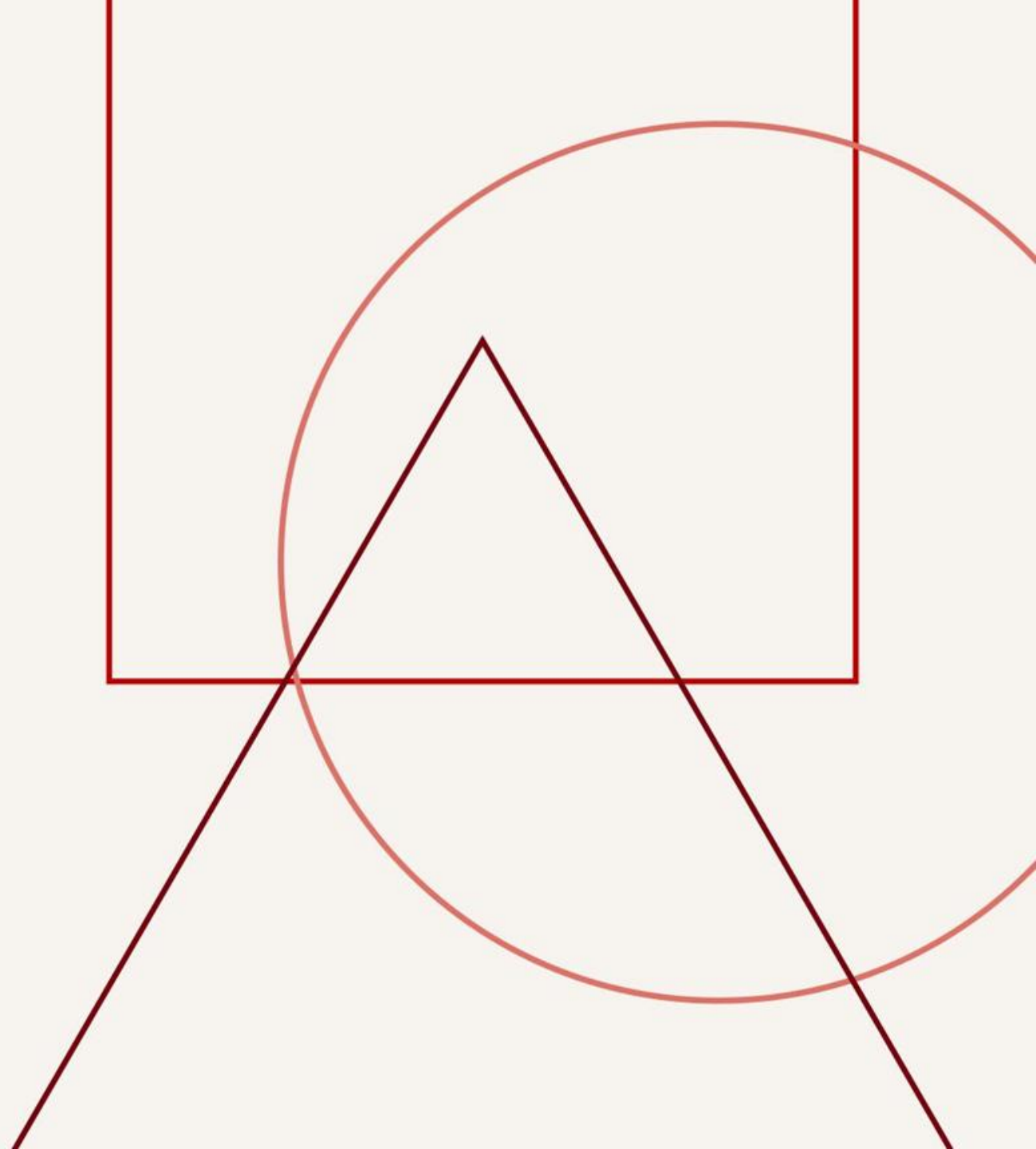
Vice Communications



Bernard Potsch

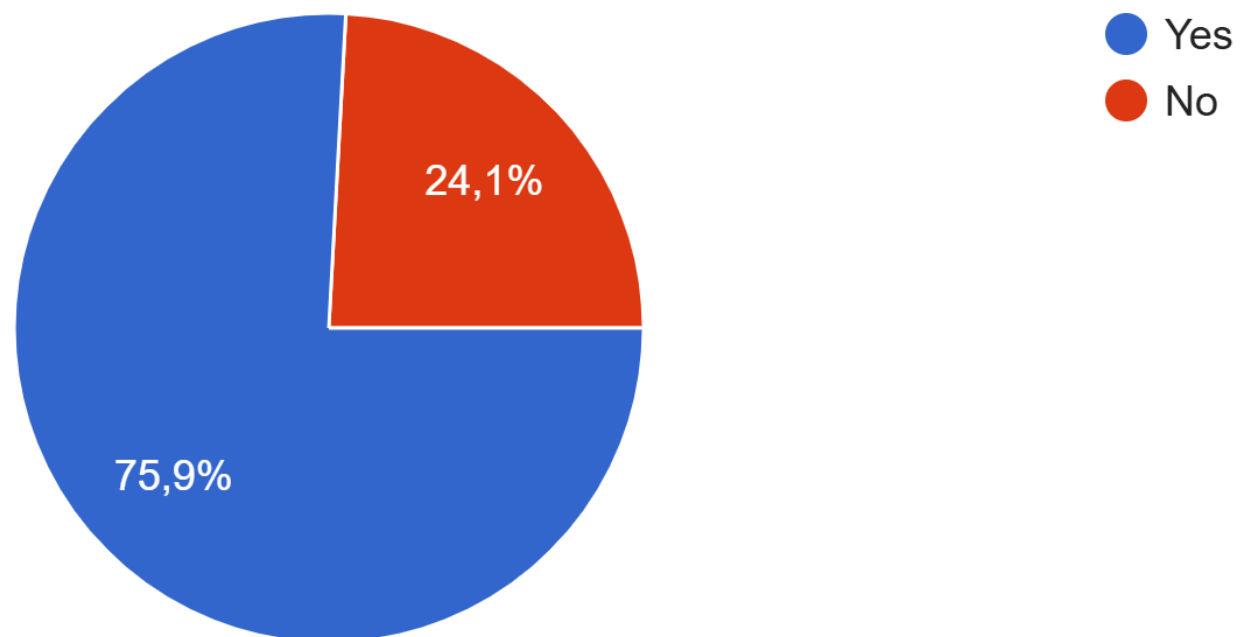
Vice Education

Annex 1:
Research answers
(graphical representation)



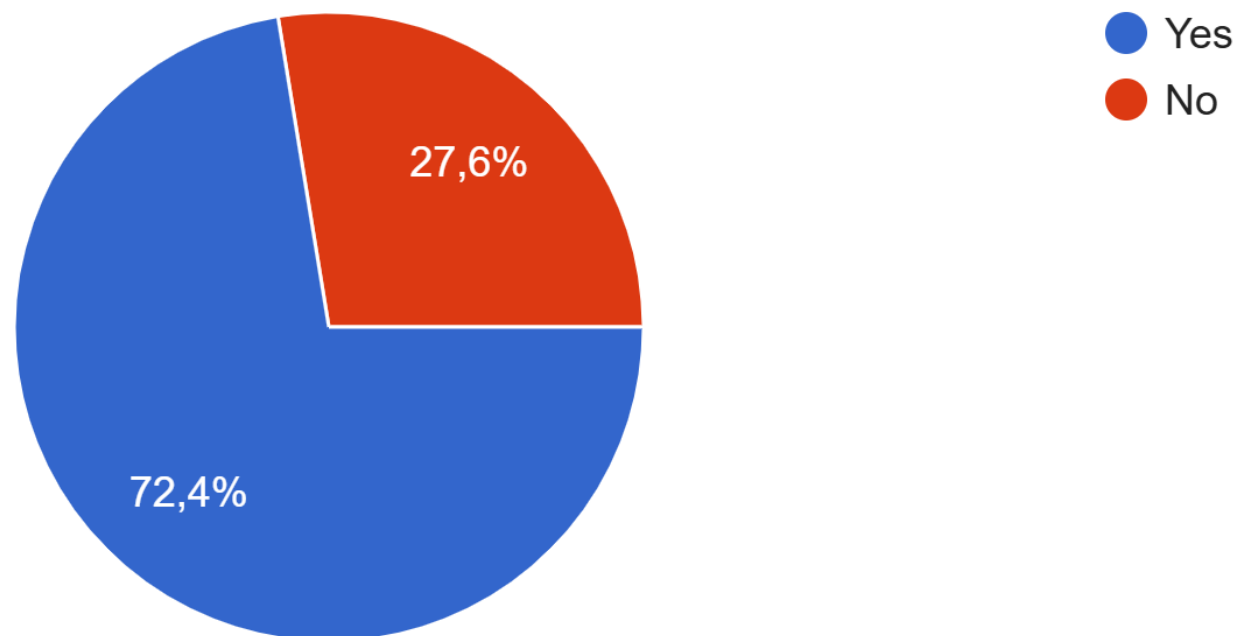
Absent the parties' agreement, does the arbitrator have the power to determine the use of written witness statements?

58 respostas



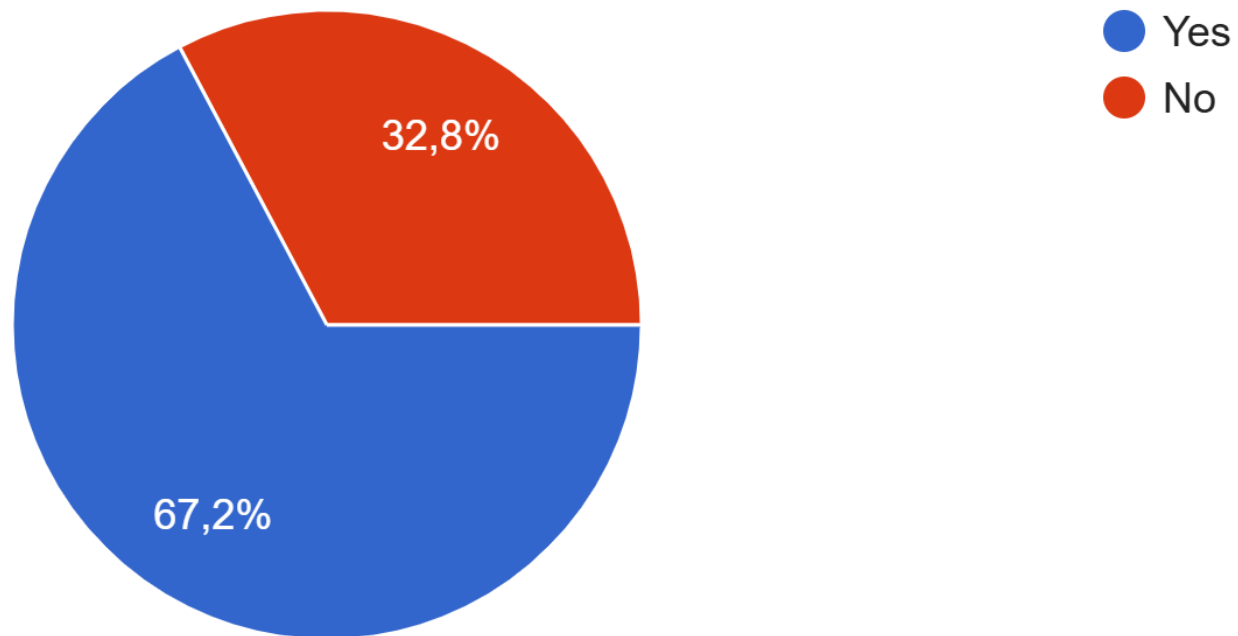
Is an agreement between the parties to use or not to use written witness statements binding to the arbitrator?

58 respostas



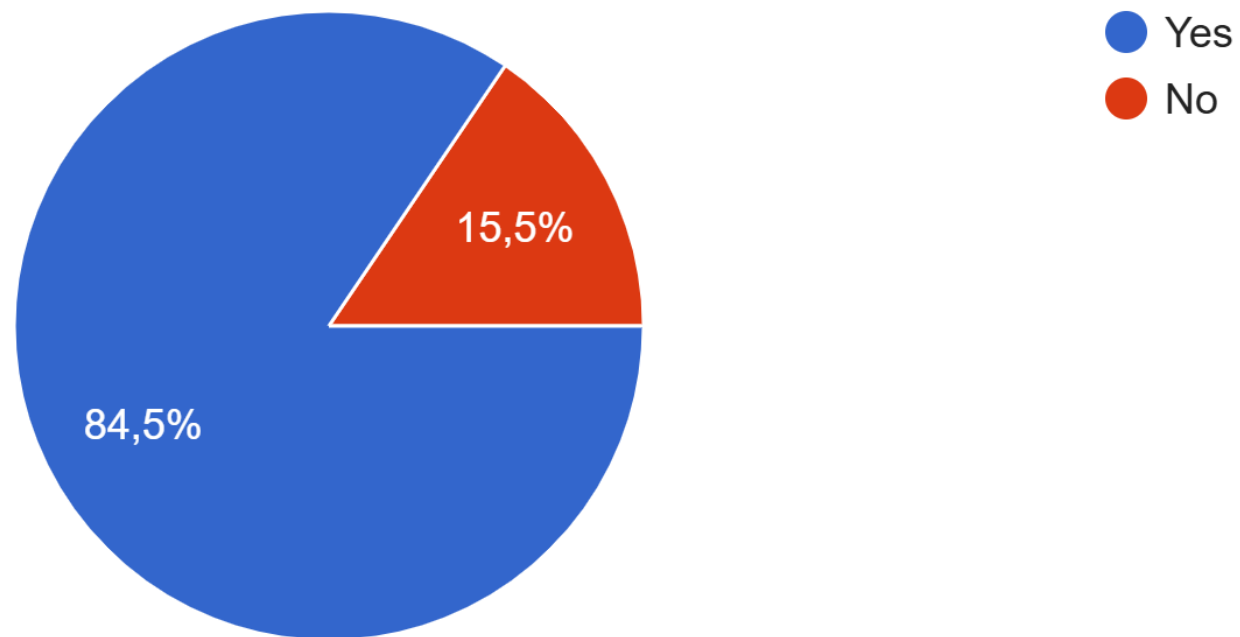
Are written witness statements submitted by one party without prior agreement of the opposing party or determination by the arbitrator admissible?

58 respostas



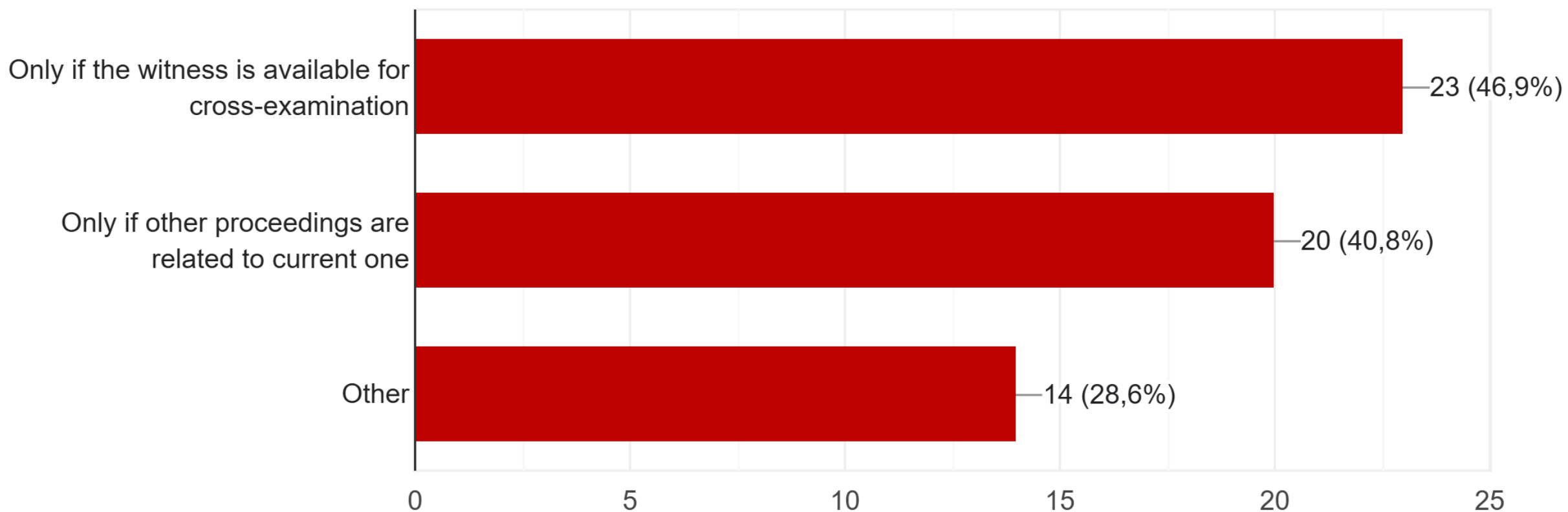
May a party submit as evidence written witness statements produced in other proceedings?

58 respostas



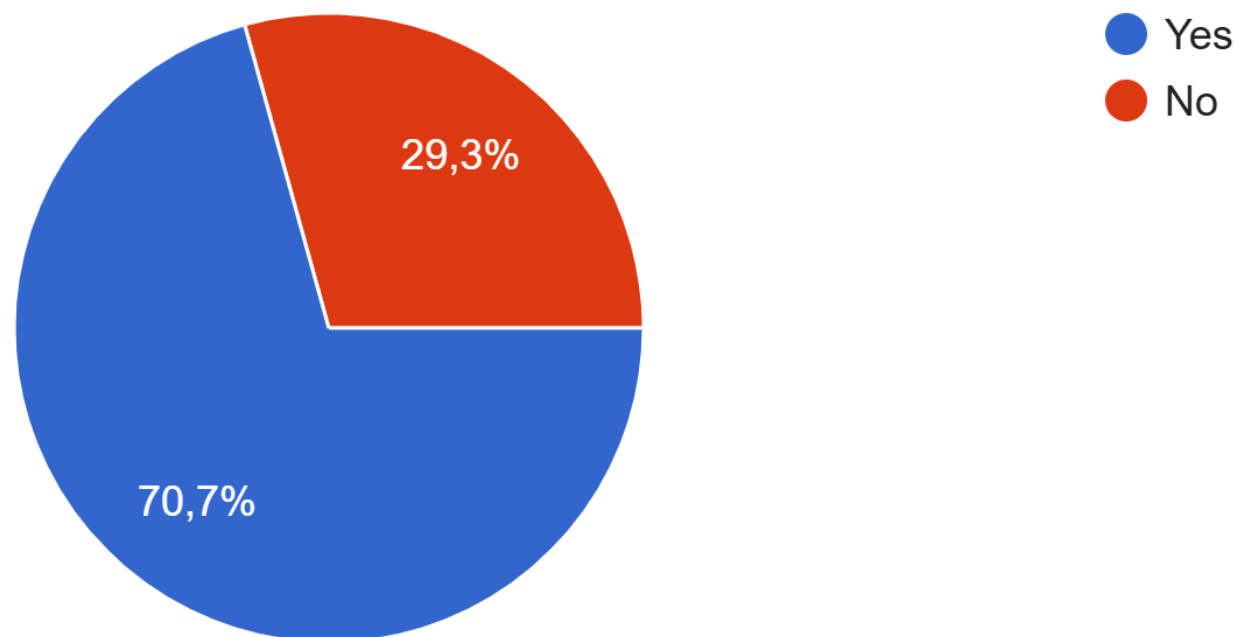
If “Yes”, under which circumstances?

49 respostas



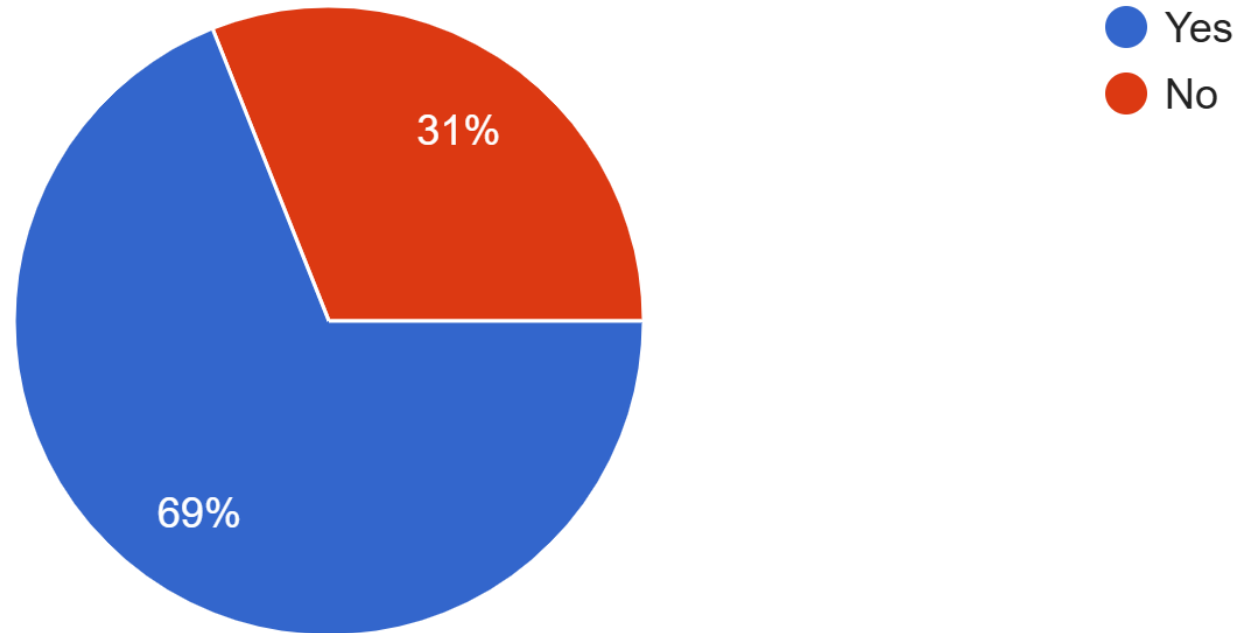
May a party ask the arbitrator to order the opposing party to produce a written statement for a person under its control (e.g., an officer or employee)?

58 respostas



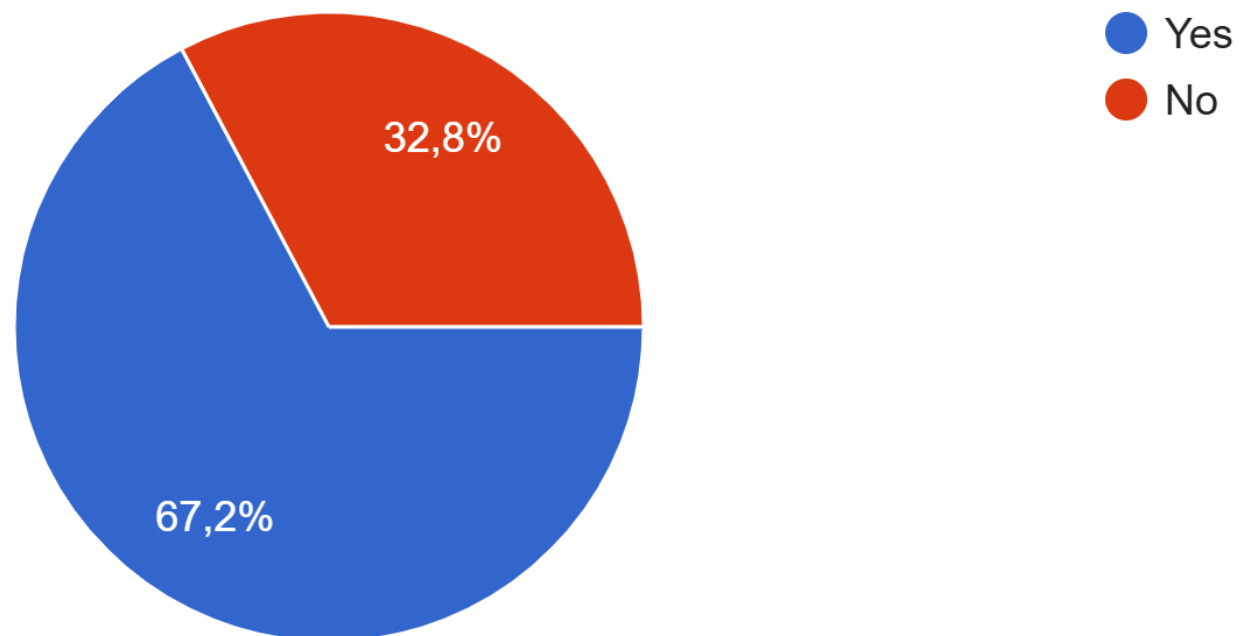
May the arbitrator ask sua sponte a party to produce a written statement for a person under its control (e.g., an officer or employee)?

58 respostas



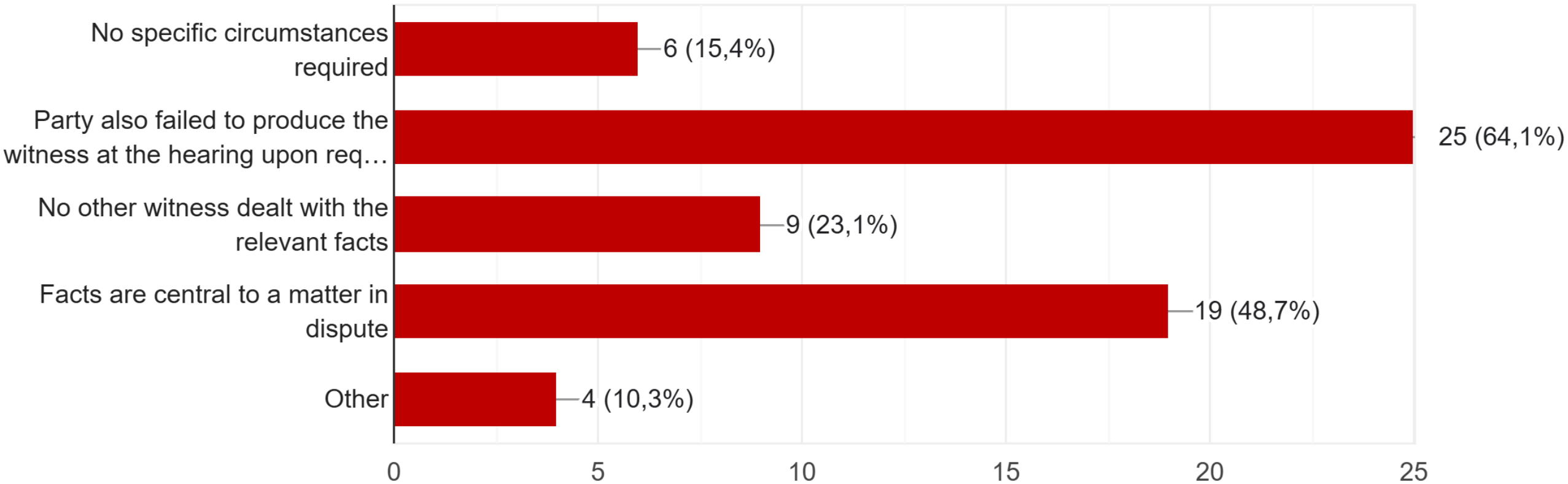
May the arbitrator draw an adverse inference when a party does not submit a written statement for a key witness under its control?

58 respostas

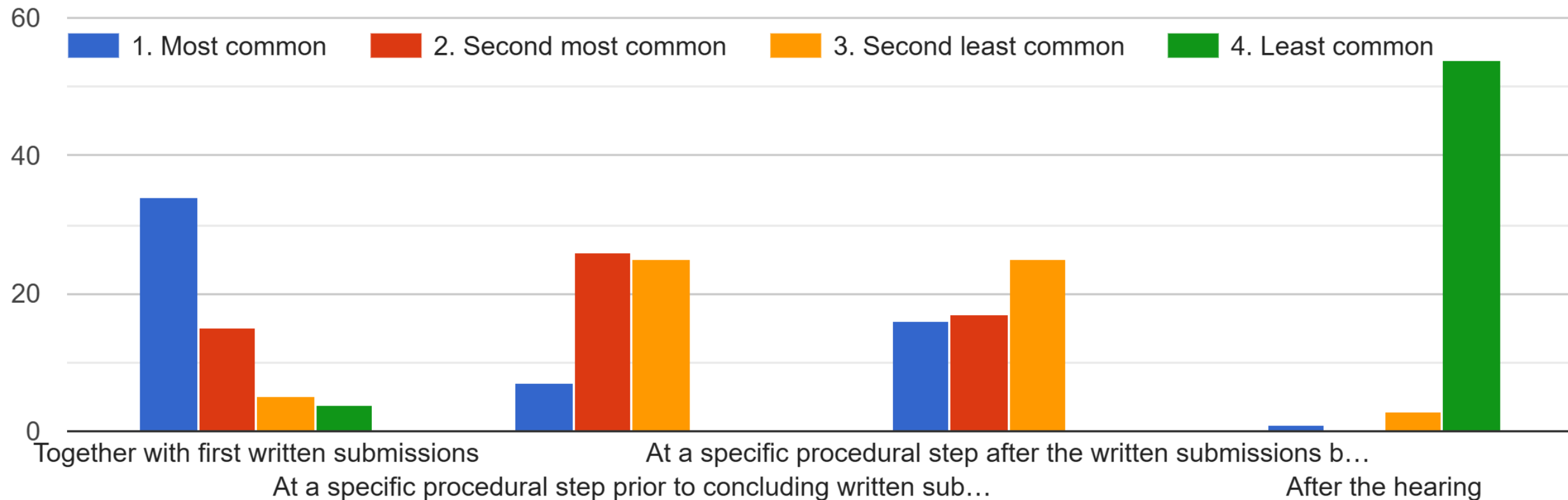


If “Yes”, under which scenarios?

39 respostas

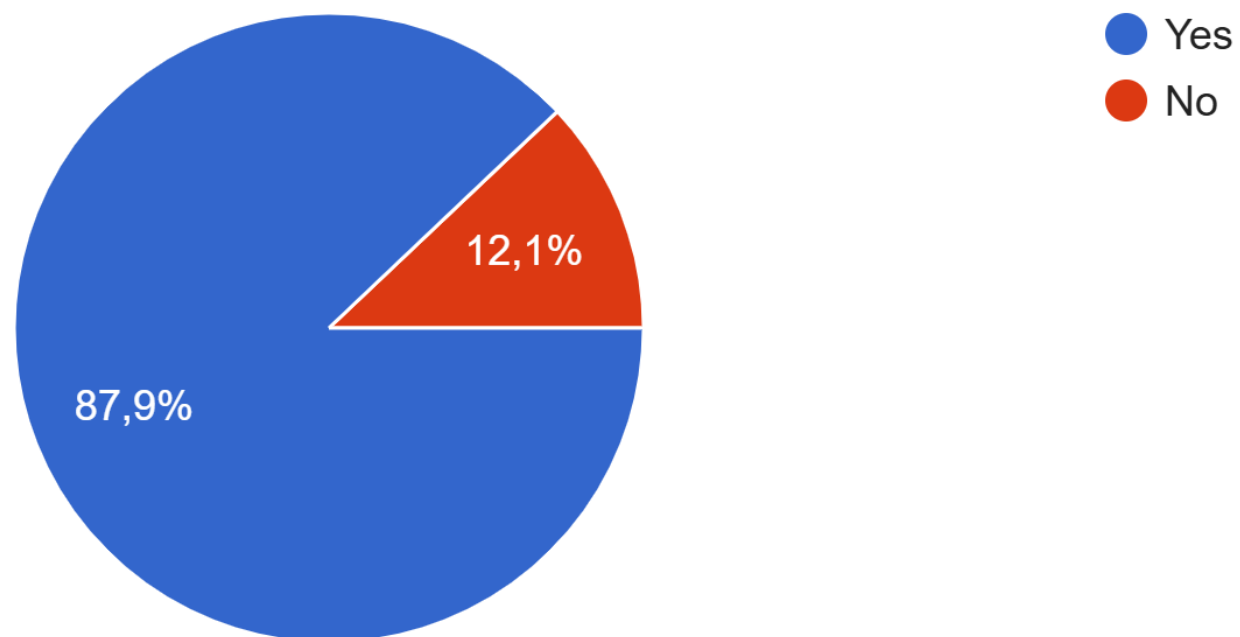


On which procedural step are written witness statements more commonly produced? Please list from most (1) to least (4) common.



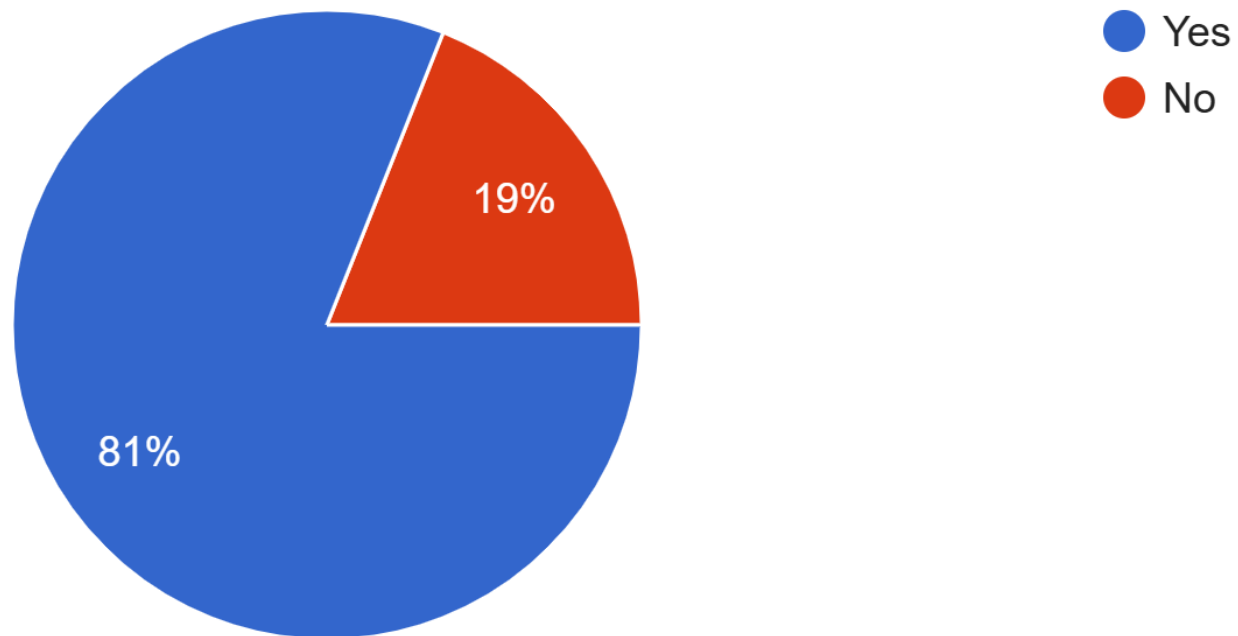
May a party submit new written witness statements in response to those produced by the opposing party?

58 respostas



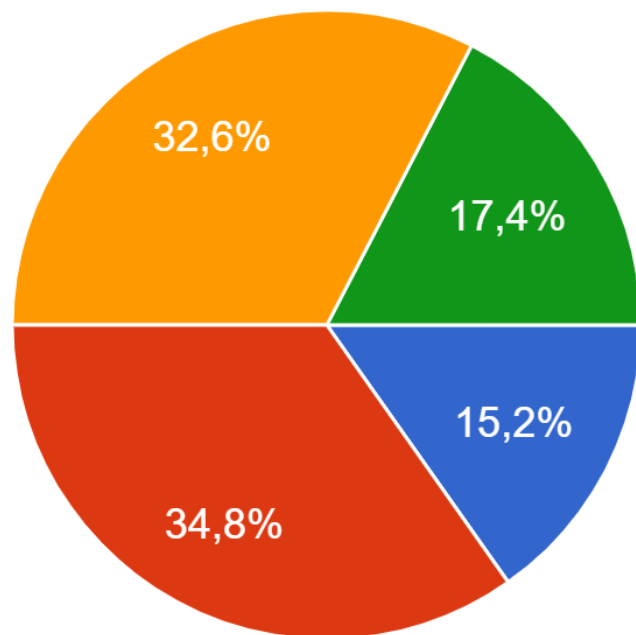
May a party amend prior written witness statements?

58 respostas



If “Yes”, up until which point?

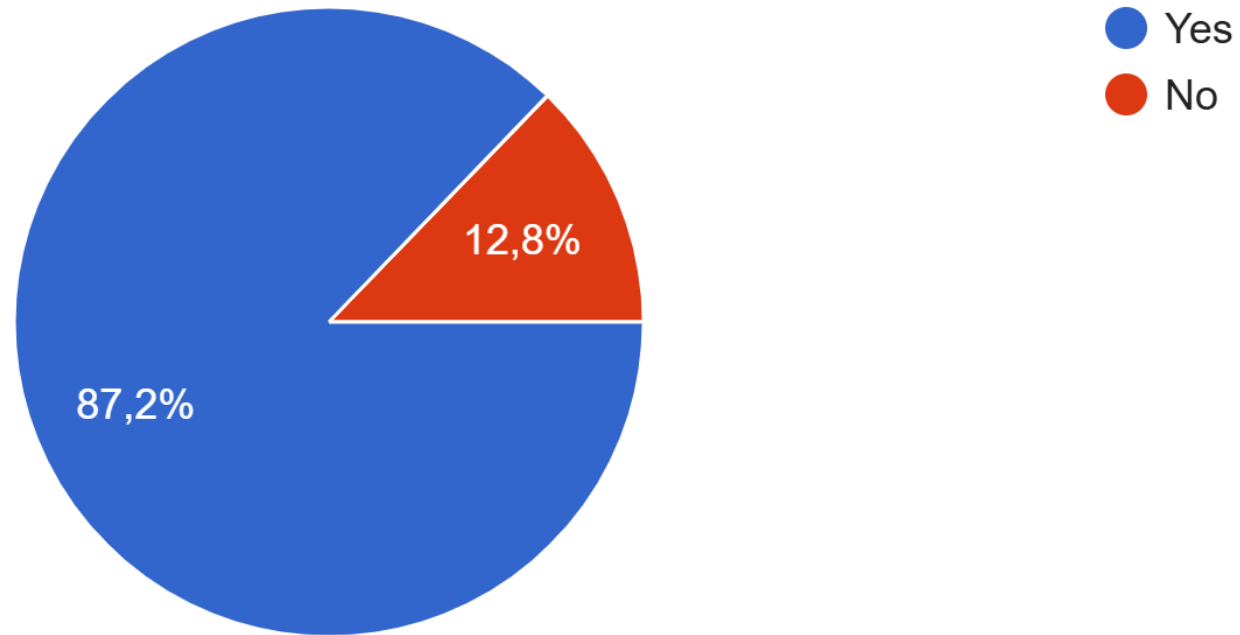
46 respostas



- End of written submissions
- Specific number of days prior to hearing
- Up to (and including) the hearing
- A specific moment determined by the arbitrator or by the parties after the hearing

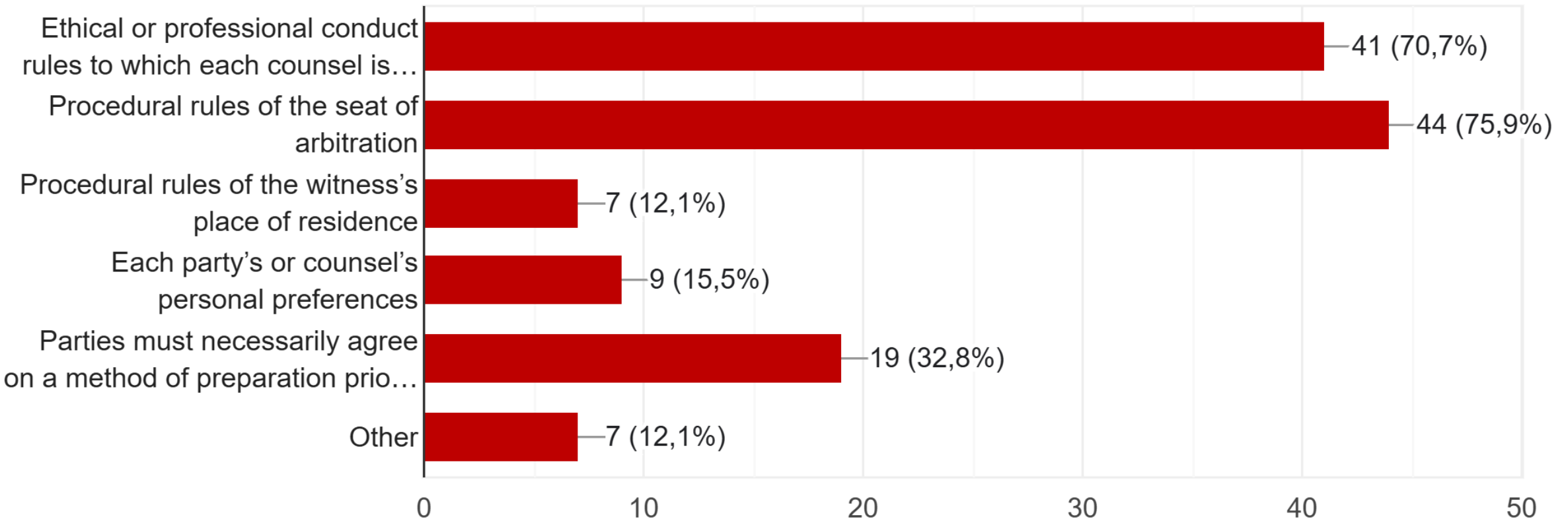
If “Yes”, does it depend on an admissibility analysis by the arbitrator?

47 respostas



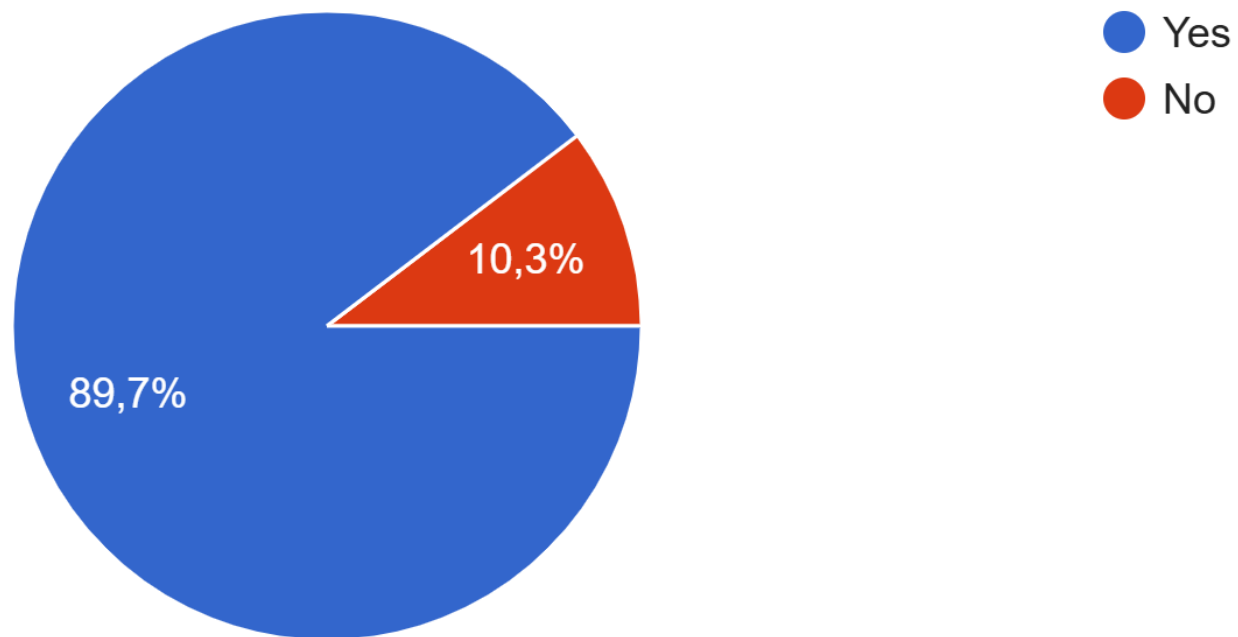
What determines how witness statements are to be prepared?

58 respostas



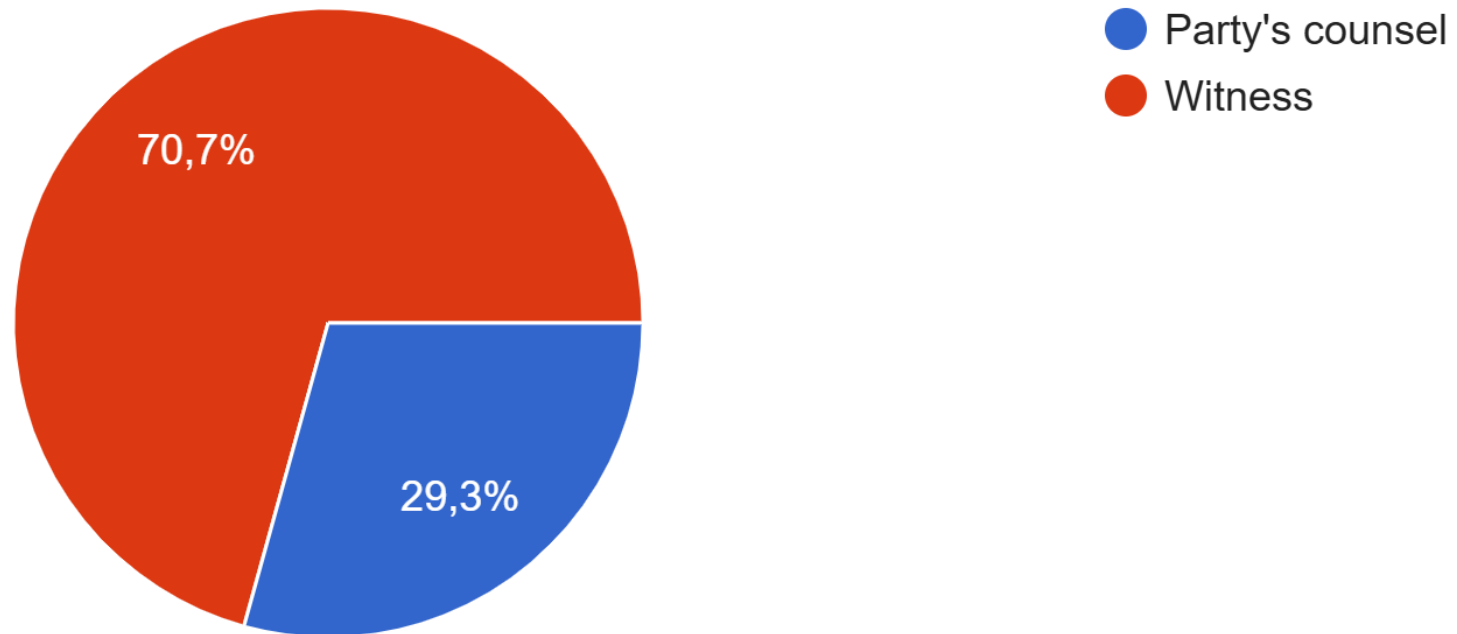
May a party hold meetings and interviews with the witness before preparing a written statement?

