International Arbitration – Trends and Challenges[*]
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I. Introduction

Disputes are an inevitable occurrence in many international commercial transactions and a consequence of increased globalisation and further market liberalisation. Different commercial and legal expectations, cultural approaches, political ramifications and geographic situations are all sources for disagreement and dispute between contracting parties. Genuine differences can concern the meaning of contract terms, the legal implications for a contract, and the respective rights and obligations of the parties. Sometimes parties agree to perform a contract where performance is just not possible. Extraneous factors and human frailties, whether through mismanagement or over-expectation, will also interfere with contractual performance. A major area of dispute is the failure to pay money due under a contract: this may be because of an inability to pay or a wish not to pay and therefore one party is seeking an excuse or a justification to refuse to pay all or part of the contract price.

Where these disputes arise and they cannot be resolved by direct negotiation, they will need to be resolved in accordance with a legal process. This process should have the confidence of the parties or at least be in a forum that is acceptable to the parties. In these circumstances, the perception is that parties to international commercial contracts frequently look to arbitration as a private, independent and neutral system. There is, however, very little empirical evidence to substantiate this and other perceptions associated with international arbitration.

In the last 25 years most countries in the world have adopted new or modernized their legislation in respect of international commercial arbitration. As a result of law reforms and, of course, as a result of increase of international trade relations, the number of international arbitrations has increased significantly: in the last five years most major international arbitration institutions combined would administer more than 5,000 – 6,000 cases. Here are some recent statistics of selected eleven major institutions:

Table 1: Arbitration Cases in Selected Arbitration Institutions from 1992 to 2006[1]

[*] Not for citation or publication without consent of the author.
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[1] Statistical data were provided by the Institutions at their website or upon request.

Institution	1992	1994	1996	1998	2000	2001	2002	2003	2004	2005	2006
AAA-ICDR[2]	204	187	226	387	510	649	672	646	614	580	586
CIETAC[3]	267	829	778	645	543	731	684	709	850	979	981
DIS[4]	20	30	31	42	62	58	77	81	87	N/A	N/A
HKIAC[5]	185	150	197	240	298	307	320	287	250	281	394
ICC[6]	337	384	433	466	541	566	593	580	561	521	593
JCAA[7]	5	4	8	14	10	17	9	14	21	11	11
LCIA[8]	21	39	37	70	81	71	88	104	87	118	130
SIAC[9]	7	22	25	67	55	56	46	41	51	58	65
SCCAI[10]	44	74	100	122	135	130	120	169	123	100	141
Vienna[11]	47	64	45	46	55	33	33	45	50	55	N/A
ICSID[12]				2	2	8	13	26	26	25	24
TOTAL	1137	1783	1880	2101	2292	2626	2655	2702	2720		

Numbers often speak better than words: arbitration appears to nowadays to be a well established mechanism for the settlement of commercial disputes. The data above, which amount to over 2700 cases annually in the last 3-4 years, relate to eleven well known international arbitration institutions. The International Federation of Commercial Arbitration Institutions (IFCAI), however, has more than 60 fee paying members, a small portion of the more than 200 operating arbitration institutions.[13]

The numbers in table 1 do not take account of the very many ad hoc international arbitrations which anecdotal evidence suggests is increasing enormously all around the world. There are also the thousands of specialist arbitrations in the commodities (e.g. GAFTA,[14] FOSFA,[15] LME[16]), insurance (e.g. ARIAS[17]) and maritime (e.g. LMAA,[18] JSE/TOMAC[19]) sectors.

In June 2003 an unscientific survey by the American Lawyer "ruffled feathers" when it publicised 40 disputes with stakes above $200 million.[20] In 2005 the same publication presented the top 50 contract arbitrations and the top 50 (investment) treaty arbi-

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[2] American Arbitration Association International Center for Dispute Resolution: www.adr.org.
[3] China International Economic and Trade Arbitration Commission: www.cietac.org.
[4] Deutsche Institution für Schiedsgerichtsbarkeit: www.dis-arb.de.
[5] Hong Kong International Arbitration Centre: www.hkiac.org.
[6] ICC Court of International Arbitration: www.iccwbo.org/index_court.asp.
[7] Japanese Commercial Arbitration Association: www.jcaa.or.jp.
[8] London Court of International Arbitration: www.lcia-arbitration.com.
[9] Singapore International Arbitration Centre: www.siac.org.sg.
[10] Stockholm Chamber of Commerce Arbitration Institute: www.sccinstitute.com/uk/Home/. The numbers include both domestic and international cases.
[11] Vienna International Arbitration Centre: www.wk.or.at/arbitration/.
[12] International Centre for the Settlement of Investment Disputes: www.worldbank.org/icsid.
[13] Compare the large IFCAI membership (of more than 60 fee paying members) and the list of more than 200 arbitration institutions at www.kluwerarbitration.com.
[14] Grain and Feed Trade Association: http://www.gafta.com/.
[15] Federation of Oils, Seeds and Fats Associations: http://www.fosfa.org/.
[16] London Metal Exchange: http://www.lme.co.uk/.
[17] Insurance and Reinsurance Arbitration Society: http://www.arias.org.uk/.
[18] London Maritime Arbitrators Association: http://www.lmaa.org.uk/.
[19] Japan Shipping Exchange: http://www.jseinc.org/en/tomac/guide/.
[20] See http://www.americanlawyer.com/focuseurope/privatepractices.html - *American Lawyer Focus Europe*, Private Practices by Michael D Goldhaber (Summer 2003).

trations, including 41 entries with stakes of $1 billion or more. The publication assembled information on 130 disputes, divided into two groups: 71 contract arbitrations with stakes of at least $300 million, and 59 treaty arbitrations with stakes of at least $100 million.[21] One can take from these results that arbitration is not only popular, it is also big business. The results were similar in the 2007 survey.[22]

International and national legislation has certainly played a significant role in the increased awareness and acceptance of arbitration. First, the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 by over 142 countries[23] and the Washington Convention on the Settlement of Investment Disputes between States and Foreign Investors 1965 by more than 144 countries,[24] including, in particular, the developing countries provides a significant public international law regulation for international arbitration.

