

International arbitration:
Corporate attitudes and practices
2006

Introduction

The growth in international trade and the flow of capital to fund investment in new markets create opportunities for corporations, but risks too. A key way for corporations to manage risk and safeguard value is to apply effective dispute resolution policies when things go wrong. The resolution of cross border disputes is becoming more sophisticated. Increasingly, parties are choosing to resolve disputes away from the courts through the use of international arbitration. It can provide distinct advantages over litigation through its more flexible processes and the wide enforceability of awards; yet there are disadvantages, particularly for the unwary.

PricewaterhouseCoopers is increasingly being instructed to provide expert evidence to quantify loss and damage or to give opinions on valuation, economic or accounting issues arising in international arbitration cases around the world.

Anecdotally, the level of knowledge and skilled use of international arbitration appears to be, at best, limited among investors in and directors of many international corporations. PricewaterhouseCoopers wanted to gauge the level of knowledge about international arbitration among a wide sample of corporations around

the world and to test certain myths and perceptions about international arbitration against leading in-house counsel.

We are delighted to have sponsored this research from the world-renowned School of International Arbitration, Queen Mary, University of London. They have brought the independence and intellectual rigour of academic thinking and set their findings in the context of existing academic research into the subject. The findings, to be published in academic journals, are summarised in this study and will be of interest in boardrooms, law firms and universities around the world. This research should provide valuable insights for any business that trades or invests abroad. We hope it will assist directors and their legal and other advisers to focus on international dispute resolution as a risk management priority thereby preserving, even enhancing, shareholder value.

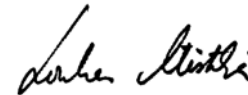


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2006

It is widely suggested that international arbitration is on the rise and most contracts include arbitration clauses. However, there is hardly any tangible data. Against this background, the School of International Arbitration, Queen Mary, University of London conducted this research into the attitudes and choices of major international corporations towards the resolution of international commercial disputes. The specific objectives of the research were to set out current perceptions of corporate attitudes towards international arbitration as a means of resolving cross border disputes and to obtain empirical data from a wide sample of corporations, to either confirm or challenge these perceptions. All corporations involved in this research are international players in their various sectors and most have experience in international arbitration.

This study is both ground-breaking and standard-setting as it introduces empirical methods in the study of international arbitration: it is ground-breaking because it is by far the largest independent statistical study yet on international arbitration and provides insights into this so far esoteric area of law; it is standard-setting because an empirical baseline has now been set and more empirical studies will follow.

The study would not have been possible without the insightful contributions made by the online respondents and the interviewees and the generous cooperation of PricewaterhouseCoopers and the business community. We trust this cooperation will be ongoing and fruitful.



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Executive Summary

International arbitration – a consensual, binding method of dispute resolution – offers the means to resolve cross border disputes away from litigation in national courts. This can create opportunities for the informed but has pitfalls for the unwary. It is clear that corporations that equip themselves with the knowledge, tools and tactics to conduct international arbitration proceedings are well placed to resolve their cross border disputes effectively and thereby manage this operational risk.

This study into the views of in-house counsel at leading corporations around the world tests twelve perceptions around international arbitration. The study was conducted during a six month period and comprised of two phases: an online questionnaire completed by 103 respondents and 40 in-depth interviews. The study is presented in sections, each using the empirical evidence from the research to either confirm or challenge these perceptions.

The key messages coming from this study are:

A significant majority of corporations prefer international arbitration to resolve their cross border disputes

- 73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multi-tiered dispute resolution process (44%)

The advantages of international arbitration clearly outweigh the disadvantages

- The top reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrators
- Expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration. Other concerns include the risk of court intervention in the arbitration process and the difficulty of joining third parties to proceedings

A clear dispute resolution policy provides an important strategic advantage when negotiating dispute resolution clauses for cross border contracts

- 65% of online respondents said they maintain a dispute resolution policy
- A policy can provide a framework for the drafting of advantageous dispute resolution clauses into contracts. This enables in-house counsel to deal more effectively with disputes once they arise, thus helping corporations anticipate and prepare for the next phase of the resolution process
- 17% of respondents stated that a dispute resolution policy directly produces cost savings and a further 69% indicated that a dispute resolution policy helps to minimise the escalation of disputes

Well crafted international arbitration clauses give corporations a tactical advantage in the event that a dispute arises

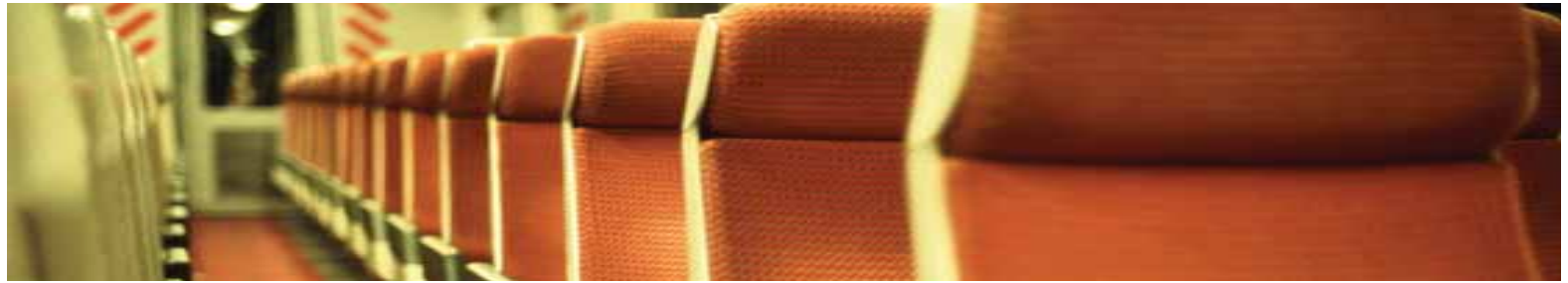
- Arbitration clauses included in contracts determine the form and legal basis of the arbitration process and shape the way in which proceedings are conducted. Well crafted clauses can enable a party to

include beneficial terms (such as the choice of seat and composition of the tribunal). However, it requires knowledge and experience of the arbitration process to ensure the choices made are advantageous

- 60% of in-house counsel interviewed said their corporations have conceded points while negotiating arbitration clauses; the clear inference is that those corporations, with hindsight, conceded important tactical advantages

Over three quarters of corporations opt for institutional arbitration

- The most commonly cited reasons for opting for arbitrations conducted under the auspices of an arbitration institution are reputation, familiarity with proceedings, an understanding of costs and fees and the convenience of using an established process
- The top ranking institutions cited by respondents were the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association/ International Centre for Dispute Resolution (AAA/ICDR)