58 respostas



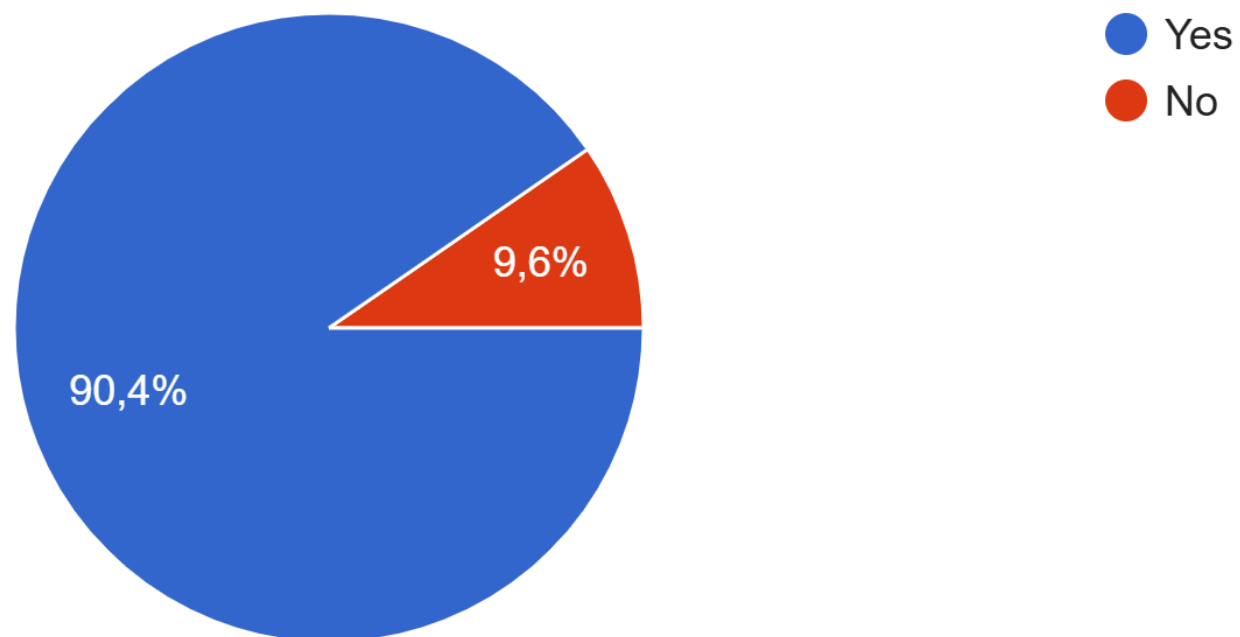
Who should be the main drafter of the written witness statement?

58 respostas



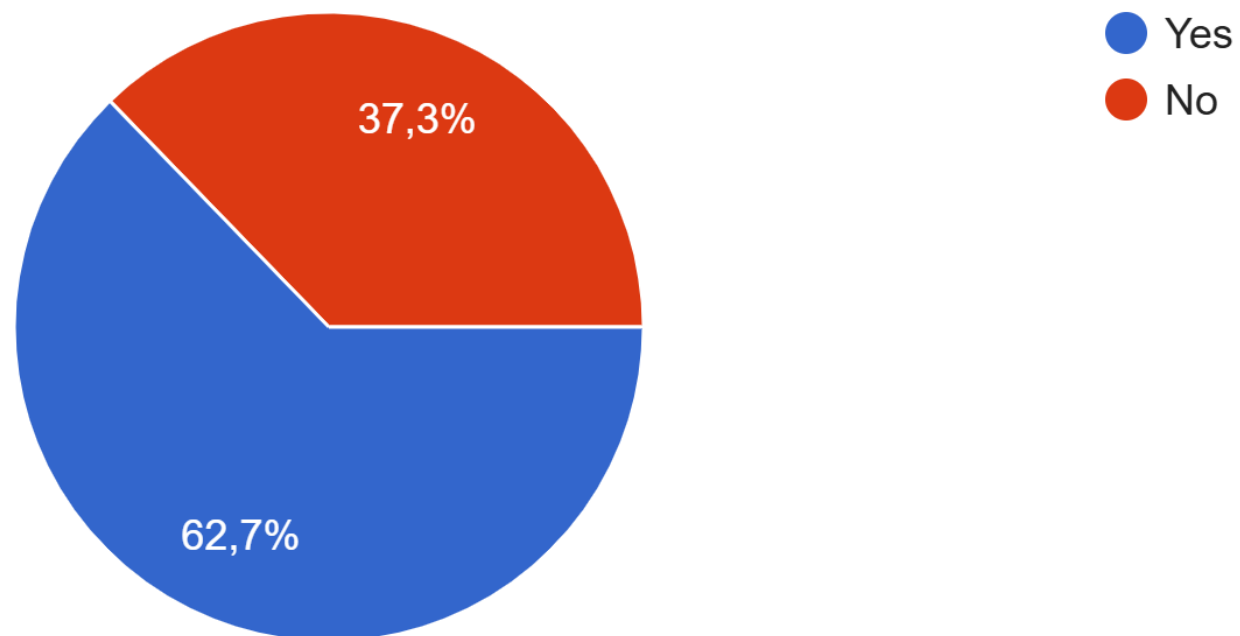
If “Witness”, is the party’s counsel allowed to review and propose amendments to the draft statement?

52 respostas



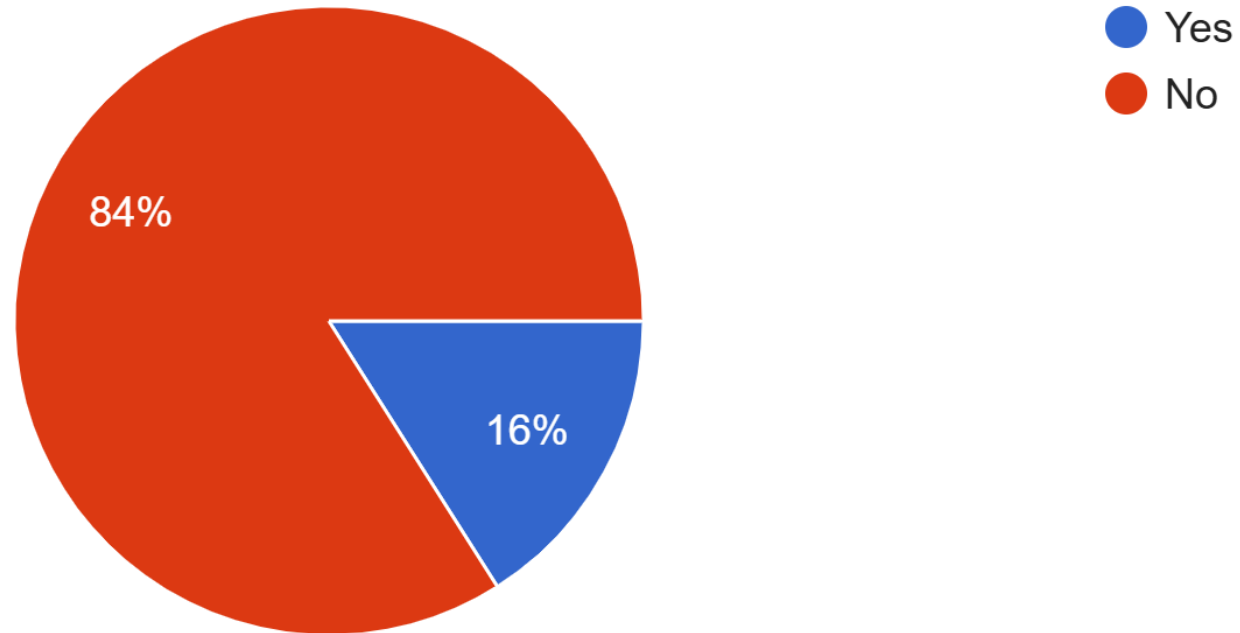
If “Yes”, is it necessary to specify in the written witness statement that it was prepared with support of the party’s counsel?

51 respostas



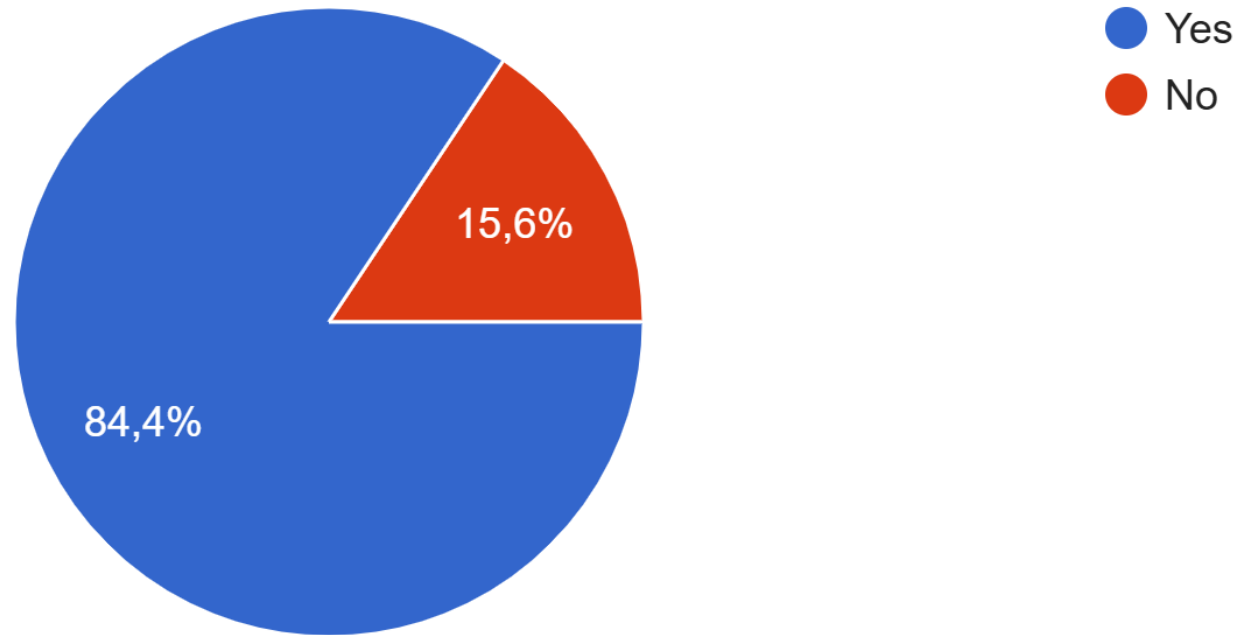
If “Party’s counsel”, is it necessary for party’s counsel to record the prior meetings and interviews with the witness?

50 respostas



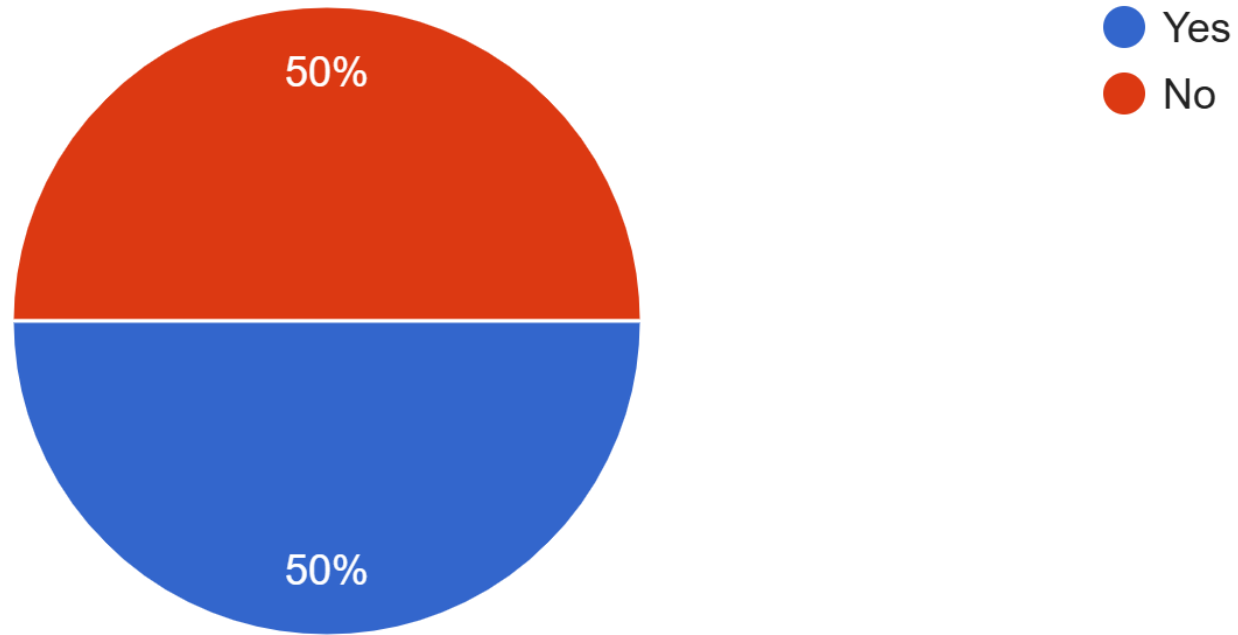
If “Yes”, is the record of prior meetings and interviews protected by attorney-client privilege?

32 respostas



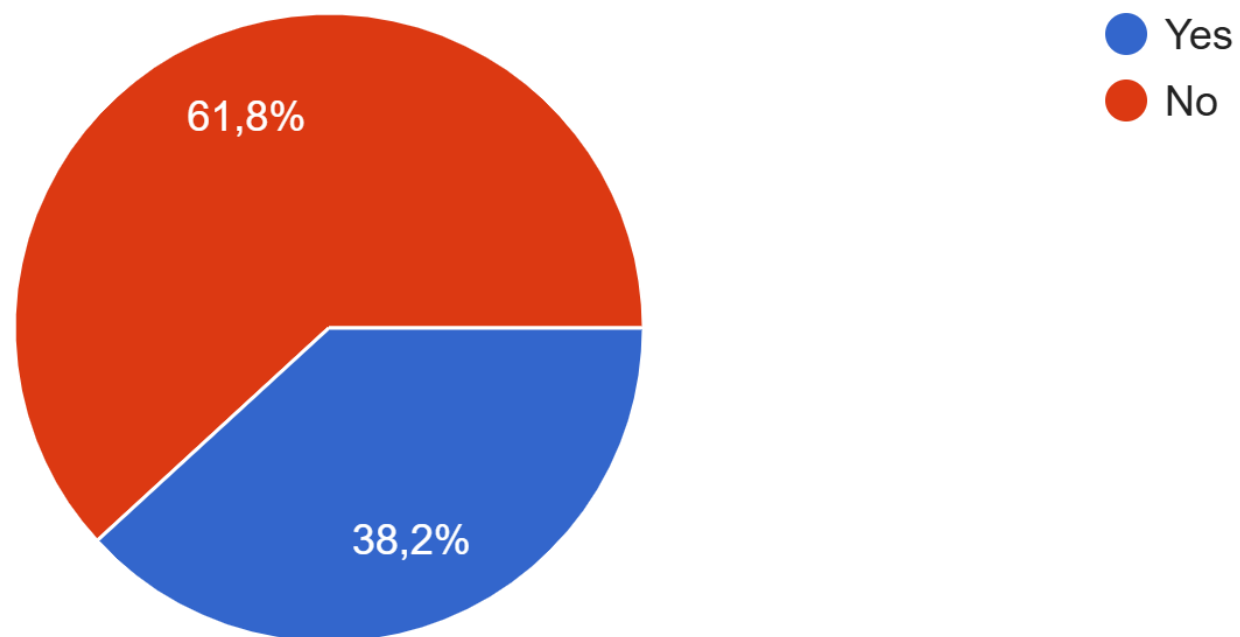
If “Party counsel”, is it necessary to specify in the written witness statement that it was prepared by the party’s counsel?

44 respostas



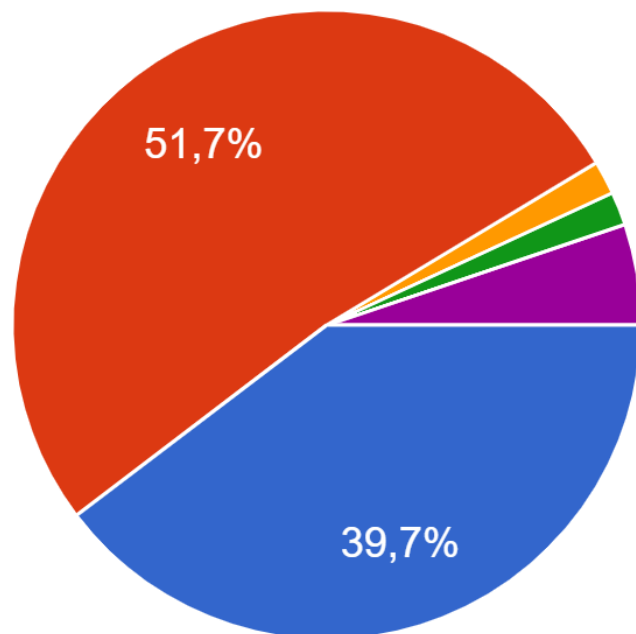
Would the responses above regarding the role of counsel be different if they concerned the role of a “witness’s independent counsel” (i.e., a counsel hire...the witness itself) instead of a “party’s counsel”?

55 respostas



What is the appropriate procedure for statements of witnesses that are not fluent on the language of the arbitration?

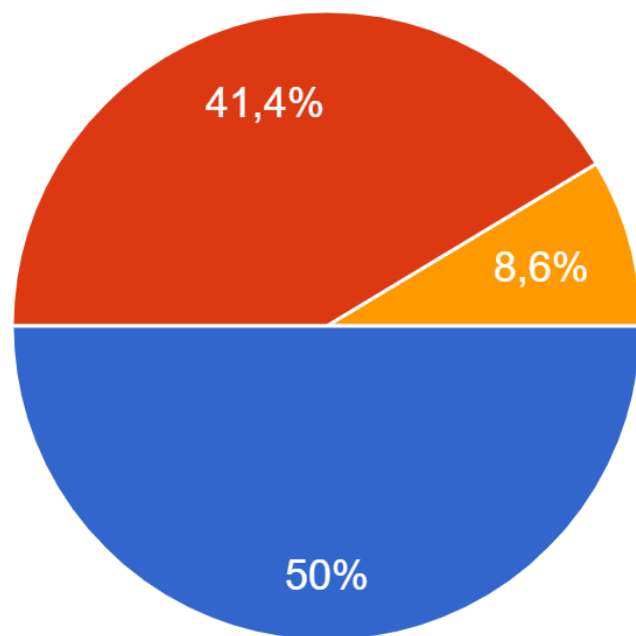
58 respostas



- Witness statement must be submitted in original language together with a translation by counsel
- Witness statement must be submitted in original language together with a certified translation
- Only a translation by counsel of the witness statement may be submitted
- Only a certified translation of witness statement may be submitted
- Other

How must documents referred to in a written statement be filed?

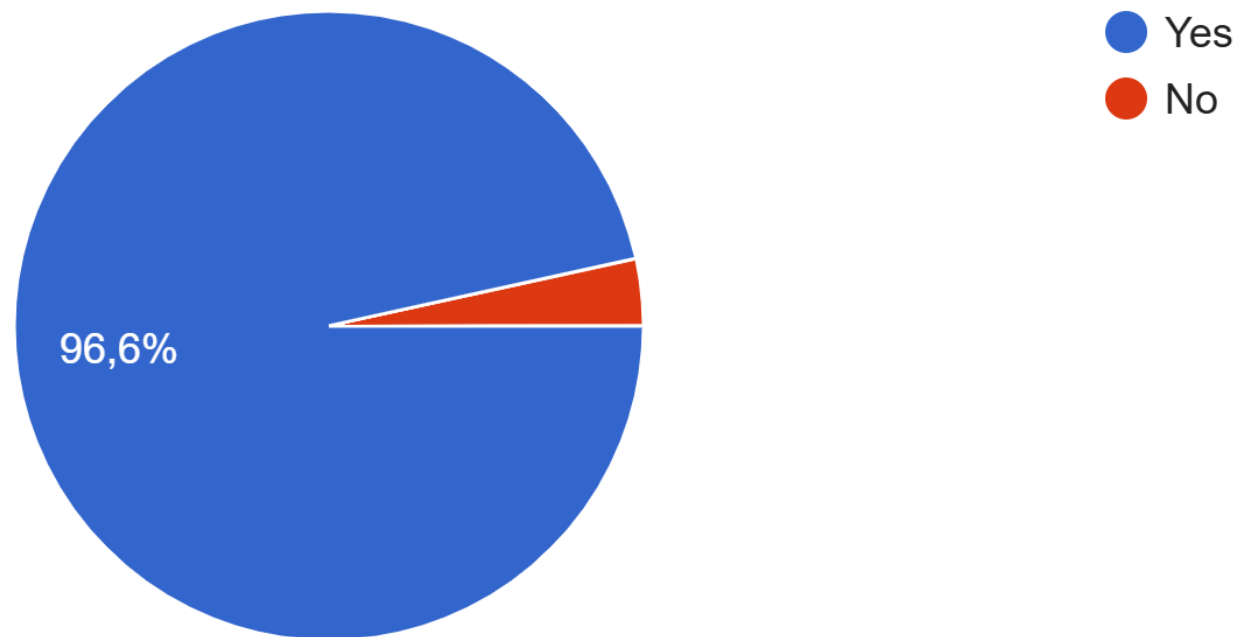
58 respostas



- Submitted as exhibits to the written statement with witness specific designations (e.g. using the witness's initials)
- Submitted as exhibits to the Parties' submissions following each party's standard exhibit designations (e.g. C- or R-)
- Other

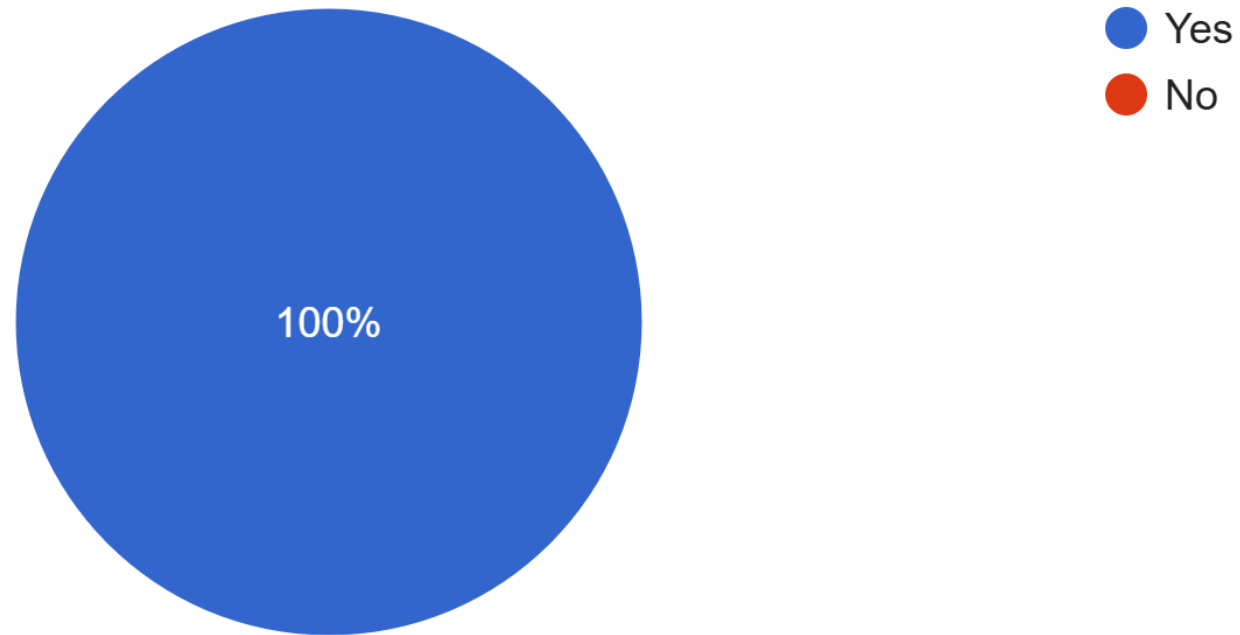
Are a party's officers, employees or representatives considered fact witnesses?

58 respostas



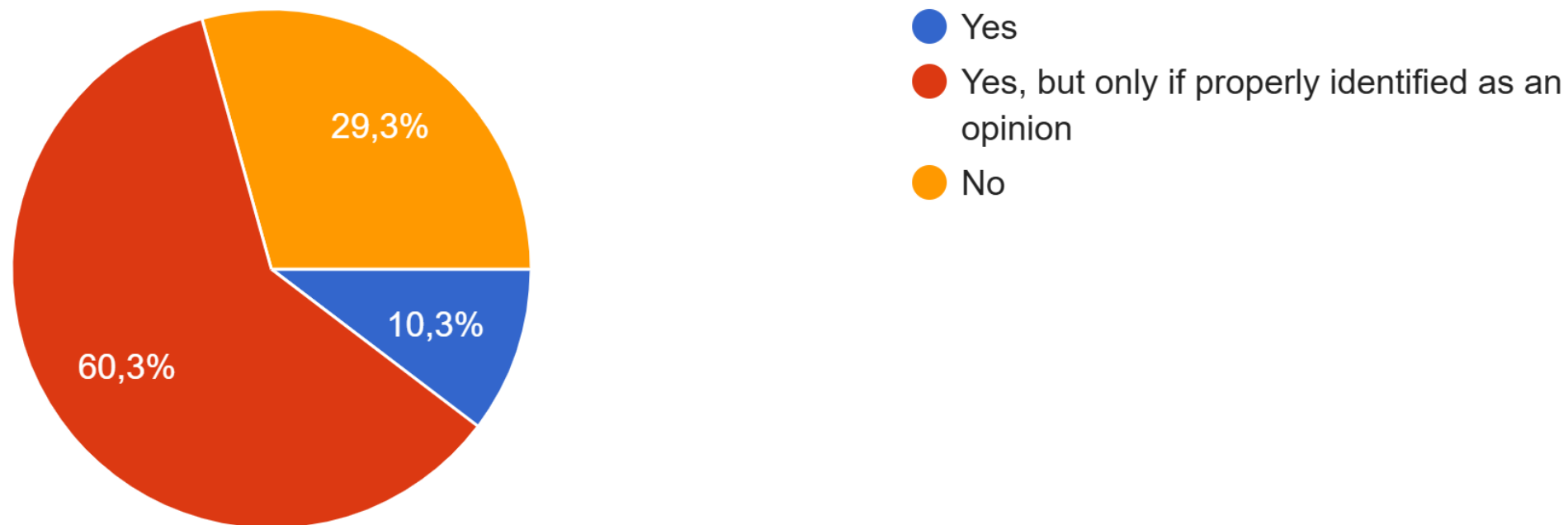
If “No”, should written statements of officers, employees or representatives be admitted?

13 respostas



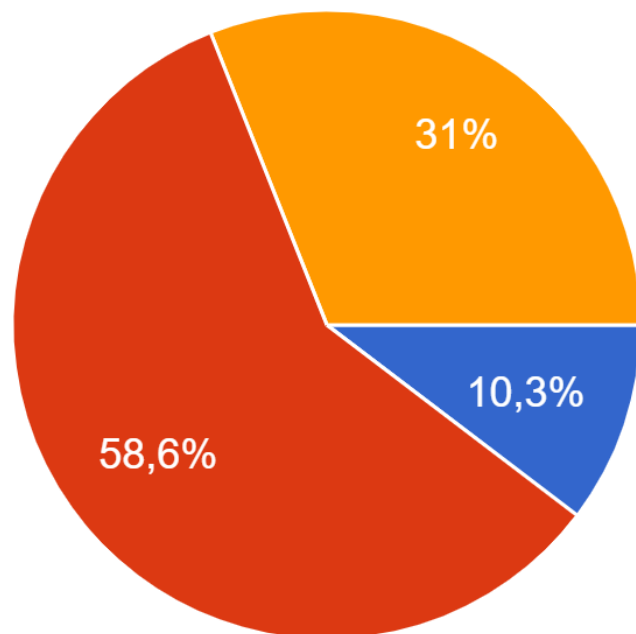
May fact witnesses give opinions in written witness statements?

58 respostas



Are fact witnesses allowed to bring second-hand information in written witness statements (e.g. facts heard from a third person)?

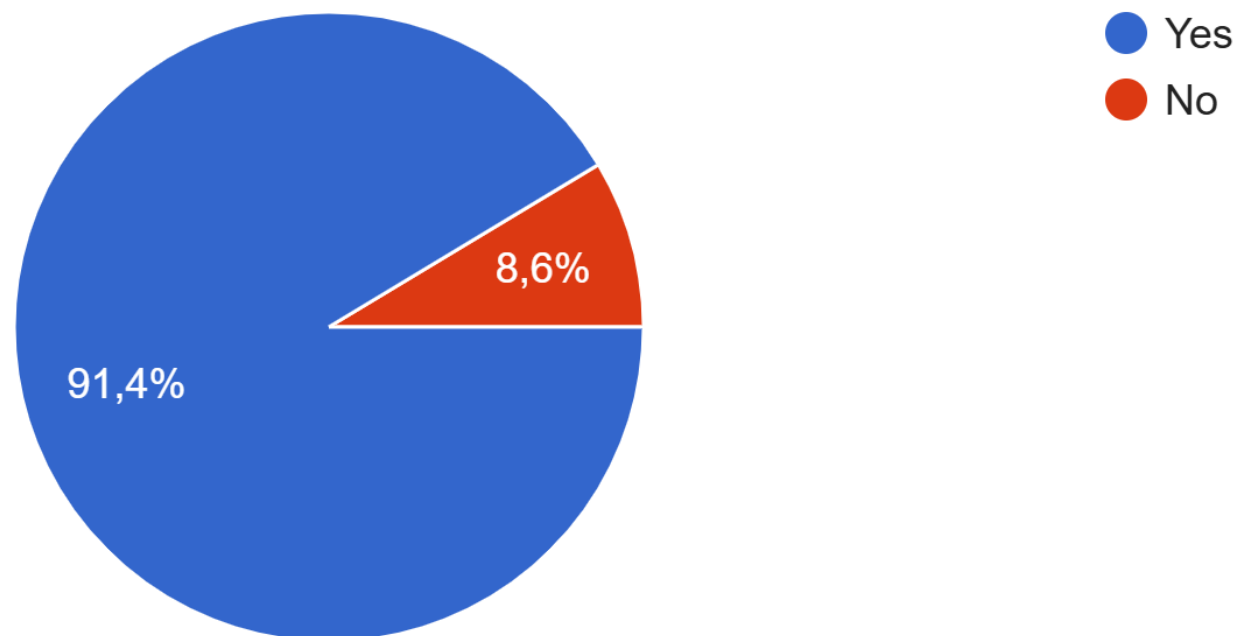
58 respostas



- Yes
- Yes, but only if identified as second-hand information
- No

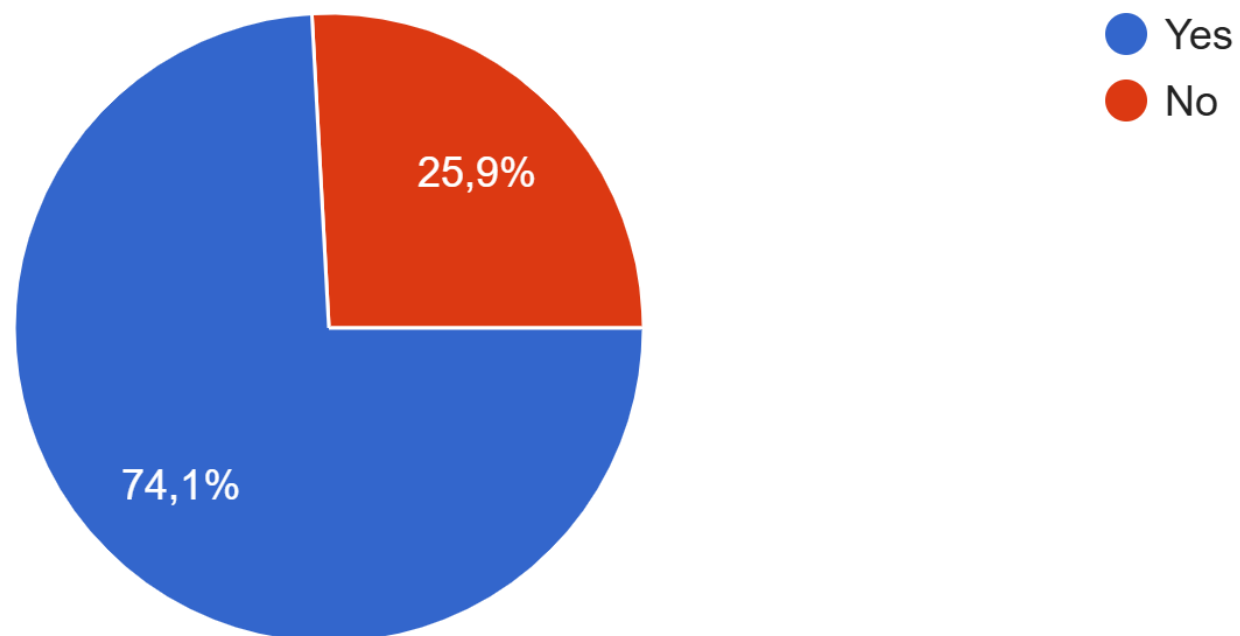
May a written witness statement incorporate by reference that witness's previous written statement by confirming its contents?

58 respostas



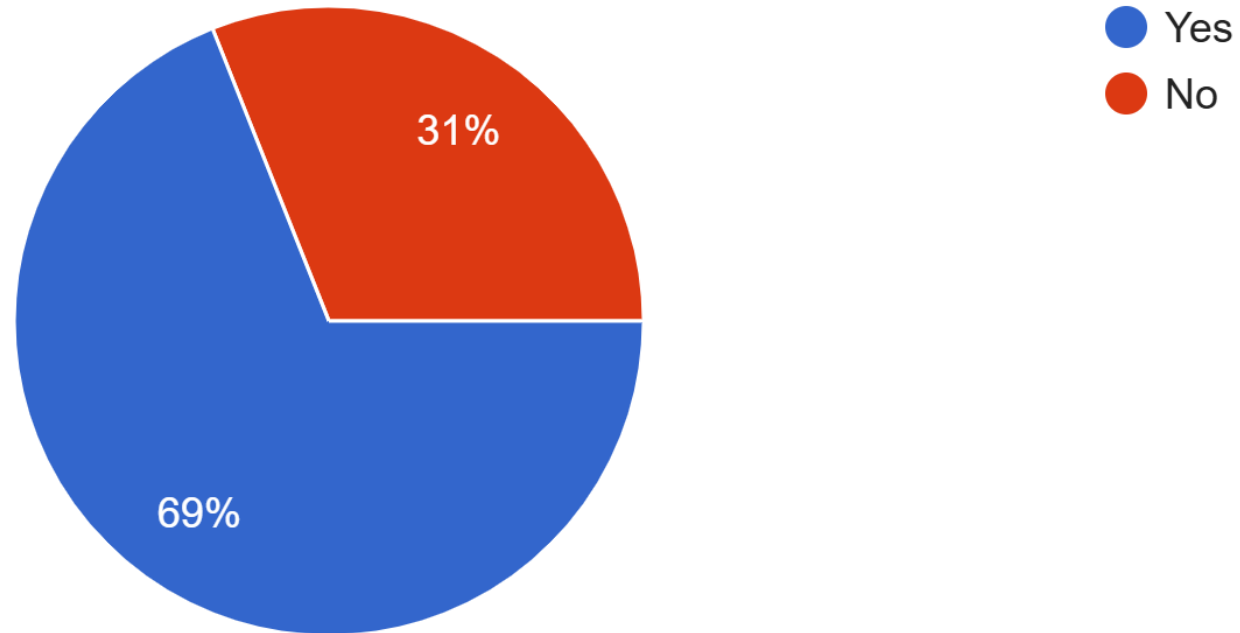
May a written witness statement incorporate by reference the previous or contemporaneous written statement of another witness by confirming its contents?

58 respostas



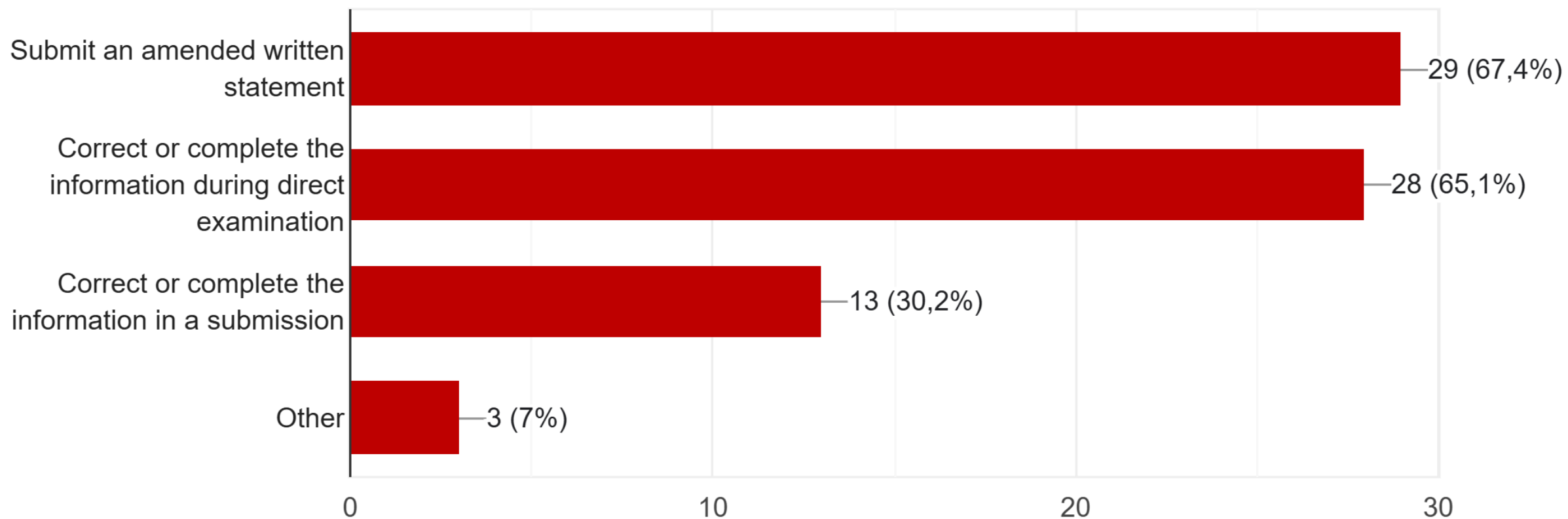
Must counsel correct information in a written witness statement later revealed to be incorrect or incomplete?

58 respostas



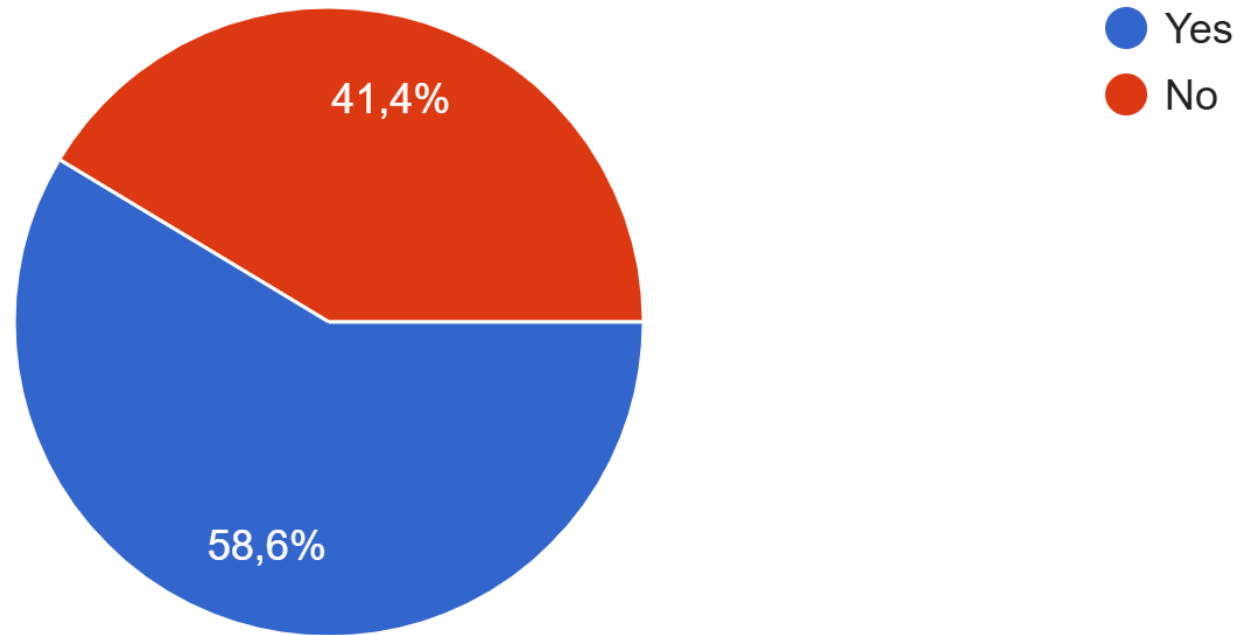
If “Yes”, how must it do so?

43 respostas



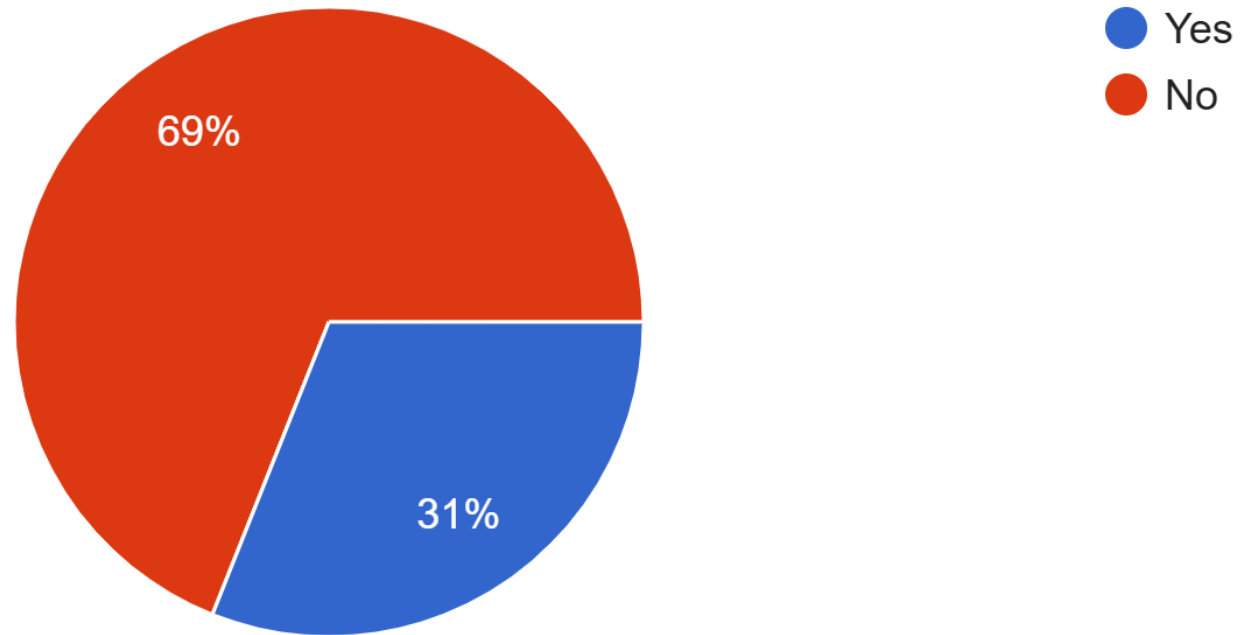
May counsel redact privileged information disclosed by a witness?