More than 52 countries[25] have adopted the 1985 UNCITRAL[26] Model Law on international commercial arbitration in the last twenty years, but interestingly enough some of the "arbitration superpowers" have designed their own laws. Amongst them:[27]

- China – Chinese Law of 1994. as amended
- England – Arbitration Act of 1996
- France – New Code of Civil Procedure 1981
- Switzerland – Swiss Private International Law Act 1987
- Sweden – Swedish 1998 Arbitration Act
- USA [the dated 1925 Federal Arbitration Act]

It is widely accepted that the UNCITRAL Arbitration Model Law[28] establishes and represents international standards. As a Model Law it sets objectives and allows enacting States to accommodate specific needs.

What is "international arbitration"? A good working definition is:

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21 See http://www.americanlawyer.com/focuseurope/scorecard0605.html - *American Lawyer Focus Europe*, Arbitration Scorecard, by Michael D Goldhaber (Summer 2005).

22 112 contractual disputes worth at least $200 million each and 120 disputes filed under treaties, each worth at least $100 million. Many of these arbitrations are being described publicly for the first time. See http://www.americanlawyer.com/focuseurope/.

23 See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

24 See http://www.worldbank.org/icsid.

25 Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005), Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia, and Zimbabwe.

26 United Nations Commission on International Trade Law: www.uncitral.org.

27 All texts are available at www.kluwerarbitration.com; *ICCA Handbook* (loose-leaf publication by Kluwer Law International, edited by Jan Paulsson); and *International Commercial Arbitration* (loose-leaf publication by Oceana, edited by Eric Bergsten).

28 See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

> "International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties."[29]

What is clear is that there are four fundamental features of arbitration:

- An alternative to national court;
- A private mechanism for dispute resolution;
- Selected and controlled by the parties;
- Final and binding determination of parties' rights and obligations

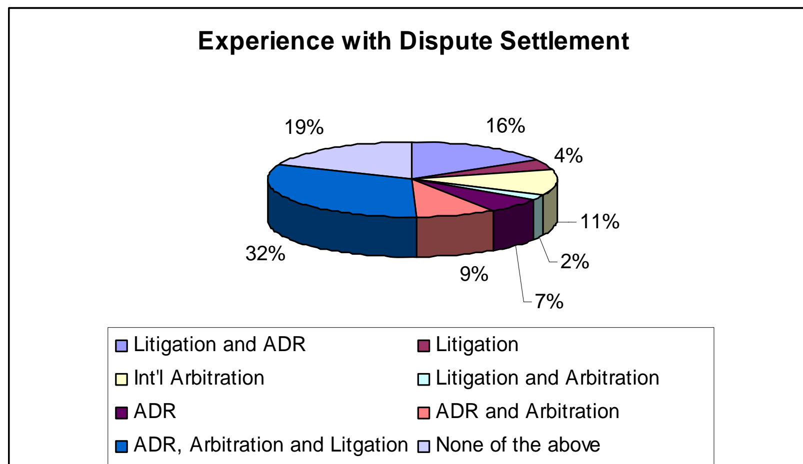
While there are many publications and other print and electronic resources about the law and practice of international arbitration, many questions remain unanswered: how much do we know about arbitration practice and most importantly what users of arbitration think about the process, why they select it, what are their expectations?

Statements to the effect that arbitration is on the rise, most contracts include arbitration clauses, and there is one ad hoc arbitration for each institutional arbitration, are heard regularly the arbitration community. However, there is hardly any tangible data.

II. Use of International Arbitration

We have conducted a survey with view of understanding corporate practices and attitudes. The widely held general perception of the use of arbitration in international commercial disputes has been supported by the findings of this survey.

It appears that at least one in ten international corporations has been involved and is interested in arbitration one way or another, i.e. either to pursue a claim or to have an award enforced or attempting to avoid litigation before foreign courts.

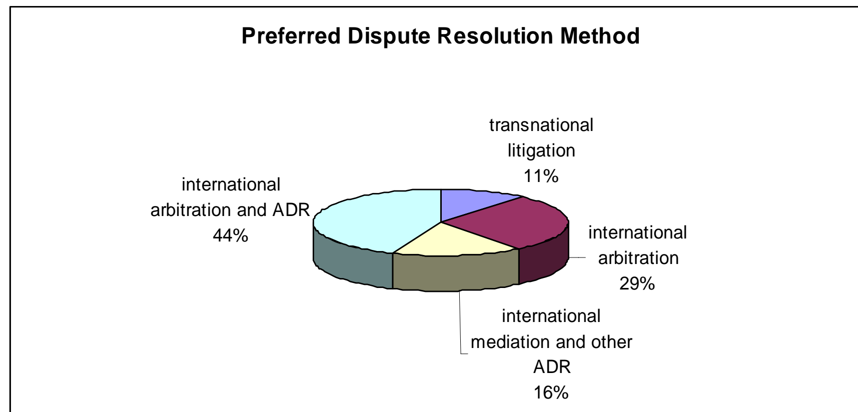


The fact is that 61% uses arbitration as a stand alone mechanism or in conjunction with other mechanisms, such as mediation and negotiation, while only 4% has

[29] Julian D M Lew / Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International: 2003, para 1-1.

experienced international litigation only. We have also asked which methods of dispute resolution parties *prefer*.

The following table highlights their preferences.



Of these 91 respondents,

- 40 preferring a combination of international arbitration and ADR (multi-tiered dispute resolution systems, including arbitration)
- 26 prefer international arbitration
- 15 international mediation and other ADR forms
- 10 consider trans-national litigation their preferred dispute resolution mechanism

This corroborates the perception set out above, since only 11% opts for international litigation, while the remaining 89% of the respondents opts for ADR and/or arbitration; and a strong 73% (i.e. 29% arbitration only and 44% a combination of arbitration ADR) certainly prefers international arbitration to any other method. We should also bear in mind that under ADR, parties understand a wide spectrum of mechanism ranging from direct negotiations once a dispute has arisen to the retention of a third party neutral for the resolution of the dispute. As a matter of fact, US parties will consider arbitration a form of ADR. The 11% of respondents preferring transnational litigation consists mainly of a peculiar mix: corporations from developing countries and corporations from developed countries which operate exclusively in developed countries. The remaining 89% operates across the regions, in the developing countries, least developed countries and the developed world.