There is widespread support for regional arbitration institutions

- A sizeable number of respondents were supportive of the development of stronger regional arbitration institutions, which are closer to the location of the disputes and which might also be less expensive than established institutions

The tactical significance of the seat of arbitration is not fully appreciated

- Legal considerations attaching to the “seat” of arbitration are the most important reasons for a corporation’s choice of venue for international arbitration proceedings
- The convenience of a location was a surprisingly close second, which suggests that some in-house counsel may not fully appreciate the tactical significance of choosing the right “seat”
- The four most popular venues were England, Switzerland, France and the United States

Corporations overwhelmingly favour the finality of arbitration awards

- 91% of the online respondents reject the idea of including an appeals mechanism in international arbitration

Corporations are looking for arbitrators with an established reputation in the international arbitration community

- There is a relatively small pool of experienced arbitrators. Industry expertise and regional experience are increasingly desirable attributes of an international arbitrator

Corporations retain specialist arbitration counsel rather than their usual external litigation counsel

- Corporations seek a firm that specialises in international arbitration, is experienced in the subject matter of the dispute, has access to counsel in the place of the dispute to provide regional expertise and is a specialist in the applicable law. Availability and reputation of counsel are also important criteria

International arbitration is at least as expensive as transnational litigation for medium and smaller size cases. In larger, more complex cases, international arbitration may represent better value for money

- In international arbitration proceedings, the parties must pay the costs of the arbitration institution and the tribunal. These may appear substantial in actual terms. However, in most cases their share of the overall expense of proceedings is not regarded as excessive

There is demand for education on the tools and tactics of international arbitration

- Despite 90% of in-house counsel feeling well informed about international arbitration proceedings, they indicated that they wished to receive more training. This, and other findings in the study, suggest that corporations might benefit from more education about the process, opportunities and risks of using international arbitration

The outlook for international arbitration is extremely positive

- 95% of corporations expect to continue using international arbitration and an increase in cases is expected
- Corporations appear confident that arbitration law and practices will generate the solutions required to meet future challenges

A photograph of a tunnel interior. The tunnel is illuminated by yellow lights along the walls. In the center, a car is driving away from the camera. The ceiling is dark, and there are some red lights visible. The overall atmosphere is dim and somewhat mysterious.

The Study: Perceptions tested – myths, data and analysis ♦ ♦

73% prefer to use international arbitration

1

Use of international arbitration

1.1 Perception: Corporations prefer to use international arbitration rather than transnational litigation as a means of resolving cross border disputes.

PARTIALLY TRUE

1.2 Data and analysis

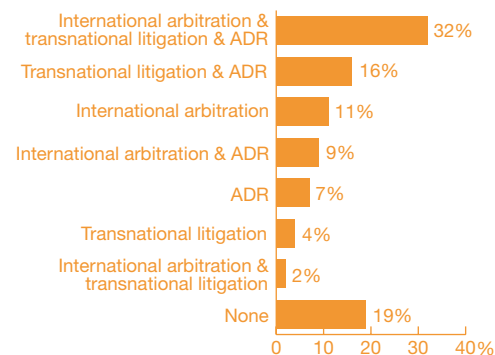
Of the corporations that participated in the online study and that had been involved in cross border transactions, 81% had direct experience with international arbitration, transnational litigation, mediation, and/or other Alternative Dispute Resolution (ADR) mechanisms.

When asked what types of resolution processes they have used for international disputes, over half reported using international arbitration either as a stand alone process (11%) or in combination with other mechanisms, such as ADR and litigation (43%). Only 4% had experience with transnational litigation alone.

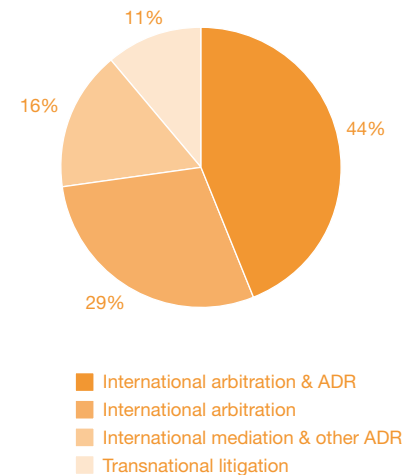
When the same respondents were asked which mechanism they preferred to use, 73% stated international arbitration; either alone (29%) or in combination with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process (44%). ADR mechanisms as a standalone approach were favoured by 16% of the corporations; transnational litigation was preferred by only 11%.

So why do nine out of ten corporations seek to avoid transnational litigation? The most common explanation is anxiety about litigating under a foreign law before a court far from home, with a lack of familiarity with local court

Experience of dispute resolution mechanisms



Preferred mechanism(s) for resolving cross border disputes



procedures and language. There are also concerns about the lack of confidentiality surrounding proceedings and the time consuming nature and associated costs of pursuing litigation overseas. In addition, some countries may lack an independent or impartial judiciary and, in the worst cases, the system may be corrupt. Finally, even if these issues are successfully navigated, the enforcement of a foreign judgment can prove very difficult.

Those corporations that are prepared to rely on transnational litigation tend to fall into one of two categories:

- Corporations that operate principally in developed countries, where they believe that they will have access to an independent, impartial judicial system
- Corporations from developing countries that may be inexperienced with and apprehensive about the arbitration process and feel more comfortable resolving disputes in their own court systems

1.3 Summary

- 73% of corporations prefer international arbitration as a means for resolving cross border disputes
- In most cases, international arbitration is not used in isolation; its use in combination with ADR mechanisms is the most common option
- Transnational litigation is the dispute resolution mechanism of choice for a minority of corporations (11%) in certain circumstances

2



Advantages and disadvantages associated with the use of international arbitration

2.1 International arbitration is favoured in resolving cross border disputes because it offers distinct advantages which outweigh the disadvantages.

TRUE

2.2 Data and analysis

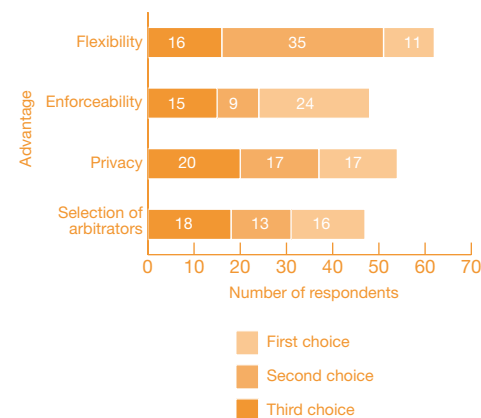
Advantages: We asked participants in the online study to list the three most important reasons for using international arbitration.

Flexibility of procedure was the most widely recognised advantage. The active participation of the parties in determining and shaping the procedure inspires confidence in the process.

However, enforceability of awards was ranked as the single most important advantage by the highest number of respondents (24 respondents).