58 respostas



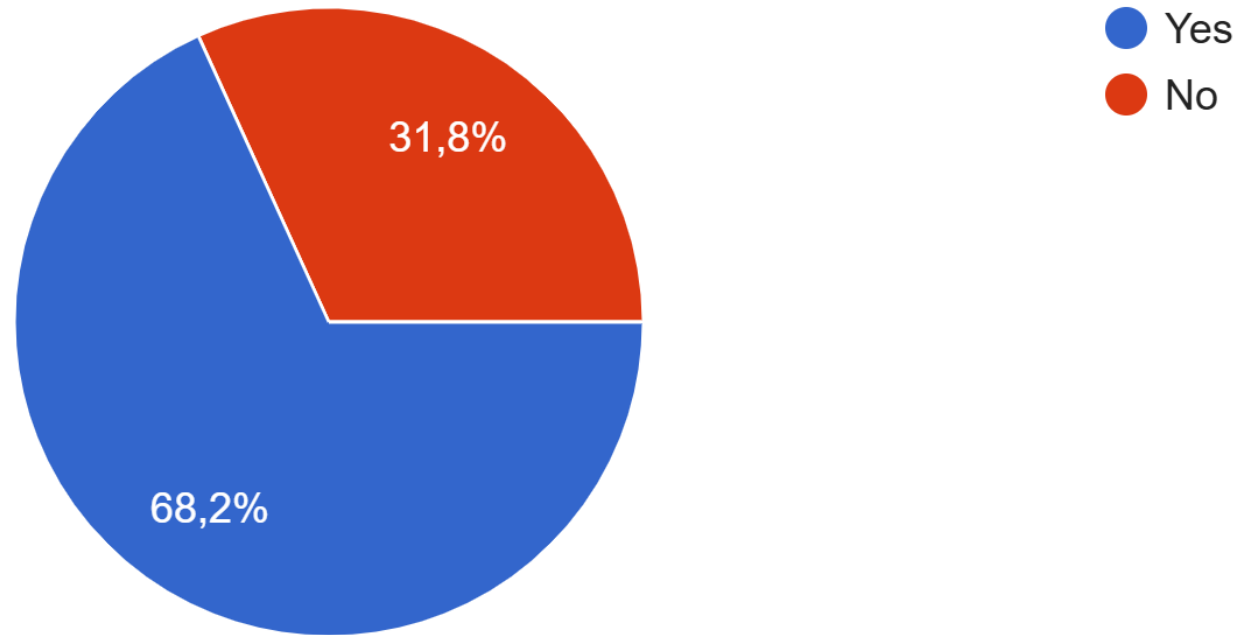
Must counsel redact privileged information disclosed by a witness?

58 respostas



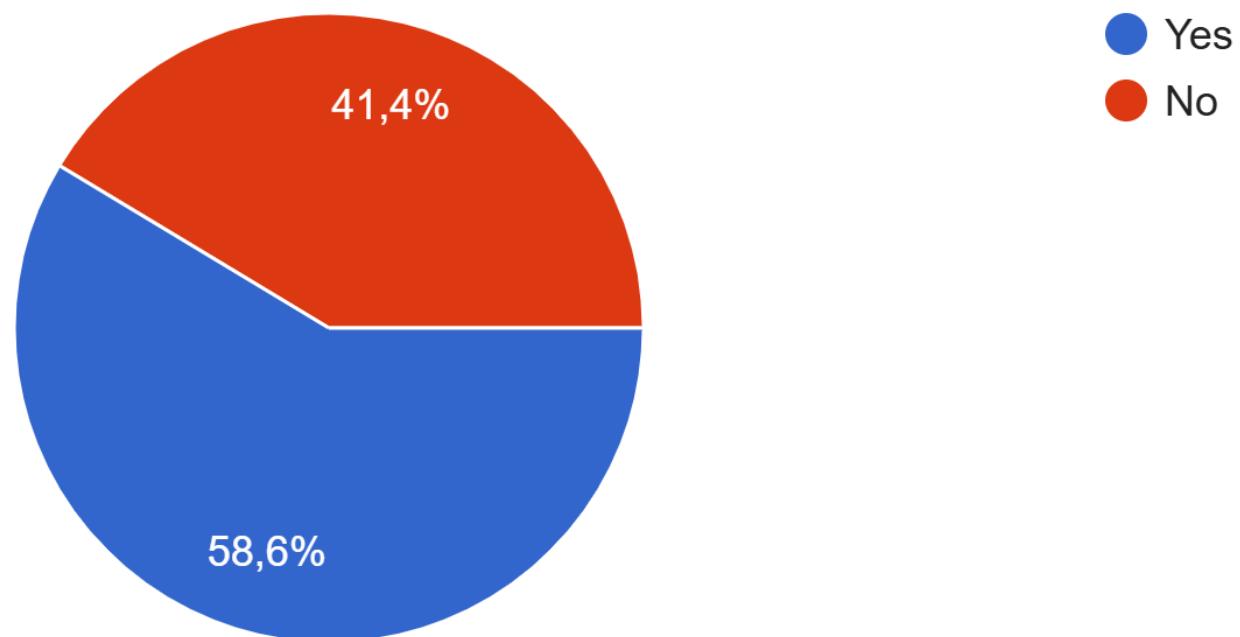
If “No”, does the arbitrator have the power to strike out information protected by privilege?

44 respostas



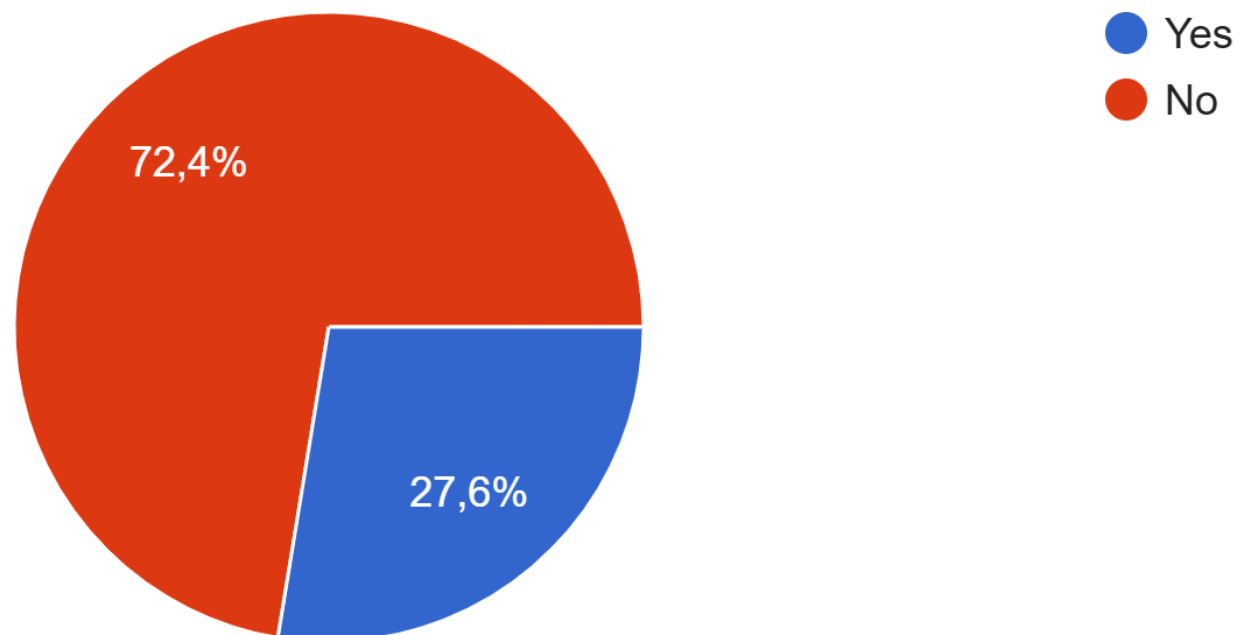
May counsel redact confidential information (e.g., trade secret not protected by privilege) brought by a witness?

58 respostas



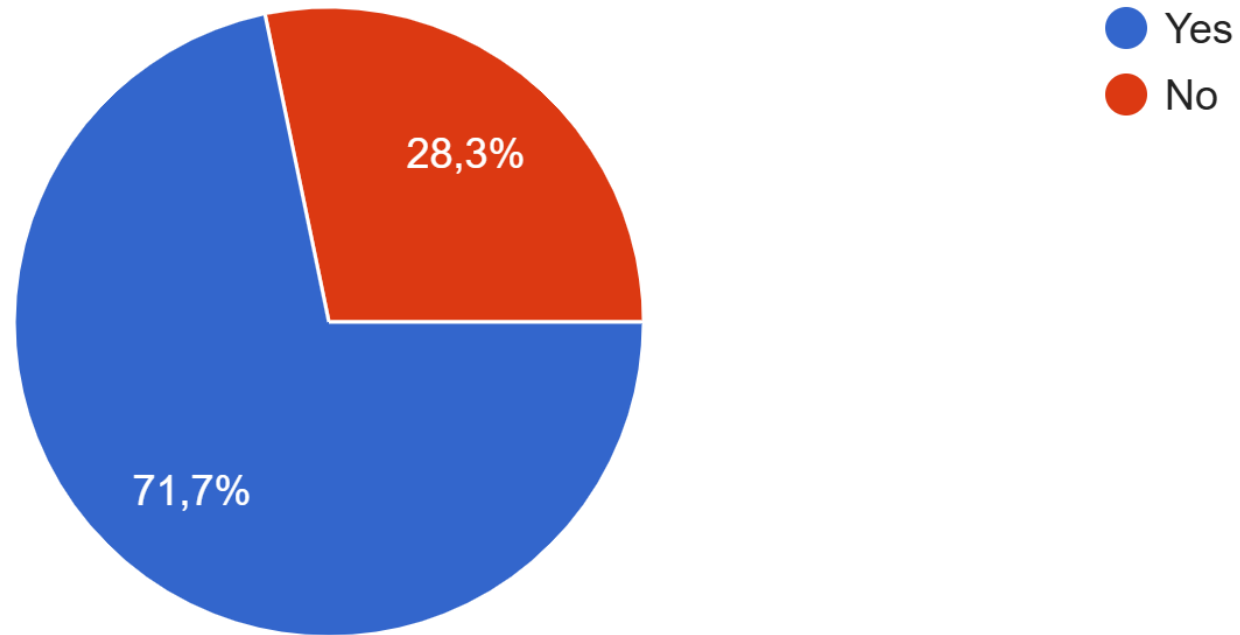
Must counsel redact confidential information (e.g., trade secret not protected by privilege) brought by a witness?

58 respostas



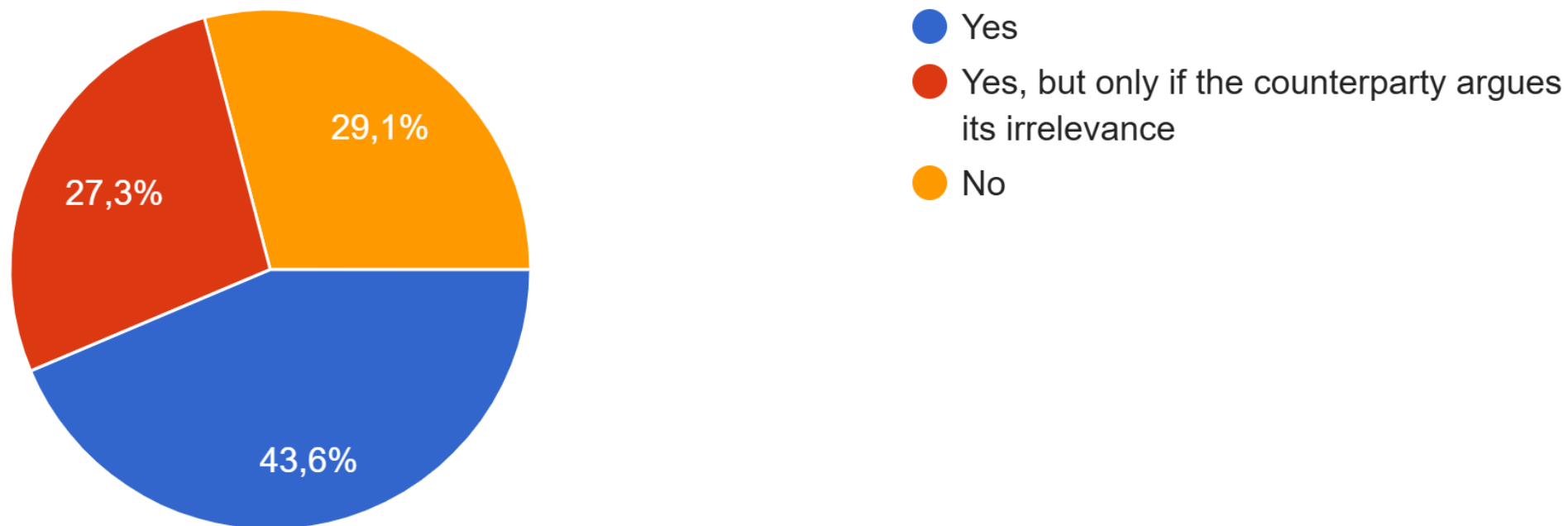
If “No”, does the arbitrator have the power to strike out confidential information?

46 respostas



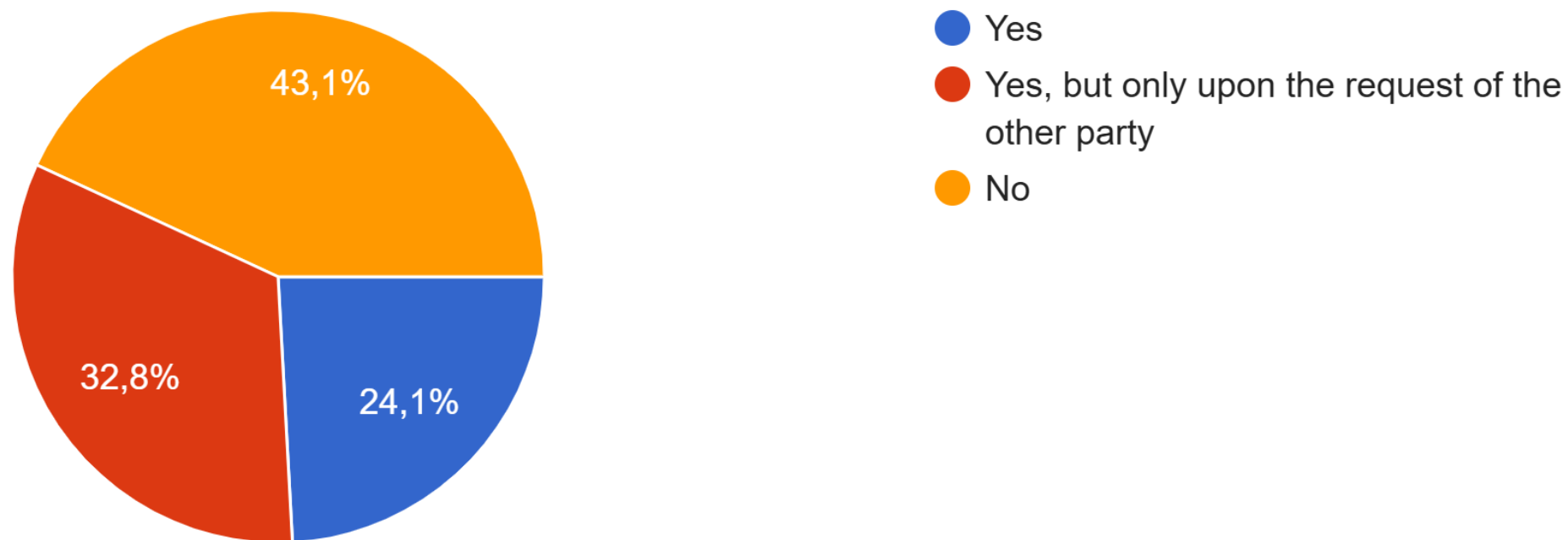
Does the arbitrator have the power to strike out written witness statements deemed irrelevant?

55 respostas



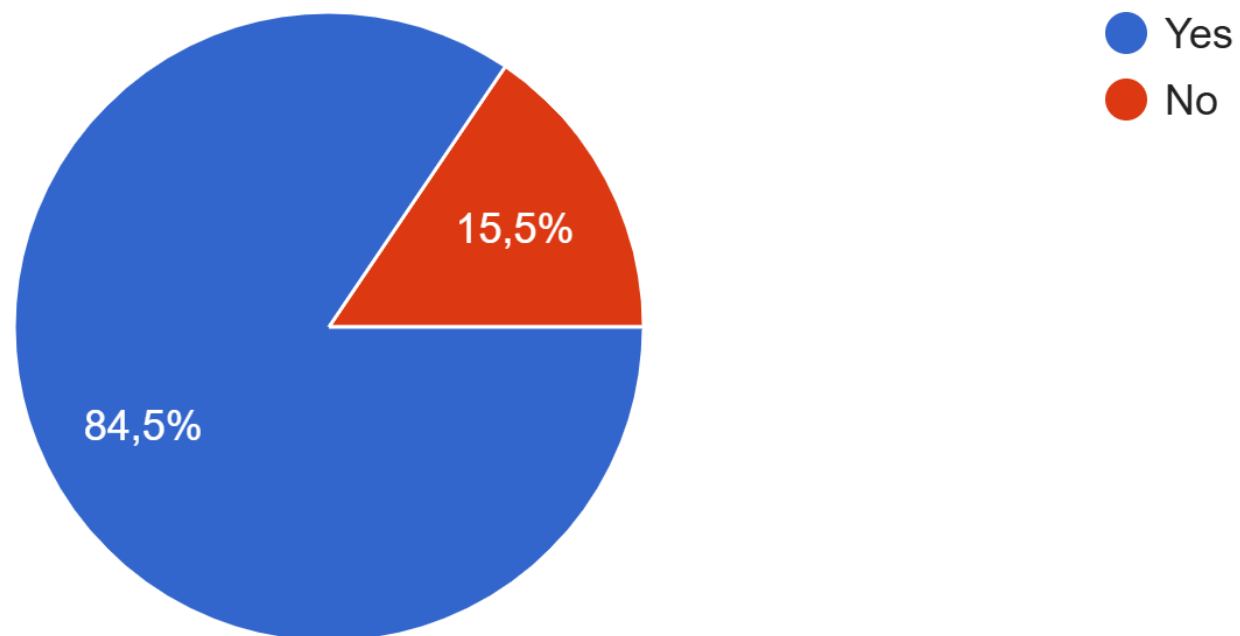
Can the arbitrator deny the examination of a witness for whom cross-examination was requested by only one of the parties (e.g., due to irrelevance)?

58 respostas



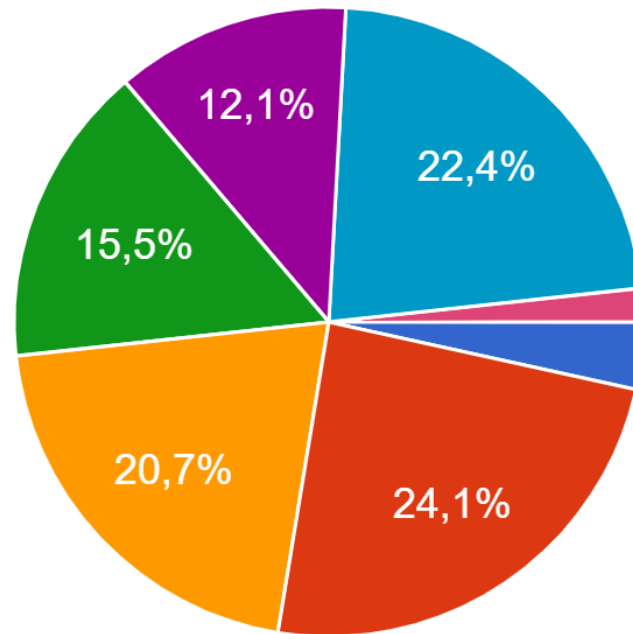
Can the arbitrator request sua sponte the examination of a witness for whom cross-examination was not requested by either party?

58 respostas



What is the impact of written witness statements on direct examination?

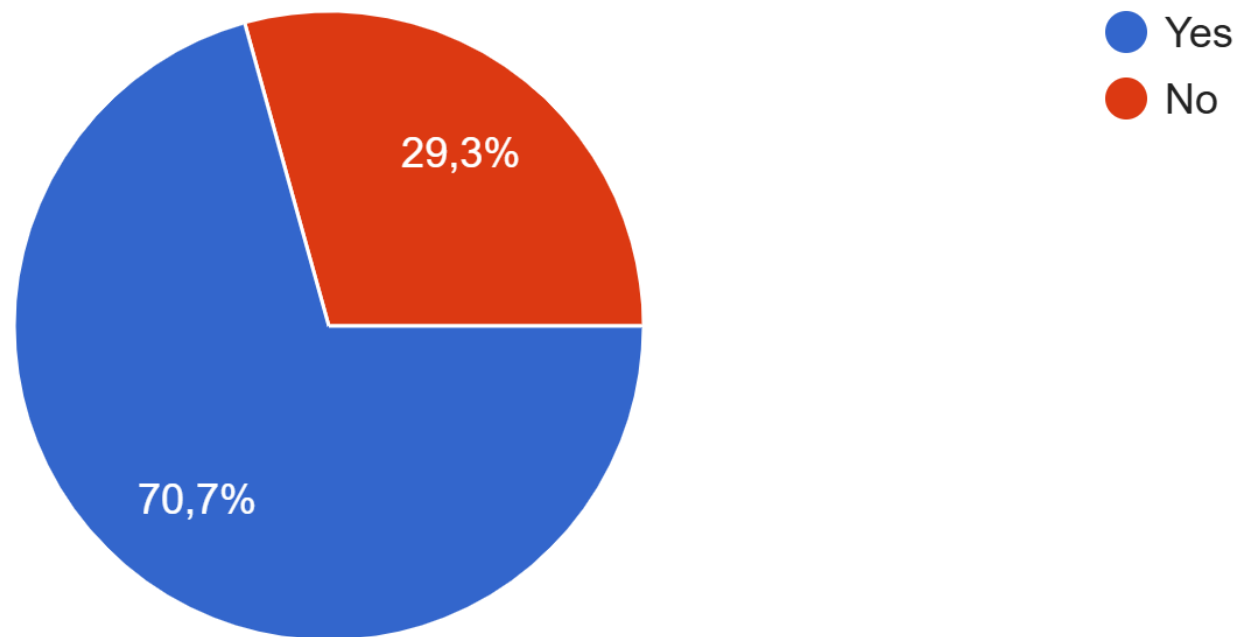
58 respostas



- No direct examination should be allowed
- Direct examination limited to confirming or correcting contents of written state...
- Direct examination limited to the above and new facts occurred after submissi...
- Direct examination limited to the above and warm-up questions
- Ample direct examination allowed
- Discretion of the arbitrator
- Other

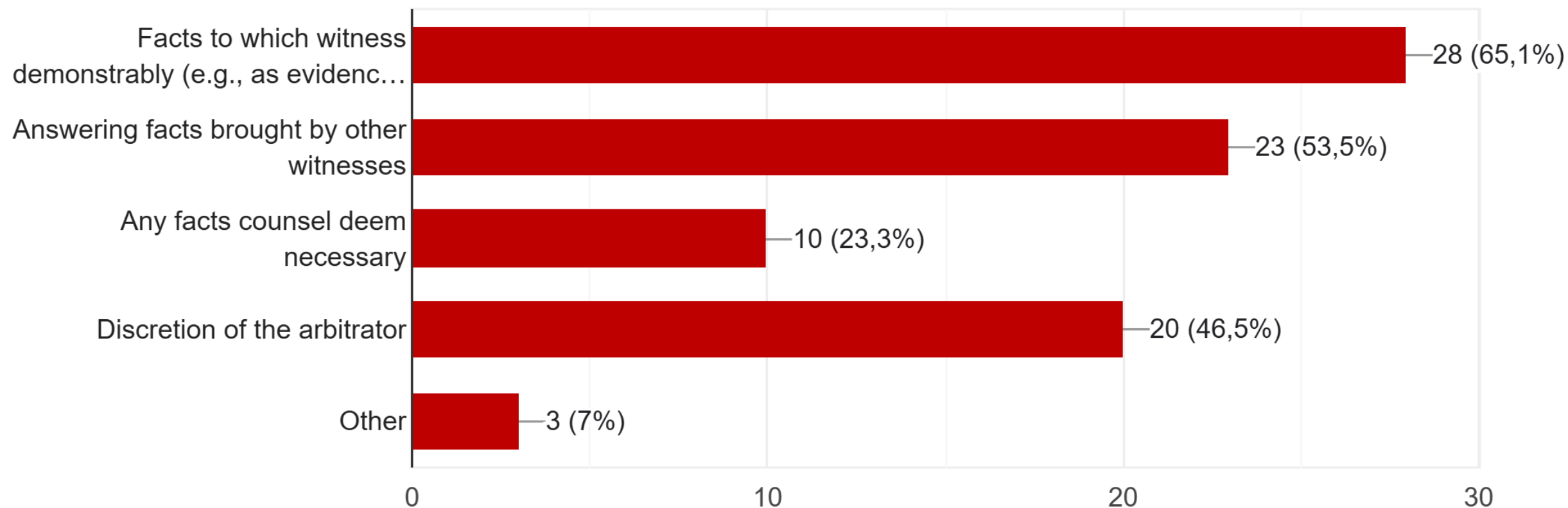
Can cross-examination address topics that were not brought in the written witness statement?

58 respostas



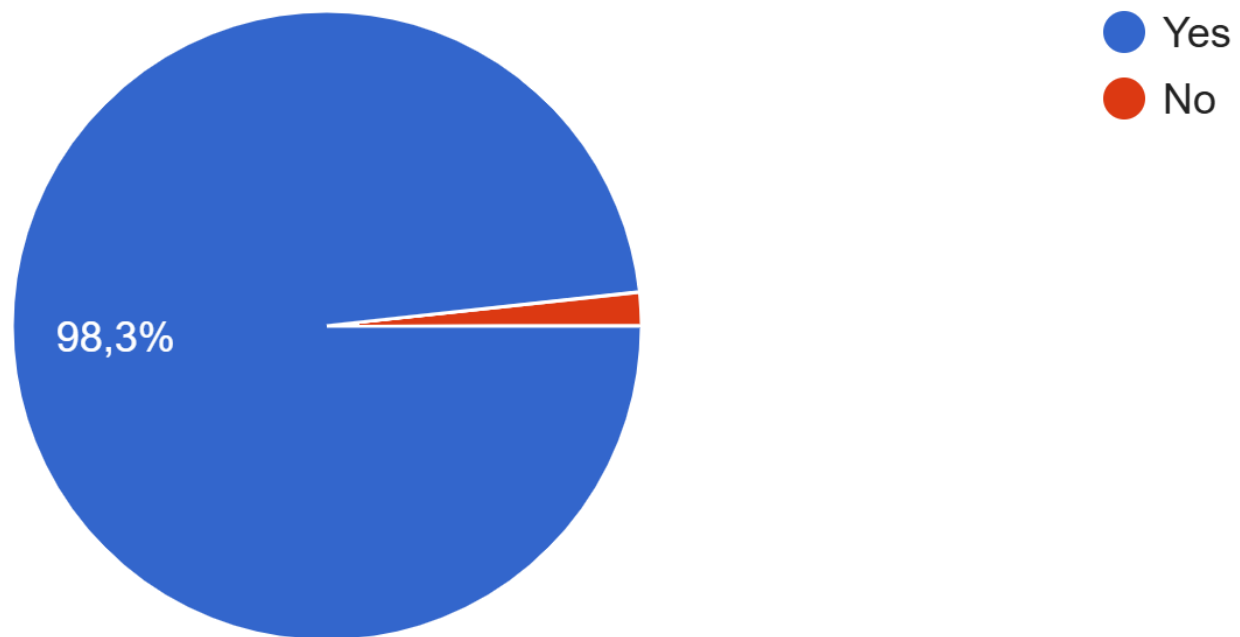
If “Yes”, under which scenarios?

43 respostas



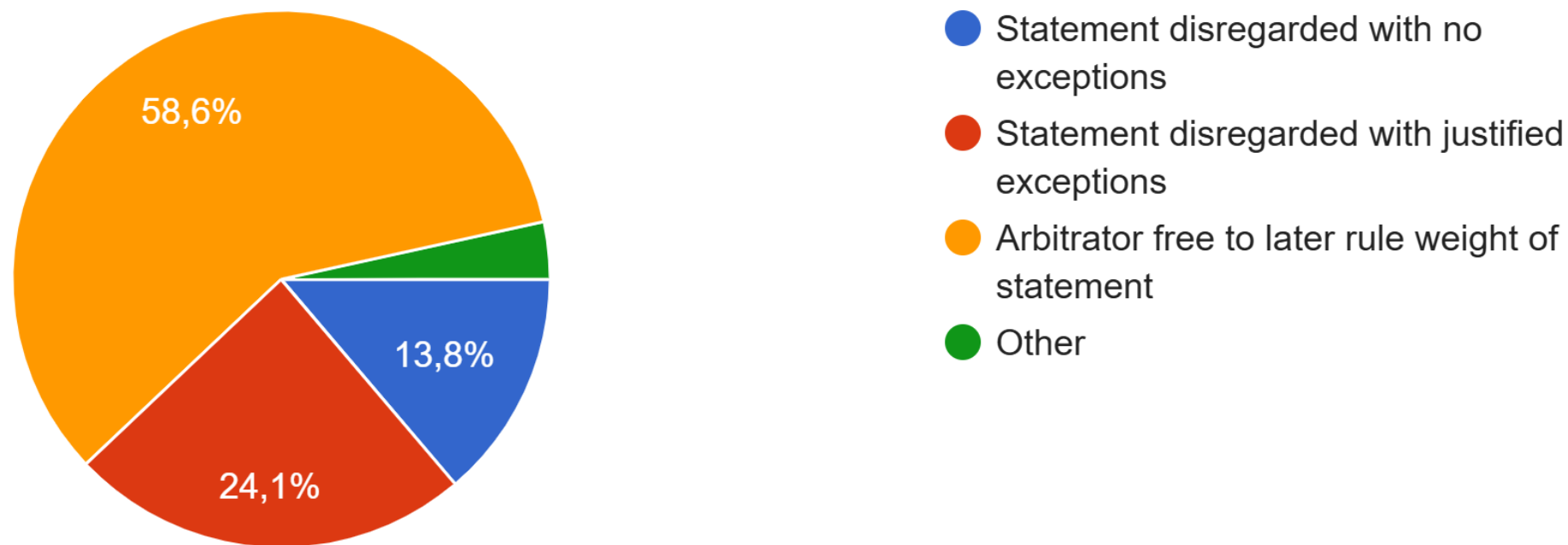
Can the arbitrator examine the witnesses?

58 respostas



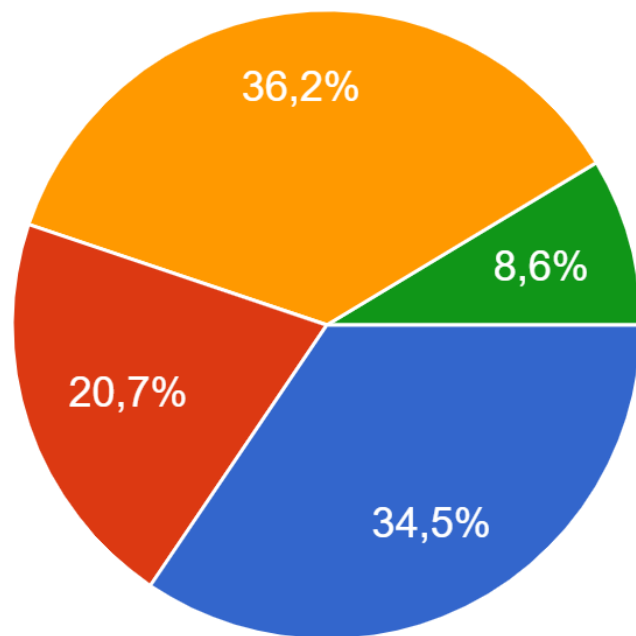
What are the consequences to the written witness statement if a witness fails to appear at the hearing?

58 respostas



What is the impact of disregarding a written witness statement on the party's submission?

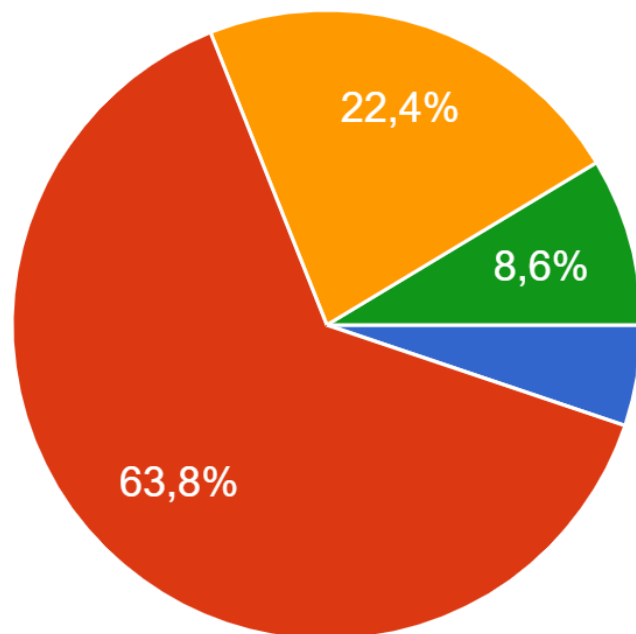
58 respostas



- No impact
- Submissions based on the statement must be stricken out
- Submissions based on the statement may be stricken out
- Other

What is the weight to be given to a written statement if cross-examination of the witness is not requested?

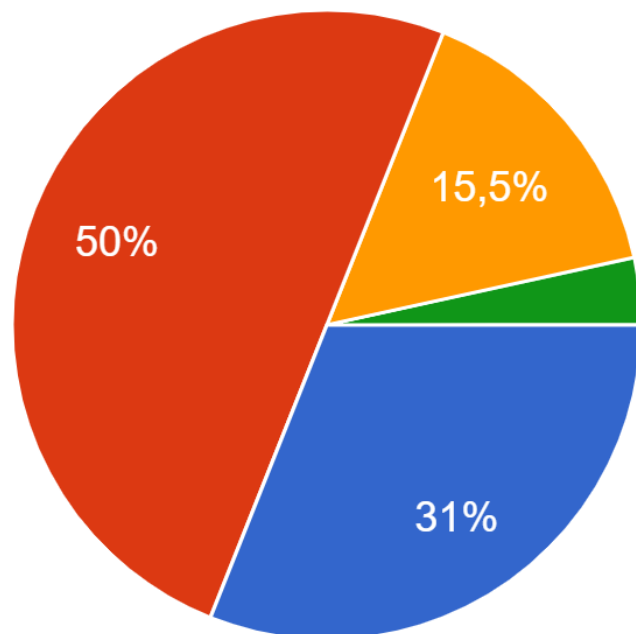
58 respostas



- Facts considered to be true
- Same weight as any other written statement
- Less weight than written statements on which witness was heard
- Other

In proceedings where written statements have been adopted, is it possible to take testimony from a person who did not produce a written statement?

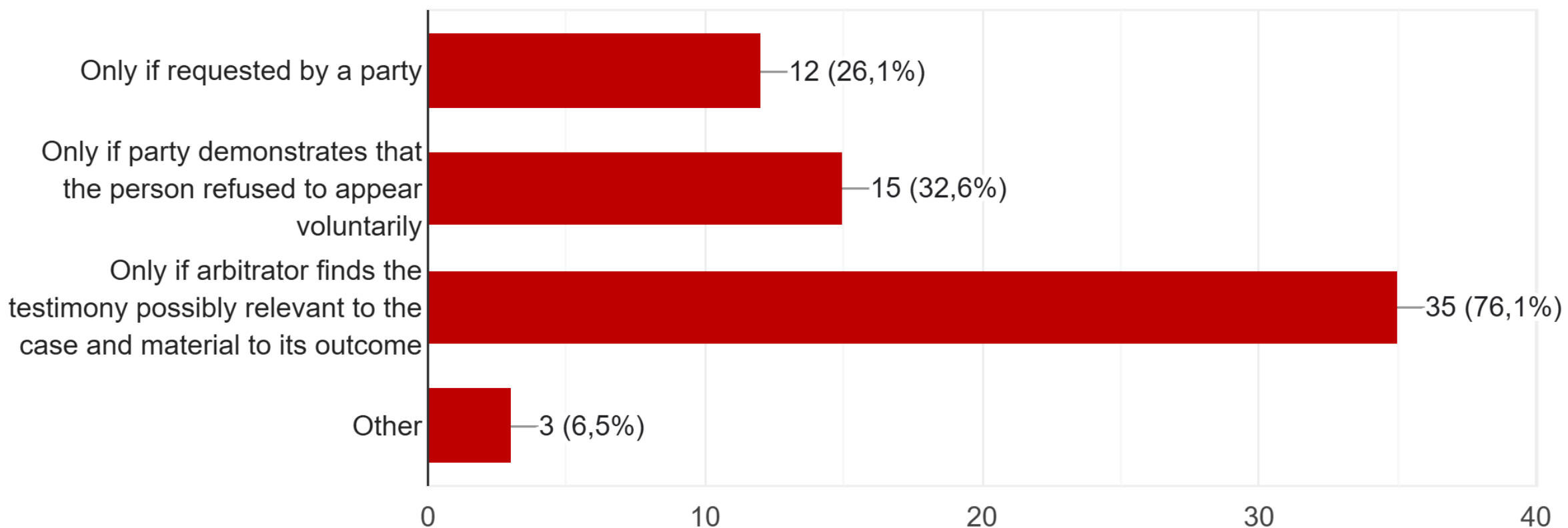
58 respostas



- Yes, arbitrator always retains full power to determine so
- Yes, except if specifically prohibited under the applicable rules, Terms of Reference or Procedural Order n° 1
- No, except if specifically allowed in the applicable rules, Terms of Reference or Procedural Order n° 1
- No, arbitrator may not allow it or seek it sua sponte if written testimony is being taken

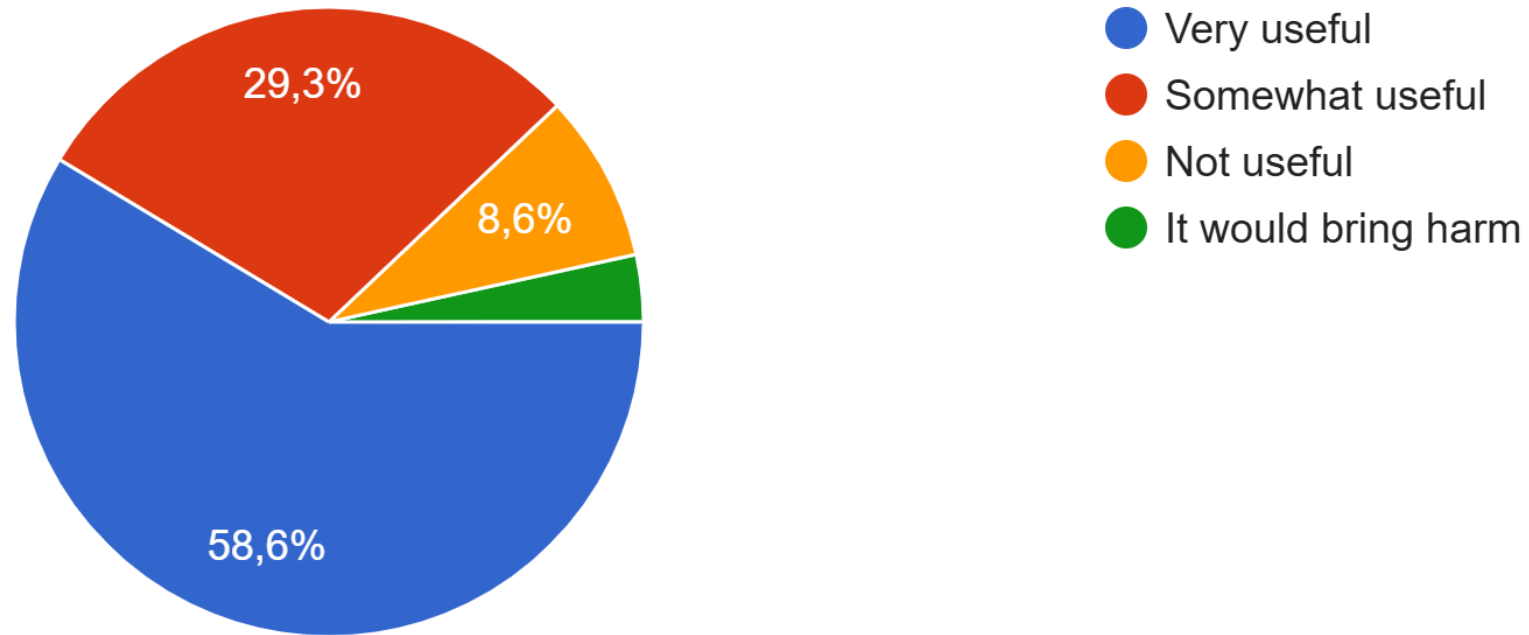
If “Yes”, under which circumstances?

46 respostas



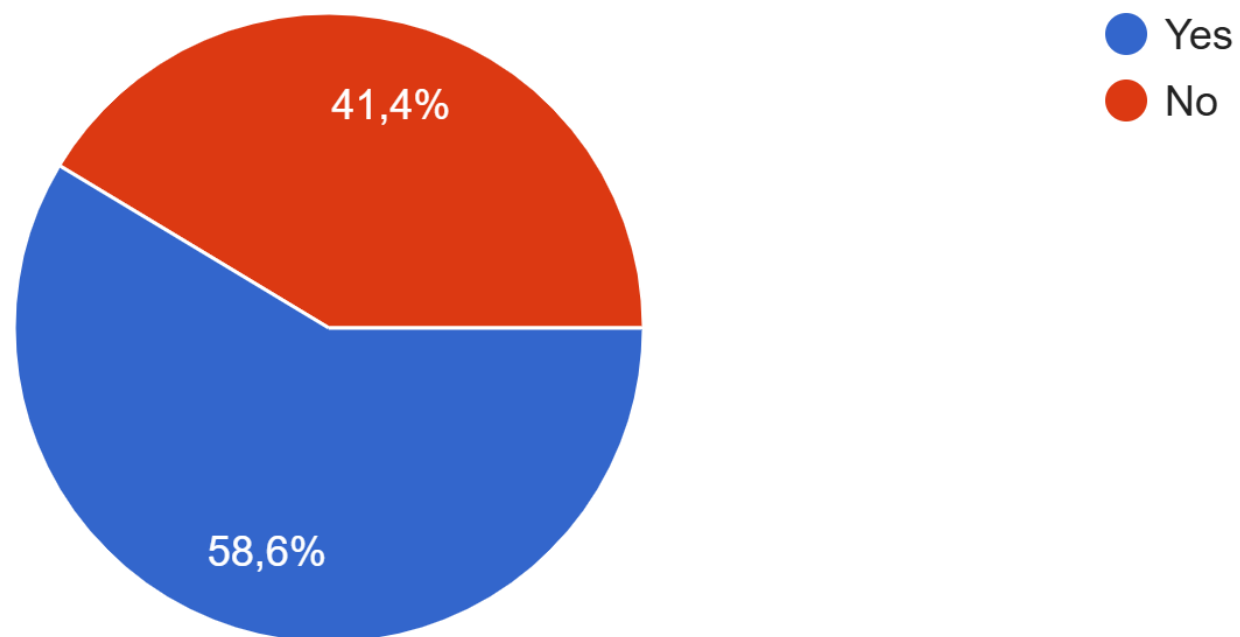
How useful would you find a specific guideline for the use of written statements by fact witnesses?

58 respostas



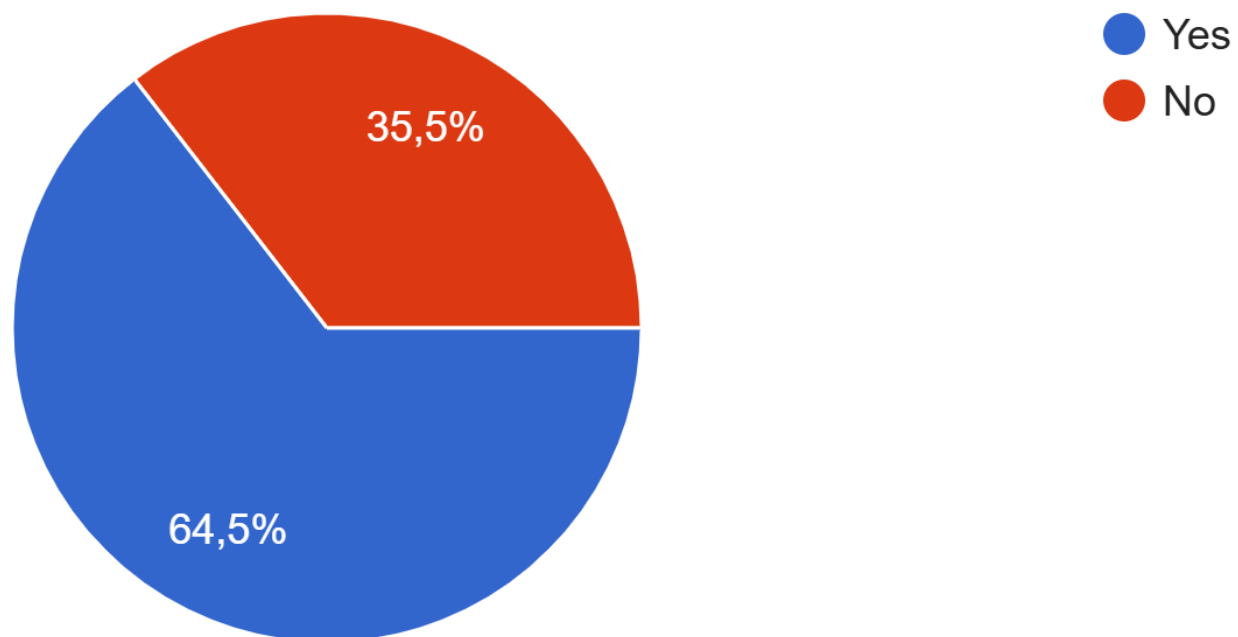
Do you believe a single set of guidelines may apply effectively to different legal traditions (e.g., common law and civil law)?