The results of the two questions read together provide further insights. While only 77% of the respondents have experience in arbitration and/or ADR, 89% would opt for (or at least consider primarily) arbitration and/or ADR. This raises the question: why only 11% would consider international litigation for the resolution of international disputes? So, ***what is wrong with litigation?***

National courts are a viable and reliable forum for dispute resolution, provided the judicial system is developed and judges well trained and perceived to be independent and fair. Cross-border litigation as a means of resolving international commercial disputes is an option available and included in most cross-border contracts as a safety net. "International" implies that a particular business transaction involves a foreign element, for instance, the parties have their place of business in different jurisdictions,

or the performance of the contract is in another jurisdiction, or the parties have by agreement conferred jurisdiction on a court in another country.

The common reasons regularly alleged as the disadvantages of cross-border litigation arise from the general fear associated with litigating before a foreign court. This includes lack of familiarity with the foreign court's system or procedure, pursuing the litigation away from home and the difficulties of enforcement of a foreign judgment. Other reasons referred to relate to cultural approaches to court proceedings, excessive formality, and the use of domestic language which may be unknown to one or both disputing parties.

The research shows that in house lawyers to these corporations themselves do not perceive these reasons to be of such a fundamental nature as to rule out altogether the use of trans-national litigation. Maybe this is due to the fact that in house lawyers will not normally conduct litigation themselves and the success of the pursuit of the case in courts would be a matter of corporate risk management. In some instances, cross-border litigation is preferred to international arbitration as in some instances international litigation can be speedy and inexpensive. However, "horror stories" in respect of litigation included the use of juries in the US for civil claims, the issue of extensive discovery, class actions, excessive cost involved in court litigation and the fact that litigation in some jurisdictions in the US may cost as much as US$4,000,000 per year! It is also argued that in some jurisdictions it would be impossible to prevail in proceedings over a local party which is a major employer and household name.

Some general counsel interviewed expressed a level of comfort about litigating in another jurisdiction (via local lawyers) in situations where they perceive they will receive a fair treatment before an independent and impartial judiciary. This issue is of such great importance that some corporations maintain a written policy to opt for litigation in some countries as a first dispute resolution choice while arbitration is the first dispute resolution choice in other countries. Although only 11% of respondents appear to prefer litigation, the remaining 89% is not automatically averse to court proceedings; they simply consider non-judicial methods of settlement of disputes to be more suitable to international disputes, ensuring a more adequate level playing field for disputing parties.

The general counsel of a manufacturing company based in Italy said his corporation maintains a list of countries falling into these two categories and forming the basis of their negotiation of dispute resolution clauses in any cross border contracts. He stated,

> "The group maintains a written guideline on jurisdictional preferences. [We] either litigate or arbitrate in the following countries: Western Europe, United States, Japan, Australia and New Zealand. In all other countries [we] arbitrate principally because of concerns over the independence of the judiciary."

This example shows that corporations are generally not averse to trans-national litigation especially where the judiciary of the relevant court is perceived to be independent (usually from the government), impartial and knowledgeable in the subject matter of the dispute. There is a positive preference for trans-national litigation under certain circumstances. Where the contracting corporations are sophisticated and from jurisdictions with experienced judiciary in the law of the subject matter of the dispute

(this is especially true for very specialist disputes requiring some degree of expertise on the part of the judiciary, e.g. financial or construction matters) they may agree to opt for litigation in either of the relevant states or a third neutral state. In this regard in-house counsel in a mining corporation interviewed said the corporation has a preference for either the English or South African courts.

In other cases, corporations are willing to litigate in whatever jurisdiction they have substantial commercial interests. An example is one of the large multinational Oil & Gas exploration corporations operating in various jurisdictions all over the world. The general counsel interviewed said the corporation was willing to litigate in most jurisdictions where it operates. In making such decision, it takes into consideration the value and effect of the transaction on their business in the particular country. Where it is a straightforward supply of services contract, for example, the corporation may opt for litigation in the operating country. As an example, they have concluded agreements in which they opted for litigation before the courts of Qatar.

Almost all in house lawyers interviewed point out the difficult and time consuming efforts of enforcement of foreign judgments as the major disadvantage of international litigation especially where there is no relevant treaty (for enforcement of judgments) in force or applicable between the relevant States. Other comments made include the fact that in some jurisdictions, litigation is efficient and inexpensive, while efficient and expensive in others, and still in others, inefficient and expensive! Thus international litigation remains a viable and, under circumstances, reasonably acceptable option.

The main outcome of this survey in respect of the first perception, is that arbitration is a popular and generally the preferred dispute resolution mechanism, Nevertheless, while international litigation maintains a significant role in international dispute resolution,

- Arbitration is more consistently relied upon than litigation as a means of resolving cross-border disputes
- However, it is not used in isolation; its use with other forms of ADR is the most common option
- Escalating dispute resolution clauses in a crystallised form are increasingly popular
- Litigation is still selected by some corporations in some circumstances

The reasons for opting of arbitration and the role of escalating or multi-tiered dispute resolutions clauses will be discussed below.