Privacy, perhaps unsurprisingly, was also ranked highly. International arbitration is considered by many as an effective way to keep business practices, trade secrets, industrial processes, intellectual property, as well as proceedings with a possible negative impact to the brand, private. This does not mean that everything in arbitration is automatically secret or confidential; it merely means that proceedings are private and may be confidential.

Most important advantages of international arbitration (No. of respondents)

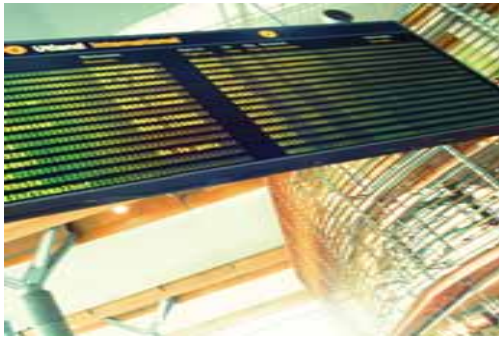


The ability of parties to select arbitrators with the necessary skills and expertise and who are well suited to the appropriate cultural or legal context was also ranked highly.

A small number of respondents identified other advantages, such as: cost; speed; the possibility of avoiding specific legal systems and national courts; and the neutrality of the arbitral venue.

Disadvantages: Corporations are not entirely satisfied with the process of international arbitration. We asked participants in the online study to list their three most significant concerns associated with the use of international arbitration.

The expense of the international arbitration process (including the costs of arbitration lawyers, arbitrators, and the arbitration institution that may be involved) was the most widely recognised disadvantage. 70 out of 80 respondents cited it as one of their top three concerns, with 50% of respondents ranking it as their primary concern. This challenges one of the common myths surrounding international arbitration, that it is less expensive than



Flexibility of the procedure and the enforceability of awards are the most widely recognised advantages of international arbitration

transnational litigation. The cost of international arbitration is covered in more detail in Perception 10 (page 19).

A related concern is the time the arbitration process takes from filing to award, which was the second most commonly expressed concern. Both the International Chamber of

Commerce (ICC) and the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) claim that, in the majority of the cases, an award is rendered within 18 months from filing a request for arbitration, which is quicker than most transnational litigation cases. However, with proceedings increasingly simulating court proceedings in the length of time it takes to complete an arbitration case, this is now perceived as a disadvantage.

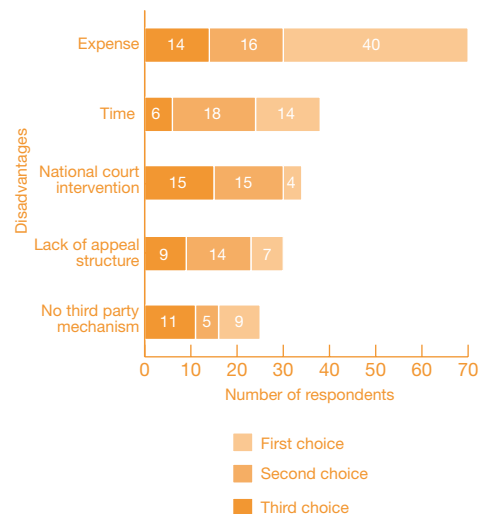
National court intervention was identified as a concern. Many countries have laws which allow international arbitrations to be conducted with limited, if any, intervention by a national court in the proceedings (for example, to challenge a decision by the arbitrators). However, this varies country by country. While many modern arbitration statutes specifically limit court intervention, if the jurisdiction allows courts to intervene, there is little an arbitration tribunal can do. This makes the choice of the seat of the arbitration an important issue. In addition, court intervention will usually result in increased time and costs.

30 respondents to our online study perceived the lack of an appeal structure as a potential disadvantage of arbitration. This may suggest either that parties would prefer an appeal system within the arbitration framework rather than choosing to appeal through the courts; or that parties are increasingly prepared to challenge awards. However, a further finding of our study was that only a small minority, in practice, want an appeal mechanism. This is covered in Perception 7 (page 15).

The lack of a third party mechanism was another widely recognised concern. Parties enter into international arbitration proceedings by agreement. It can be very difficult to bring other entities, who are not party to the arbitration agreement, into the proceedings at a later stage.

- The top reasons for choosing international arbitration to resolve disputes are: the flexibility of procedure, the enforceability of awards, the privacy the process provides and the parties' ability to select the arbitrators
- Expense and time are not perceived as advantages; indeed they were the two most commonly cited disadvantages of the process. However, the majority of in-house counsel interviewed stated that the success of the New York Convention on the Recognition and Enforcement of Arbitral Awards compensates for failures in cost and time
- Other concerns associated with international arbitration include national court intervention in the process and the difficulty of joining third parties to proceedings

Disadvantages of international arbitration (No. of respondents)



2.3 Summary

- Corporations perceive that the distinct advantages outweigh the disadvantages associated with the use of international arbitration

A clear dispute resolution policy provides a strategic advantage

3



Dispute resolution policy considerations

3.1 Corporations involved in international transactions usually have a dispute resolution policy in place in order to be prepared for any disputes that may arise.

PARTIALLY TRUE

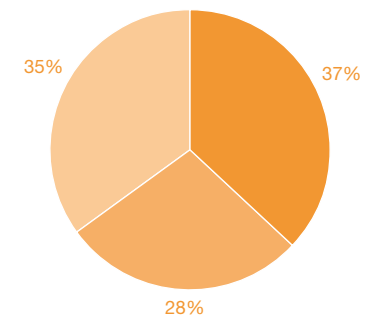
3.2 Data and analysis

Our online study asked corporations whether they maintain a dispute resolution policy. 65% said they do, with over half having a policy in a crystallised form (such as standard terms or model clauses). The remainder have a policy in a non-crystallised form and explained that their policy serves as a guideline which could be modified by negotiation. A third of the respondents do not have a dispute resolution policy in any form.

The most important benefit of having a dispute resolution policy, according to 69% of respondents, is that it minimises dispute escalation, while 17% believe the primary benefit is cost savings. The remaining 14% ranked the consistent internal practice that results from having a dispute resolution policy as most important.

In our experience, a clear dispute resolution policy provides an important strategic advantage.

Do corporations maintain dispute resolution policies?