58 respostas

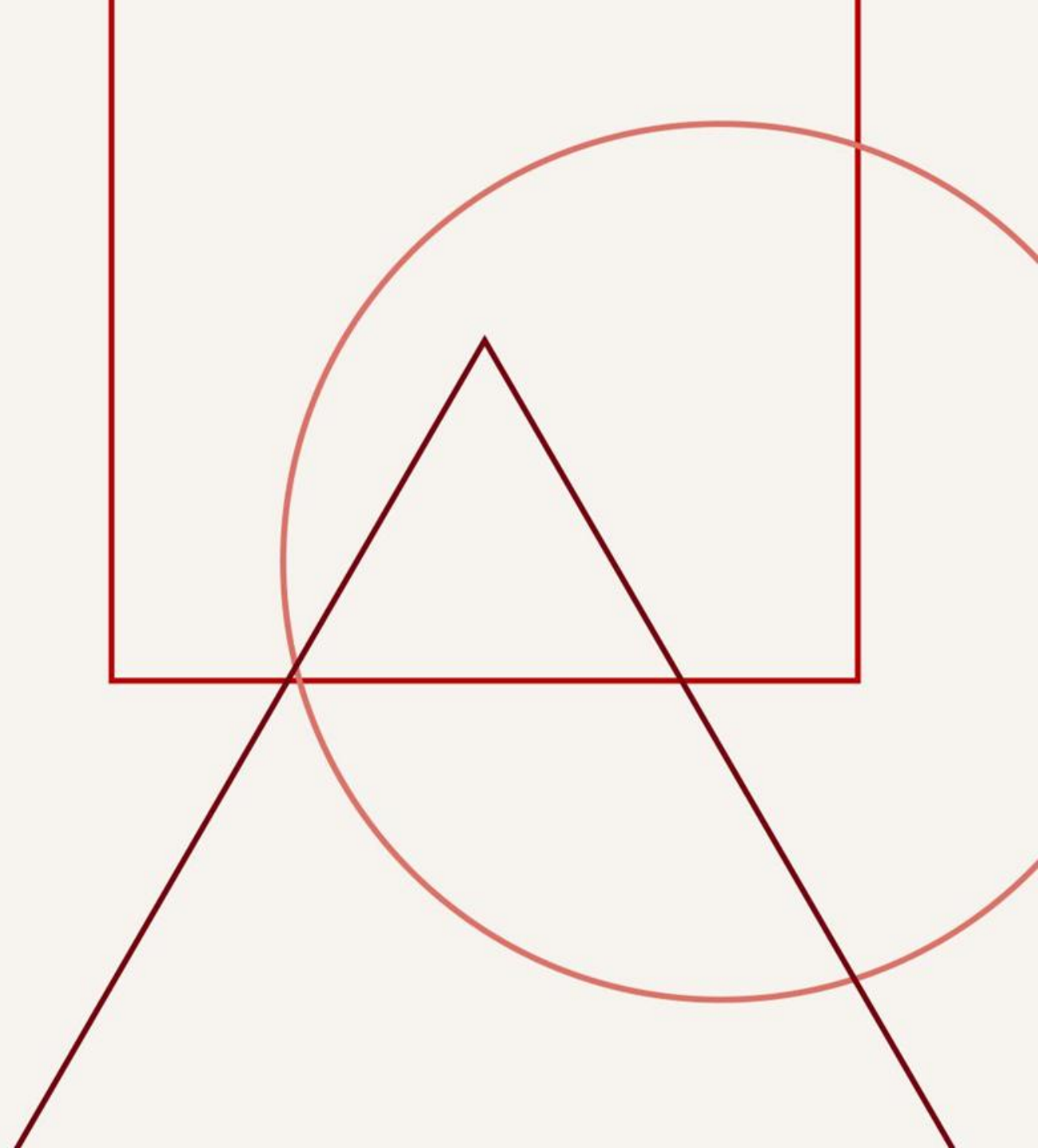


If “No”, do you believe that different guidelines should apply depending on the prevailing legal tradition in the arbitration (e.g., a set for common law and a set for civil law)?

31 respostas

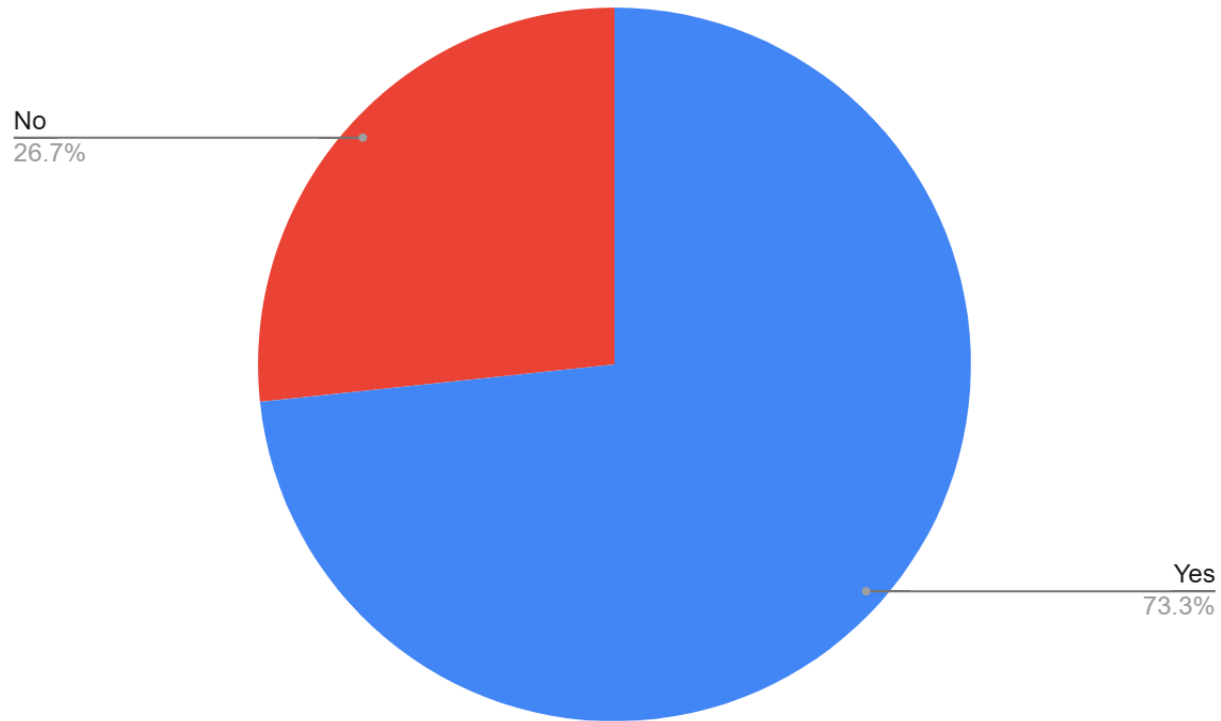


Annex 2:
*Comparison
between civil and
common law*

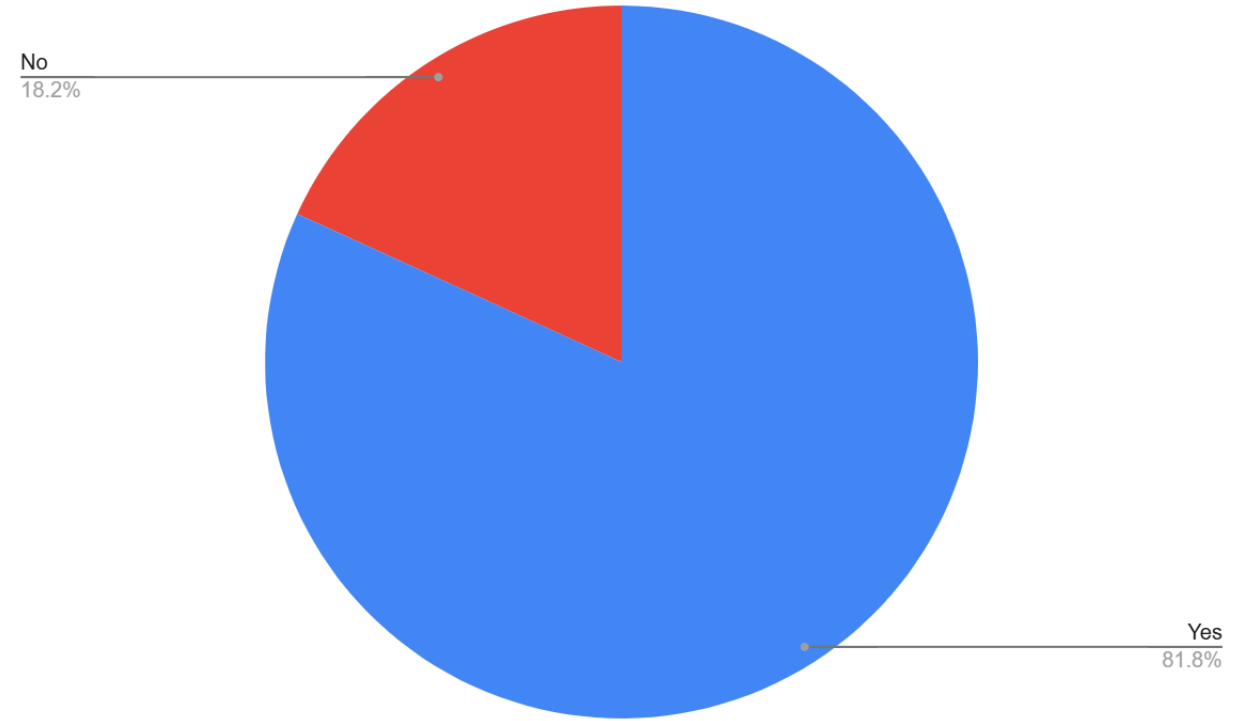


Absent the parties' agreement, does the arbitrator have the power to determine the use of written witness statements?

Civil law

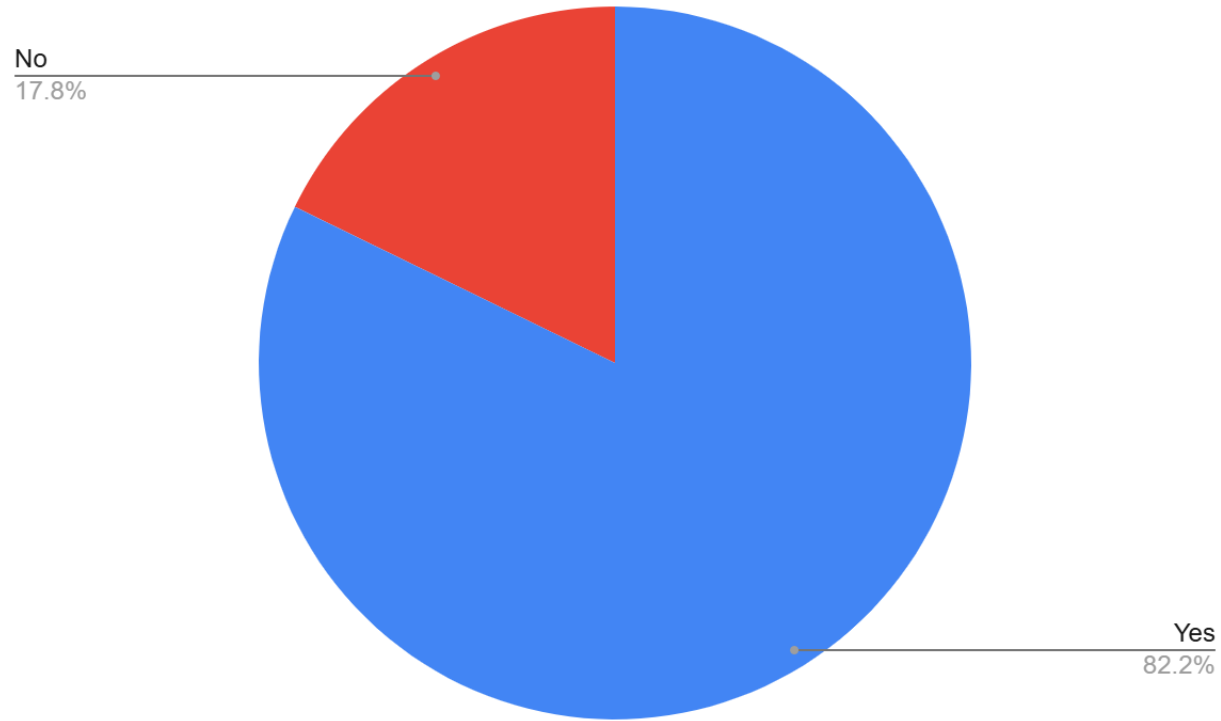


Common law

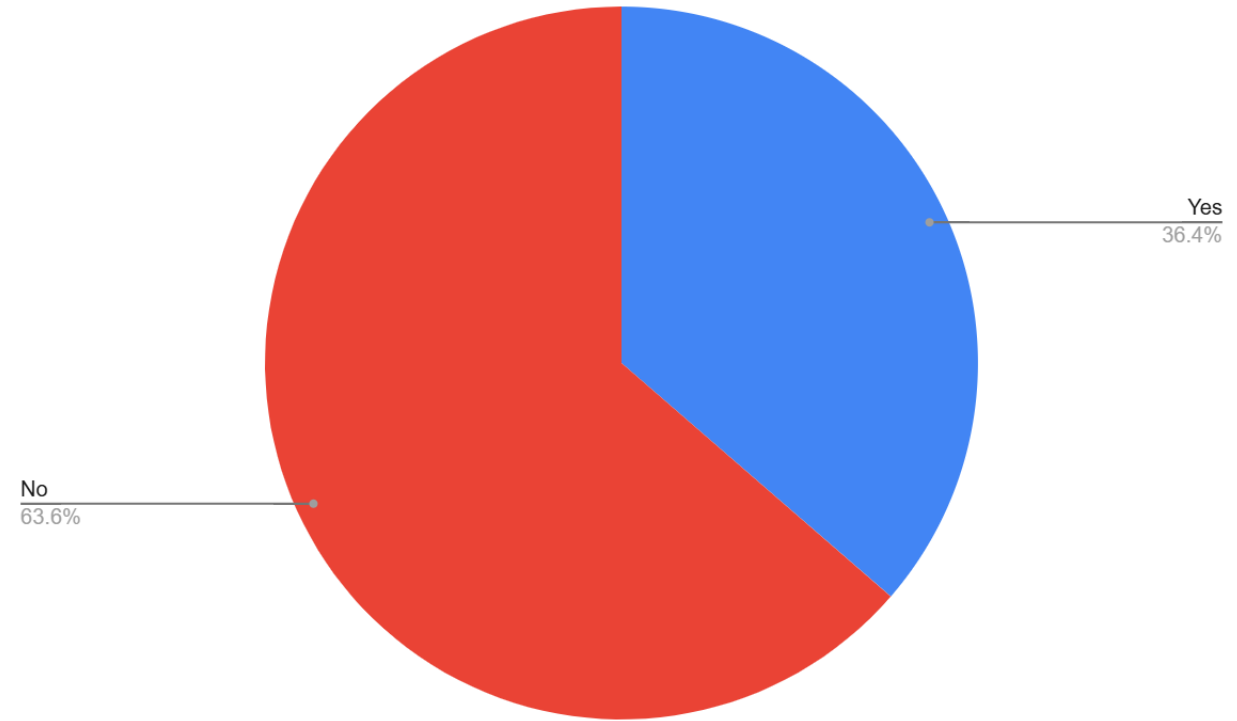


Is an agreement between the parties to use or not to use written witness statements binding to the arbitrator?

Civil law

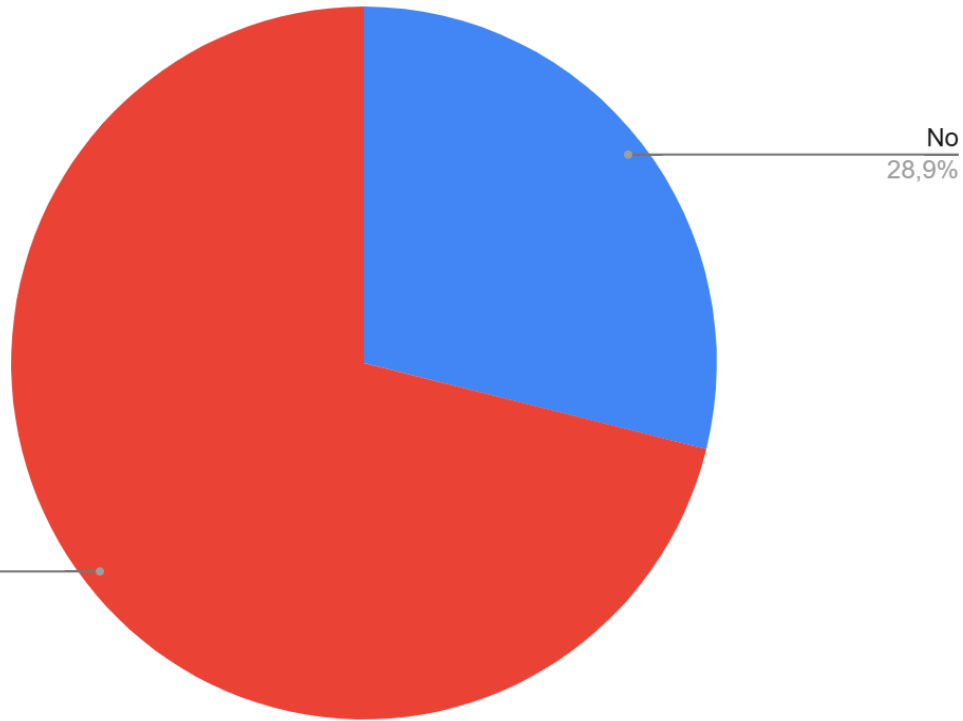


Common law

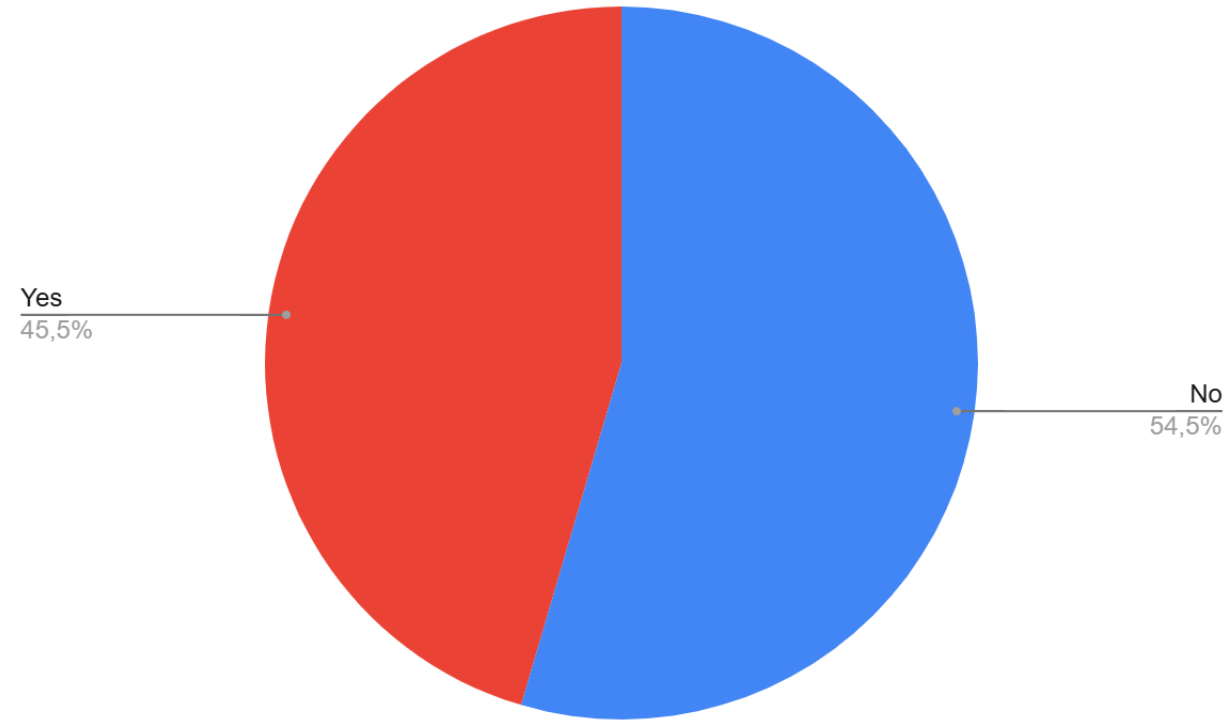


Are written witness statements submitted by one party without prior agreement of the opposing party or determination by the arbitrator admissible?

Civil law

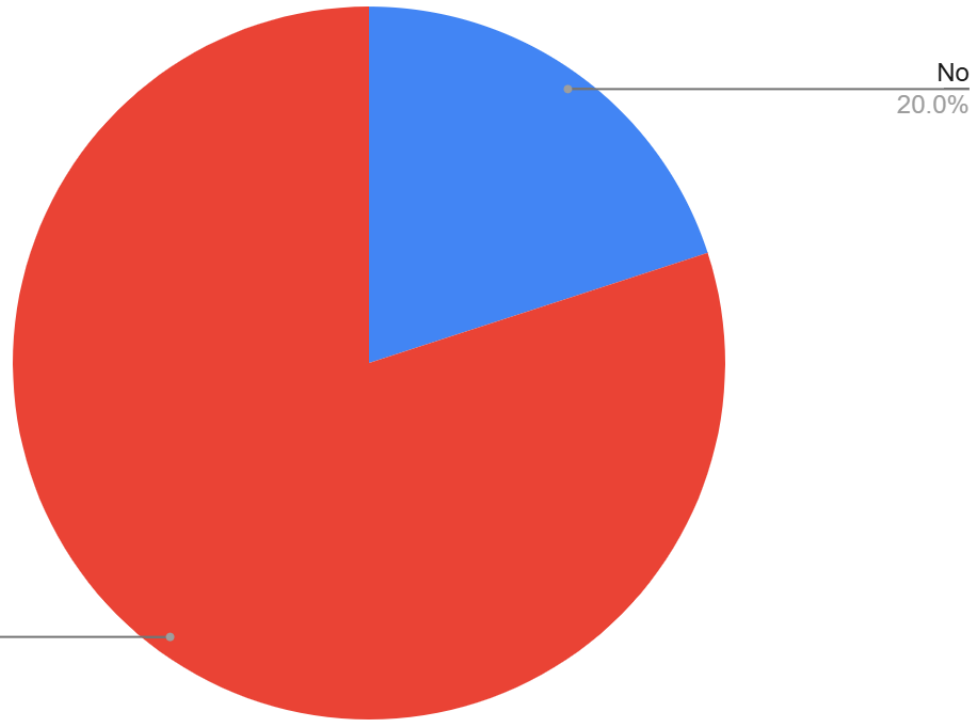


Common law

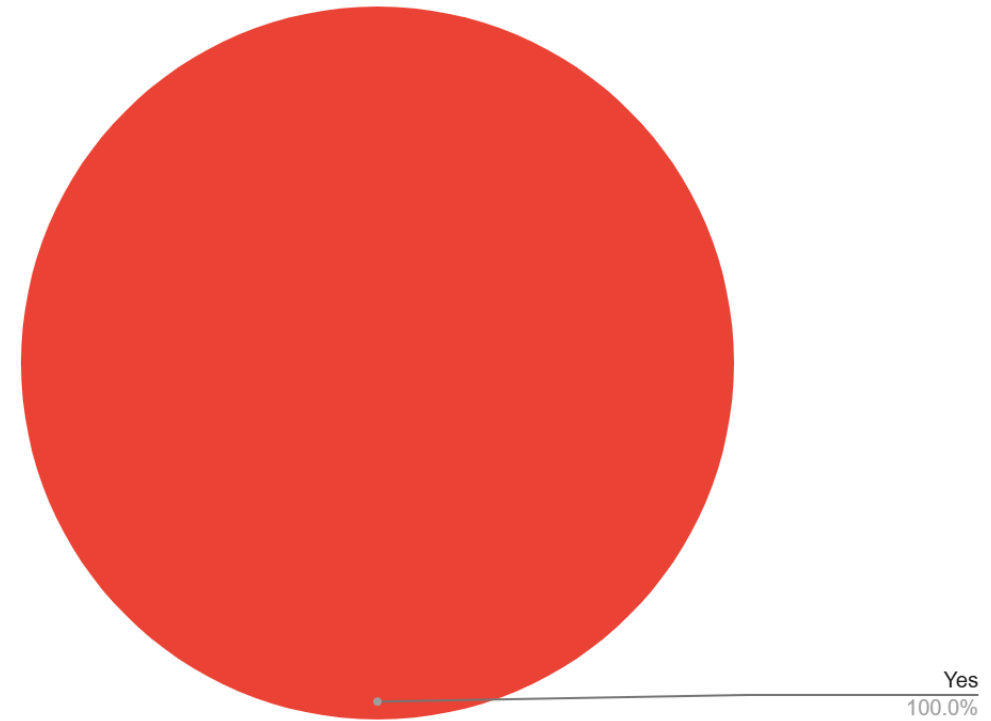


May a party submit as evidence written witness statements produced in other proceedings?

Civil law



Common law

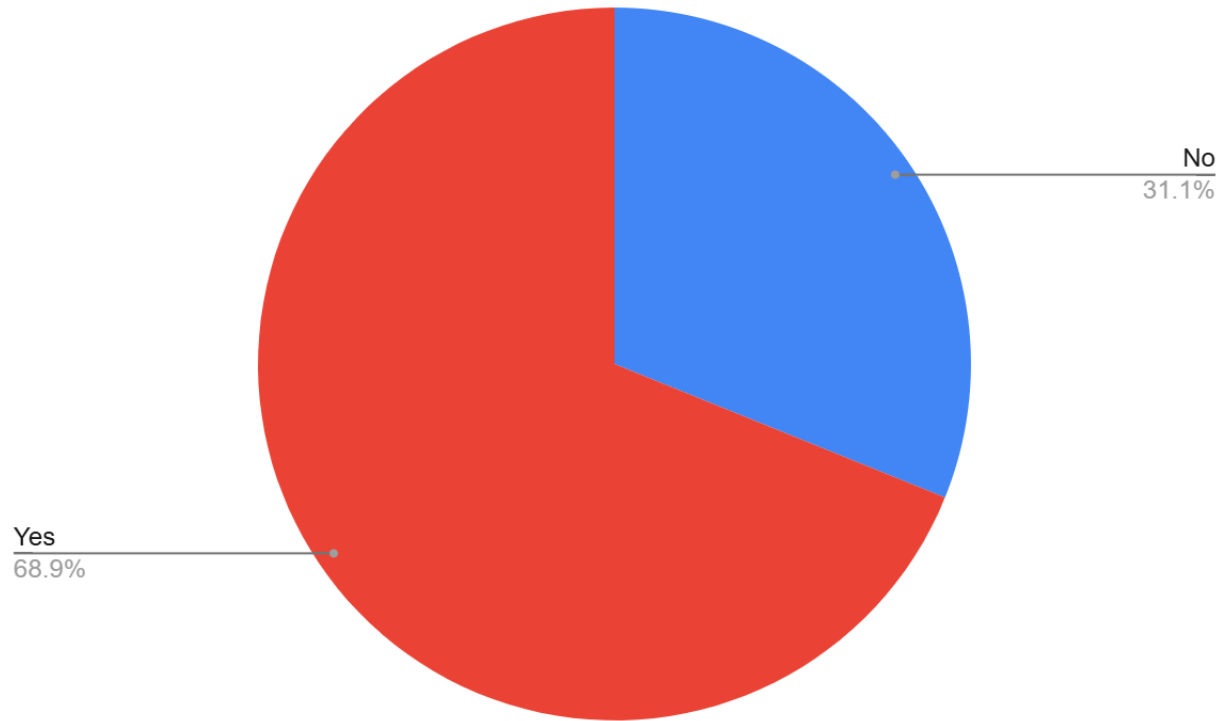


If "Yes", under which circumstances?

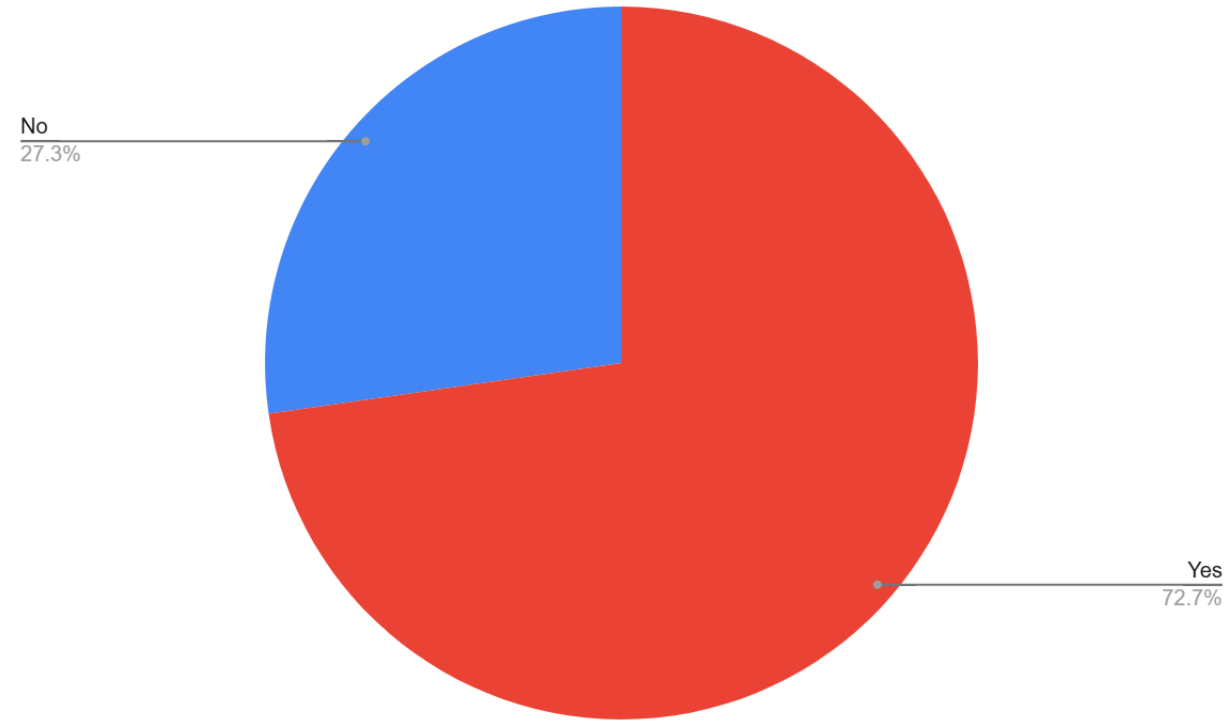
	Civil Law	Common Law
Only if the witness is available for cross-examination	29%	27%
Only if other proceedings are related to current one	20%	27%
Both options above	13%	9%
Other	20%	4%

May a party ask the arbitrator to order the opposing party to produce a written statement for a person under its control (e.g., an officer or employee)?

Civil law

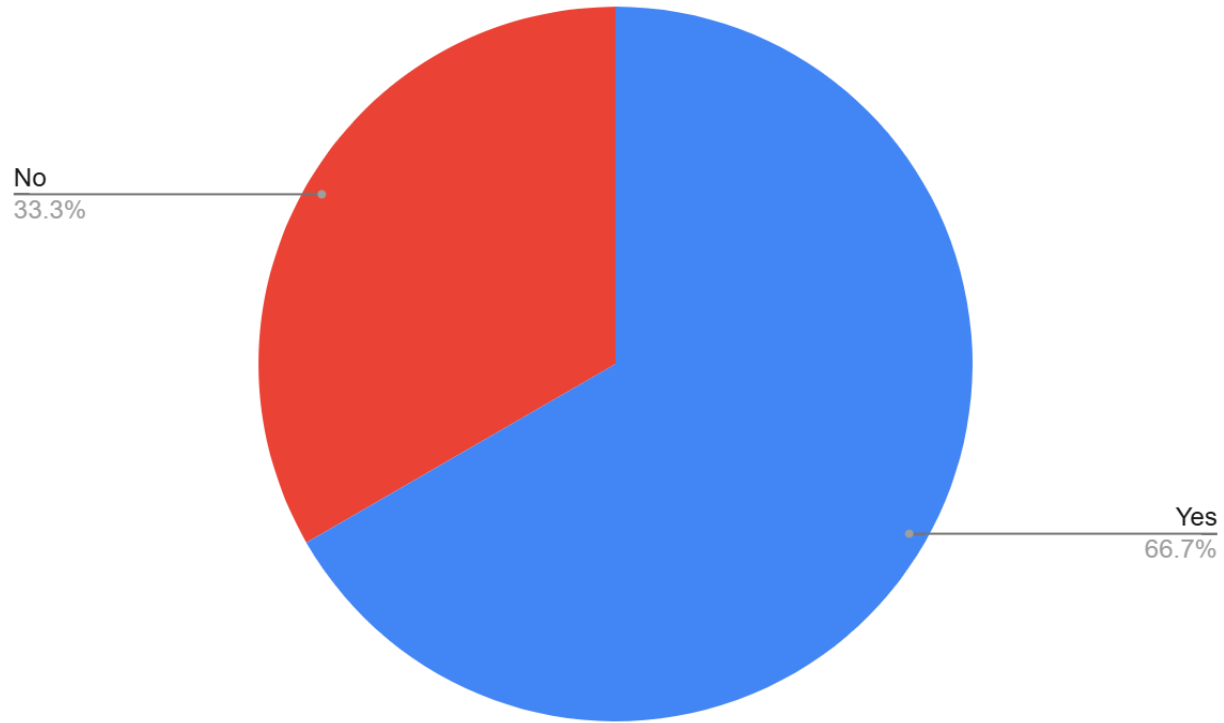


Common law

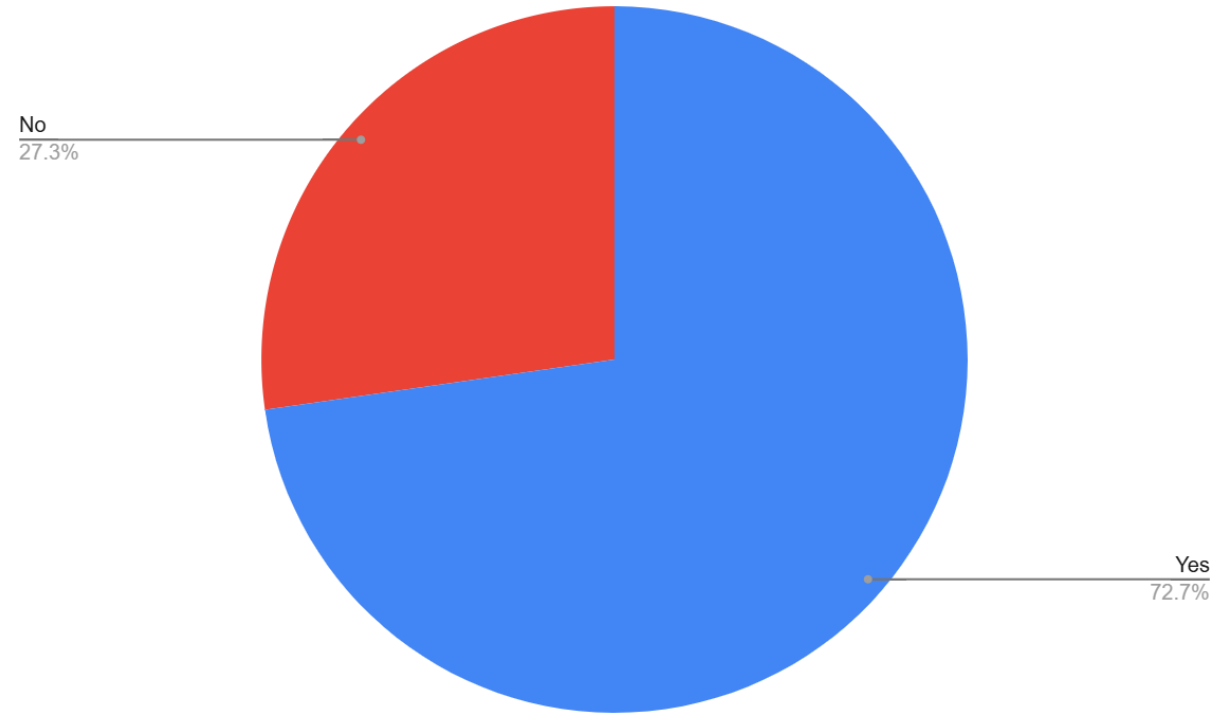


May the arbitrator ask *sua sponte* a party to produce a written statement for a person under its control (e.g., an officer or employee)?

Civil law

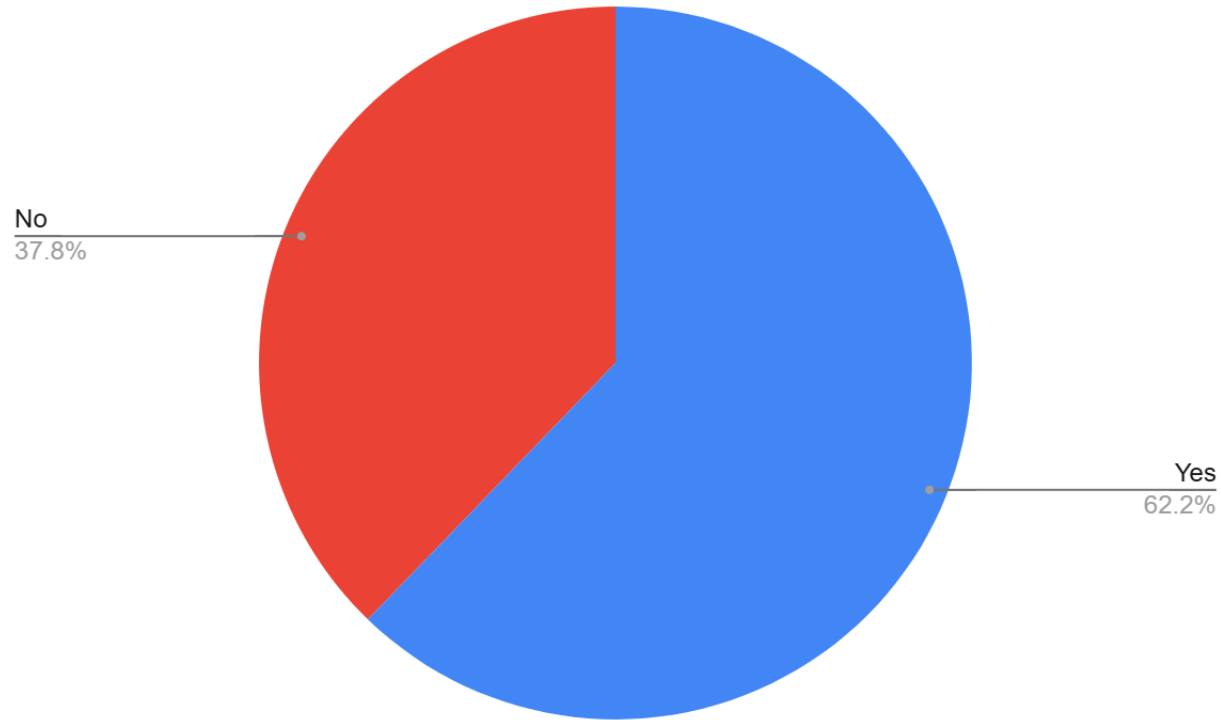


Common law

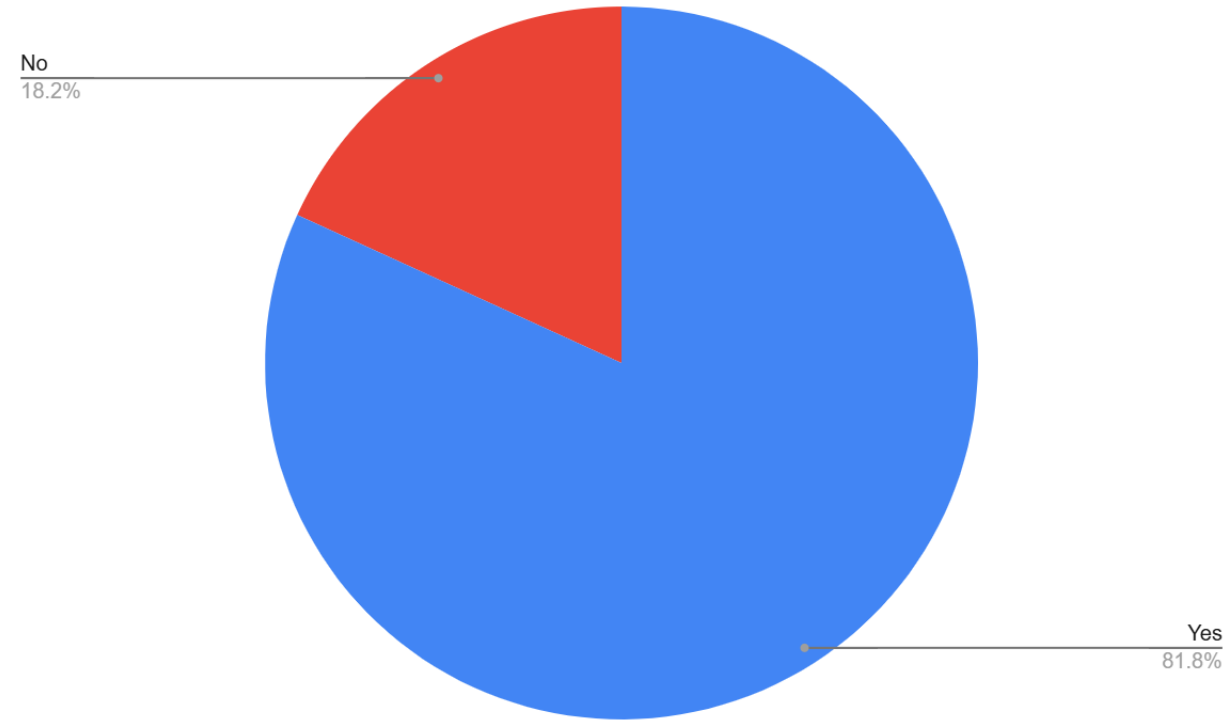


May the arbitrator draw an adverse inference when a party does not submit a written statement for a key witness under its control?

Civil law



Common law

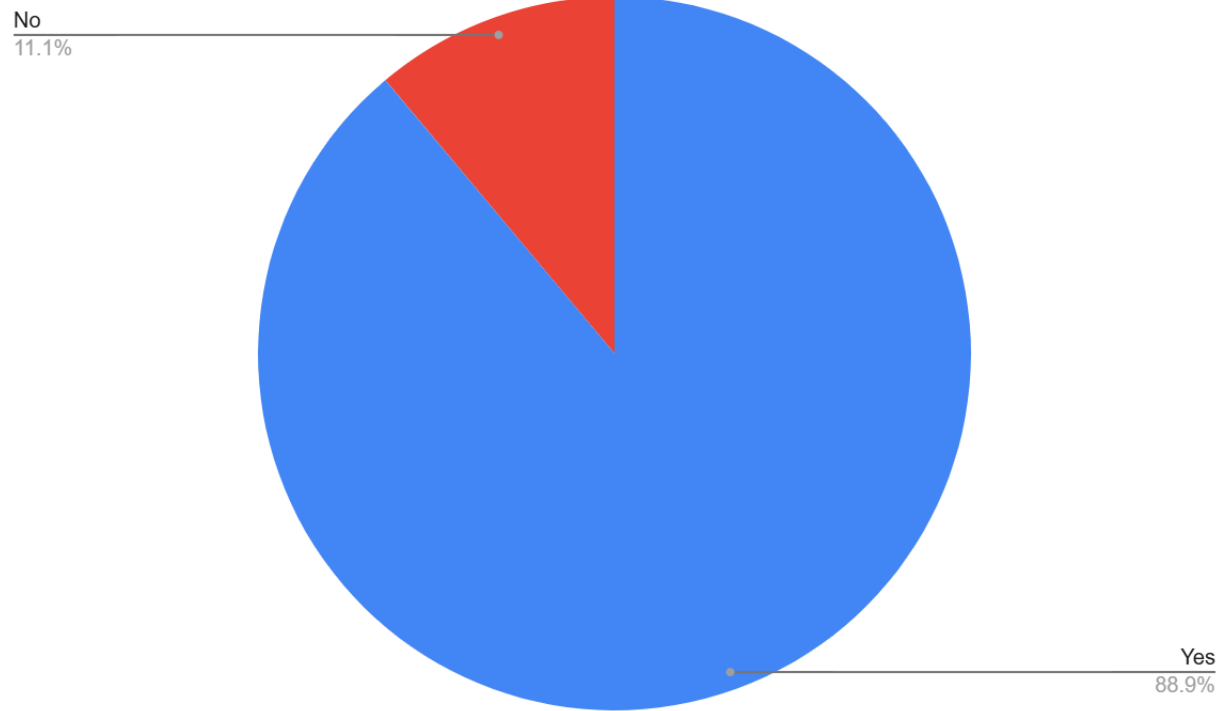


If “Yes”, under which scenarios? (respondents could select more than one answer)

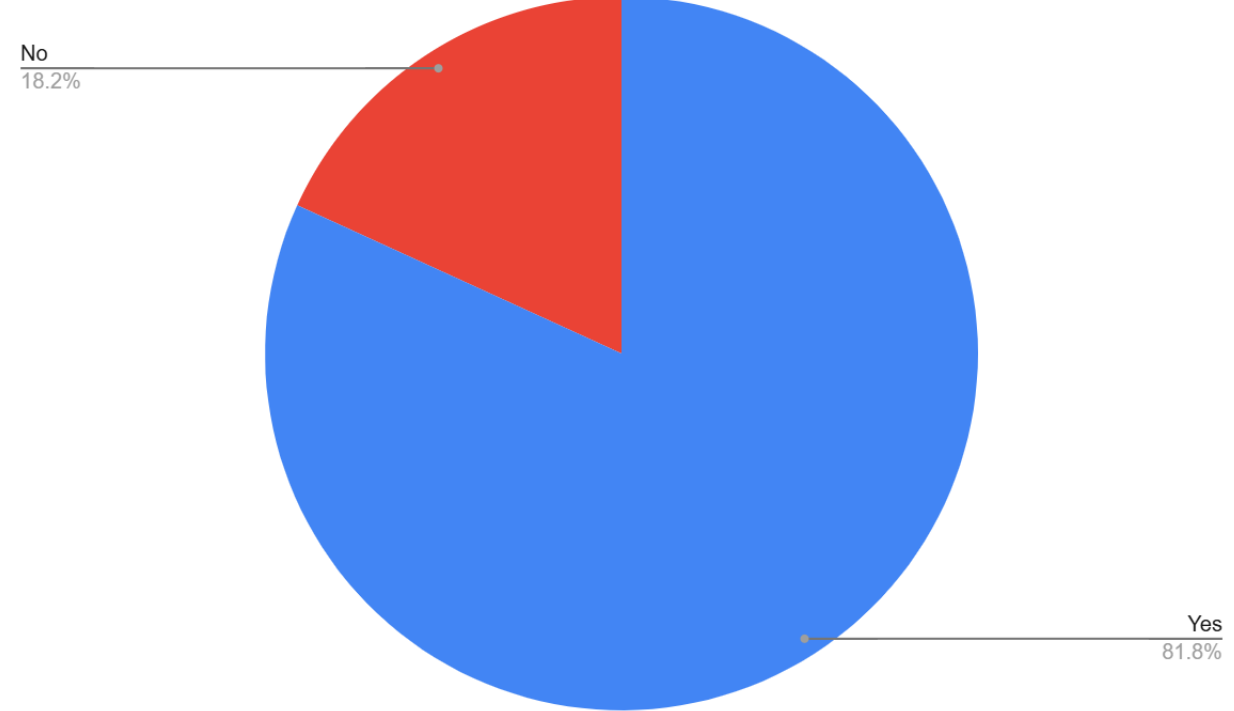
	Civil Law	Common Law
Party also failed to produce the witness at the hearing upon request	64%	66%
No other witness dealt with the relevant facts	21%	33%
Facts are central to a matter in dispute	42%	55%
No specific circumstances required	14%	22%
Other	14%	0%

May a party submit new written witness statements in response to those produced by the opposing party?