III. Advantages and Disadvantages Associated with the Use of International Arbitration

International arbitration is associated with a number of perceived advantages. These include mainly:

- avoidance of the other parties home court system

- taking advantage of the international legal framework governing the enforceability of arbitration awards[30]
- confidentiality
- suitability for international disputes
- cost and speed

A study by Richard Naimark and Stephanie Keer asked participants in AAA international arbitrations to rank a list of attributes in order of importance in that particular proceeding.[31] They found that "an overwhelming majority of the parties ranked a fair and just result as the most important attribute, even above the receipt of a monetary award, speed of outcome, cost or arbitrator expertise." Interestingly, the confidentiality of the arbitration proceeding, which Bühring-Uhle found to be an "important" advantage of arbitration, ranked quite low in the Naimark & Keer study. The explanation may be that before a dispute arises parties prefer a private method of dispute resolution, but that after a dispute arises they may see less need for privacy in that particular case. The results of the Naimark and Kerr study were revisited in the 2003 Dispute Wise survey and the following table emerged for purposes of comparison:

Table 2: Reasons for Using Arbitration[32]

Reasons for Using Arbitration	**2003**	**1998**
Is required by contract	91%	92%
Saves time	68%	69%
Saves money	65%	69%
Has limited discovery	65%	59%
Allows parties to resolve disputes themselves	61%	N/A
Provides of more satisfactory process	60%	61%
Preserves confidentiality	54%	43%
…	…	…
Is an international dispute	25%	32%
Provides more suitable resolution compared to litigation	20%	28%
Became standard practice in industry	18%	34%

There are, of course, several perceived disadvantages. These include increased costs, length of arbitration proceedings, that third parties may not be joined and that parallel proceedings cannot be consolidated.

All these perceptions were taken to test. Various reasons were given why corporations opt for arbitration as their preferred process for resolving their international commercial disputes. Each respondent could list its top 3 preferences. Based upon these results, we assigned 3 points to the top score, 2 to the second reason and 1 to the third reason. The following were the top 5 advantages:

[30] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International, 1996), pp. 135-136.
[31] Richard W. Naimark & Stephanie E. Keer, "International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People", 30 *Int'l Bus. Lawyer* 203 (2002).
[32] Dispute-Wise (2003), supra note 38, at page 8.

Table 3: Top Reasons for Using Arbitration

Advantage	*Score*	*No of respondents*	*Ranked top reason*
Flexible procedure	119 points	71 respondents	11 respondents[33]
Enforceable awards	105 points	48 respondents	24 respondents[34]
Privacy	105 points	54 respondents	17 respondents[35]
Selection of arbitrators	92 points	47 respondents	16 respondents[36]
Other (incl. speed)	47 points	18 respondents	14 respondents

Most in-house lawyers interviewed admitted that the traditional grounds for opting for arbitration (arbitration being faster and more cost effective than litigation) are no longer true in most cases. However, the success of the New York Convention on the Recognition and Enforcement of Arbitral Awards compensates for these failures in cost and time. 82 out of 91 online respondents ranked the importance of various issues in influencing their decision to arbitrate. 24 ranked enforceability of international arbitral awards as the most important advantage of arbitration and why they opt and continue to opt for arbitration in their cross border contracts.

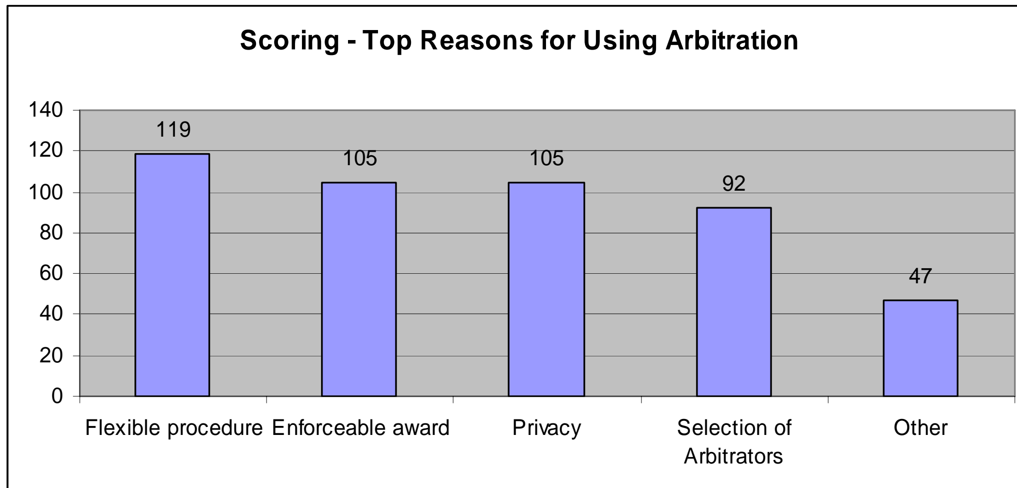
Interestingly enough, in the scoring system, flexible procedure is the most important reason as 71 respondents consider it one of the top three reasons. However, only 11 respondents consider it the top reason. Flexible procedure means that the procedure is emancipated from the constraints of national court proceedings and that the parties can determine the procedure on their own or with the assistance of the tribunal.

Another issue that influences parties in opting for international arbitration is the privacy / confidentiality the process affords parties. Privacy was ranked by 17 respondents as the most important factor. International arbitration is a private process contrary to the public nature of litigation in national courts. Privacy does not necessarily connote confidentiality, though parties use the terms interchangeably. In house lawyers believe that arbitration is the process to adopt when corporations do not want the dispute publicised for various strategic reasons including where the image of the corporation may be brought to disrepute.

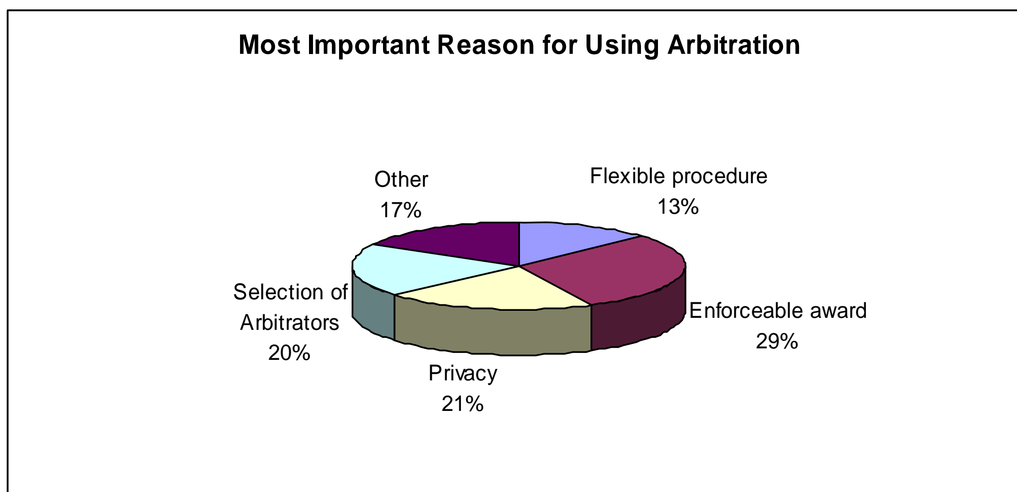
Selection of own arbitrator was ranked the most important advantage of arbitration by 16 respondents.