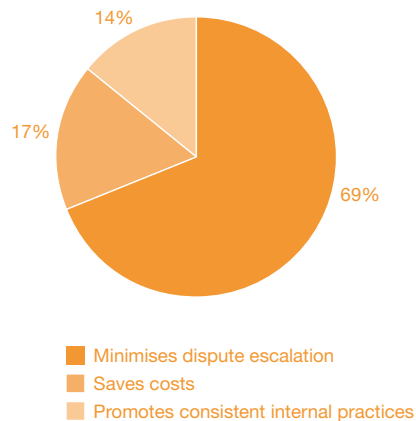


- Maintain a policy (crystallised format)
- Maintain a policy (non-crystallised format)
- Do not maintain a policy



It ensures that negotiators are informed and know the parameters within which they can be flexible during dispute resolution negotiations. A policy can provide a framework for the drafting of advantageous dispute resolution clauses into contracts. This enables in-house counsel to deal effectively and efficiently with disputes once they arise, therefore helping corporations anticipate and prepare for the next phase of the dispute resolution process.

Most important benefit of maintaining a dispute resolution policy



Corporate dispute resolution policies:

- Assist with contract negotiations
- Assist with risk management and general legal planning
- Facilitate dialogue between the legal department and the rest of the corporation and increase awareness of legal support for corporate objectives
- Project a positive attitude towards dispute resolution

Our research shows that dispute resolution policies often include clauses promoting multi-tiered or escalating dispute resolution procedures. These may involve the parties initially holding negotiations with a view to settlement, thereby avoiding the immediate threat of legal proceedings. If this fails, the next step prior to arbitration might include an attempt to settle with the assistance of a neutral third party.

3.3 Summary

- A clear dispute resolution policy provides strategic benefits
- Corporations perceive an advantage in designing a dispute resolution policy and using it as a basis for negotiation
- 86% of respondents stated that a dispute resolution policy produces cost savings either through effective management of the dispute process or by helping to minimise the risk of dispute escalation

Well crafted international arbitration clauses can provide a tactical advantage

4



International arbitration clauses

4.1 Perception: Corporations will always try to include an international arbitration clause in their contracts. This is believed to provide an advantage in the event of a dispute.

PARTIALLY TRUE

4.2 Data and analysis

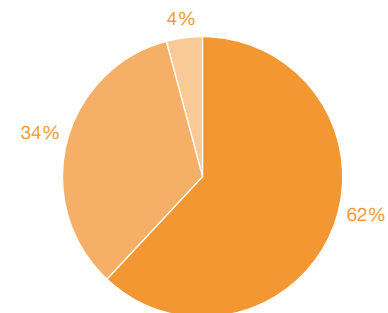
In our interviews, 95% of in-house counsel said that their corporation includes some form of dispute resolution clause in their cross border contracts. This clause might prescribe international arbitration, litigation, ADR mechanisms or a combination of these, even if it is not required by corporate policy.

Our online study asked corporations whether they insist on the inclusion of an international arbitration clause in their cross border contracts as a matter of practice. 62% stated that they insist on including international

arbitration clauses, 34% said they do not insist and 4% were unsure.

However, an important finding is that 60% of in-house counsel said that their corporations will concede points when negotiating these clauses if faced with strong objections from the counterparty. It is only when a dispute

Do corporations insist on the inclusion of an international arbitration clause in contracts?



- Insist on including an international arbitration clause
- Do not insist on including an international arbitration clause
- Unsure

arises that it becomes clear that well crafted international arbitration clauses can provide a distinct advantage and safeguard the interests of the corporation.

The lack of attention to the negotiation of a suitable international arbitration clause can leave a corporation adversely exposed should a dispute arise. Conversely, by ensuring the inclusion of a well-crafted clause, it maybe possible to include advantageous terms should the dispute end up in arbitration proceedings (such as the choice of seat and the selection of arbitrators).

During our interviews some in-house counsel expressed concern about being excluded from the decision making process at this key stage of contract negotiations. Corporations might wish to reflect whether this exposes them to additional risk.

Our online study also asked whether corporations adopt standard form arbitration clauses or draft clauses for individual contracts. 48% of respondents stated that they use standard arbitration clauses in all



their contracts, while 43% tailor clauses to each individual contract. The remaining 9% were unsure of their corporate practice.

In our experience, it is important to include an international arbitration clause, although whether it is better to adopt a standard clause or a tailored one depends on the circumstances of the transaction. Standard clauses, whether recommended by arbitration institutions or

drafted by the corporation, are invariably well tested but may not suit the circumstances of the contract under negotiation. Tailored clauses, on the other hand, may suit business needs more precisely but arbitration experts should be involved in the drafting as there may be pitfalls and missed opportunities when clauses are drafted by those who are unfamiliar with the arbitration arena.

Typical defects of a poorly drafted arbitration clause may include:

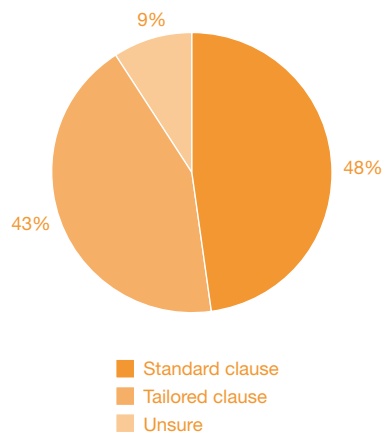
- Merely providing the parties with an option to choose arbitration
- Lack of clarity as to whether the parties actually agreed on arbitration or on some other form of dispute resolution, such as expert determination
- Conflicting dispute resolution provisions, e.g. an exclusive jurisdiction clause for litigation and an arbitration clause
- Incorrect reference to the institution under whose rules an arbitration should take place or designating a non-existent appointing authority

- Pre-arbitration stages in multi-tier dispute resolution clauses maybe poorly defined
- Issues relating to the seat, composition of the tribunal and other important factors may be omitted; this might be a defect or merely a lost opportunity to influence the dispute resolution process

4.3 Summary

- Most corporations insist on the inclusion of an arbitration clause in their contracts
- Multi-tiered or escalating dispute resolution clauses are increasingly popular
- Fractionally more corporations use standard form arbitration clauses rather than tailored clauses in their contracts
- A majority of in-house counsel indicated that their corporations have been willing to concede points and/or arbitration clauses during negotiations to complete a transaction, possibly conceding legal and tactical opportunities in the event a dispute ends up in arbitration proceedings

Do corporations use standard or tailored international arbitration clauses?





5

Ad hoc v. institutional arbitration

5.1 Perception: Corporations prefer institutional arbitration to ad hoc arbitration.

TRUE

5.2 Data and analysis

Online respondents were asked whether they generally opt for arbitration under the rules of an arbitration institution or whether they mutually agree their own (ad hoc) process. A clear majority, 76%, reported that they opt for institutional arbitration.

We asked the respondents to our online study to select their top three reasons for choosing institutional arbitration and we applied a weighting system to the results. A strong reputation for managing arbitration proceedings was the most widely recognised reason for choosing institutional arbitration,

scoring more than the second and third most common reasons (familiarity with proceedings and an understanding of costs and fees) put together.