Civil law

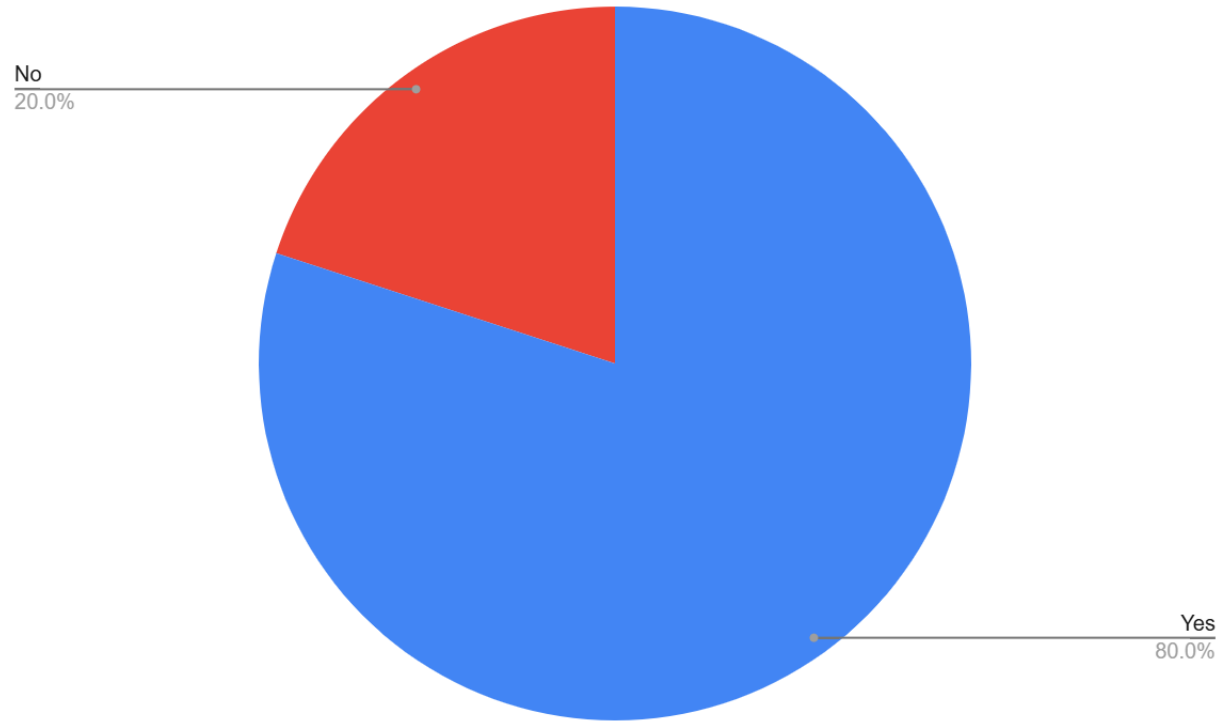


Common law

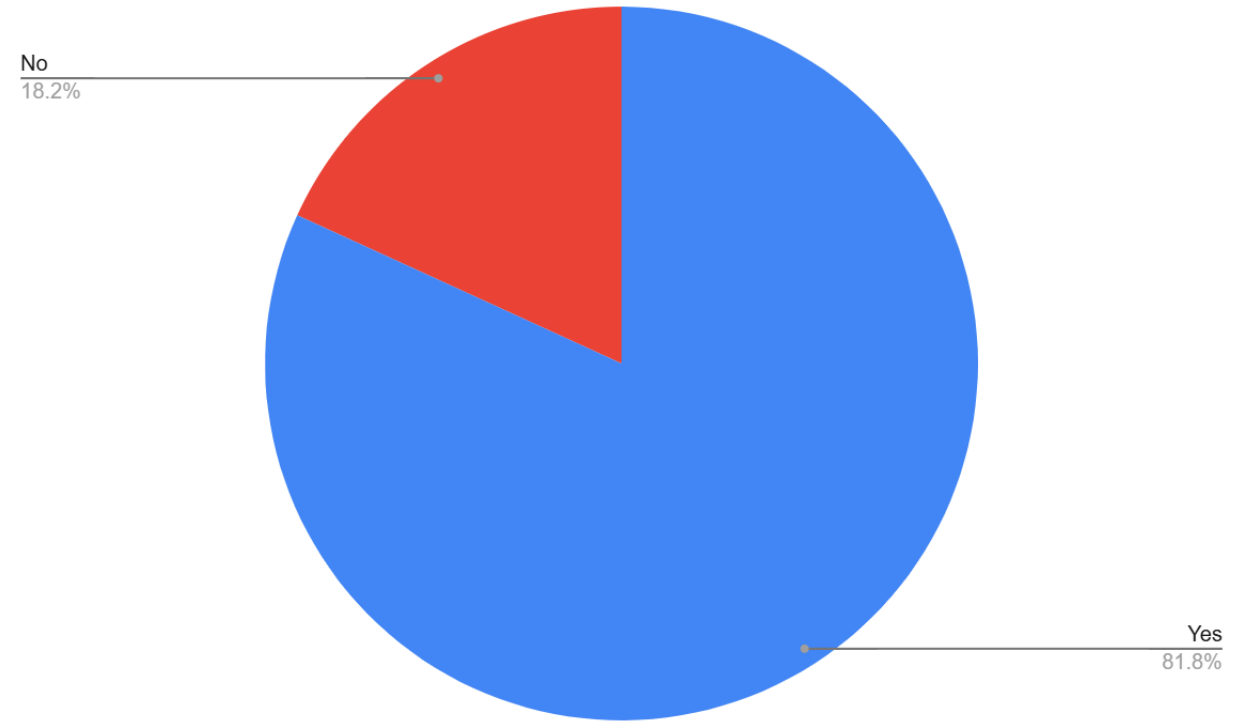


May a party amend prior written witness statements?

Civil law

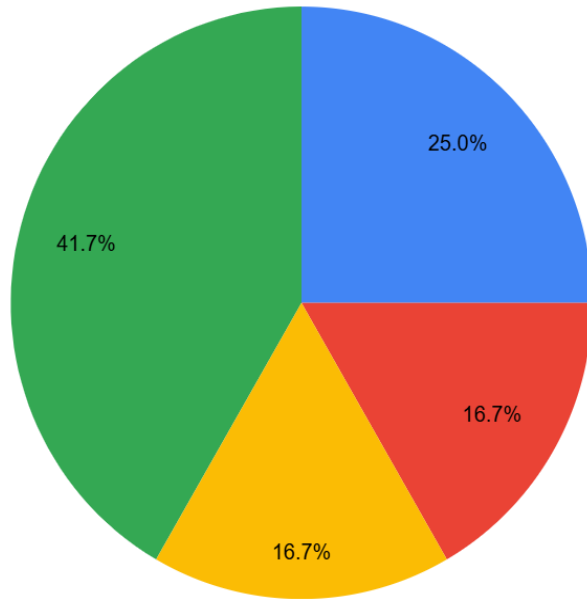


Common law



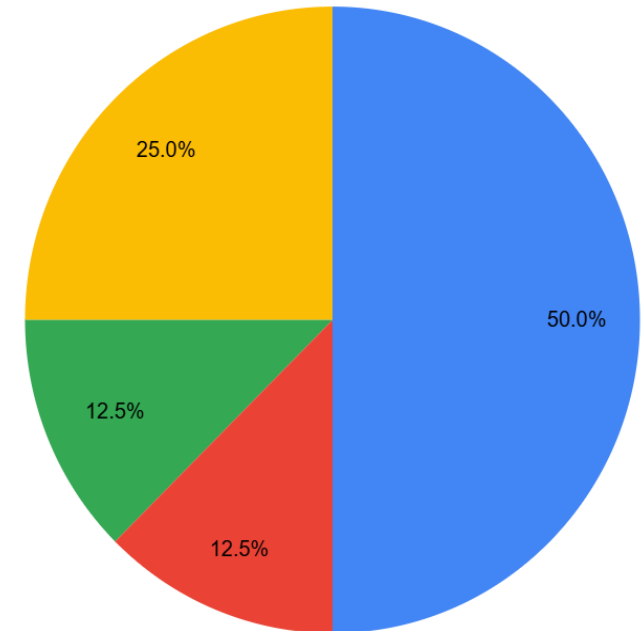
If "Yes", up until which point?

Civil law



- Up to (and including) the hearing
- End of written submissions
- A specific moment determined by the arbitrator or by the parties after the hearing
- Specific number of days prior to hearing

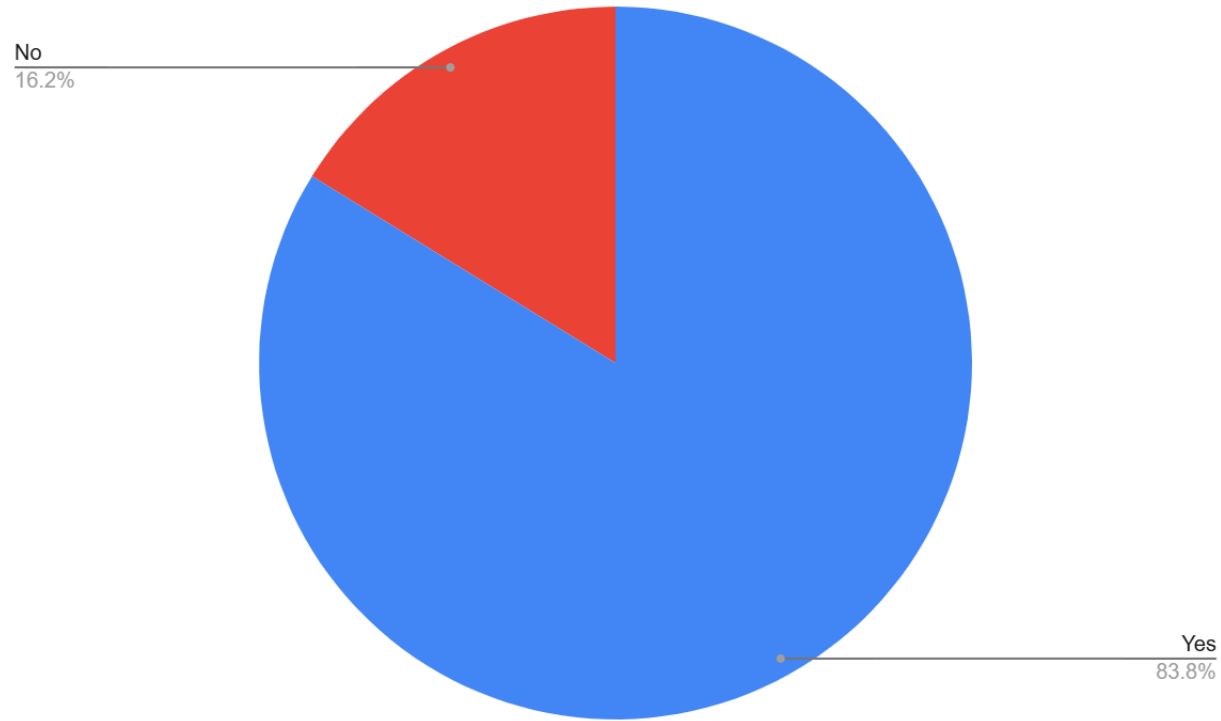
Common law



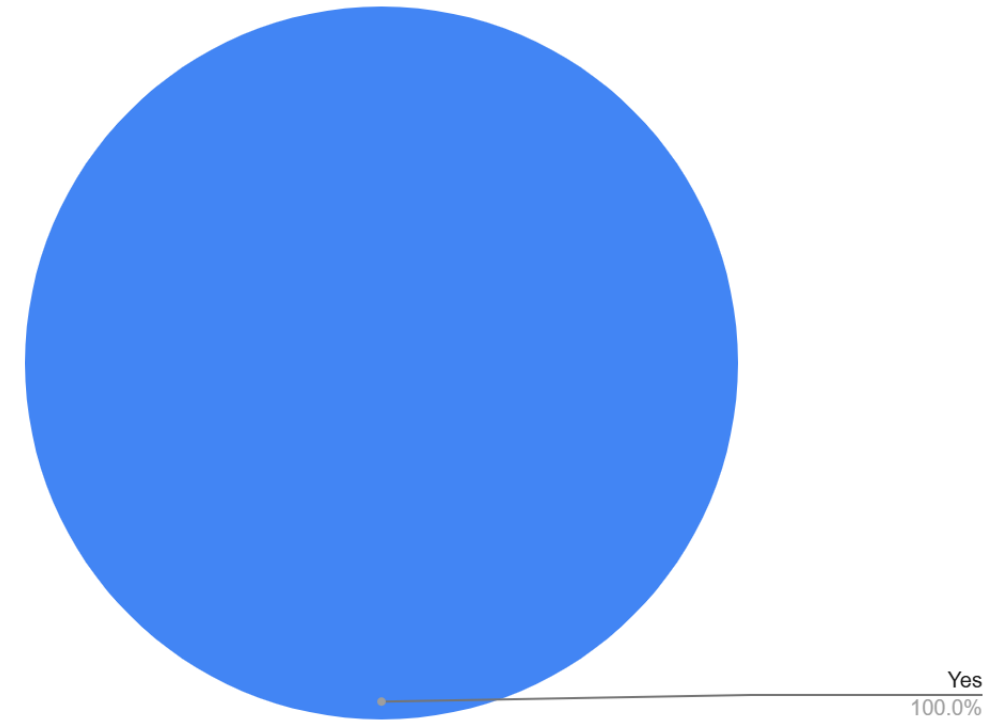
- Up to (and including) the hearing
- End of written submissions
- Specific number of days prior to hearing
- A specific moment determined by the arbitrator or by the parties after the hearing

If "Yes", does it depend on an admissibility analysis by the arbitrator?

Civil law



Common law



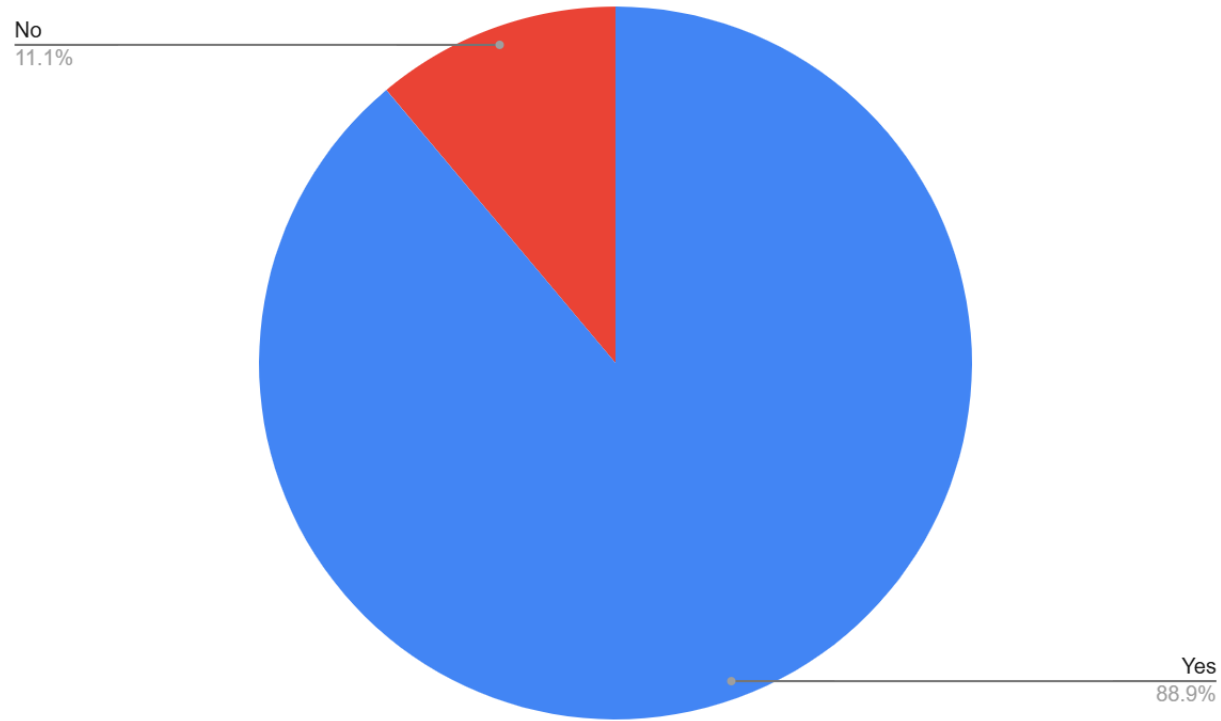
What determines how witness statements are to be prepared?

(respondents could select more than one answer)

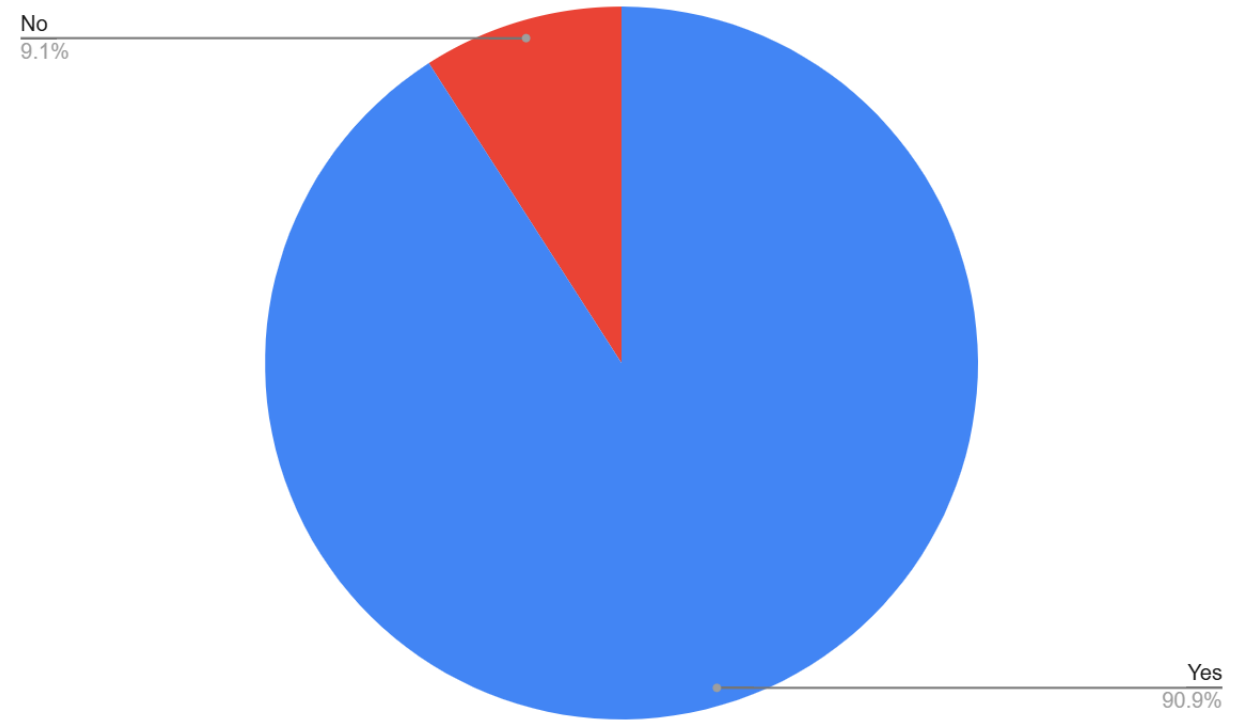
	Civil Law	Common Law
Ethical or professional conduct rules to which counsel is bound	73%	73%
Procedural rules of the seat of arbitration	75%	73%
Procedural rules of the witness's place of residence	11%	18%
Each party's or counsel's personal preferences	16%	18%
Parties must necessarily prior agree on a method or preparation	36%	27%
Other	11%	9%

May a party hold meetings and interviews with the witness before preparing a written statement?

Civil law

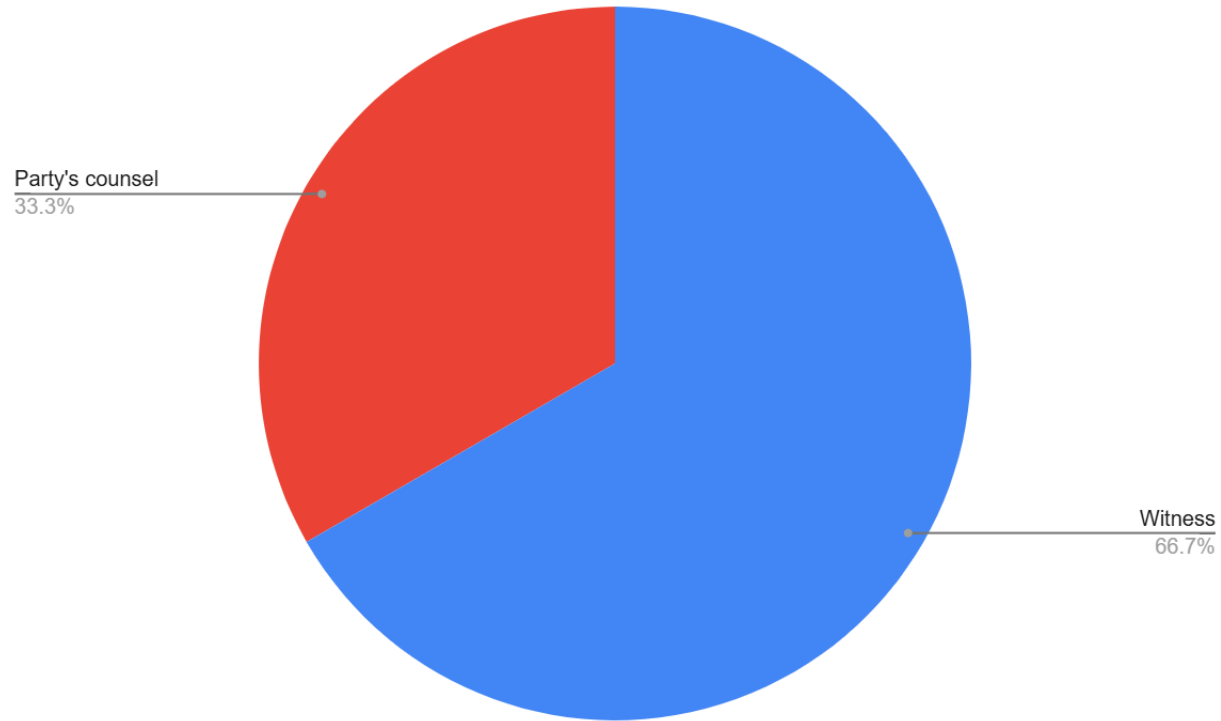


Common law

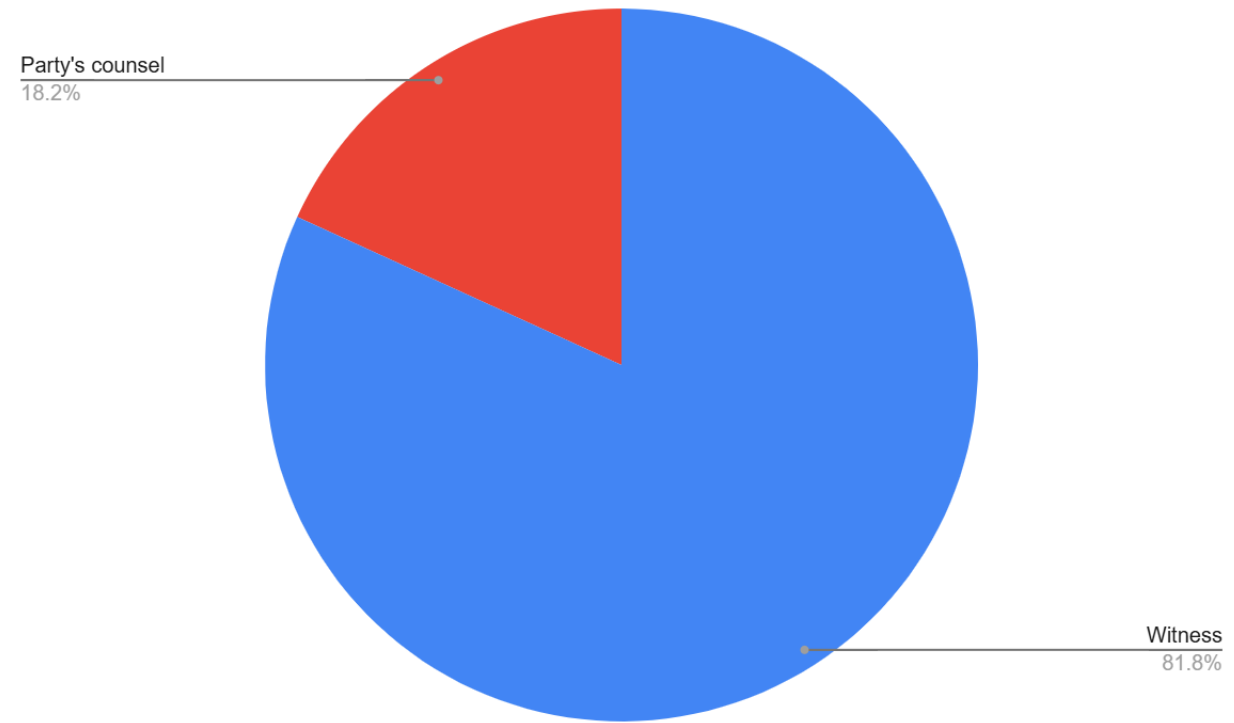


Who should be the main drafter of the written witness statement?

Civil law

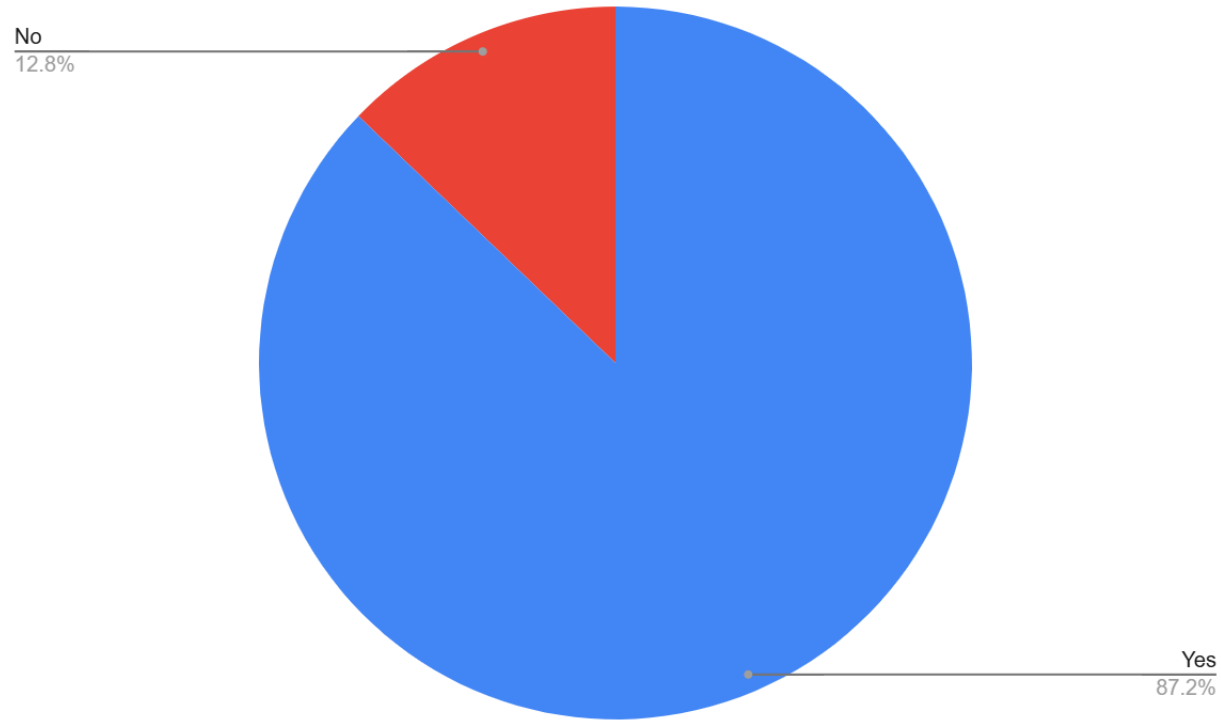


Common law

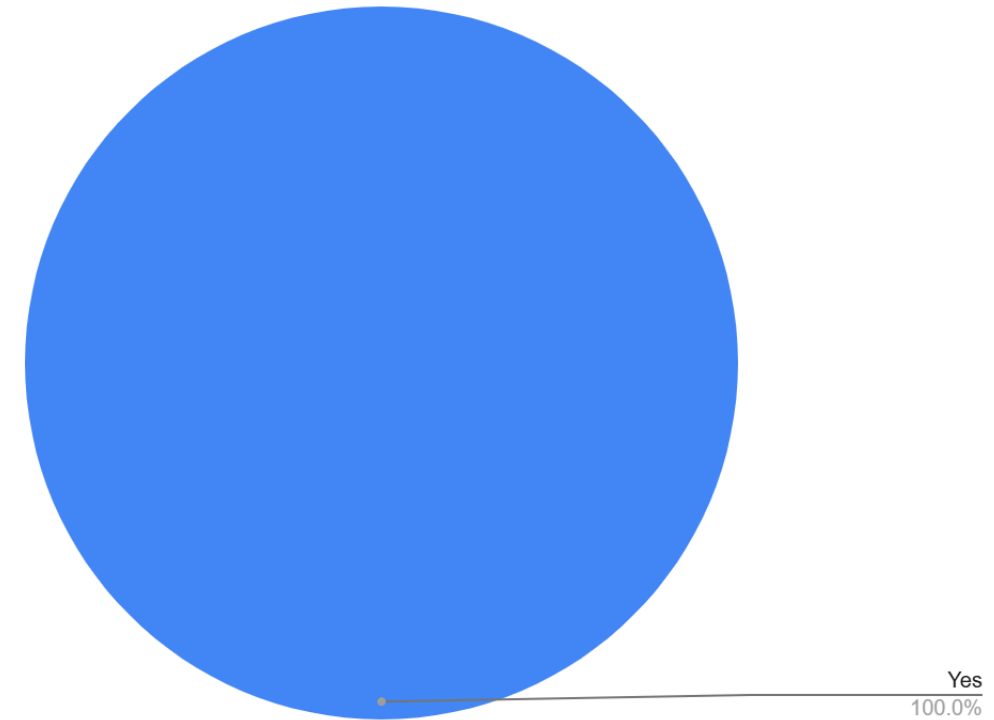


If "Witness", is the party's counsel allowed to review and propose amendments to the draft statement?

Civil law

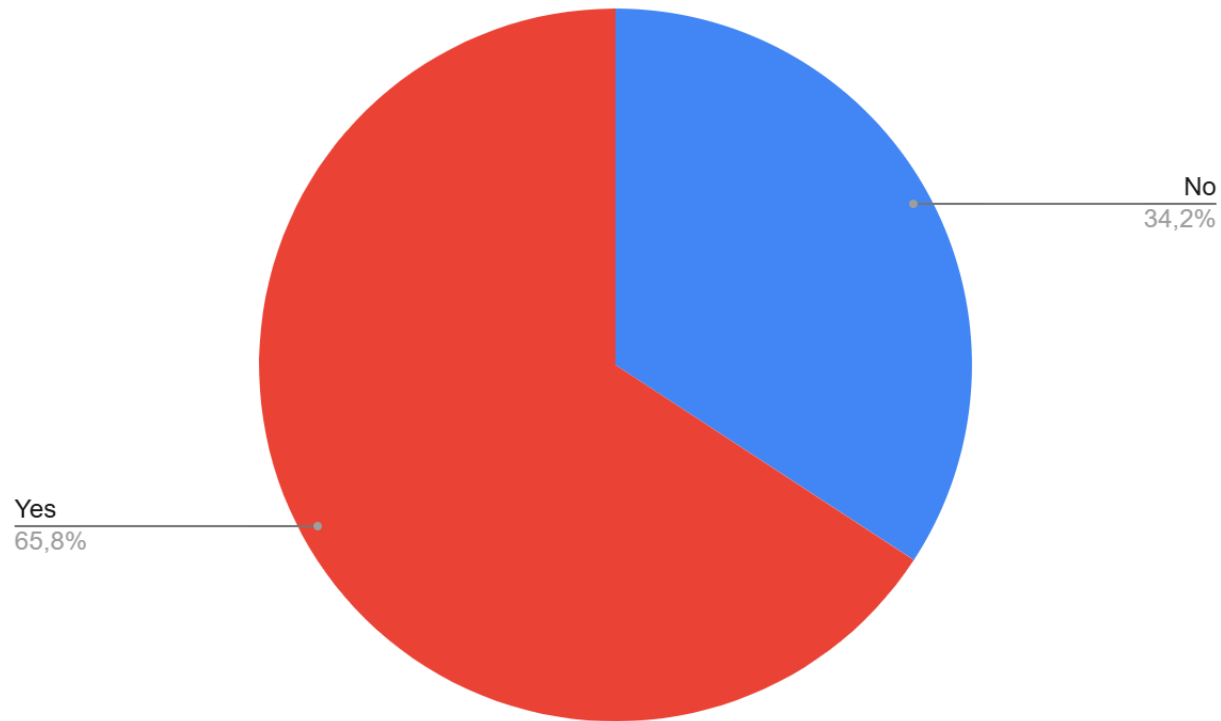


Common law

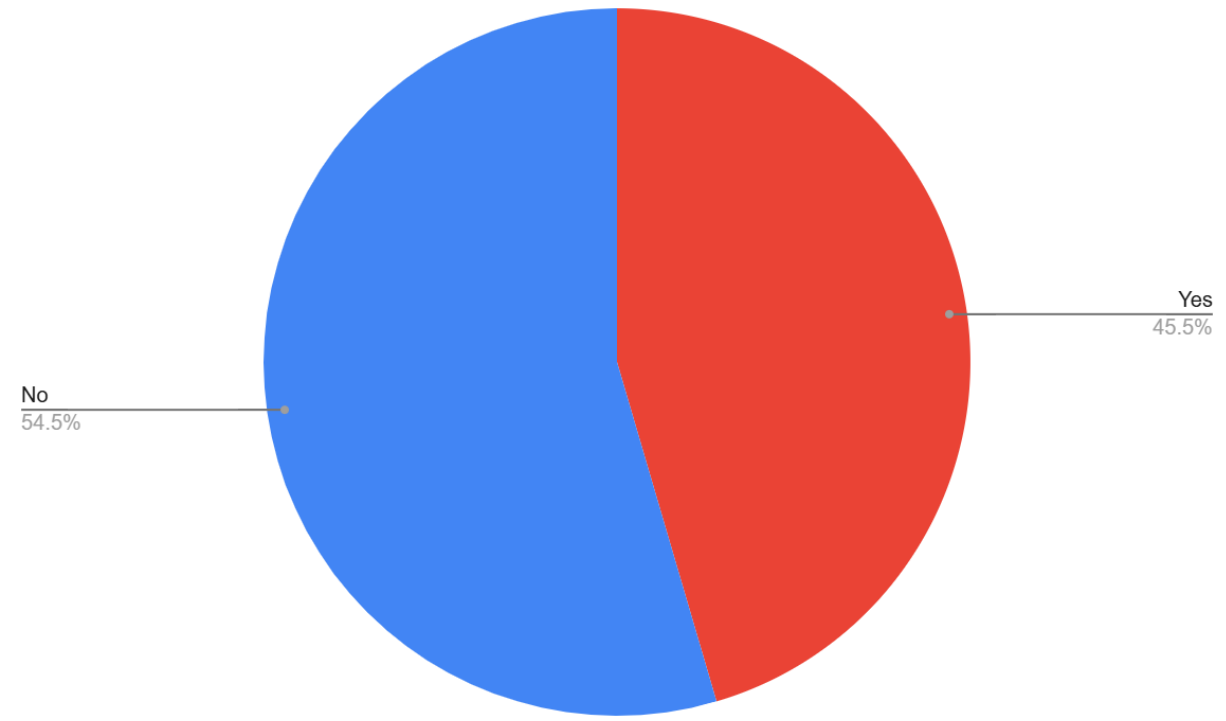


If "Yes", is it necessary to specify in the written witness statement that it was prepared with support of the party's counsel?

Civil law

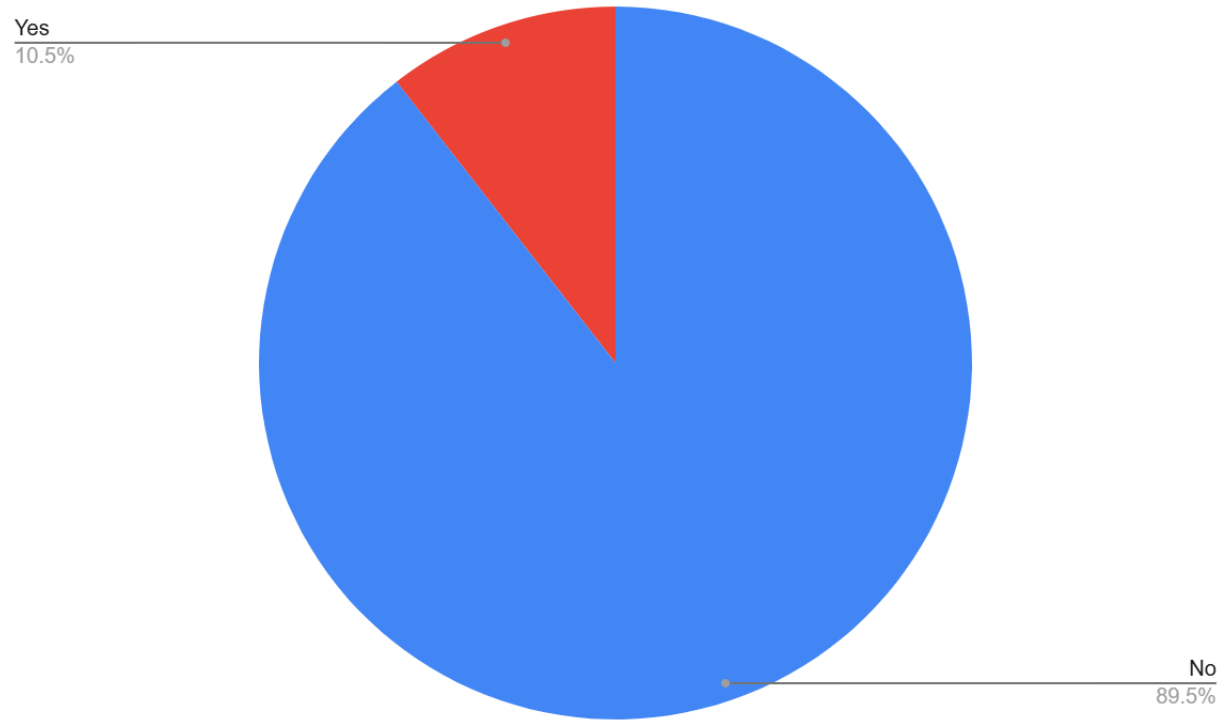


Common law

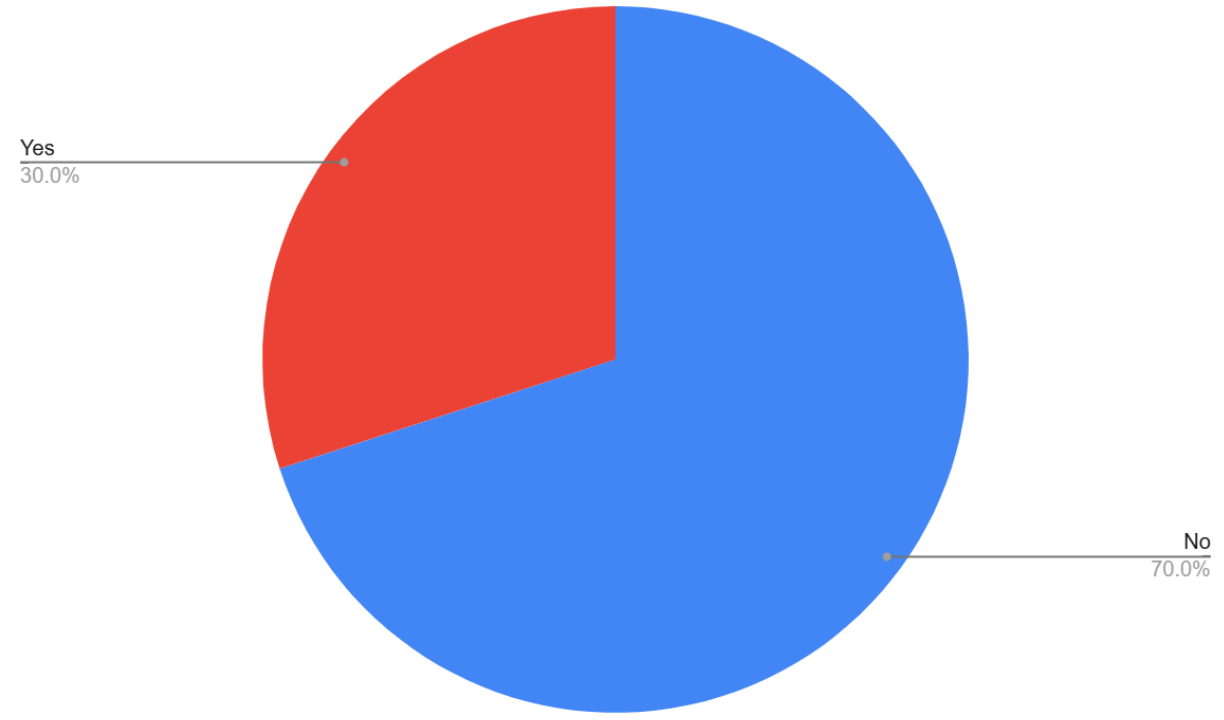


If "Party's counsel", is it necessary for party's counsel to record the prior meetings and interviews with the witness?