Other factors perceived as making arbitration advantageous include, neutrality of venue, fairness, suitability for international disputes, avoiding unfavourable legal systems, and industry practice.

[33] 35 respondents ranked second and 16 third most important reason.
[34] 9 respondents ranked second and 15 third most important reason.
[35] 17 respondents ranked second and 20 third most important reason.
[36] 13 respondents ranked second and 18 third most important reason.



The chart below highlights how the respondents weigh the various advantages. 29% considers the enforceability of awards most important reason, 21% considers privacy, 20% considers the ability to select arbitrators most important, while flexible procedure is considered most important by 13%.



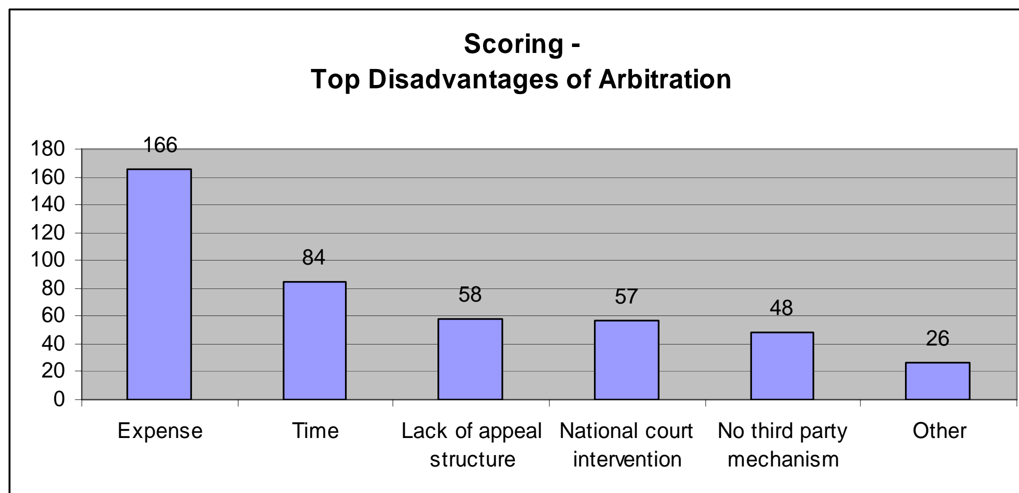
There are also some ***disadvantages*** associated with the arbitration process as this survey found.

Corporations are not entirely satisfied with the process of arbitration in its present state. 80 online respondents answered the question on what was the most important disadvantage of arbitration. 50% of them (40 respondents) rank expense (cost) as the most important disadvantage of international arbitration. Time is ranked the most important disadvantage by 14 respondents while difficulty of third party joinder is ranked the most important disadvantage of arbitration by 9 respondents. 7 of the 40 in-house lawyers interviewed worry about the quality and accessibility to pool of arbitrators currently available.

The top concerns respondents have are:

Table 4: Top Disadvantages of Reasons Arbitration

Disadvantage	*Score*	*No of respondents*	*Ranked top reason*
Expense[37]	166 points	70 respondents	40 respondents
Time[38]	84 points	38 respondents	14 respondents
Lack of an appeal structure[39]	58 points	30 respondents	7 respondents
Intervention of national court	57 points	34 respondents	4 respondents
No third party mechanism	48 points	25 respondents	9 respondents
Other	26 points	14 respondents	6 respondents

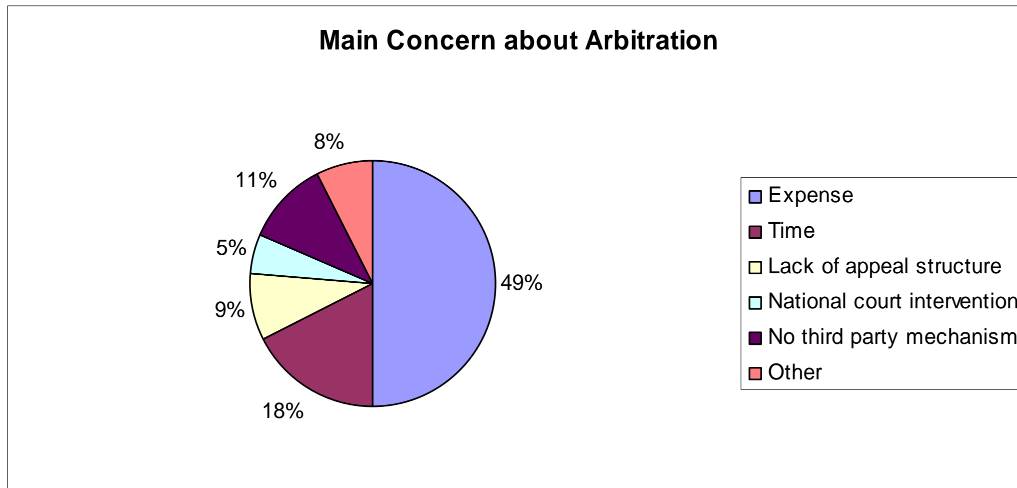


When the data are presented on the basis of which is the main concern one gets a different picture. Accordingly, while the top scoring disadvantages retain their top position with a combined 67%, the lack of an appeal structure drops fourth, with a 9%, while the lack of third party mechanism emerges as third with 11%.

[37] See analysis by Klaus Sachs, “Time and Money”, in Loukas Mistelis and Julian D M Lew (eds.), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), Chapter 5.