The 24% of respondents that stated their organisations prefer ad hoc arbitration proceedings are primarily from corporations with a gross annual turnover of more than US\$5 billion. In many cases, these corporations have large, sophisticated

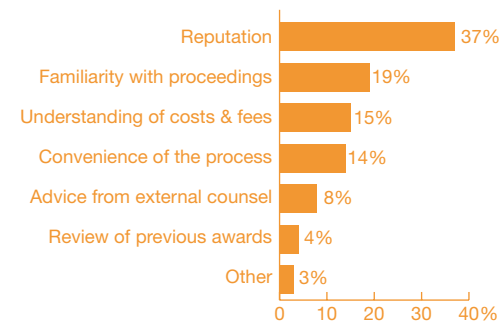
in-house legal departments with experience of managing arbitration proceedings.

An important finding of the study was that a sizeable number of respondents were supportive of the development of stronger “regional” arbitration institutions¹. Many corporations indicated an interest in institutions closer to the location of the dispute, which might also be less expensive than established institutions. However, most

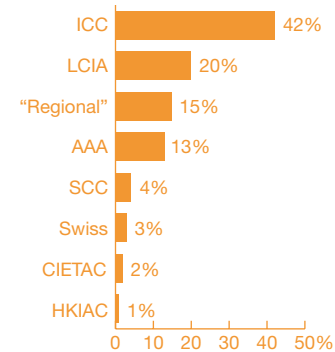
corporations are not yet willing to send their cases to less established regional centres before they have a proven track record.

To determine the most popular arbitration institutions, online respondents were asked to choose their top three preferences from a list of ten well known institutions. Respondents had the option to add other preferred institutions to the list. The institutions were then ranked by applying a weighting system to the answers. The ICC, LCIA and AAA/ICDR were ranked the highest.

Reasons for choosing institutional arbitration



Preferred arbitration institutions



5.3 Summary

- 76% of corporations opt for institutional arbitration; the 24% opting for ad hoc proceedings are primarily larger corporations with more experience of international arbitration
- The most commonly cited reasons for choosing institutional arbitration are reputation, familiarity with proceedings,

¹ “Regional” arbitration institutions referred to were SIAC, JCAA, CANACO, ACICA and CRCICA. Definitions of these acronyms can be found in the glossary.

Corporations support the development of strong regional arbitration centres

understanding of costs and fees and the convenience of the process

- The top-ranking institutions of choice are the ICC, the LCIA and the AAA/ICDR
- There is demand from corporations for the development of stronger regional institutions, however they must demonstrate a proven track record to instil confidence in potential users. This presents an opportunity and a challenge for some regional institutions



6

Venues for the seat and conduct of international arbitration

6.1 Legal considerations are the most important factor in the choice of a venue for arbitration.

PARTIALLY TRUE

The seat of international arbitration determines the procedural law which, in concert with institutional or ad hoc rules, will govern the conduct of arbitration proceedings.

There are conflicting views on the importance of the seat of arbitration. One view holds that the seat is important as it determines the support or intervention that may be received from local courts in the course of arbitration, (i.e. the extent to which awards may be challenged where basic procedural standards of fairness are not followed and the guidance that may be provided by the local law when the choice of arbitral procedure by the parties is

not sufficiently comprehensive). An alternative view is that the choice of seat is less important because it is often a matter of convenience or governed by the desire for neutrality.

6.2 Data and analysis

The online questionnaire referred to arbitration venues rather than the legally-laden terms “seat” or “place” of arbitration.

We asked online respondents to rank their top three choices for an arbitration venue and the three most important factors in determining their choices. The four most popular venues are shown in the graph overleaf.

Tactical significance of the seat of arbitration is not fully appreciated

When asked for the main reasons for their choice of venue, online respondents highlighted legal considerations, convenience, the neutrality of the venue and proximity to evidence and witnesses.

Legal considerations were chosen as the single most important factor by the highest number of respondents. Convenience came a close second. The fact that many in-house

counsel see the choice of seat as more a matter of convenience than of concern with legal issues might suggest that some do not fully appreciate the significance of choosing the right seat for international arbitration. It may not be clear to some in-house counsel that the choice of seat is a tactical decision that can help them achieve the best outcome for their side. This suggests that in-house legal departments might benefit from

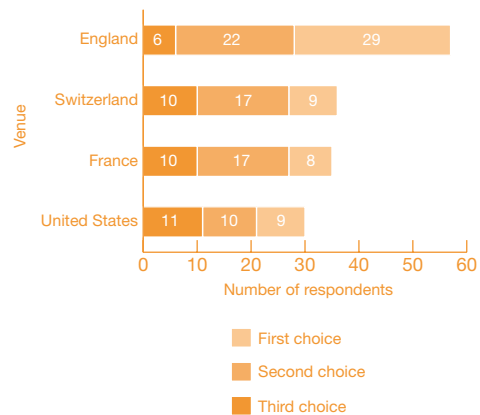
briefings by arbitration specialists on the legal consequences and tactical opportunities arising from the choice of seat.

6.3 Summary

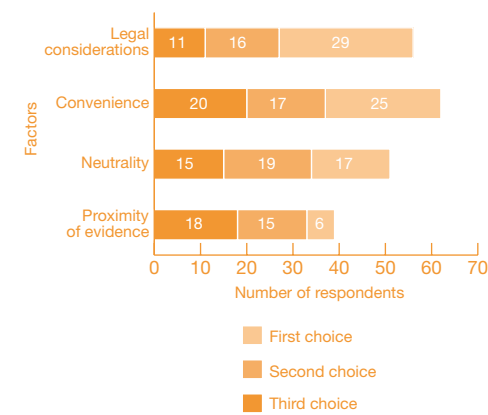
- Legal considerations were the single most important factor for a corporation's choice of venue for international arbitration proceedings
- However, convenience was a surprisingly close second. This suggests that the arbitration community may need to do more to educate in-house counsel in this area



Preferred international arbitration venues



Factors in choosing a venue



7

Potential for appeal on the merits

7.1 Perception: Corporations would like the ability to appeal an arbitration award or to have a review of the merits of an award.

FALSE

7.2 Data and analysis

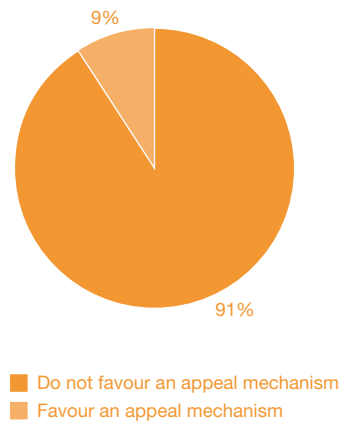
Traditionally, one of the main advantages associated with international arbitration has been its finality. In recent years, however, there has been an increase in the number of applications challenging awards.