Civil law

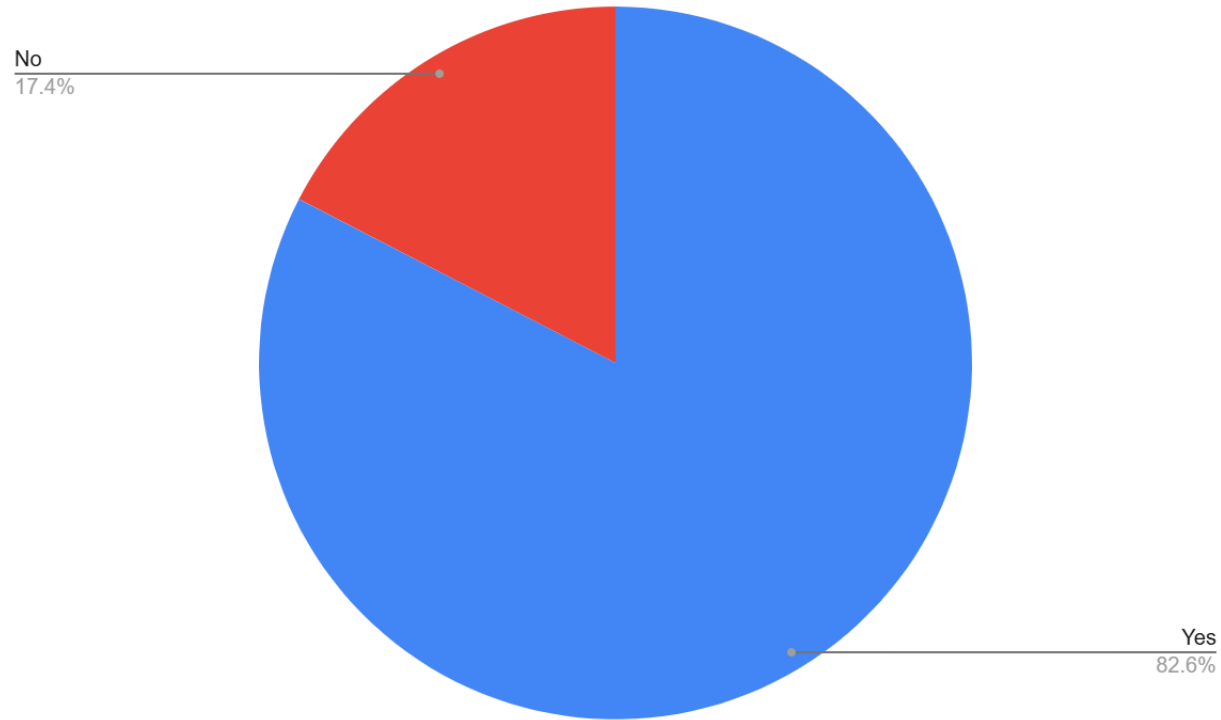


Common law

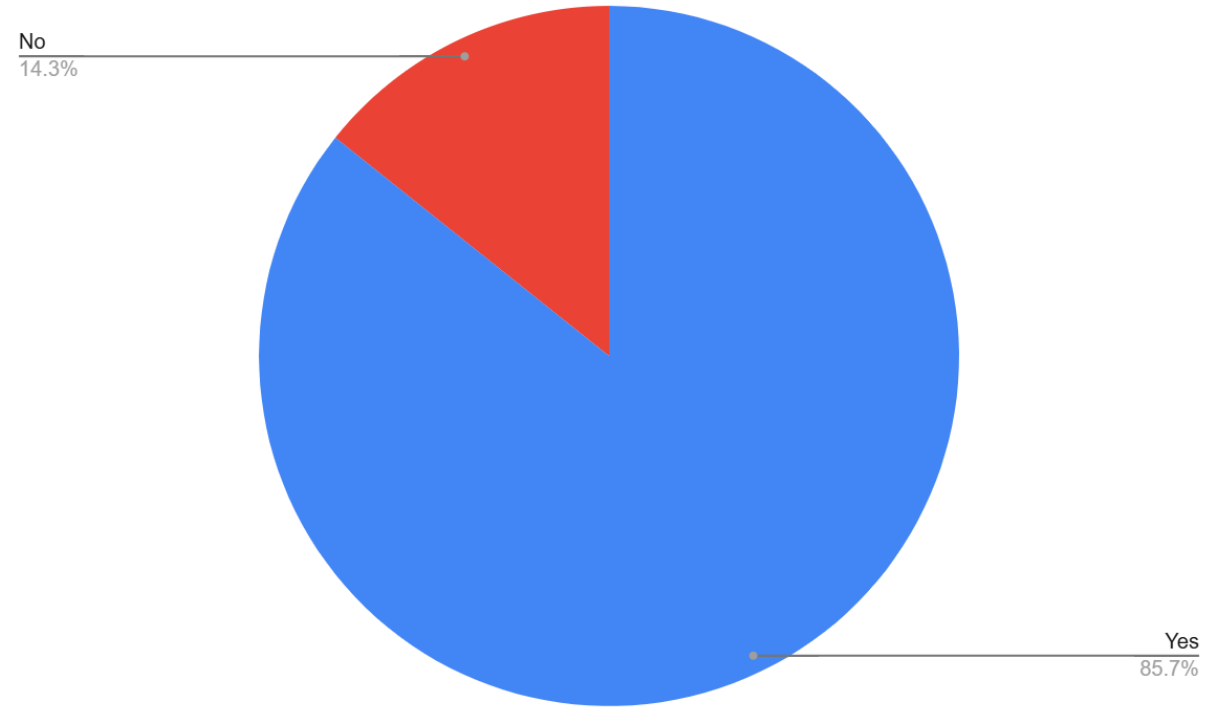


If "Yes", is the record of prior meetings and interviews protected by attorney-client privilege?

Civil law

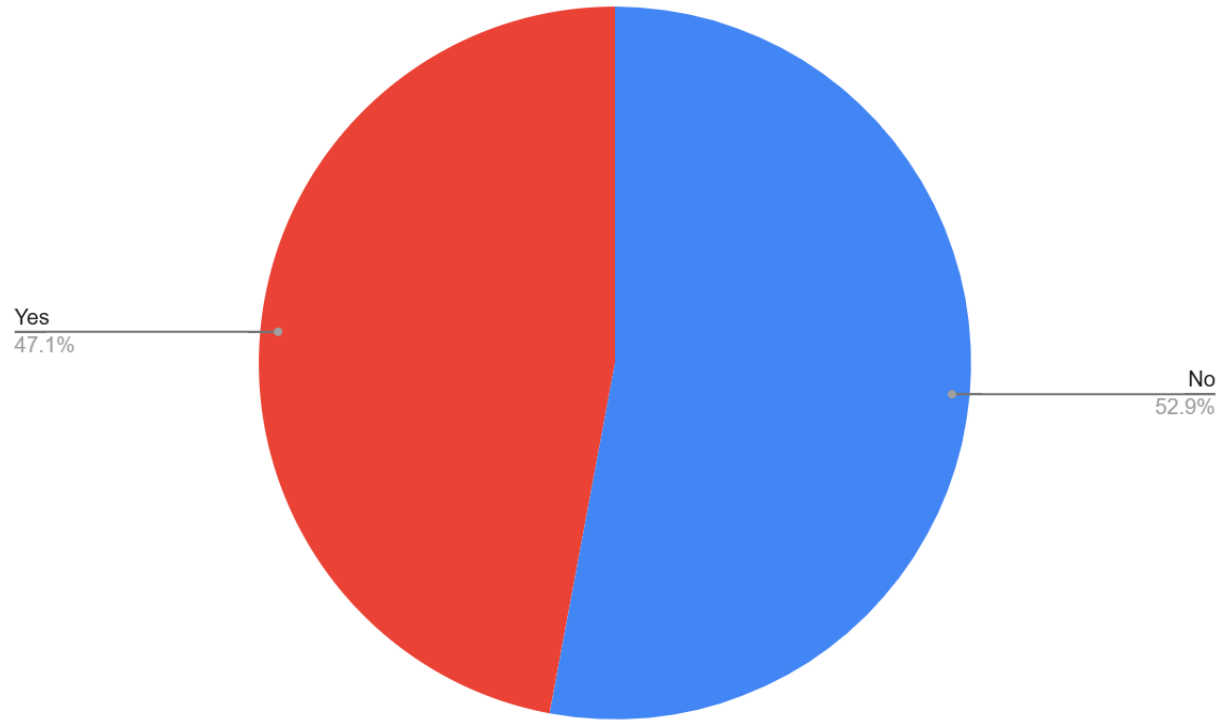


Common law

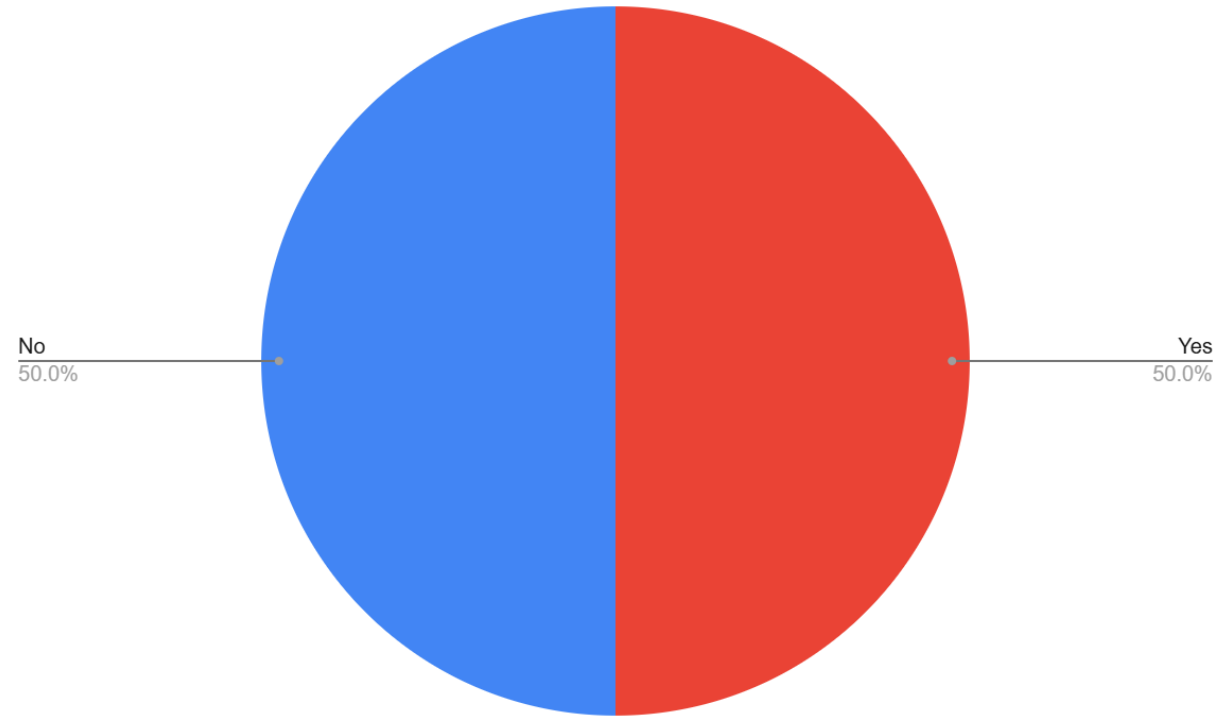


If "Party counsel", is it necessary to specify in the written witness statement that it was prepared by the party's counsel?

Civil law

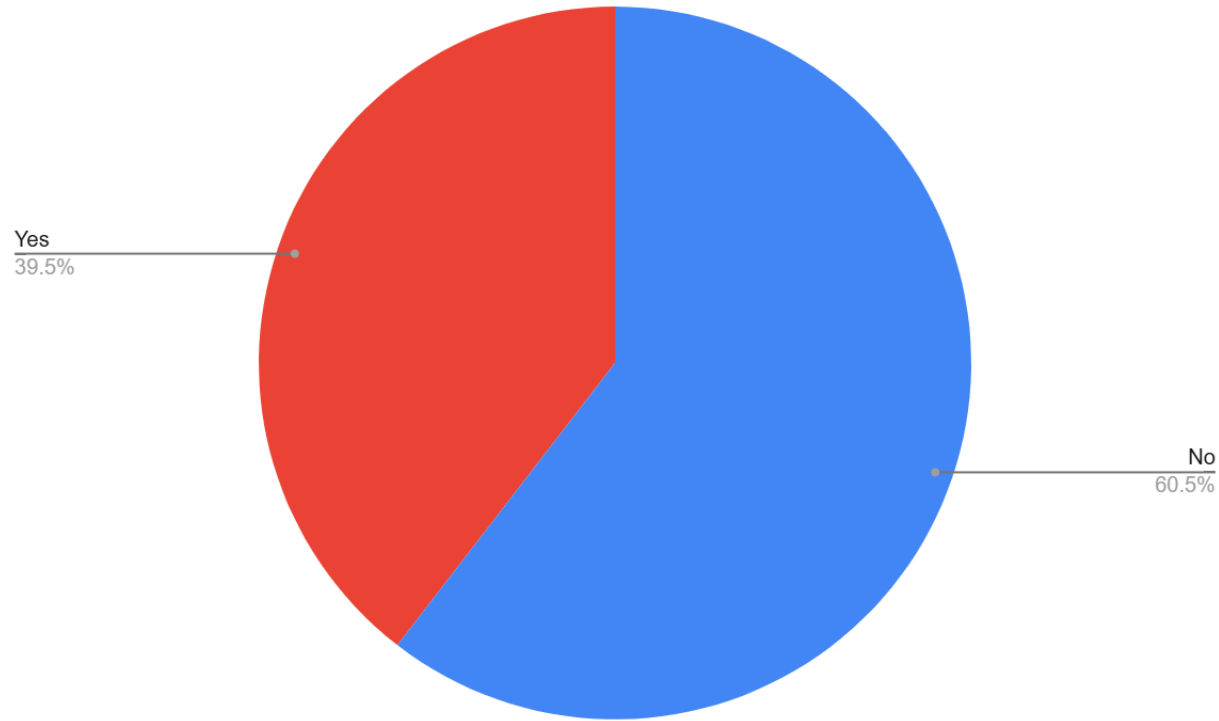


Common law

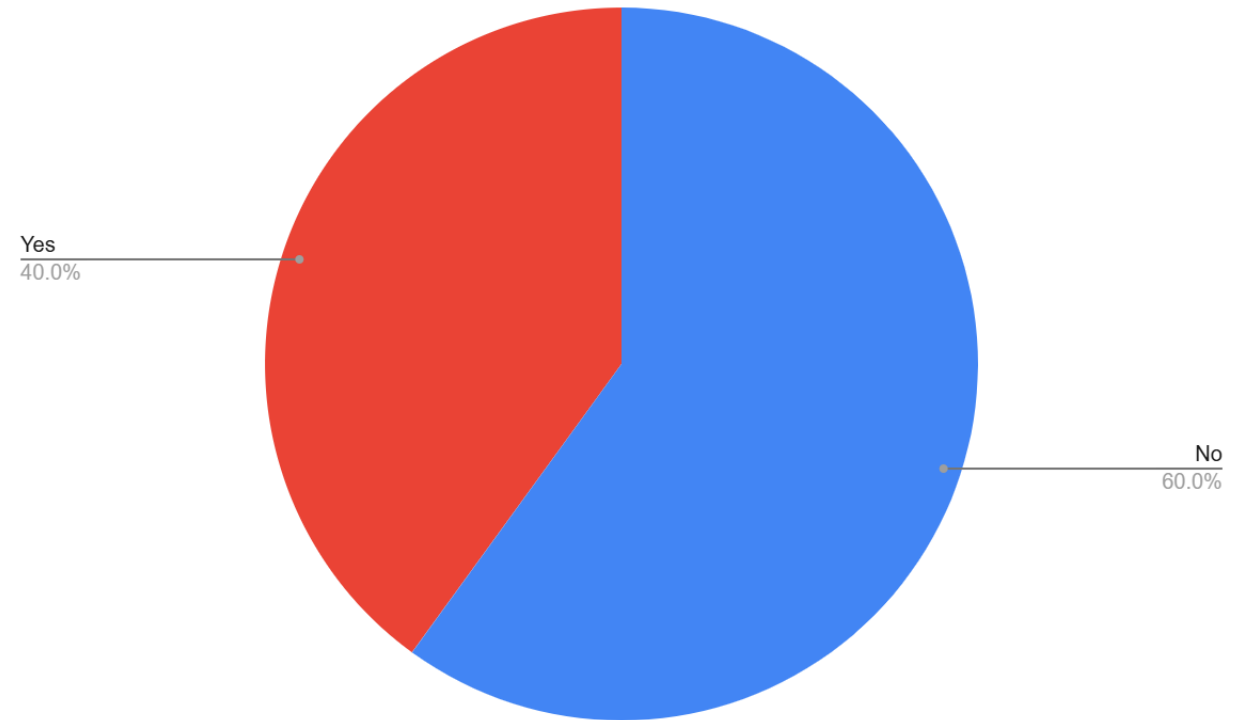


Would the responses above regarding the role of counsel be different if they concerned the role of a “witness’s independent counsel” (i.e., a counsel hired by the witness itself) instead of a “party’s counsel”?

Civil law

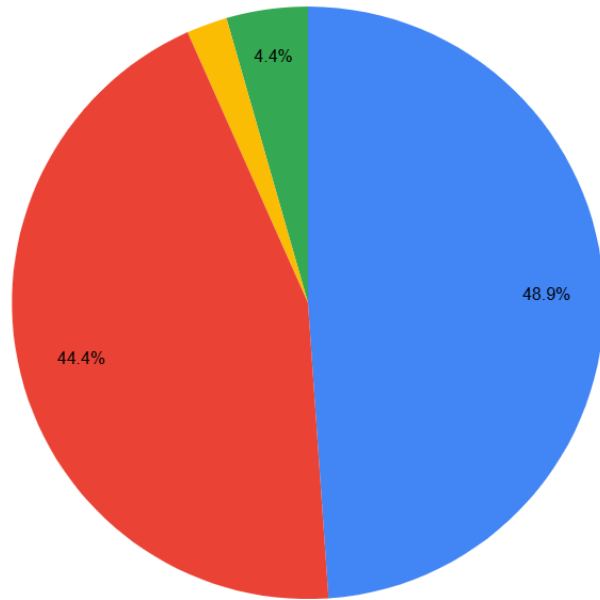


Common law



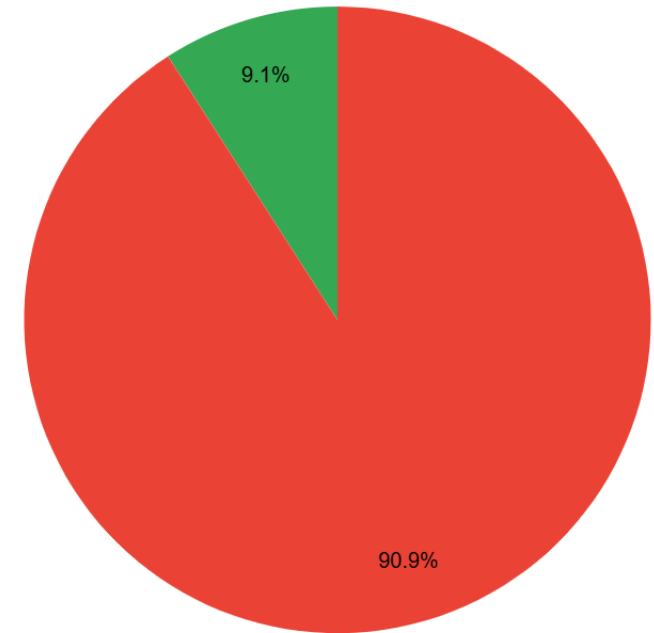
What is the appropriate procedure for statements of witnesses that are not fluent on the language of the arbitration?

Civil law



- Witness statement must be submitted in original language together with a translation by counsel
- Witness statement must be submitted in original language together with a certified translation
- Only a translation by counsel of the witness statement may be submitted
- Other

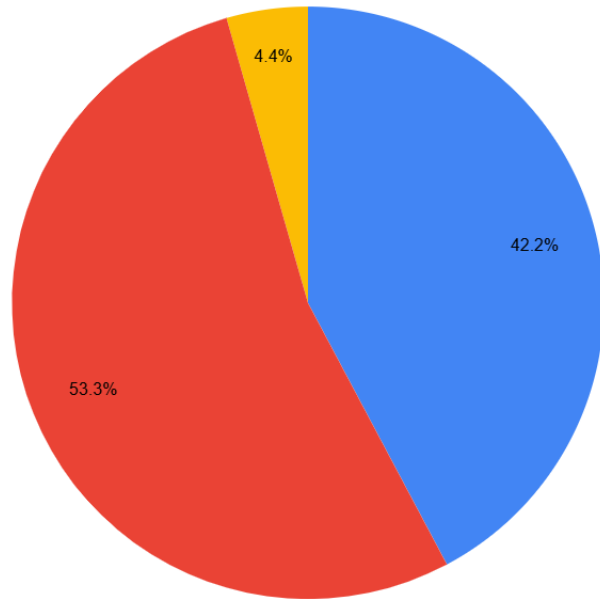
Common law



- Witness statement must be submitted in original language together with a certified translation
- Other

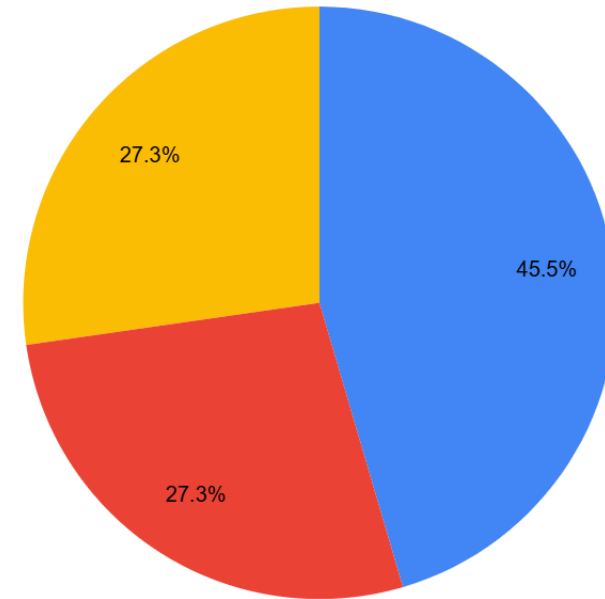
How must documents referred to in a written statement be filed?

Civil law



- Submitted as exhibits to the Parties' submissions following each party's standard exhibit designations (e.g. C- or R-)
- Submitted as exhibits to the written statement with witness specific designations (e.g. using the witness's initials)
- Other

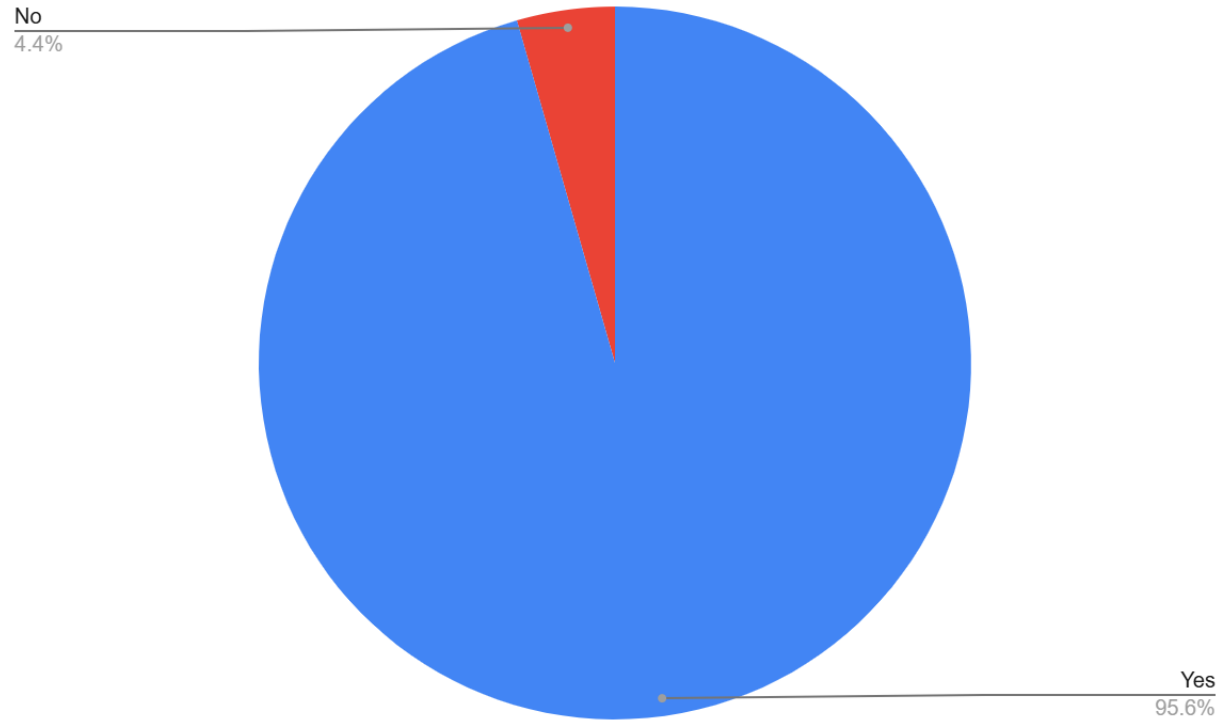
Common law



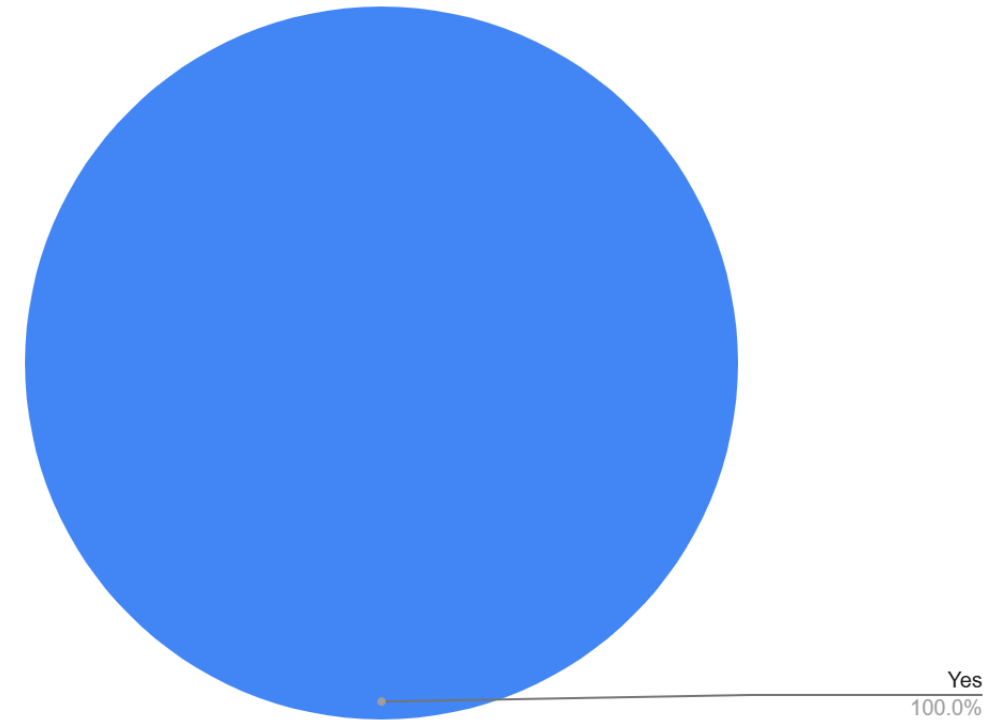
- Submitted as exhibits to the Parties' submissions following each party's standard exhibit designations (e.g. C- or R-)
- Submitted as exhibits to the written statement with witness specific designations (e.g. using the witness's initials)
- Other

Are a party's officers, employees or representatives considered fact witnesses?

Civil law

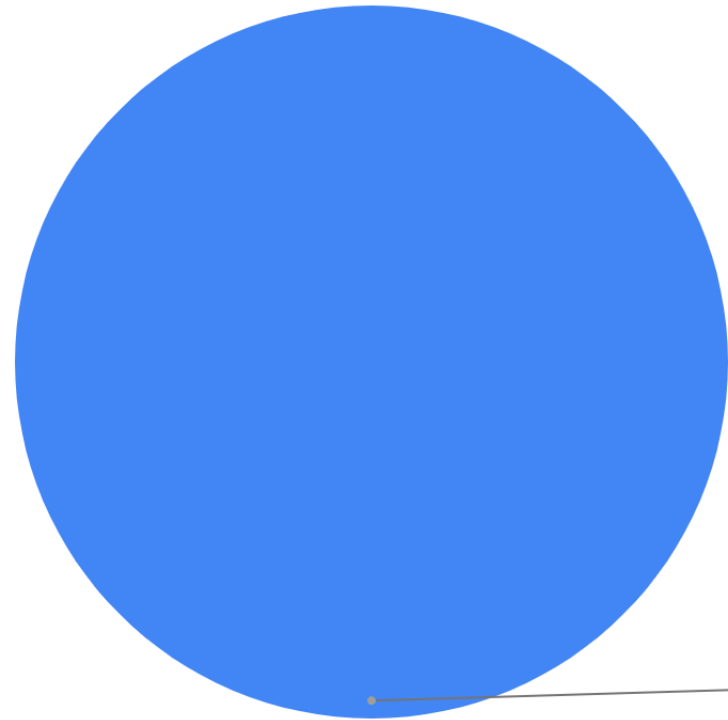


Common law

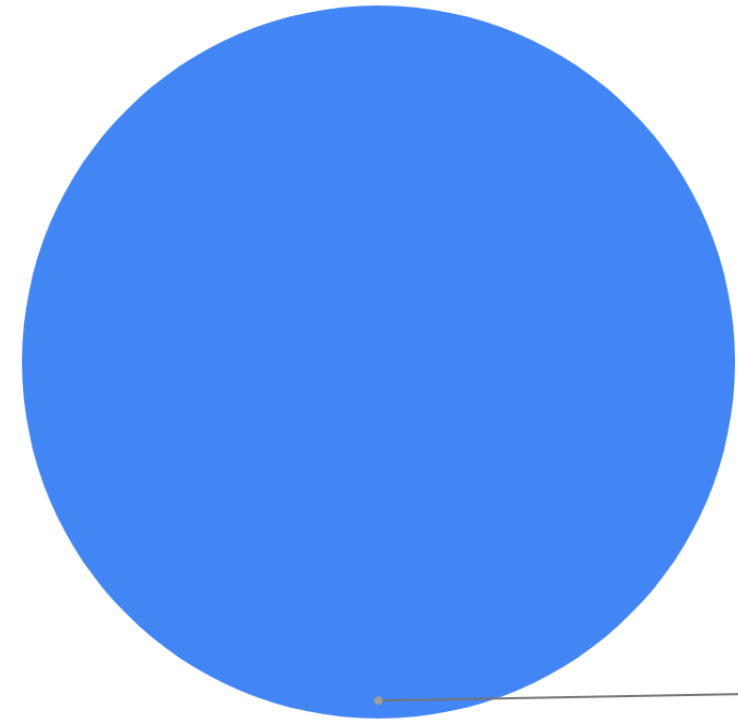


If "No", should written statements of officers, employees or representatives be admitted?

Civil law

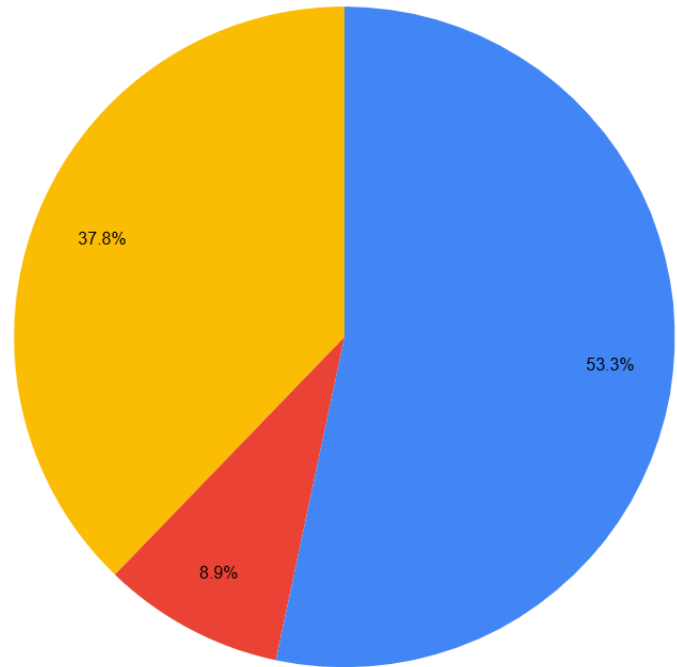


Common law



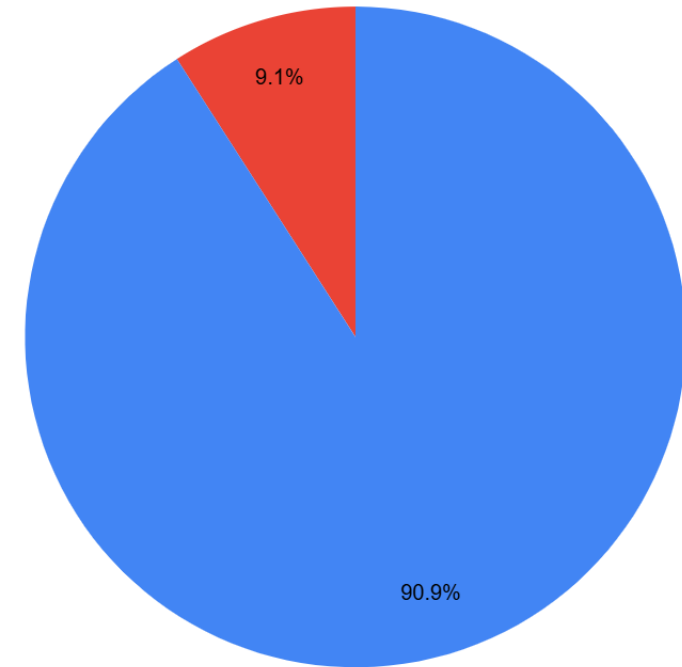
May fact witnesses give opinions in written witness statements?

Civil law



● Yes, but only if properly identified as an opinion ● Yes ● No

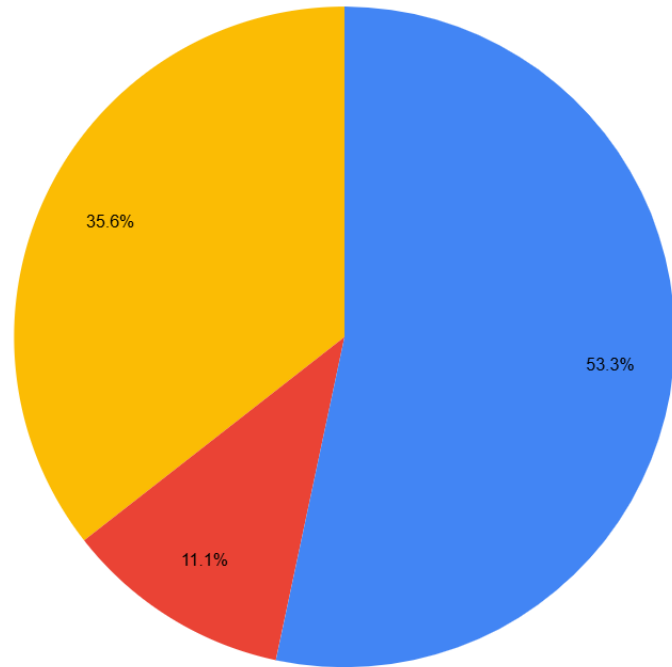
Common law



● Yes, but only if properly identified as an opinion ● Yes

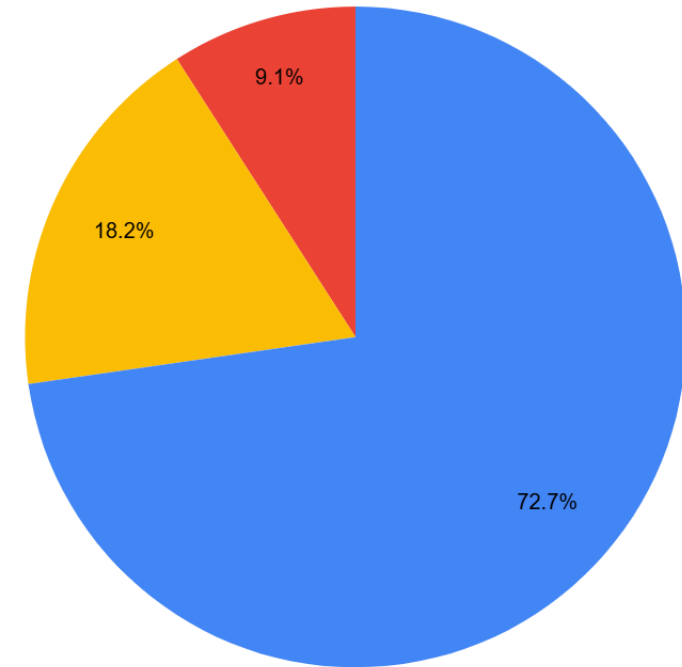
Are fact witnesses allowed to bring second-hand information in written witness statements (e.g. facts heard from a third person)?

Civil law



● Yes, but only if identified as second-hand information ● Yes ● No

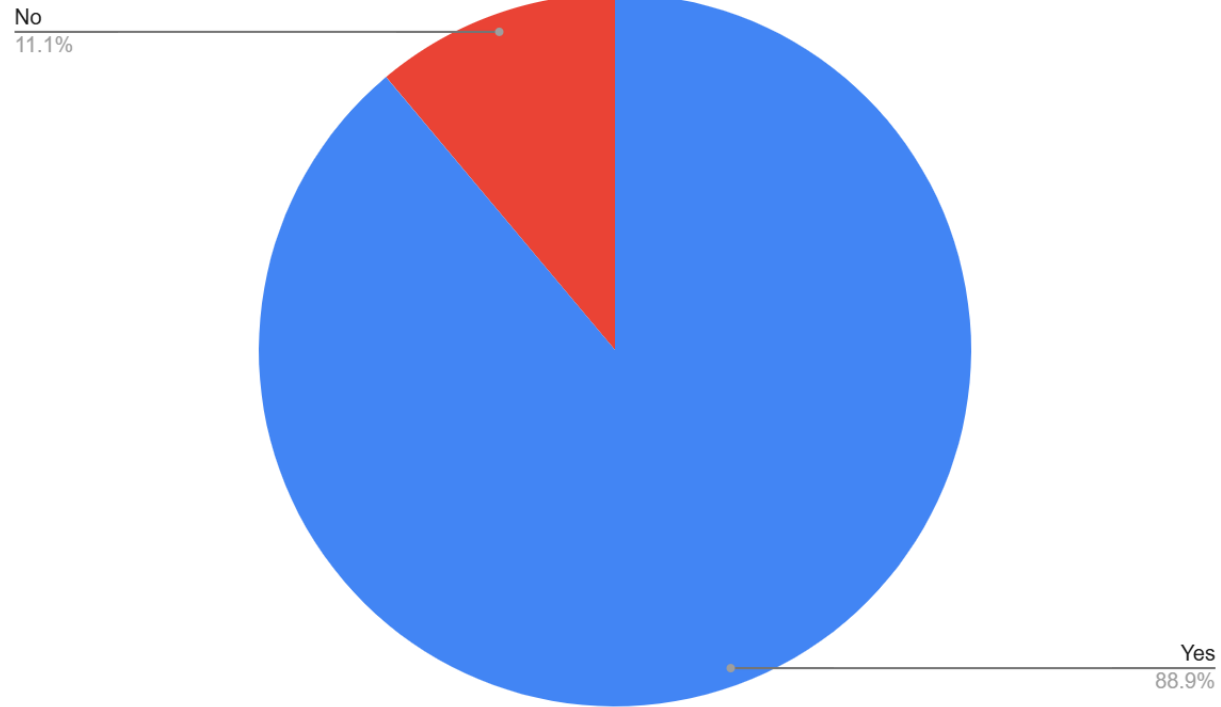
Common law



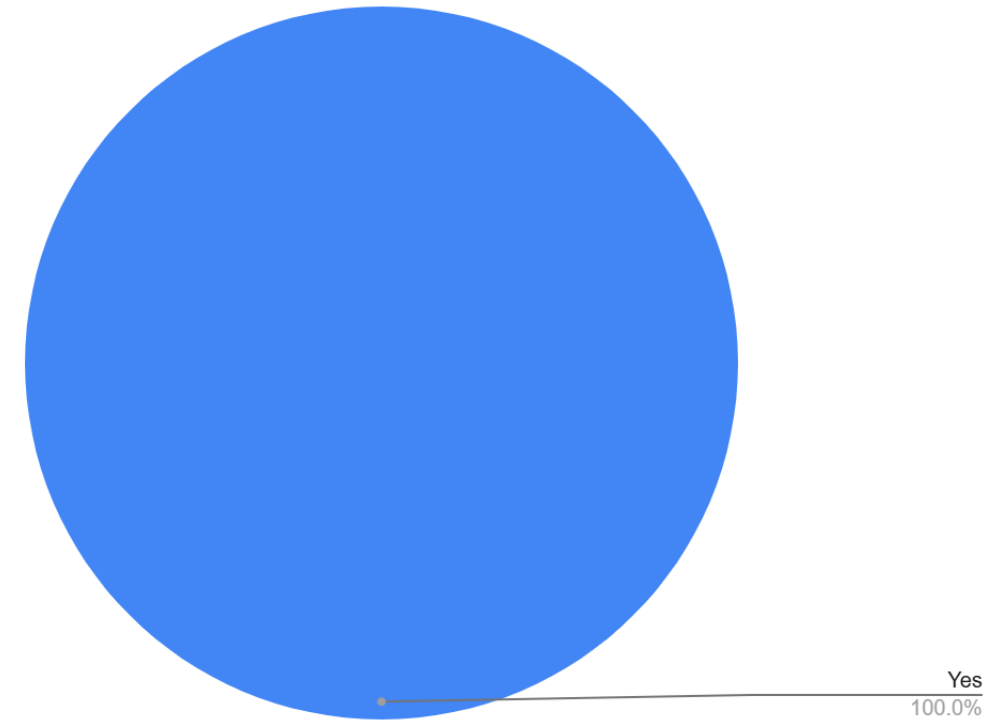
● Yes, but only if identified as second-hand information ● No ● Yes

May a written witness statement incorporate by reference that witness's previous written statement by confirming its contents?

Civil law

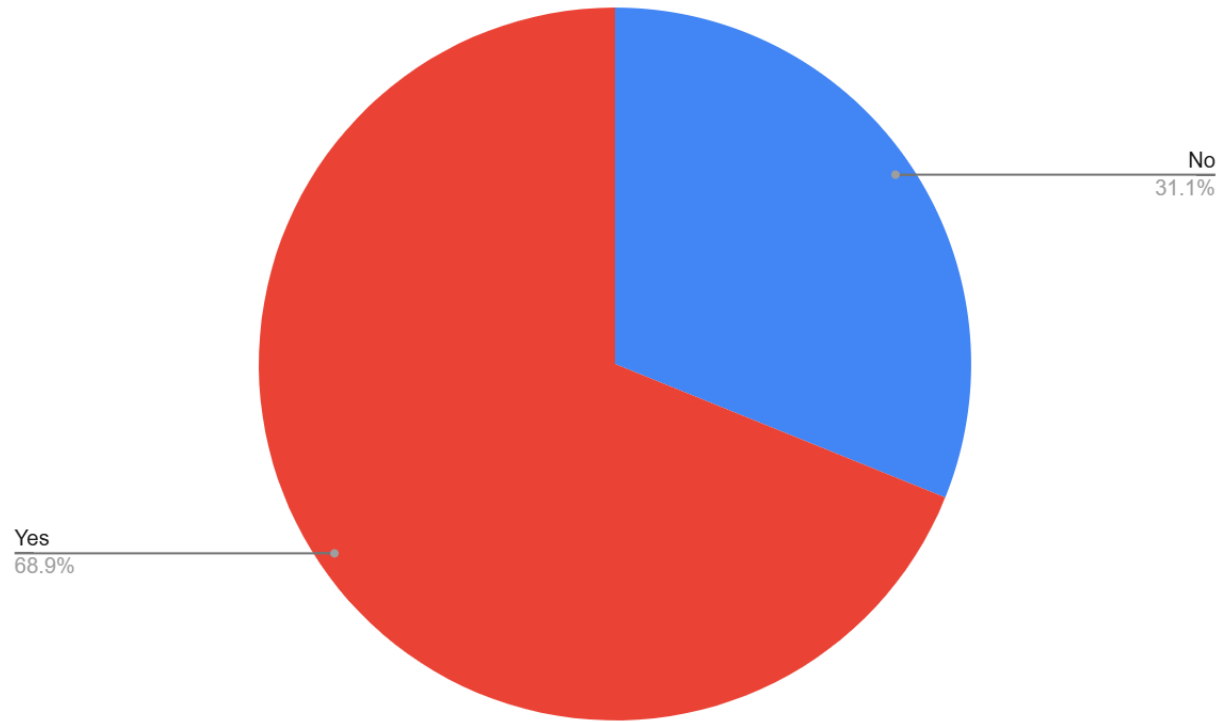


Common law

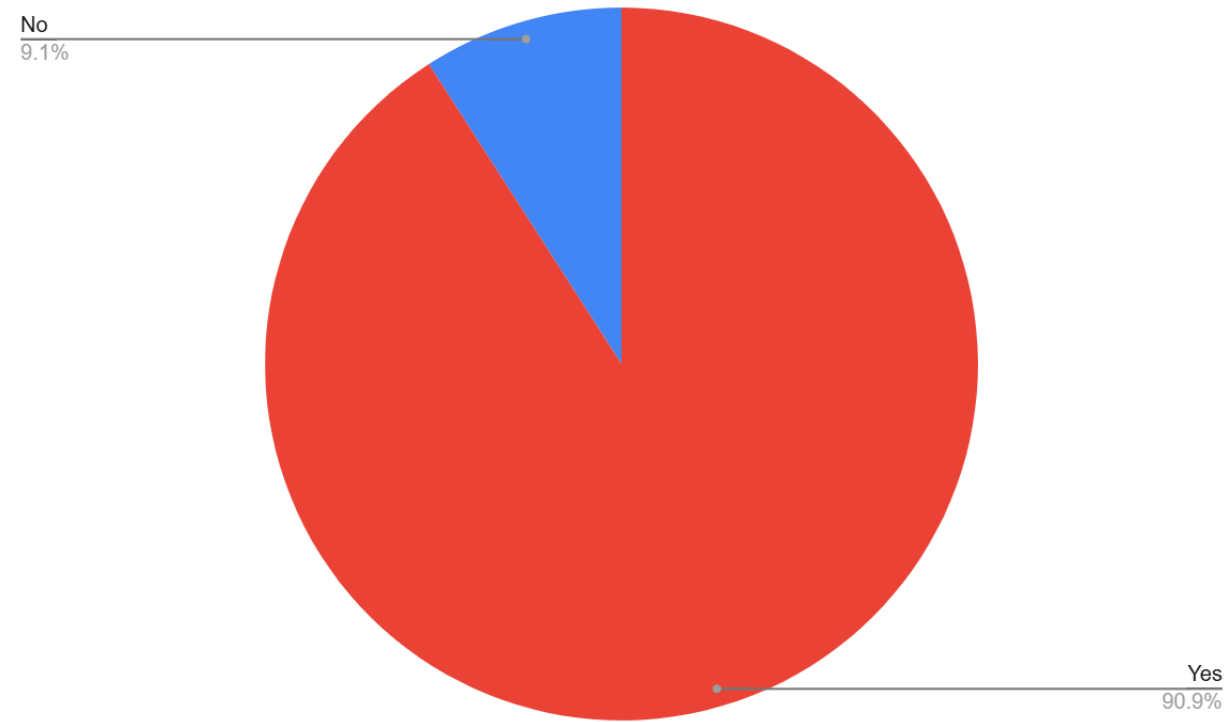


May a written witness statement incorporate by reference the previous or contemporaneous written statement of another witness by confirming its contents?