[38] Both the ICC and the AAA claims that in the majority of the cases an award is rendered within 28 months from filing of request for arbitration.

[39] Note, however, that this suggestion has been rejected by institutions such as ICSID. ICSID in 2004 conducted a survey as to what it can be improved in the system. In summer 2005 the idea of an appeals mechanism was abandoned as there was no support amongst the users or arbitration.



On the issue of costs, some in house lawyers interviewed believe that a cost/benefit analysis makes the costs incurred reasonable. However, a majority voiced concerns over the ever increasing costs of international arbitration cases as compared to the first stage of litigation before a national court. This view corresponded with responses from the online questionnaire.

The interviews conducted reflected the same concerns. For example, the regulatory counsel of a telecommunications corporation said she does not recommend the use of arbitration because from her experience

> "it is very expensive, difficult to find arbitrators with expertise (in the area of telecom software) without any conflict difficulties, and it is time consuming."

The main outcomes of this survey confirm many of the perceptions, that arbitration is associated with several major advantages but also with some drawbacks. However, this survey shows a different focus on which features of the arbitration process are perceived as an advantage and which features are perceived as a drawback.

In particular, the top reasons to choose international arbitration are:

- *Flexible procedures used in international arbitration:* indeed the procedures of arbitration are specific to each case and the parties are free to determine the procedures they would like to have followed. In this respect remedies not available in court proceedings may become available in arbitration. The active participation of the parties in the shaping up of the procedure inspires confidence in the whole process. The only limitation is that the procedure has to meet the due process standards of equal treatment of the parties.[40]
- *Enforceability of awards*: there is hardly any doubt that an arbitration award is more easily enforceable than any foreign judgment. This is due to the widely ratified New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which reduces the formalities linked with the recognition of awards and also limits the grounds on which a court may rely on to refuse enforcement.

[40] See, for example, Article V(1)(b) New York Convention, Article 18 Model Law, section 33 English Arbitration Act.

- *Privacy*: privacy features high as the parties opt for arbitration as a private mechanism for the settlement of dispute. Several commercial matters, such as patents or business practices, are sensitive and not in the public domain. This does not automatically imply that everything in arbitration is secret or confidential; it merely means that proceedings are private and may be confidential. Confidentiality is also, however, a well accepted characteristic of the arbitration process.[41]
- *Selection of arbitrators*: the right of parties to select arbitrators of their liking is an important characteristic of international arbitration, as a method which is close to the parties. The party appointed arbitrators is and should not be a partisan arbitrator; it is an arbitrator who may be better suited to understand a cultural or legal context.[42]
- Other advantages referred to be respondents include cost, speed, the suitability of arbitration for international disputes, the possibility to avoid specific legal systems and national courts and the neutrality of the arbitral venue.

The top drawbacks of international arbitration are:

- *Expense*: it is often alleged that arbitration is expensive and this is the single main concern of the users of arbitration. Costs will be discussed below but this is a matter that both lawyers representing parties in international arbitration and arbitration institutions will have to consider.
- *Time*: arbitration proceedings often take longer than the parties anticipated, in particular, given that proceedings increasing try to simulate court proceedings, but this is something the parties and the arbitrators can control.[43] The problem is that parties sometimes employ dilatory tactics and although it may be possible to recognise them, the rejection of dilatory requests, may have legal consequences, in that the award may be set aside or enforcement is refused, if a party could prove that it was not given an opportunity to present its case.

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[41] See, e.g., Loukas Mistelis, "Conflidentiality and Third Party Participation", 21(2) *Arbitration International* 205 (2005); Anjanette Raymond, "Confidentiality, In a Forum of Last Resort? Is the Use of Confidential Arbitration a Good Idea for Business and Society?", 16 *American Review of International Arbitration* (forthcoming 2005); Cindy Buys, "The Tensions between Confidentiality and Transparency in International Arbitration", 14 *American Review of International Arbitration* 121 (2003); Olivier Oakley-White, "Confidentiality revisited: Is International Arbitration Losing one of its Major Benefits?", 1 *International Arbitration Law Review* 29 (2003); Hanns Prütting, "Vertraulichkeit in der Schiedsgerichtsbarkeit und in der Mediation", in Briner, Fortier, Berger and Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel* (Carl Heymanns Verlag 2002) 629; Leon Trackman, "Confidentiality in International Commercial Arbitration", 18 *Arbitration International* 1 (2002); Hans Bagner, "Confidentiality – A Fundamental Principle in International Commercial Arbitration?", 18(2) *Journal of International Arbitration* 243 (2001); Edward Leahy and Carlos Bianchi, "The Changing Face of International Arbitration", 17(4) *Journal of International Arbitration* 19 (2000); Yves Fortier, "The Occasional Unwarranted Assumption of Confidentiality", 15 *Arb Int* 131 (1999); Patrick Neill, "Confidentiality in Arbitration", 12 *Arbitration International* 287 (1996); Andrew Rogers and Duncan Miller, "Non-Confidential Arbitration Proceedings", 12 *Arbitration International* 319 (1996);Jan Paulsson and Nigel Rawding, "The Trouble with Confidentiality", 11 *Arbitration International* 303 (1995); Michael Collins, "Privacy and Confidentiality in Arbitration Proceedings", 11 *Arbitration International* 321 (1995); Hans Smit, "Confidentiality in Arbitration", 11 *Arbitration International* 337 (1995).

[42] The independence and impartiality of party appointed arbitrators is stipulated not only in arbitration law but also in the relevant codes of ethics, such of those of the American Bar Association, International Bar Association and American Arbitration Association.

[43] See, for example, section 33 of the English Arbitration Act which mandates that the arbitrators have to adopt procedures for the speedy resolution of disputes.