However, 91% of the online respondents and an overwhelming majority of those interviewed reject the idea of including an appeal mechanism in international arbitration. According to those interviewed, the advantages of the finality of an award outweigh the need for an appeal mechanism.

The ability to appeal is seen as a disadvantage because it makes arbitration more cumbersome and litigation-like and essentially negates a key attribute of the arbitral process.

The 9% of respondents who supported some form of appeal system as part of the arbitration process cited previous, negative arbitration experiences as the reason for their views.

Views on developing an appeal mechanism for awards



7.3. Summary

- Corporations overwhelmingly favour the finality of arbitration awards, view this as a vital attribute and reject the idea of an appeal mechanism



8

Appointment of arbitrators

8.1 Perception: Arbitrators are principally appointed on the basis of their reputation.

PARTIALLY TRUE

8.2 Data and analysis

50% of online respondents stated that they appoint arbitrators on the advice of external counsel; 33% appoint arbitrators on the basis of personal knowledge; and 3% appoint arbitrators on the recommendation of a third party. The remaining 14% leave the selection of arbitrators to an appointing authority.

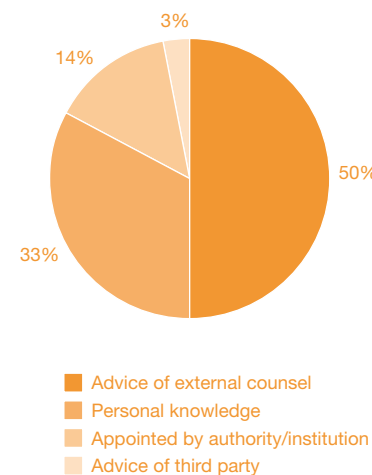
In the online study, in-house counsel highlighted the various factors they take into consideration in appointing arbitrators². With their assessment of a candidate based

on personal knowledge, information from informal contacts and recommendations of external counsel, 90% of respondents highlighted the reputation of the arbitrator as the most important factor. This is closely followed by expertise and common sense, attributes considered important by 80% of

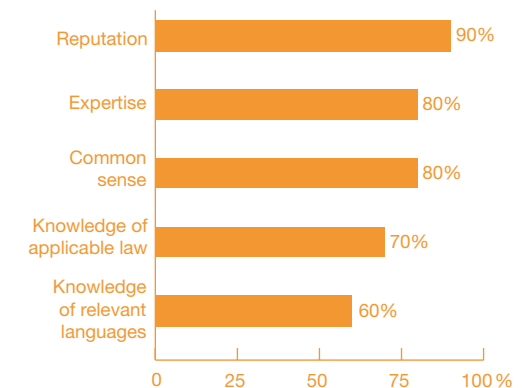
respondents. Knowledge of applicable law and of relevant languages are also desirable attributes of international arbitrators, mentioned by 70% and 60% of the respondents, respectively.

An important finding is that in-house counsel generally favour appointing an arbitrator with

How arbitrators are selected



Attributes of an arbitrator



² It was presumed that arbitrators are neutral, independent, and impartial.

There is demand for a wider pool of arbitrators

specialisation or expertise in the subject matter of the dispute. They also increasingly seek:

- Specialisation in industry sector
- Regional or country experience
- Cross-disciplinary expertise (e.g. technical or financial background) which may be useful for the quantification of damages, or understanding relevant market conditions

In-house counsel believe that arbitrators with these skills save their corporations time and money.

Our research also reveals that in-house counsel prefer to have an arbitration “heavyweight” on the panel (often as chairman) to conduct the process with knowledge, authority and gravitas. Ideally two specialists in law, industry or geographic region make up a versatile and informed tribunal.

33% of the in-house counsel interviewed raised concerns over limited availability of arbitrators with sufficient breadth of

experience. They expressed a strong desire to have a wider pool of experienced arbitrators. However, none was willing to appoint an inexperienced arbitrator in their cases. It is interesting to note that one quarter of the in-house counsel interviewed expressed an interest in being appointed as arbitrators in the future.

8.3 Summary

- Corporations look for arbitrators with an established reputation in the international arbitration community
- Relevant industry and/or regional expertise are increasingly desirable attributes of an international arbitrator
- Corporations continue to select arbitrators from a narrow pool of established individuals. Although corporations would like a wider pool of arbitrators from which to choose, the importance they attach to reputation might make it difficult to expand the pool quickly in the short term. As the popularity

of international arbitration increases, so will the demand for the scarce specialists at the top of the arbitration community





9

Appointment of law firms

9.1 Perception: Corporations retain their usual external litigation counsel when conducting international arbitration cases.

FALSE

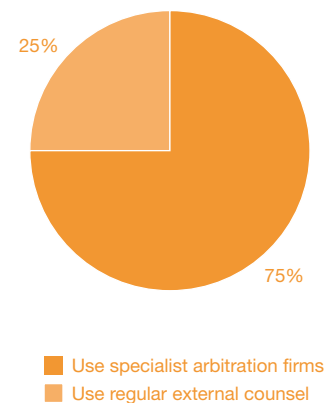
9.2 Data and analysis

Interviews with in-house counsel made clear that they do not generally use their retained external counsel for international arbitration work. 75% of the in-house counsel interviewed said that their corporations retain specialist arbitration firms or firms with a substantial international arbitration practice.

The in-house counsel interviewed consider themselves increasingly sophisticated in their procurement of arbitration services, many stating that they had been involved in, or managed, international arbitration proceedings in the past.

As a result, rather than turn to their usual external litigation counsel, interviewees said that when appointing arbitration counsel, they seek a firm that specialises in international arbitration, is experienced in the subject matter of the dispute and has access to counsel in the place of the dispute to provide regional expertise. Availability and reputation are also important criteria.

Appointment of law firms for international arbitration cases



Interviewees said long standing relations between corporations and specialist arbitration law firms are considered to be beneficial for both parties. These are typically one-to-one relationships between the in-house counsel and arbitration lawyers in an external firm.

9.3 Summary

- Corporations generally retain specialist arbitration counsel rather than their usual external litigation counsel to represent them in international arbitration proceedings

Arbitration costs are rising but still represent value for money

10



Cost

10.1 Perception: International arbitration is considered to be less costly than transnational litigation.

FALSE

10.2 Data and analysis

Although some in the international arbitration community have argued that it is less expensive to resolve disputes through arbitration than through litigation, in recent years corporations have complained that international arbitration has become increasingly costly. As Perception 2 of this study shows, the study found that seven out of eight online respondents identified expense as a disadvantage of international arbitration; half of the respondents said it is the most significant disadvantage.