Civil law

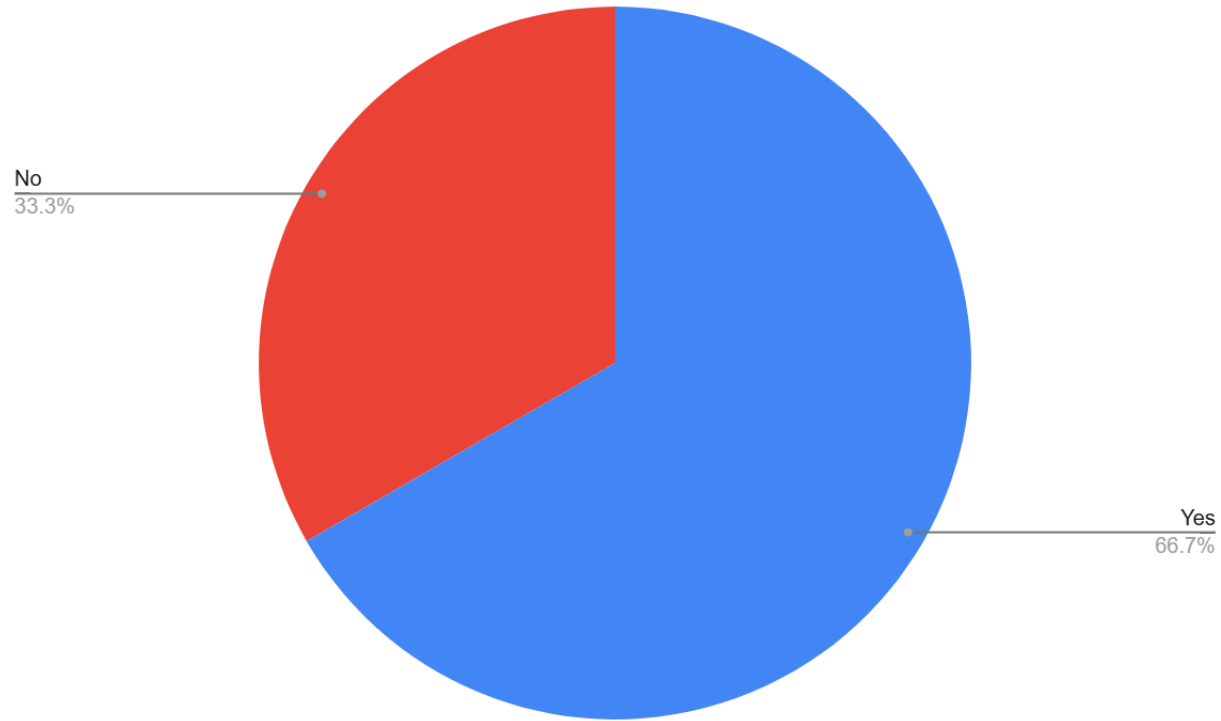


Common law

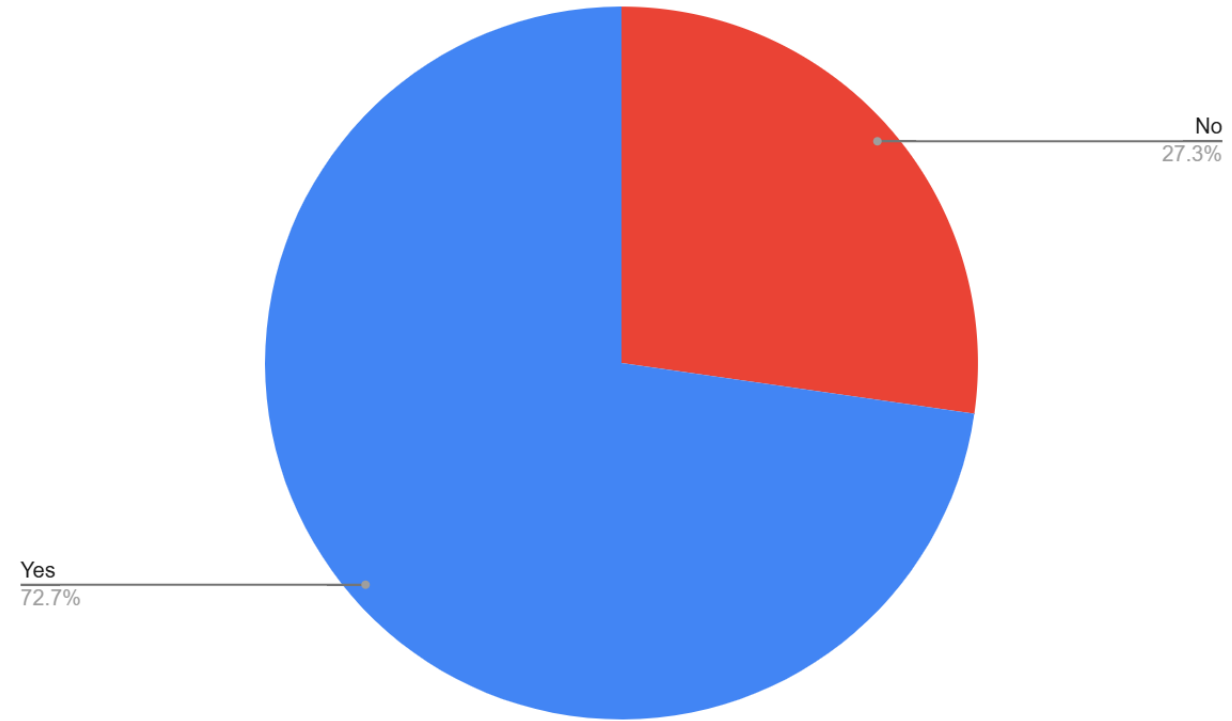


Must counsel correct information in a written witness statement later revealed to be incorrect or incomplete?

Civil law



Common law

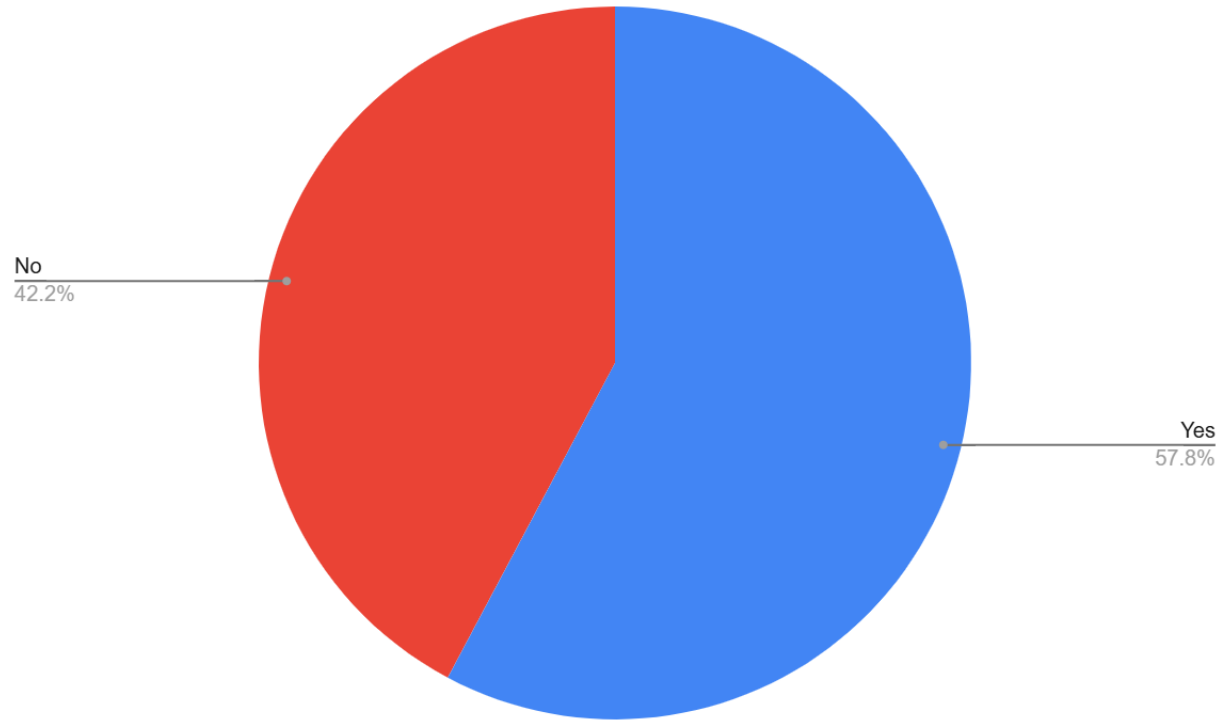


If "Yes", how must it do so? (respondents could select more than one answer)

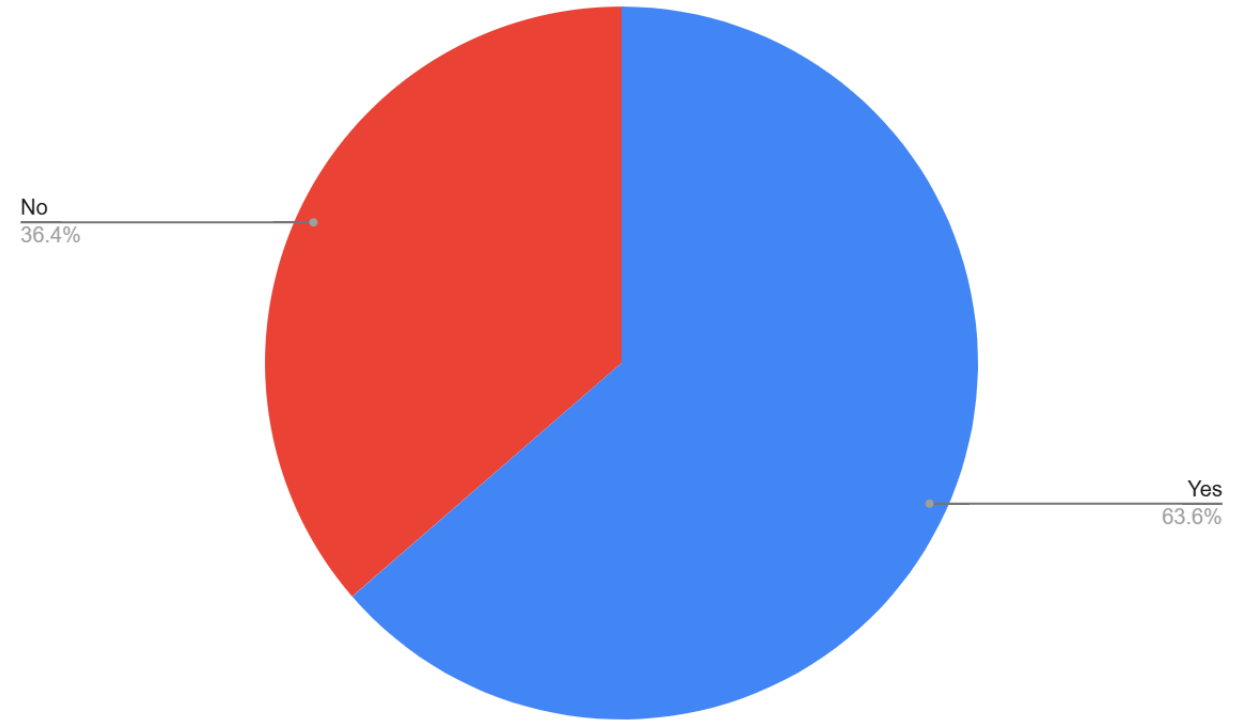
	Civil Law	Common Law
Submit na amended written statement	66%	78%
Correct or complete the information during direct exam.	63%	78%
Correct or complete the information in a submission	25%	33%
Other	6%	11%

May counsel redact privileged information disclosed by a witness?

Civil law

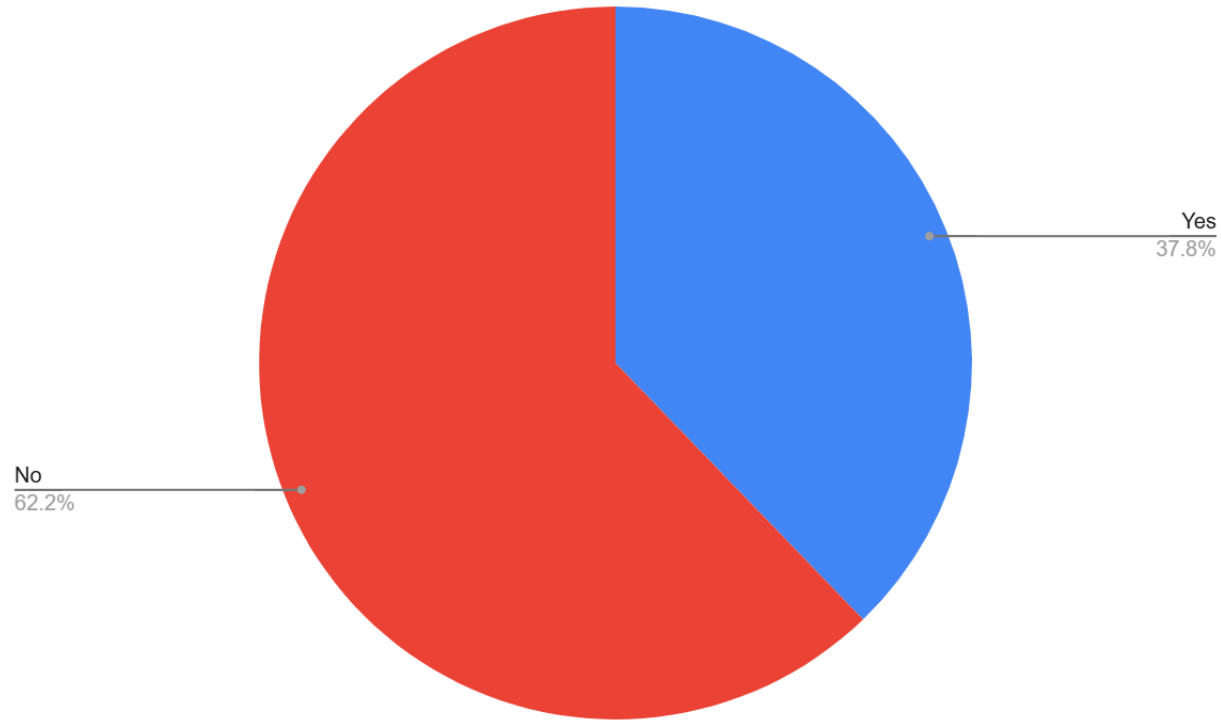


Common law

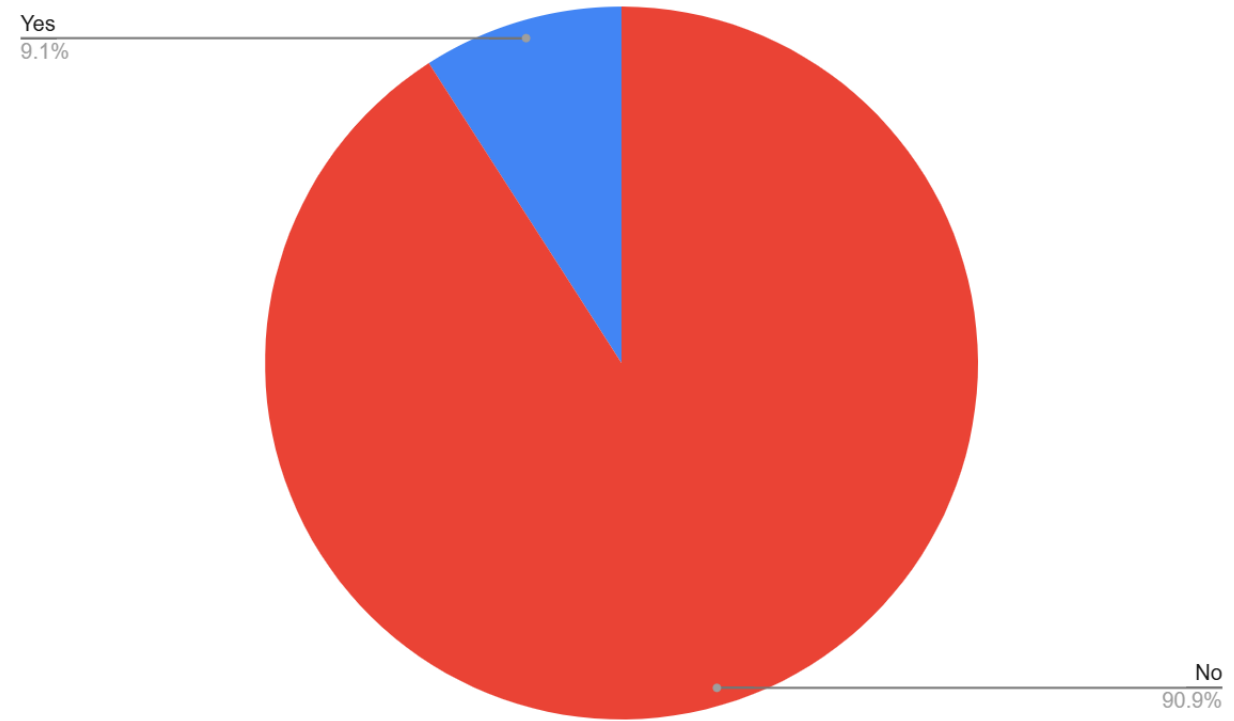


Must counsel redact privileged information disclosed by a witness?

Civil law

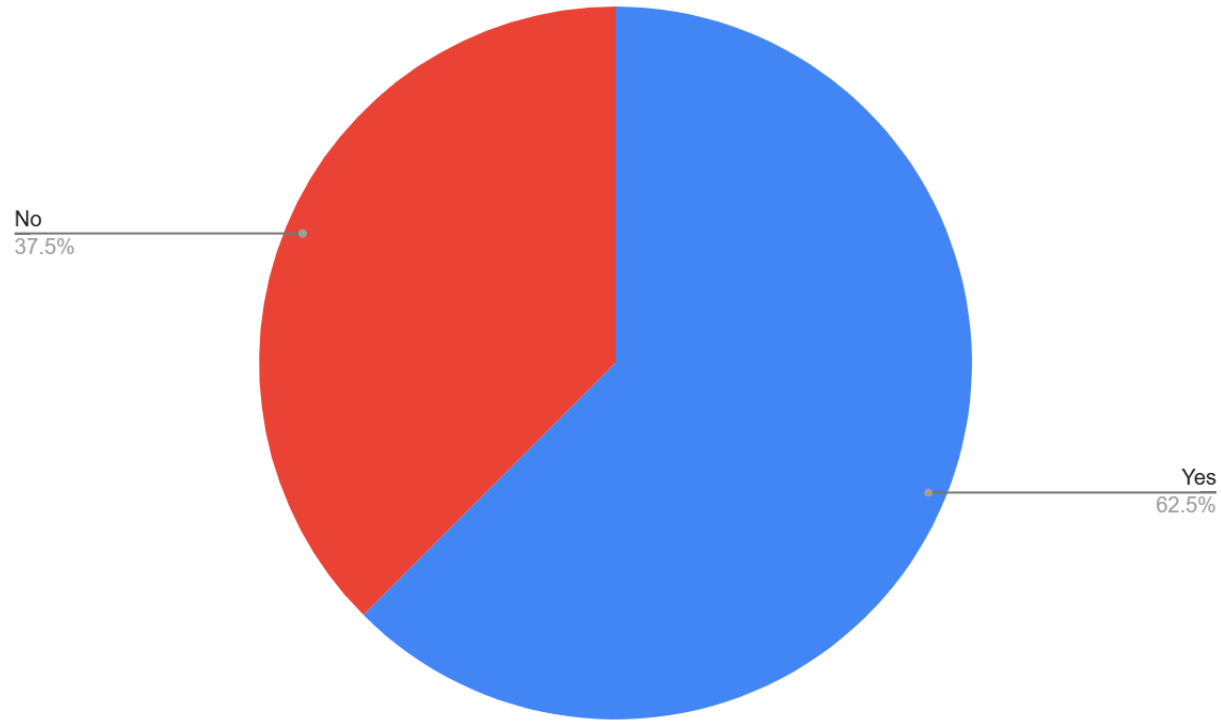


Common law

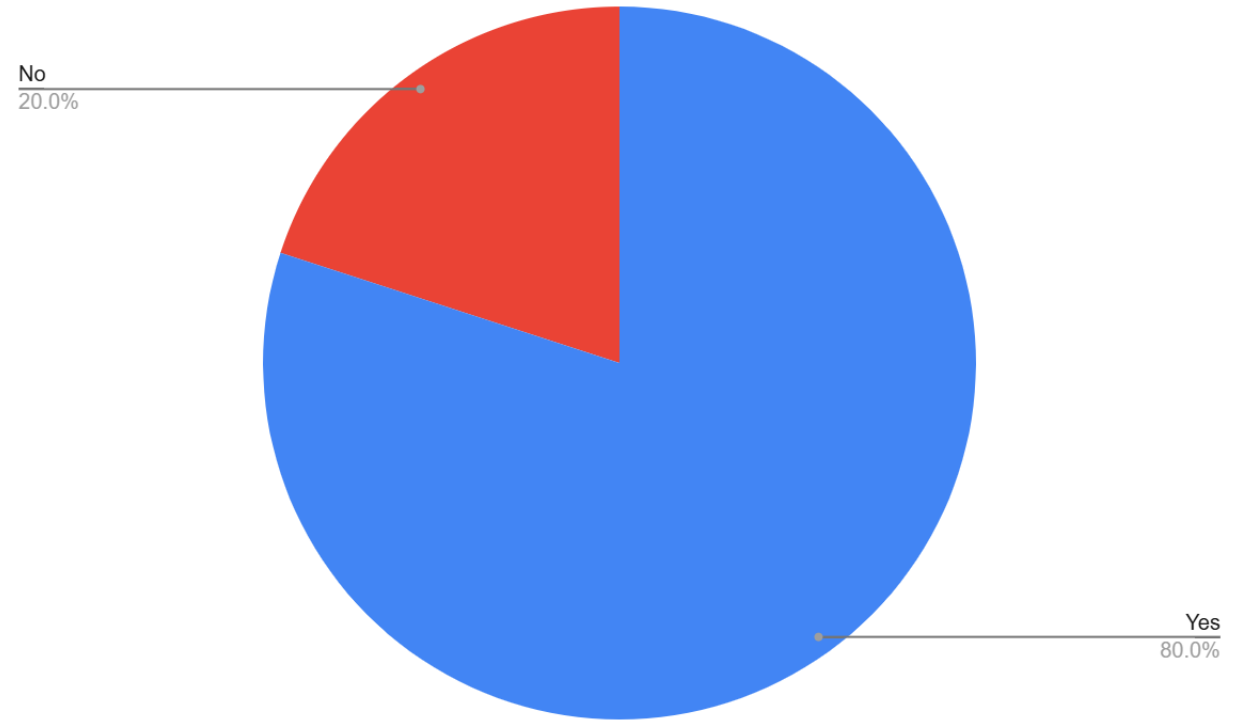


If "No", does the arbitrator have the power to strike out information protected by privilege?

Civil law

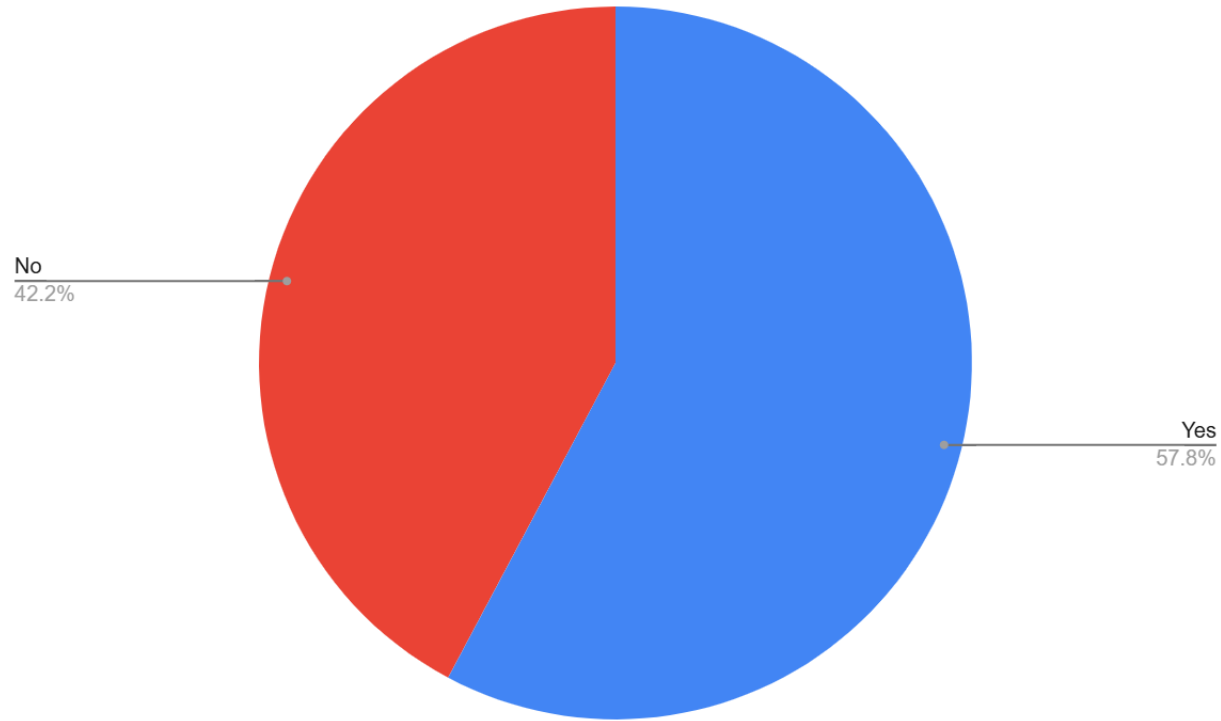


Common law

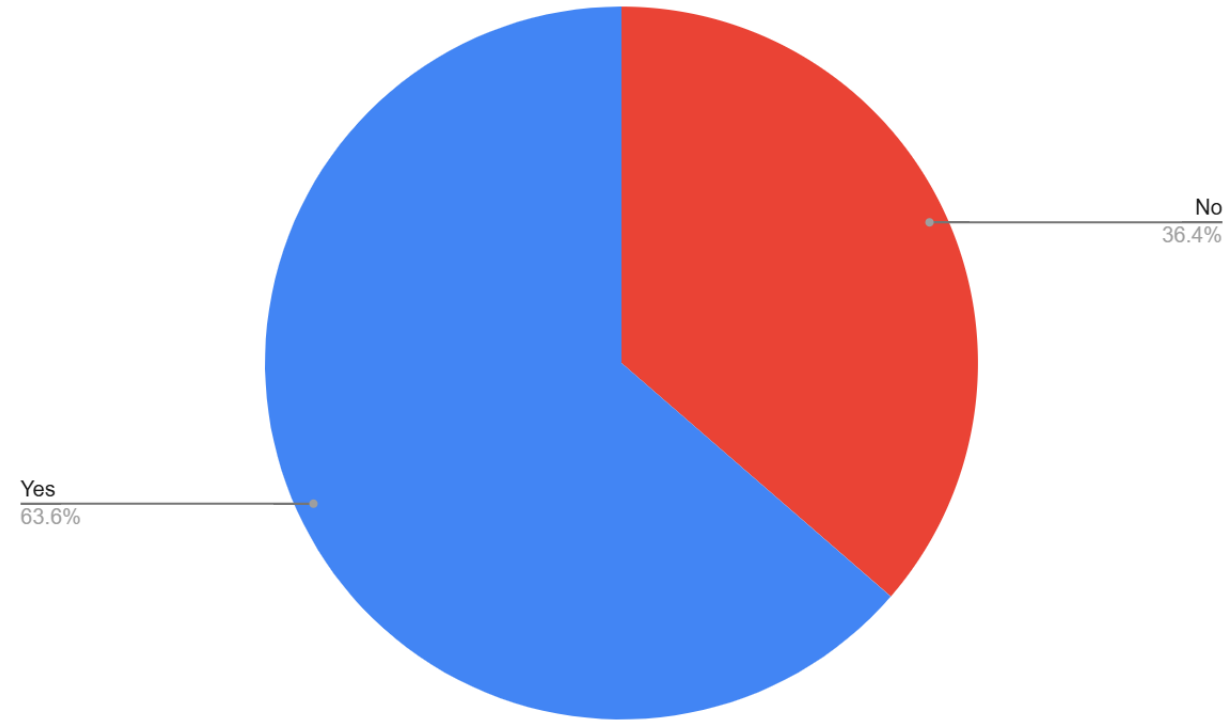


May counsel redact confidential information (e.g., trade secret not protected by privilege) brought by a witness?

Civil law

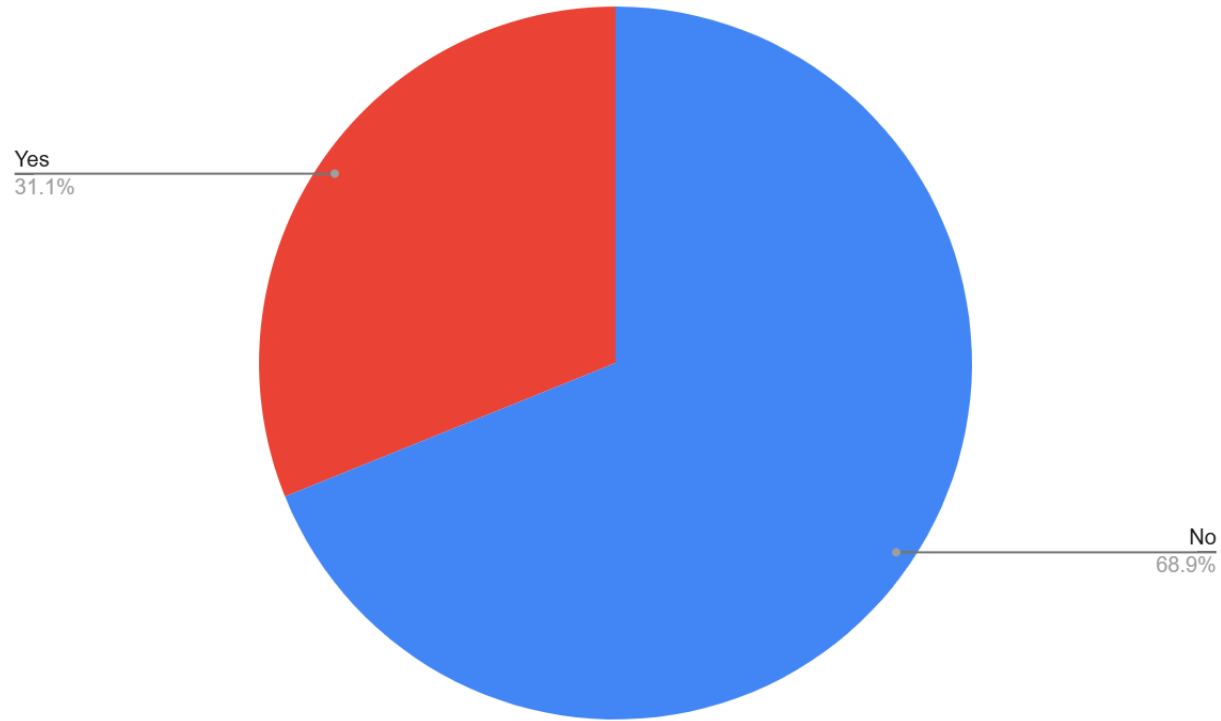


Common law

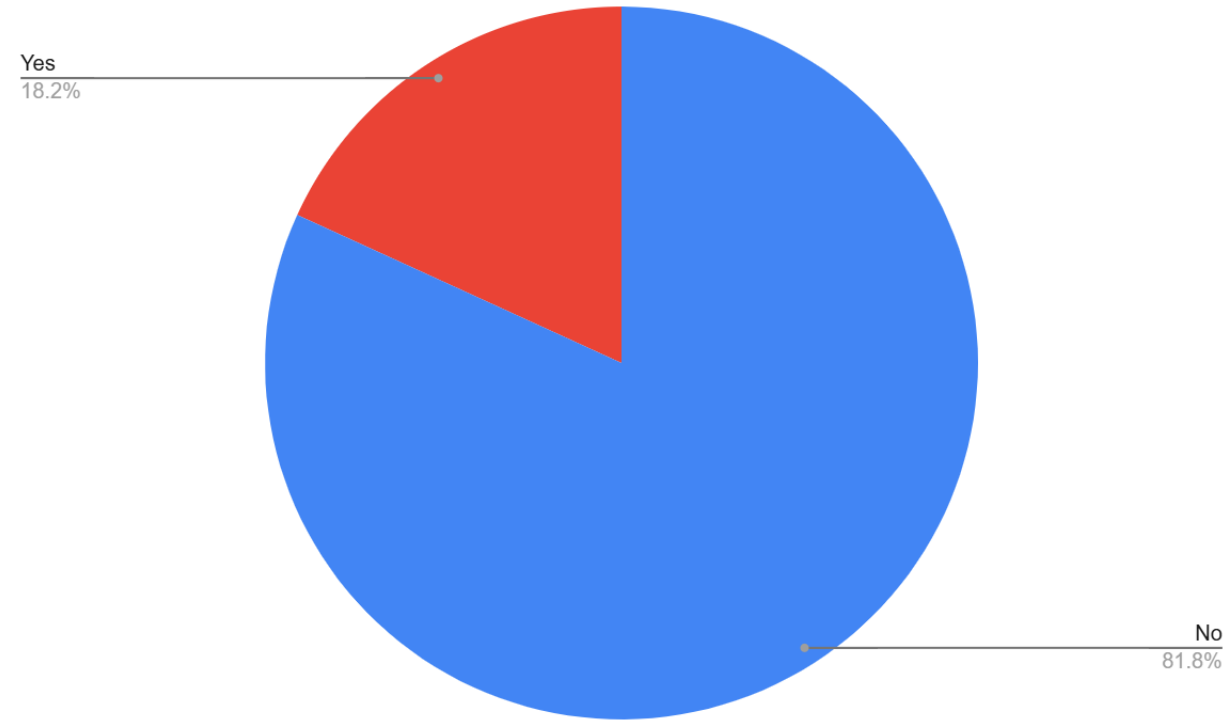


Must counsel redact confidential information (e.g., trade secret not protected by privilege) brought by a witness?

Civil law

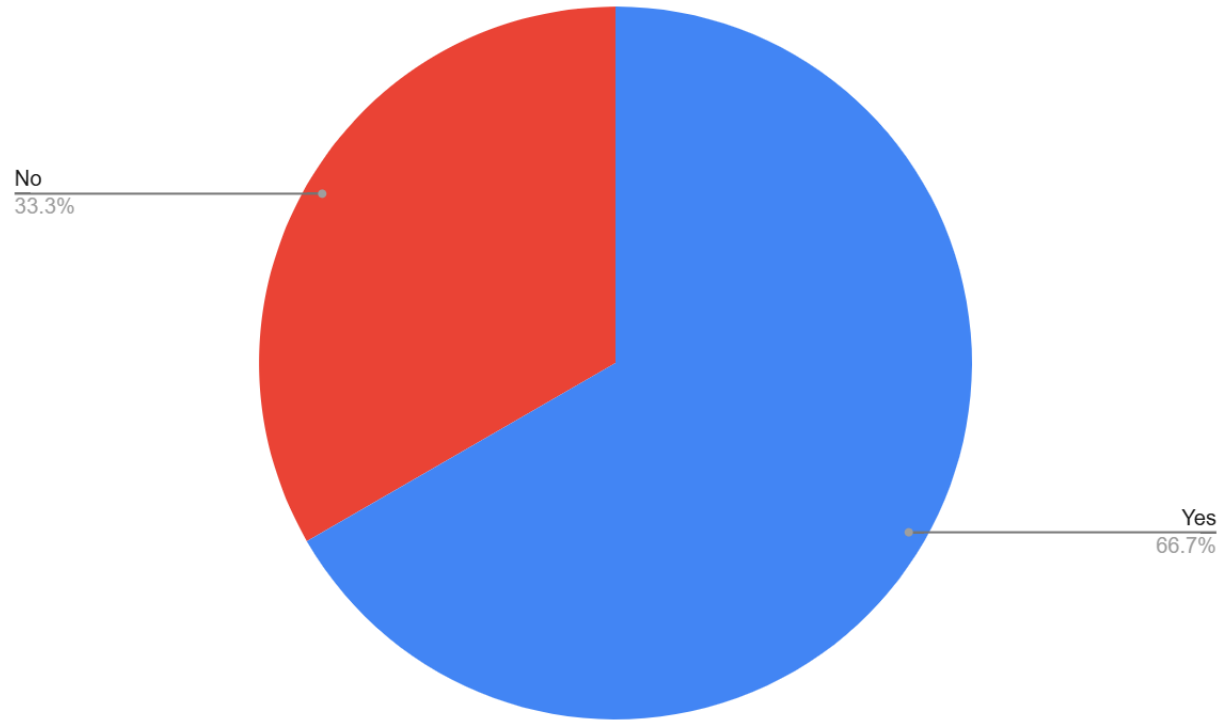


Common law

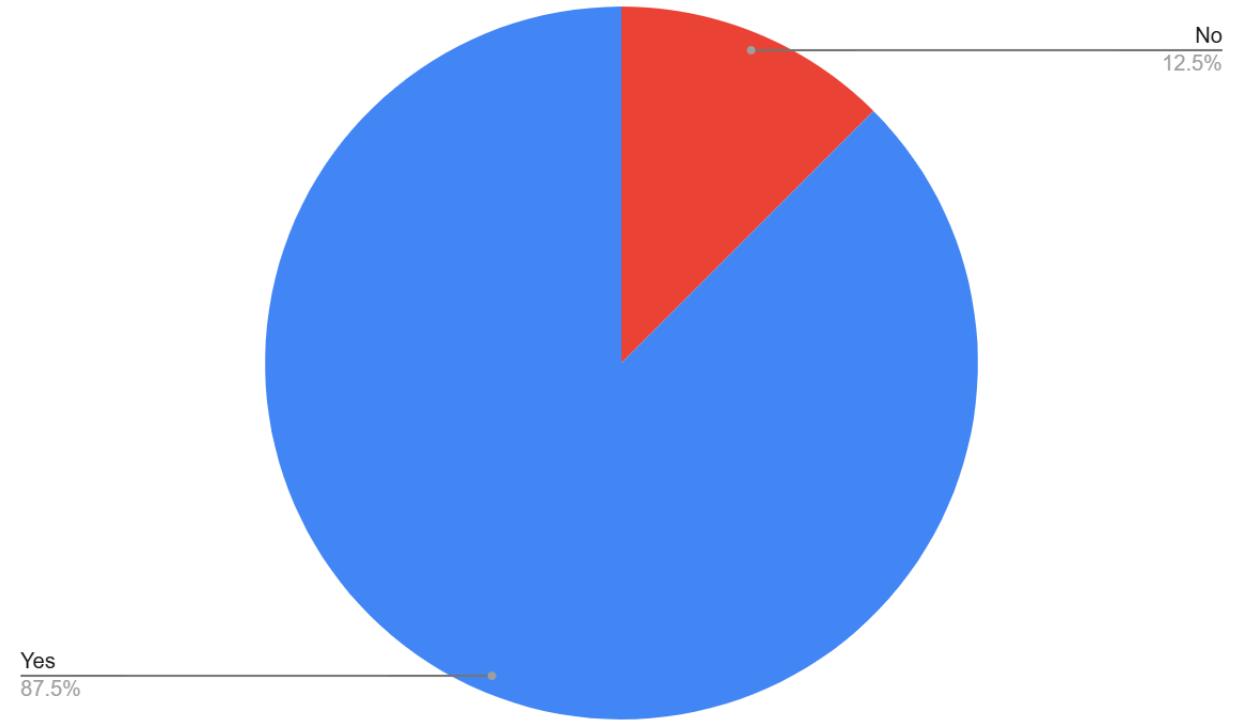


If "No", does the arbitrator have the power to strike out confidential information?

Civil law

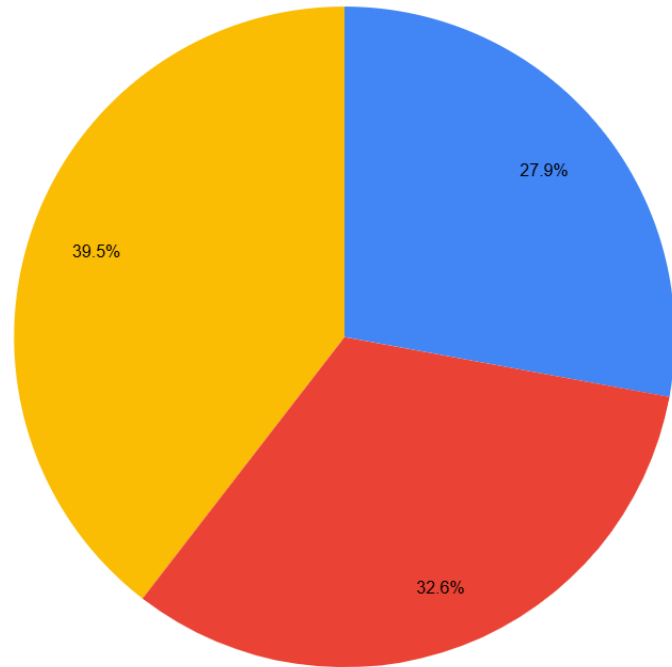


Common law



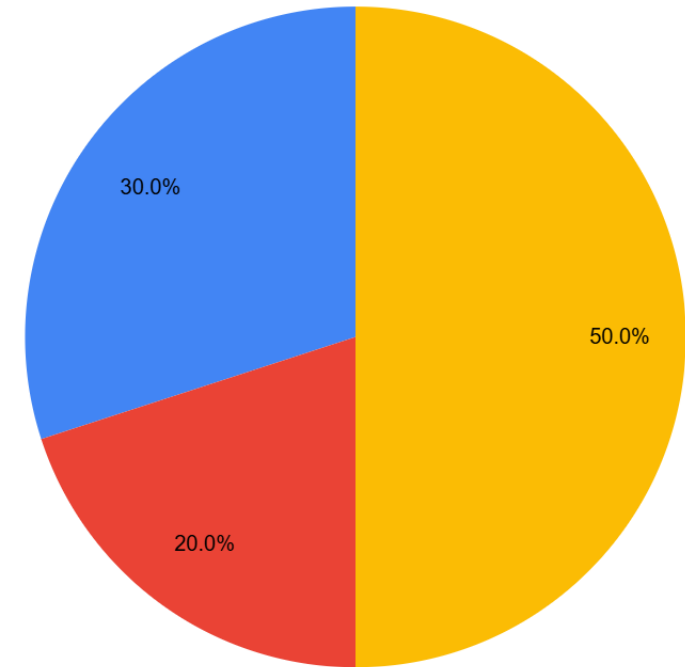
Does the arbitrator have the power to strike out written witness statements deemed irrelevant?

Civil law



● Yes, but only if the counterparty argues its irrelevance ● No ● Yes

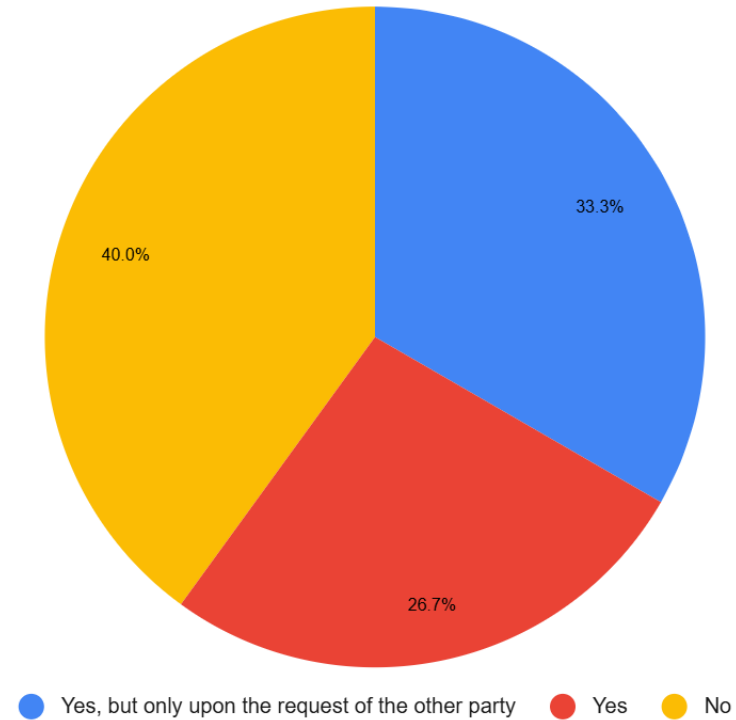
Common law



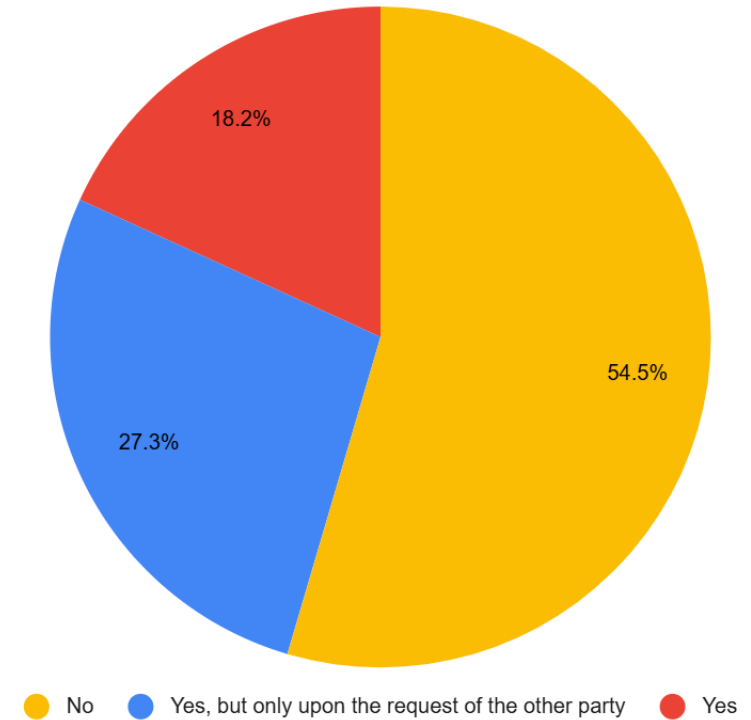
● Yes ● No ● Yes, but only if the counterparty argues its irrelevance

Can the arbitrator deny the examination of a witness for whom cross-examination was requested by only one of the parties (e.g., due to irrelevance)?