- *No third party mechanism*: it is a real issue that arbitration is bi-polar, designed for and typically operating between two parties; this is also justified on the basis of contractual nature of arbitration. However, modern business practices often involve more than two parties and the 2004 ICC statistics indicate that almost one in three cases is multi-party. This raises issue of multi-party, multi-contract disputes,[44] the issue of the impact of arbitration of third parties[45] as well as issues of joinder of third parties and consolidation of proceedings[46] as well as issues of parallel proceedings and *res judicata*.[47] These issues are in the forefront of arbitration developments and research and no doubt are worthy or further empirical research.
- *Court intervention*: this is possible before, during and after the arbitration proceedings but there is not much an arbitration tribunal can do to control or limit such interventions. In many cases, however, modern arbitration statutes, such as the UNCITRAL Model Law, specifically limit court intervention.
- *Lack of an appeal mechanism*: this is a controversial finding of this survey which requires further discussion. It is a well embedded perception that users of arbitration appreciate the finality of arbitration awards, i.e. is there is no appeal of the arbitration awards. Some arbitration institutions provide for an internal appeal mechanism, within the institution (e.g. GAFTA, ICSID). At the same time there is widespread criticism of legal systems which allow for an appeal of arbitration awards on a point of law. Furthermore, there is evidence that there is an increase in the number of applications to national courts for the challenge of arbitration awards. This finding may imply one of two things: (a) the parties would prefer that there is an arbitration appeal system, within the arbitration institution rather than before courts; or (b) parties are prepared to challenge awards more often than before, an evidence of the increased litigious approach to international arbitration. This could be a matter for further research. Interestingly enough in the 40 interviews conducted only 2 interviewees (i.e. 5%) referred to this issue as a potential problem.

IV. Ad hoc v. institutional arbitration

With the majority of respondent corporations having a preference for arbitration as the favourite method of resolving their international commercial disputes, we sought to confirm whether more international arbitrations are conducted ad hoc or institutional. Some people suggest for each institutional arbitration[48] case there is one ad hoc.[49]

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[44] See, on this issue, Bernard Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International 2006)

[45] See Loukas Mistelis and Julian D M Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), Chapters 14-18 by Hanotiau, Friedland, Jagusch and Sinclair, Gallagher and Kröll.

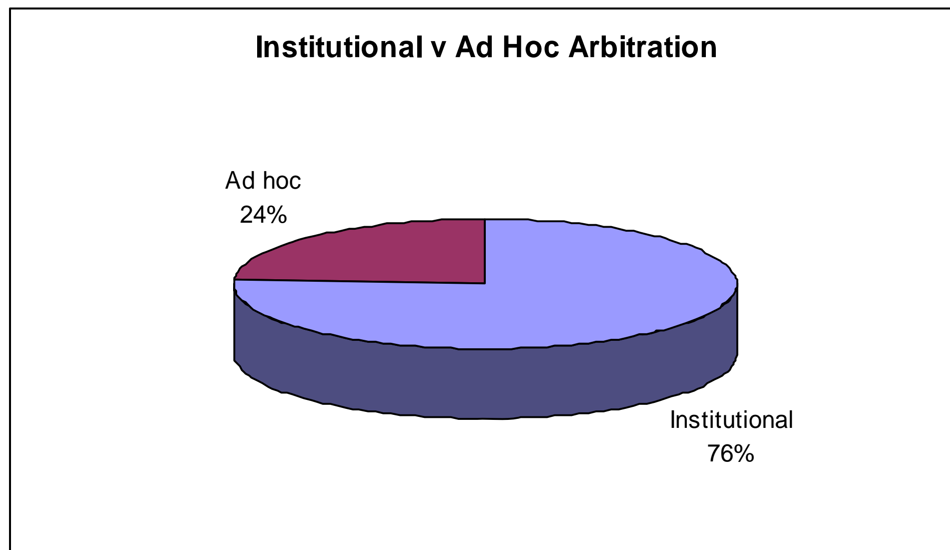
[46] See, e.g., Julian D M Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), Chapter 16; Martin Platte, "When Should an Arbitrator Join Cases?", 18 *Arbitration International* 67 (2002).

[47] See Norah Gallagher, "Parallel Proceedings, res judicata and lis pendens: problems and possible solutions", in Mistelis and Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), 331 et seq.; ILA International Commercial Arbitration Committee Interim Report on *Res Judicata* and Arbitration, Berlin Conference 2004 (hereinafter "ILA Interim Report"), Section V, p. 18. The Report is available at www.ila-hq.org.

[48] Institutional arbitration is where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing institution. There are a

There are few reliable data on the number of arbitration request submitted, or the number of arbitrations conducted every year. On the one hand many international arbitration institutions have started to report quite regularly about the numbers and the profile of their cases; but not all of them do so: out of some 200 institutions only about 20 or 25 would produce useful data on a regular basis. On the other hand, there is hardly any data on ad hoc arbitration proceedings, save for word of mouth.[50] Others suggest that there are more institutional or more ad hoc cases.

The hypothesis tested here is that overall corporations prefer institutional arbitration to ad hoc arbitration.



87 respondents answered the question on the type of arbitration their corporation generally adopts. An overwhelming majority of 66 respondents (i.e. 76%) confirmed that their corporations opt for institutional arbitration proceedings. 21 opt (i.e. 24%) for ad hoc arbitration. This, however, does not imply that there are more institutional than *ad hoc* arbitrations. Accordingly the trend presented here relates to the choices rather than number of proceedings.