Costs related to arbitration can be divided into two main groups: arbitration costs and

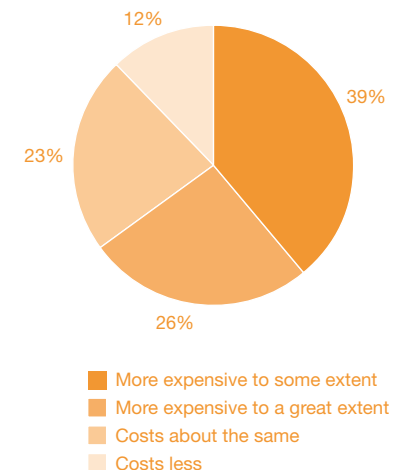
counsel's fees. Arbitration costs include the arbitrator's fees, expenses connected with the hearings (e.g. hiring venue, translators' fees), fees and expenses of any experts appointed by the tribunal and the administrative expenses of the arbitration institution, if the arbitration is an institutional one.

Our research reveals that nearly two thirds (65%) of the respondents perceive international arbitration to be more expensive than transnational litigation and 23% believe it is about as costly as transnational litigation. However, responses were clearly conditioned by experience of the costs of litigation. These can vary significantly according to jurisdiction, with the United States regarded as the most expensive jurisdiction in which to litigate.

Respondents were asked to indicate the total cost of their corporation's most recent international arbitration case. 52% of the cases identified incurred costs ranging from \$100,000 to \$500,000. However, 12% incurred costs greater than \$5 million.

We also asked respondents to indicate what percentage of total arbitration costs counsel's fees represented in their corporation's most recent international arbitration. The respondents reported that in 64% of cases, counsel's fees were greater than 50% of the total cost of the arbitration. Whilst the costs of the arbitration institution and tribunal may appear significant, their share of the overall expense is not regarded as excessive.

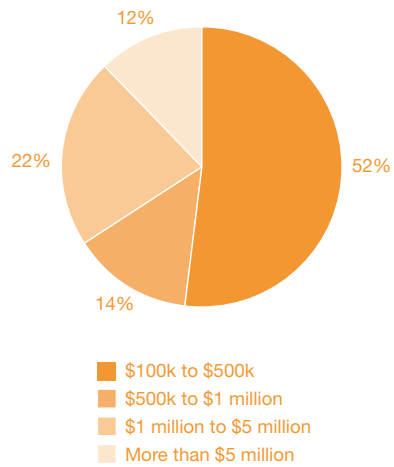
Is international arbitration more expensive than transnational litigation?



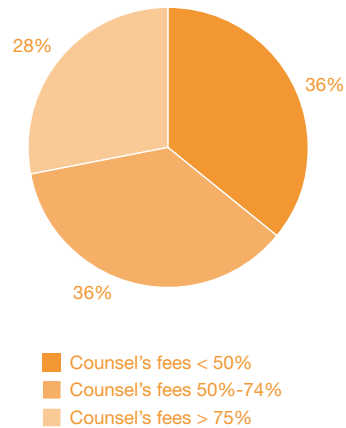
The interviews with in-house counsel indicate that corporations in developed countries are less concerned about the cost of arbitration than those in emerging economies. In addition, corporations from most common law jurisdictions as well as several civil law jurisdictions (such as Sweden, France, and Italy) consider the costs to be acceptable given the expertise of arbitrators and overall

quality of services provided. However, in emerging economies, the cost of arbitration and lack of familiarity with the process may discourage many corporations from using it. As a result, and as explored in Perception 1, some of these corporations prefer litigation in their own courts, where the costs may be more predictable and less burdensome.

Costs of recent international arbitration cases

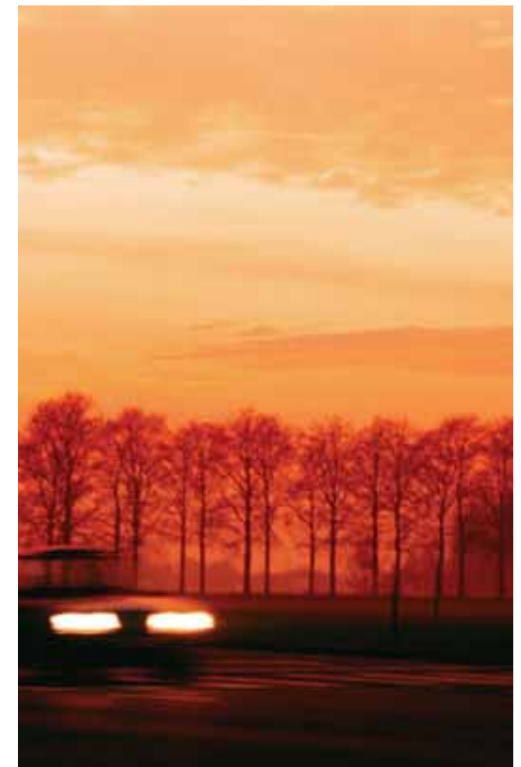


Counsel's fees as percentage of the total cost of arbitration



10.3 Summary

- International arbitration is considered at least as expensive as transnational litigation for middle and smaller size cases. In larger, more complex cases, international arbitration may represent better value for money
- Most of the costs of international arbitration are counsel's costs. Although the costs of the arbitration institution and tribunal may appear substantial in actual terms, their share of the overall expense of proceedings is not regarded as excessive



In-house counsel are becoming more sophisticated purchasers of arbitration services



11

Sophistication of users

11.1 Perception: In-house counsel generally lack extensive experience in international arbitration; to gain maximum benefit from this process they require the advice of external counsel with arbitration expertise.

PARTIALLY TRUE

11.2 Data and analysis

Our study results indicate that many in-house counsel in larger multinational corporations have had some, and even considerable, experience in managing the arbitration process. Of the in-house counsel interviewed, 90% felt that they were informed about arbitration but wished to receive more training. 10% felt they lacked the necessary in-house resources for arbitration.

It may come as a surprise to the arbitration community to find such a high percentage

of in-house counsel consider themselves to have sufficient resources to manage arbitrations. While in-house counsel claim to be sophisticated enough to handle arbitration matters, some of our study's findings – for example, a willingness to drop dispute resolution clauses from contracts and the failure to fully appreciate the tactical importance of choosing the right seat – suggest that further education from specialist lawyers might be beneficial in some corporations.

Those asking for training said it should specifically address the design and negotiation of dispute resolution clauses, updates on arbitration law and practice, tools and tactics, venue choice, and the enforcement of awards. The commercial benefits of this training and the resulting experience could lead to:

- A greater appreciation of the tools and tactics available in international arbitration proceedings
- Improved drafting of dispute resolution clauses in contracts

- More effective management of arbitration cases
- Eventually, a wider pool of arbitrators from which to draw

11.3 Summary

- 90% of lawyers felt well informed about international arbitration proceedings but indicated they would benefit from further training
- Other evidence in this study confirms there is scope for additional education in critical aspects of international arbitration

The outlook for international arbitration is extremely positive

12



The future of international arbitration

12.1 Perception: Corporations will continue to use international arbitration as the preferred means of resolving cross border disputes.