Civil law

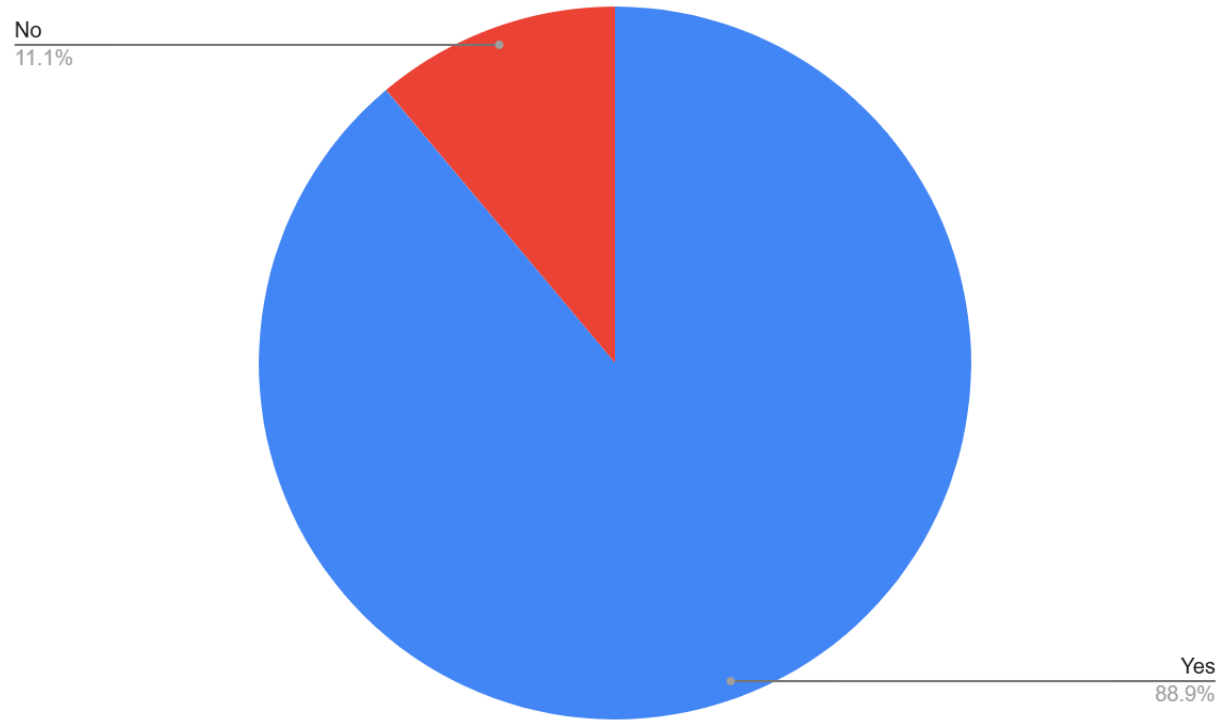


Common law

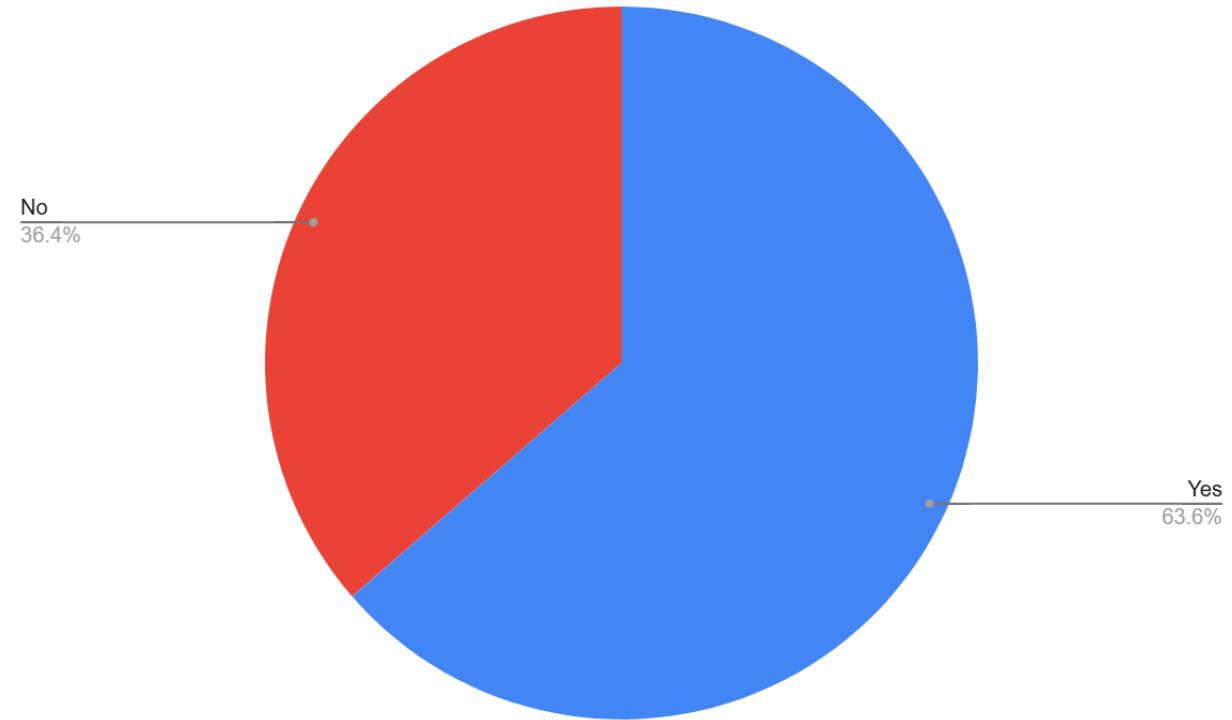


Can the arbitrator request *sua sponte* the examination of a witness for whom cross-examination was not requested by either party?

Civil law

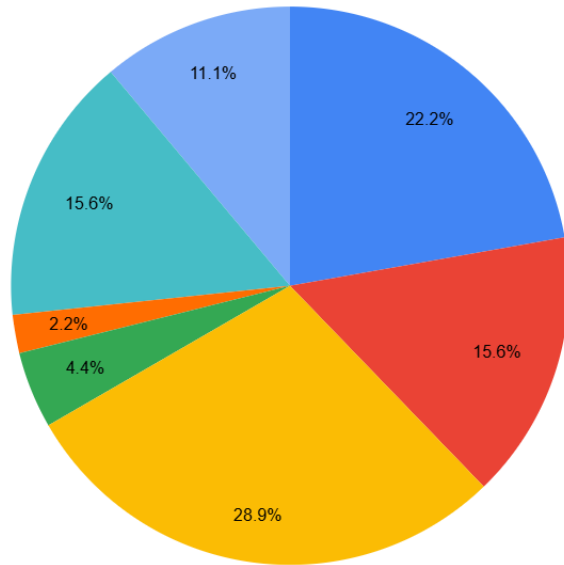


Common law



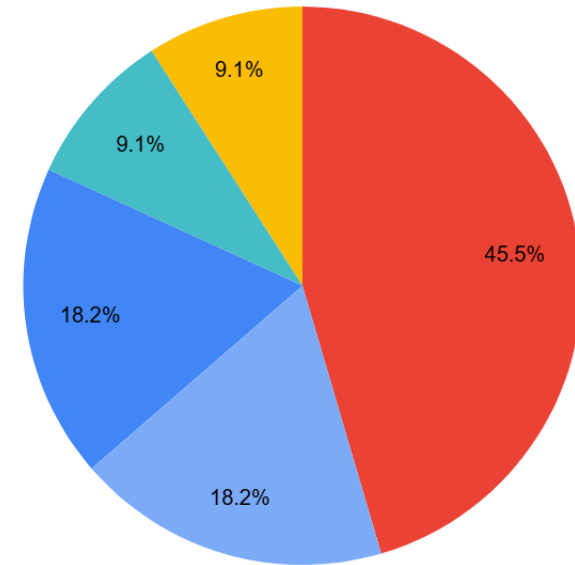
What is the impact of written witness statements on direct examination?

Civil law



- Direct examination limited to the above and new facts occurred after submission of last written statement
- Discretion of the arbitrator
- Direct examination limited to confirming or correcting contents of written statement
- No direct examination should be allowed
- Other
- Direct examination limited to the above and warm-up questions
- Ample direct examination allowed

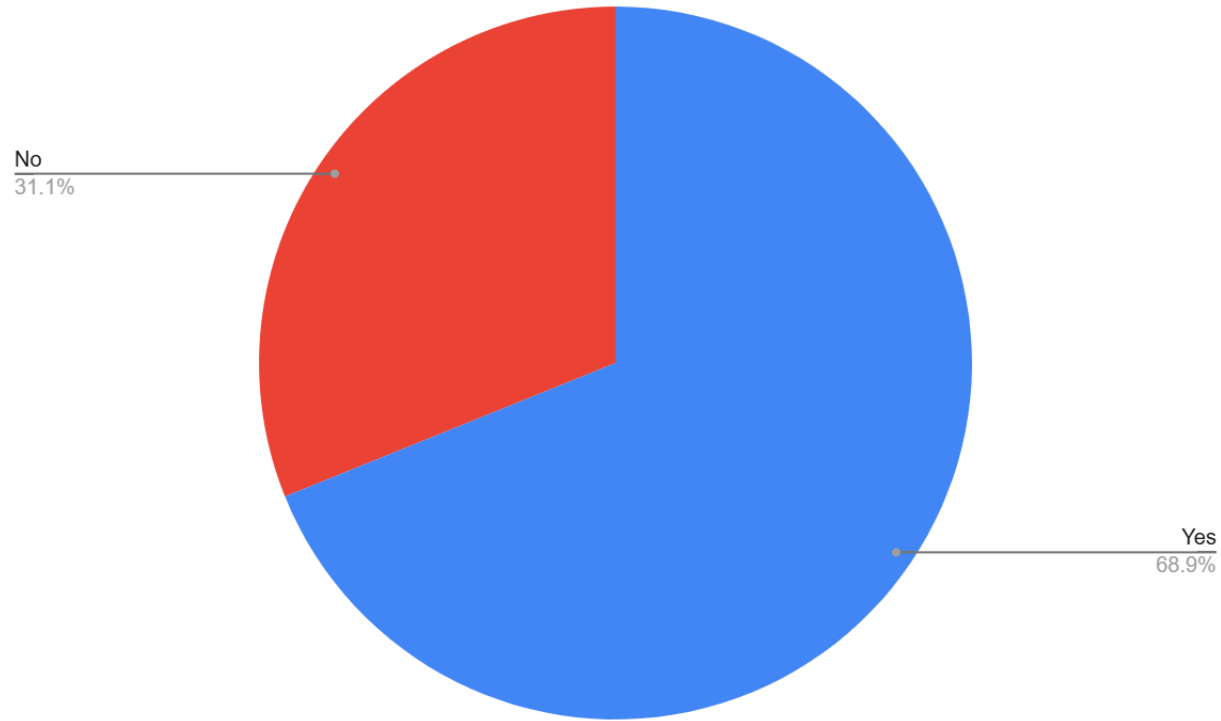
Common law



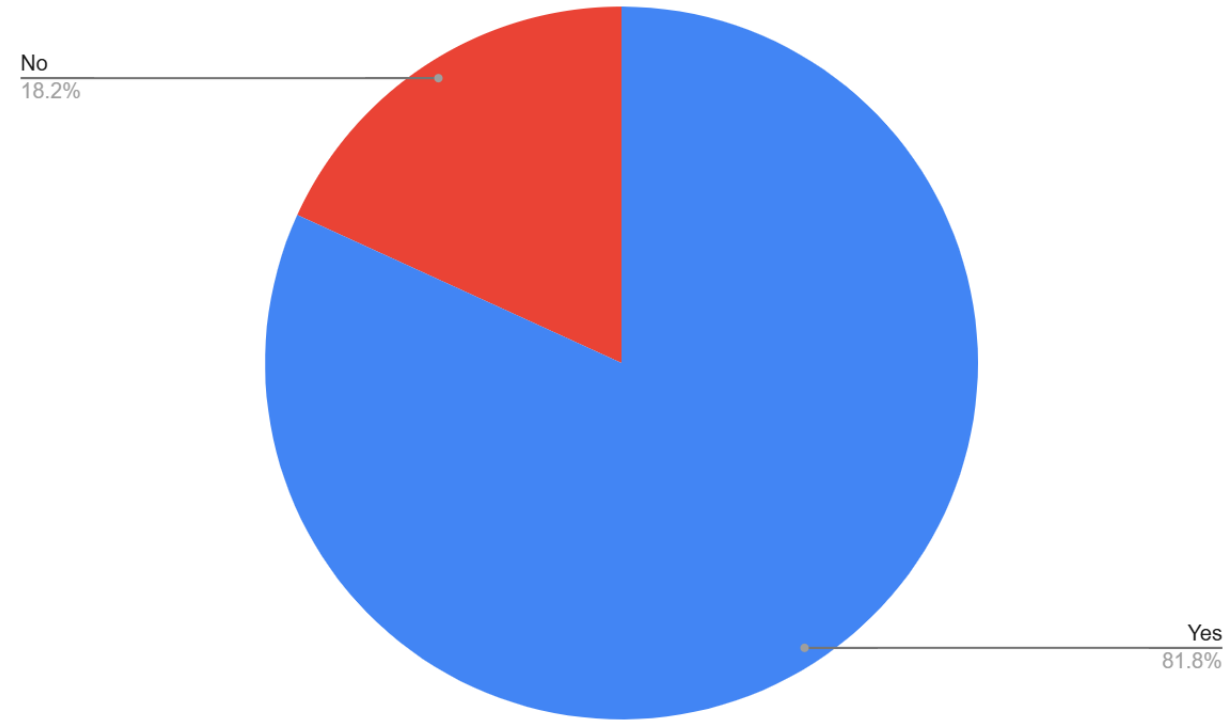
- Discretion of the arbitrator
- Ample direct examination allowed
- Direct examination limited to the above and new facts occurred after submission of last written statement
- Direct examination limited to the above and warm-up questions
- Direct examination limited to confirming or correcting contents of written statement

Can cross-examination address topics that were not brought in the written witness statement?

Civil law



Common law

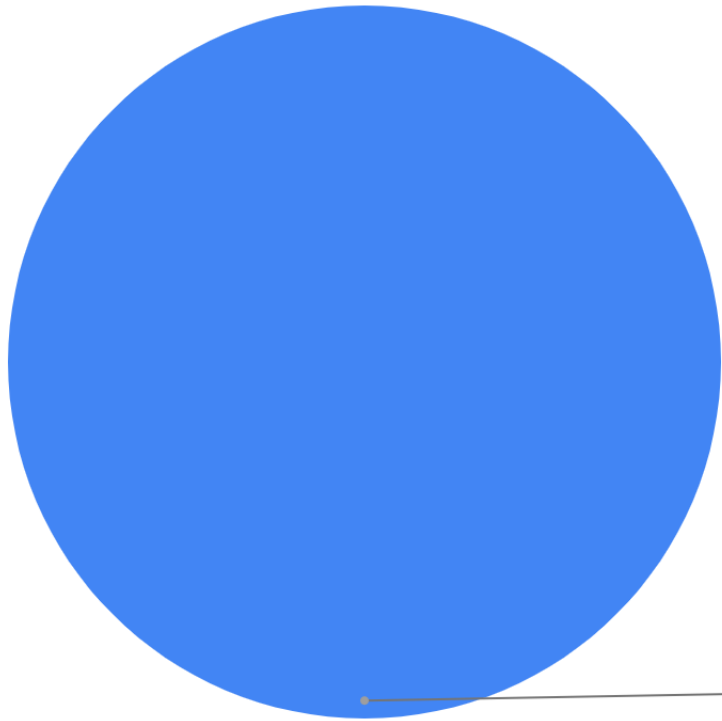


If “Yes”, under which scenarios? (respondents could select more than one answer)

	Civil Law	Common Law
Facts to which witness demonstrably took part	67%	56%
Answering facts brought by other witnesses	55%	44%
Any facts counsel deem necessary	21%	33%
Discretion of the arbitrator	42%	55%
Other	6%	11%

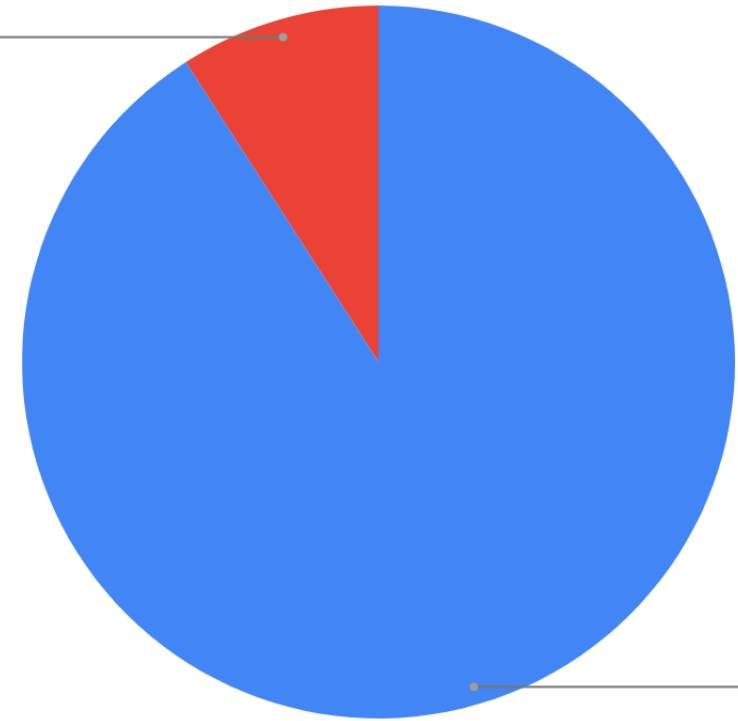
Can the arbitrator examine the witnesses?

Civil law



Yes
100.0%

Common law

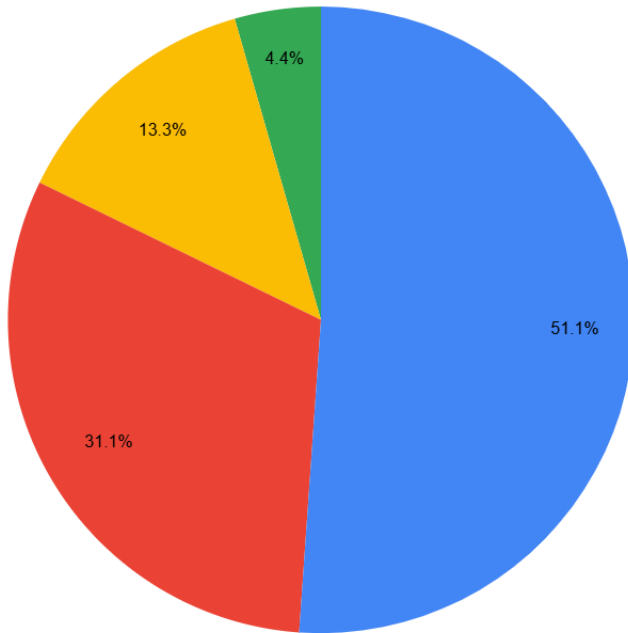


No
9.1%

Yes
90.9%

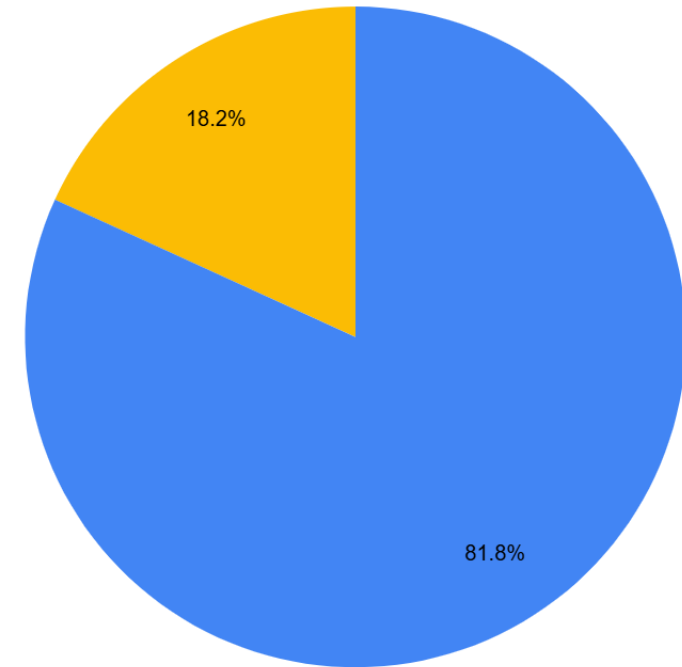
What are the consequences to the written witness statement if a witness fails to appear at the hearing?

Civil law



- Arbitrator free to later rule weight of statement
- Statement disregarded with justified exceptions
- Statement disregarded with no exceptions
- Other

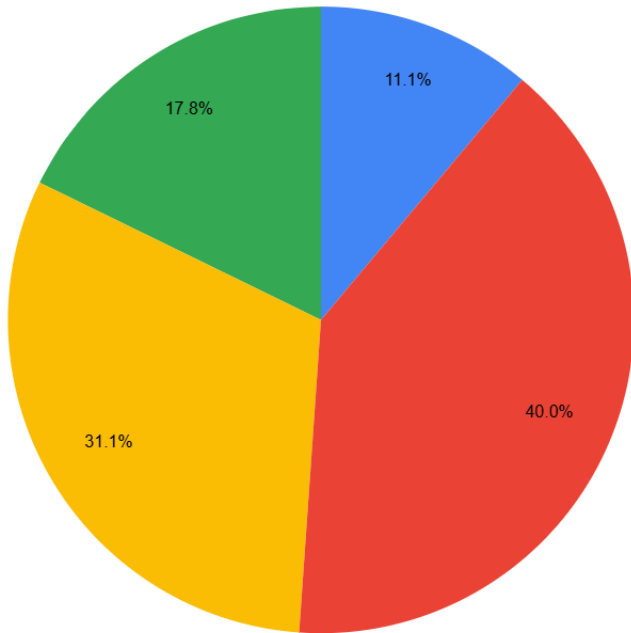
Common law



- Arbitrator free to later rule weight of statement
- Statement disregarded with no exceptions

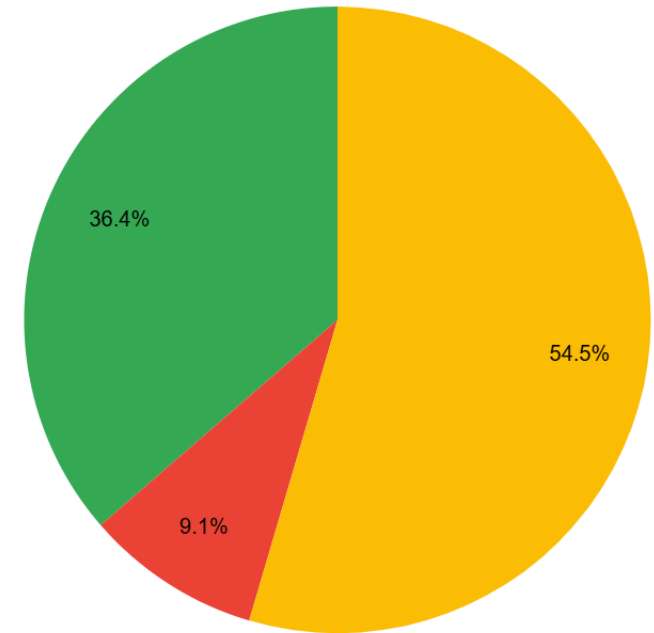
What is the impact of disregarding a written witness statement on the party's submission?

Civil law



- Other
- No impact
- Submissions based on the statement may be stricken out
- Submissions based on the statement must be stricken out

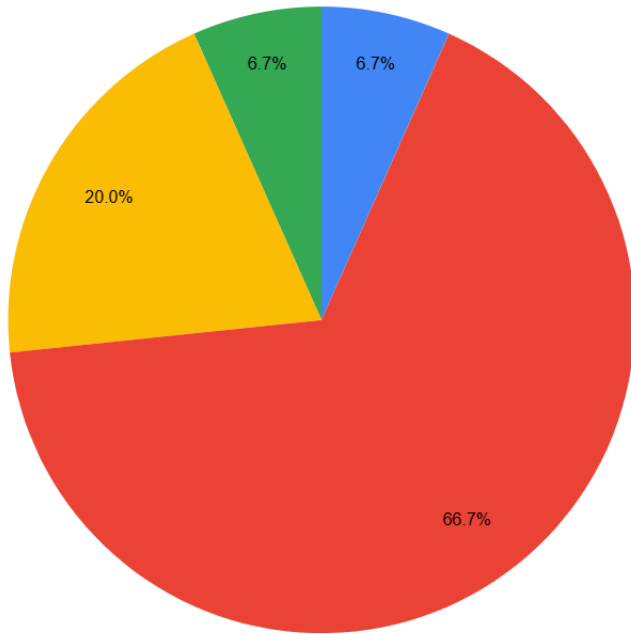
Common law



- Submissions based on the statement may be stricken out
- No impact
- Submissions based on the statement must be stricken out

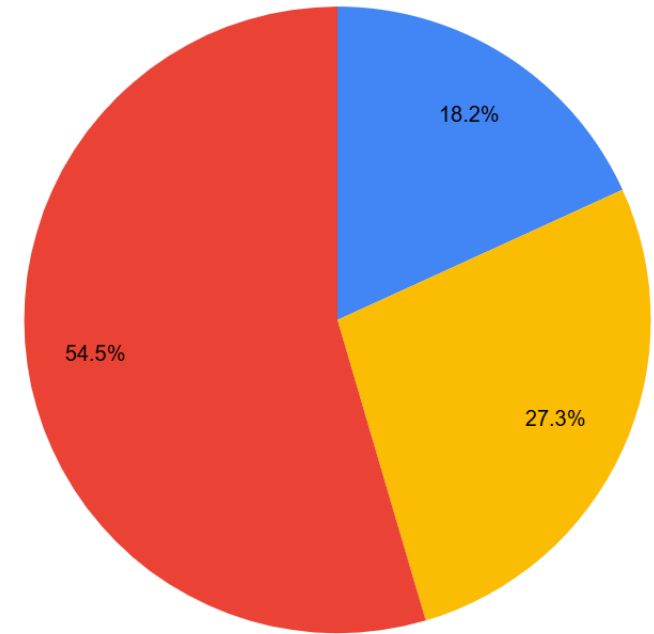
What is the weight to be given to a written statement if cross-examination of the witness is not requested?

Civil law



● Other ● Same weight as any other written statement
● Less weight than written statements on which witness was heard ● Facts considered to be true

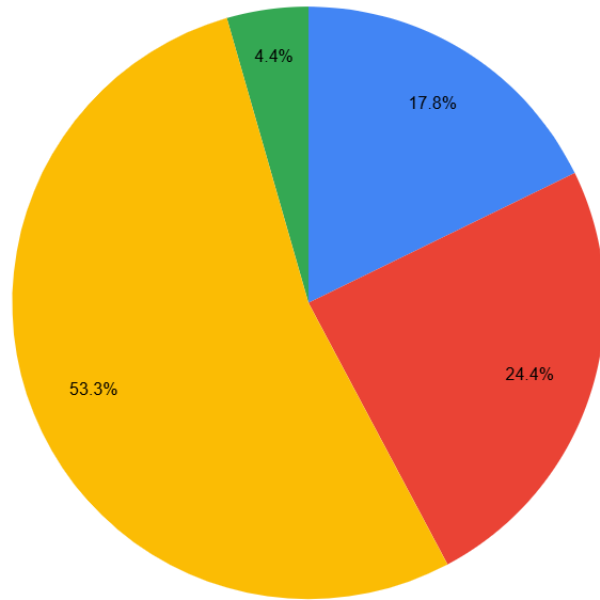
Common law



● Other ● Less weight than written statements on which witness was heard
● Same weight as any other written statement

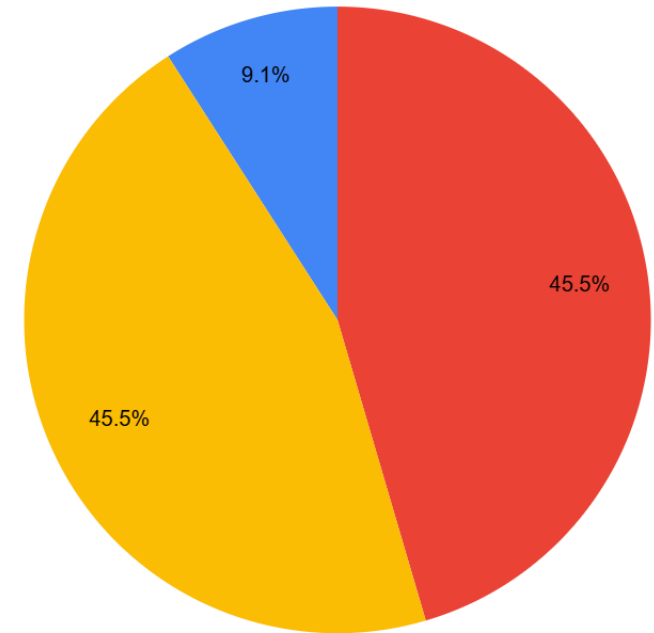
In proceedings where written statements have been adopted, is it possible to take testimony from a person who did not produce a written statement?

Civil law



- No, except if specifically allowed in the applicable rules, Terms of Reference or Procedural Order n° 1
- Yes, arbitrator always retains full power to determine so
- Yes, except if specifically prohibited under the applicable...
- No, arbitrator may not allow it or seek it sua sponte if written testimony is being used

Common law



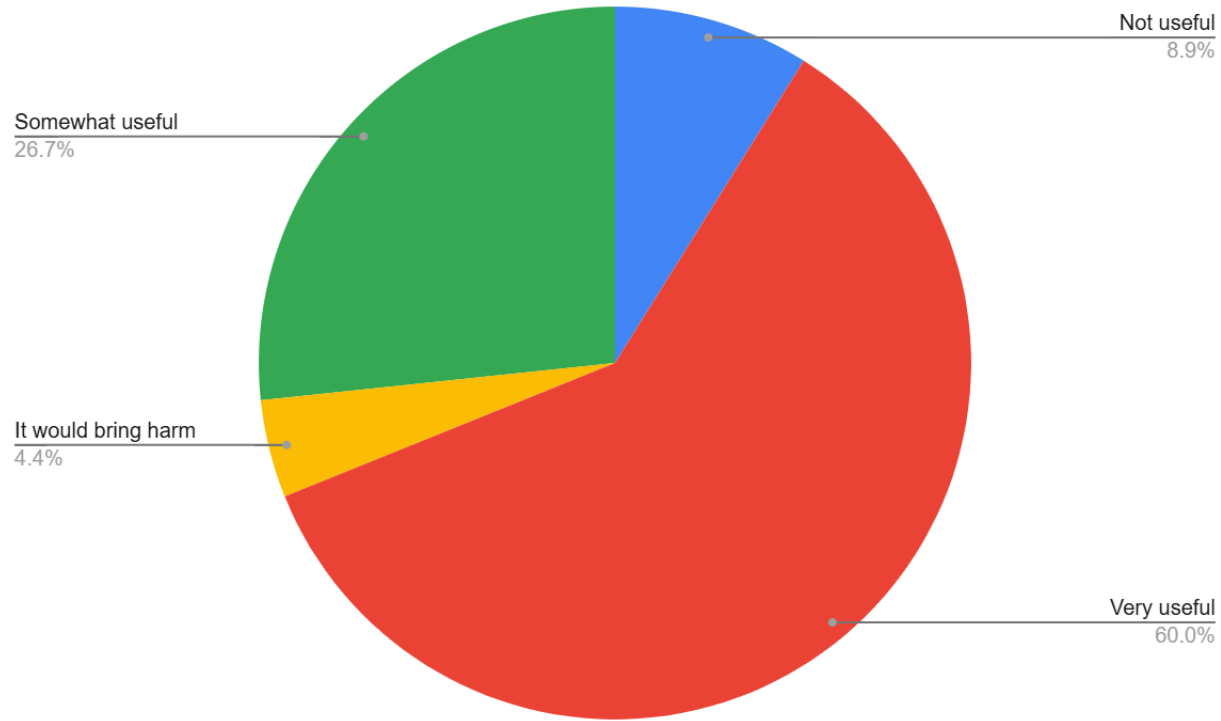
- Yes, arbitrator always retains full power to determine so
- Yes, except if specifically prohibited under the applicable...
- No, except if specifically allowed in the applicable rules, Terms of Reference or Procedural Order n° 1

If “Yes”, under which circumstances? (respondents could select more than one answer)

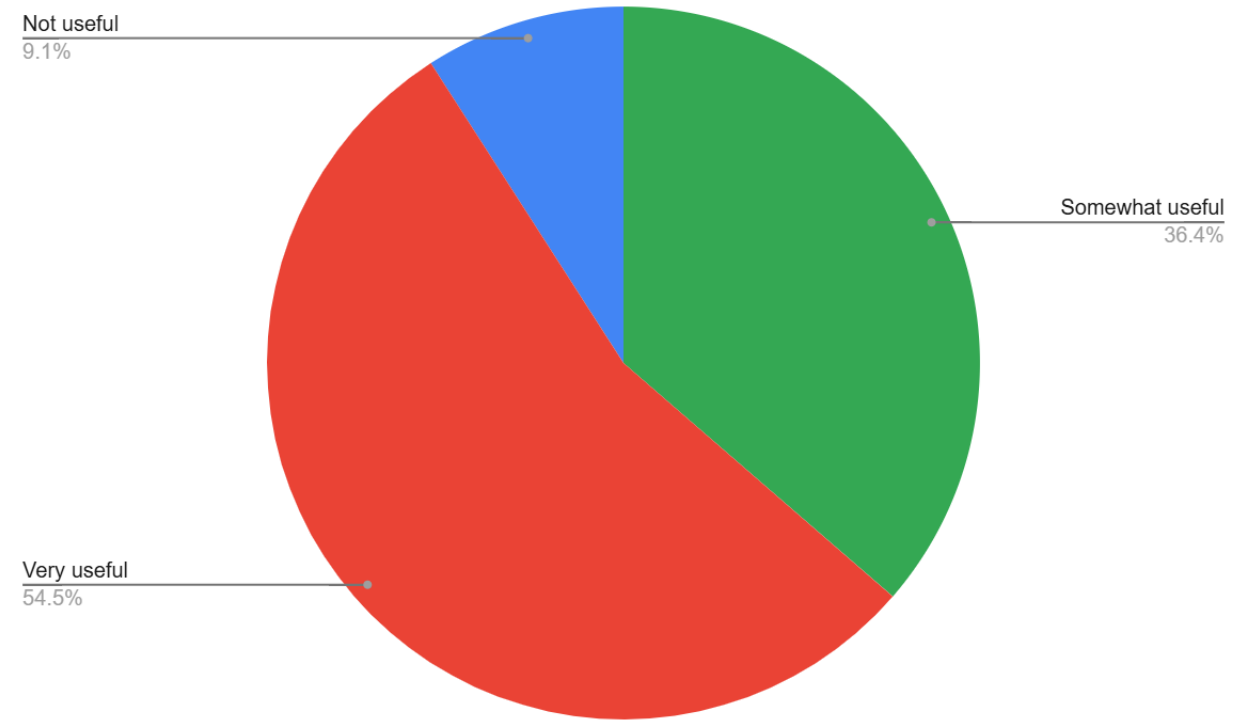
	Civil Law	Common Law
Only if requested by a party	29%	20%
Only if party demonstrates that the person refused to appear voluntarily	35%	20%
Only if arbitrator finds the testimony possibly relevant to the case and material to its outcome	79%	70%
Other	0%	30%

How useful would you find a specific guideline for the use of written statements by fact witnesses?

Civil law

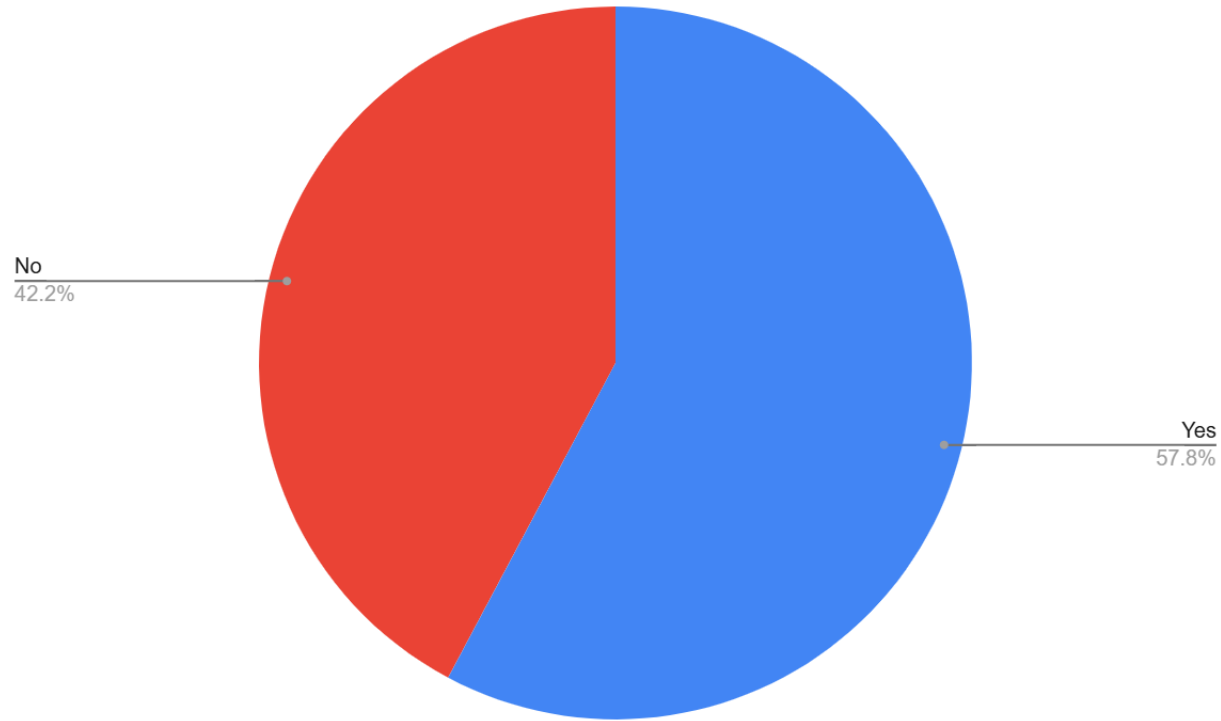


Common law



Do you believe a single set of guidelines may apply effectively to different legal traditions (e.g., common law and civil law)?

Civil law

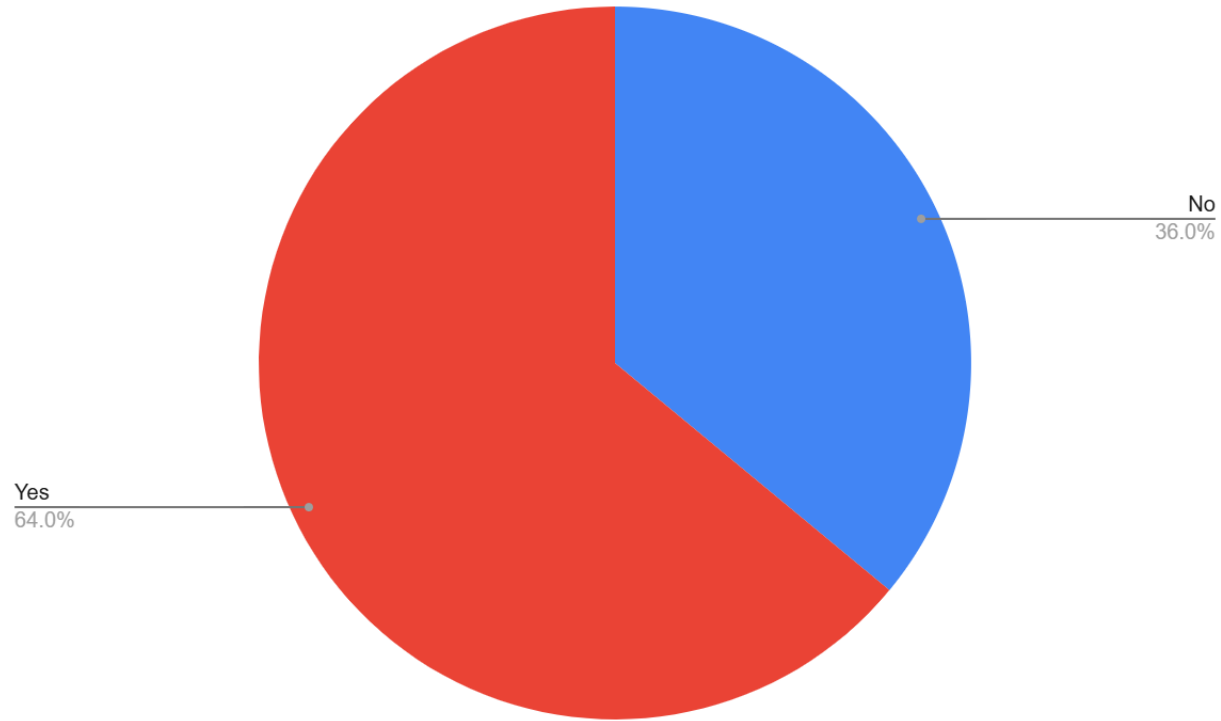


Common law

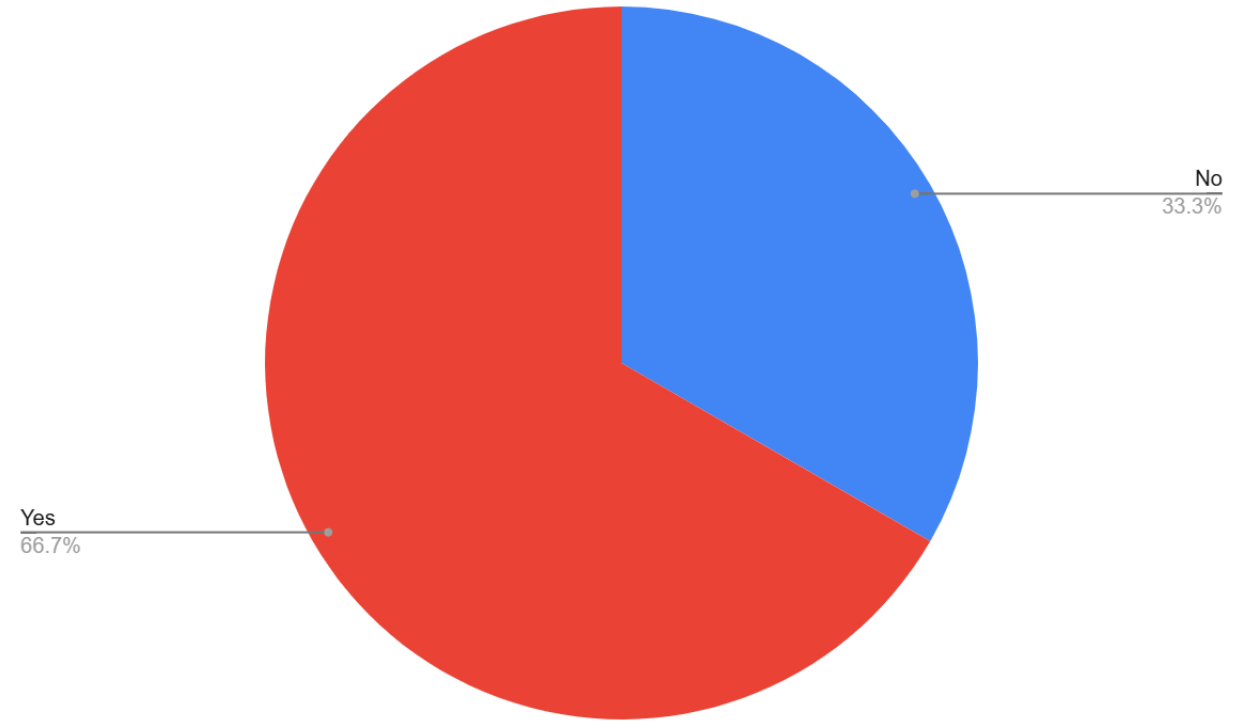


If "No", do you believe that different guidelines should apply depending on the prevailing legal tradition in the arbitration (e.g., a set for common law and a set for civil law)?

Civil law



Common law



Annex 3:

Research answers

(raw data in spreadsheet format)

Available at: <https://bit.ly/ciarbbrazilresearchws>