TRUE

12.2 Data and analysis

Will international corporations continue to opt for arbitration? How will increased demand for arbitration expertise be accommodated? What aspects of the arbitration process should be changed or improved? The answers to these questions will help shape the future of arbitration as a valued resource in resolving cross border disputes.

According to our study results, 95% of the corporations currently employing international arbitration will continue to use it. All interviewees expressed the view that the expansion of

international trade will result in a steady increase in arbitration cases.

Respondents also highlighted major issues of concern, including:

- The need to improve the framework for multiparty, multi-contract, and multi-claim disputes
- The need for more effective enforcement of interim measures
- The need for a mechanism to reduce arbitration costs
- The need for more countries to become members of the New York Convention

Our study findings point to other significant developments. The first is the trend toward the development of more sophisticated dispute resolution policies. Increasingly, these will take the form of escalating, multi-tiered dispute resolution procedures. Secondly, appeal on the merits will remain unattractive to corporations. As a result, in-house counsel will continue to favour finality over the open-ended nature of a mechanism for appealing awards. Finally, the

need for international arbitrators is steadily increasing and in-house counsel express a clear demand for a wider pool of high quality arbitrators and strong regional arbitration institutions.

12.3 Summary

- The outlook for international arbitration is extremely positive. 95% of corporations expect to continue using it, and a rise in arbitration cases is projected
- Arbitration users have concerns, including high costs, difficulties in dealing with multi-party proceedings, and the currently small pool of arbitrators
- In-house counsel appear confident that arbitration law and practices will generate the solutions required to meet future challenges

Appendices

A wide-angle photograph of a sunset over a large body of water. The sky is a gradient of warm colors, from deep orange near the horizon to a lighter yellow at the top. The water is dark, reflecting the colors of the sky. In the foreground, a small, dark island or peninsula is visible, with a small pool of water on its surface that reflects the sunset. The overall mood is serene and peaceful.



Methodology

The research element of this study was conducted between 3 May and 31 October 2005 by Ms. Emilia Onyema, LLB, LLM, MCIArb, employed at the time as PwC Research Fellow at the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London, together with

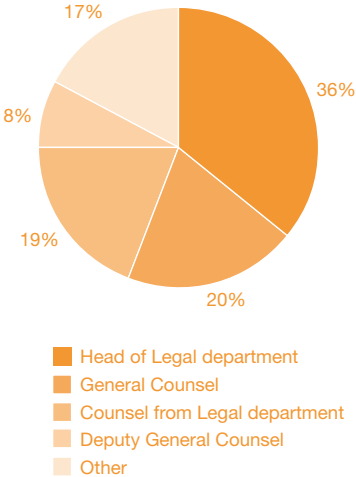
Professor Dr. Loukas Mistelis, LLB (Hons, Athens), MLE (magna cum laude), Dr Iuris (summa cum laude) (Hanover), MCIArb, Advocate, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration; Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London.

The research comprised of two phases:

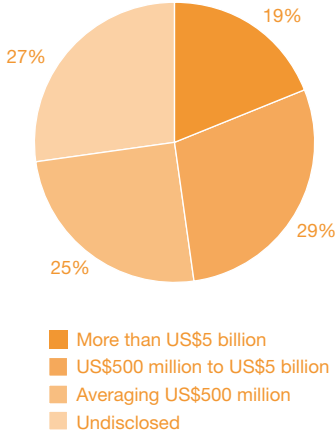
- **Phase 1:** an online questionnaire completed by 103 respondents. Respondents targeted were: heads of legal departments, general counsel (or deputy), or counsel in charge of arbitration/litigation in corporations involved in cross border transactions. Information taken solely from this group is referred to as from “respondents” or “our online study”

- **Phase 2:** face-to-face and telephone interviews with 40 general counsel, heads of legal departments and other counsel (on the authority of the general counsel). Inter-interviews were based on a set of guideline questions and varied from 15 to 30 minutes (for telephone interviews) to two hours for face-to-face interviews. Information taken solely from this group is referred to as from “interviewees” or “from interviews”

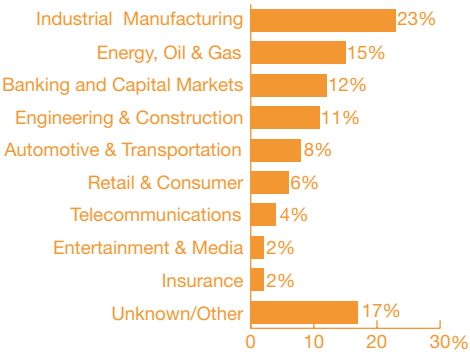
Position of respondents/interviewees



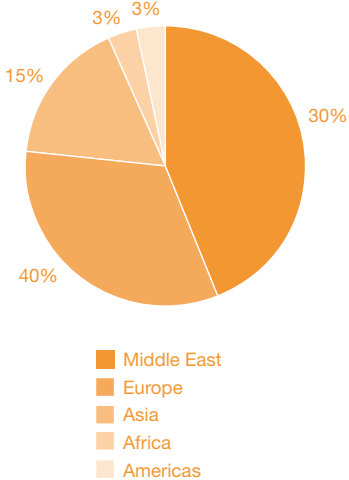
Annual turnover of respondent/interviewee corporations



Respondents by industry sector



Geographic location of respondents/interviewees



All interviews were conducted in English and the majority of the interviewees were (at least) bilingual. The responses from the online questionnaire and interviews were collated, statistically analysed and interpreted.

Targeted corporations were those operating in the top tier, and with significant involvement in cross border transactions. In the majority of cases, participant corporations have offices in more than one country.

Ultimately, it is corporations which are the users of the dispute resolution service provided by arbitrators and arbitration counsel and, for this reason, this study explores the attitudes of corporations, not the views of the external counsel representing them.

Glossary

Arbitration Institutions

AAA/ICDR – American Arbitration Association/International Centre for Dispute Resolution

ACICA – Australian Centre for International Commercial Arbitration

CANACO – Cámara Nacional de Comercio (Mexico)

CIETAC – China International Economic and Trade Arbitration Commission

CRCICA – Cairo Regional Centre for International Commercial Arbitration

HKIAC – Hong Kong International Arbitration Centre

ICC – International Chamber of Commerce

JCAA – Japan Commercial Arbitration Association

LCIA – London Court of International Arbitration

SIAC – Singapore International Arbitration Centre

SCC – Stockholm Chamber of Commerce



PricewaterhouseCoopers' international arbitration network

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