Having established the preference for institutional arbitration the next step would be to find the reasons for such choices. The following are the top reasons given for the preference for institutional arbitration:

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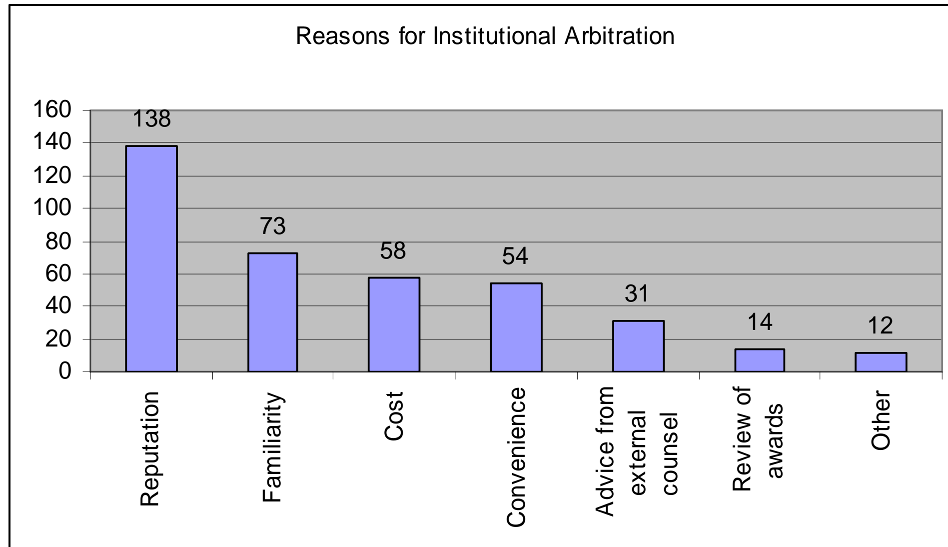
large number of institutions of different kinds. These institutions aim to provide an arbitration service specifically, or within the context of their overall activities and objectives, and due to their infrastructure will in some cases assist with the running of the arbitration.

[49] *Ad hoc* arbitration is where the arbitration mechanism is established specifically for the particular agreement or dispute. Where parties are silent and have not selected an institutional arbitration, the arbitration will be *ad hoc*.

[50] See, for example, the biannual report in the Focus Europe section of the *American Lawyer*, supra notes 14 and 15.



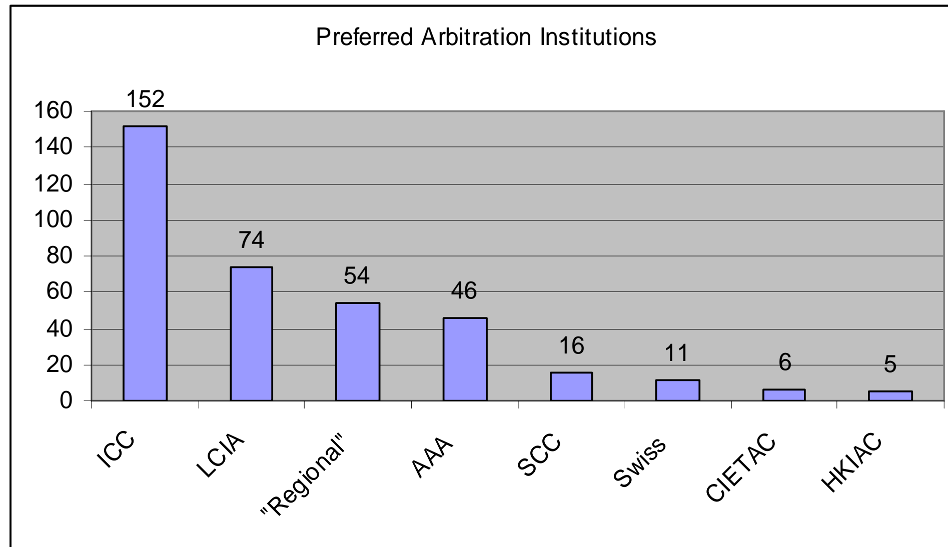
35 of the 66 respondents chose reputation as the most important factor, while to 13 respondents, familiarity (meaning, in part, also recognition of brand) was the most important factor; cost was the most important factor to 9 respondents. In the interviews, the reasons varied from the comfort of knowing that there is a supervisory agency in the background to that of being the norm in some jurisdictions, e.g. Latin America or in the Central and Eastern Europe and the former Soviet Union.

One in four corporations have a preference for ad hoc while also involved in institutional arbitration. This 25% is a significant portion not least because most of these corporations have a gross yearly turnover of more than US$5 billion. There appears to be a causal link between large corporations and their preference of ad hoc arbitration. The reasons for this link can be traced in the fact that larger corporation often have large and sophisticated in house legal departments and have accrued experience in managing arbitration proceedings. In addition all government controlled corporations interviewed opt for ad hoc arbitration, as ad hoc arbitration is perceived to be controlled by the parties more effectively. However, corporations preferring ad hoc arbitration are involved in institutional proceedings if these were provided by the arbitration clause agreed.

A further important finding is that most corporations start looking at or opt for regional arbitration institutions. Respondents also indicate that they are interested in regional institutions and support their further development, either by including clauses of regional institutions, or supporting their general work, which sometimes includes public events such as seminars and conferences. It is unclear though, whether everyone concerned agrees on the definition of “regional”.[51]

[51] For most people it includes the regional arbitration centres under the auspices of the African Asian Legal Cooperation Council (CRCICA- Cairo Regional Centre for International Commercial Arbitration; RACKL – Regional Arbitration Centre in Kuala Lumpur; and the two other regional centres in Lagos and Teheran), CANACO – Cámara Nacional de Comercio in various cities in Mexico, ACICA – Australian Centre for International Commercial Arbitration.

Having established that parties have a preference for institutional arbitration, we tried to find out the top five institutions, using our scoring system.[52] From a list of 10 well known international arbitration institutions, 66 respondents chose the following as the most "recognisable ones". Respondents were also given the option to add other preferred institutions on the list:



41 of the 66 respondents ranked the ICC as the most important institution with LCIA and regional institutions voted the most important institution by 5 respondents each. The regional institutions mentioned by the online respondents and the interviewees include the Japanese Commercial Arbitration Association (JCAA),[53] Cairo Regional Centre for International Commercial Arbitration (CRCICA),[54] CANACO,[55] ACICA,[56] SIAC.[57]

In house lawyers interviewed noted that the position of ICSID is different since they may be compelled to arbitrate under ICSID because of the nature of the dispute and their opponent. Thus investment disputes with States or State entities may be required to be resolved by arbitration under ICSID. This is effectively the reason why ICSID was not one of the various institutions listed for respondents to consider.

60% of the in house lawyers interviewed believe regionalised institutional arbitration is the future. The in house lawyer of an oil and gas multinational corporation, for example, pointed out that he believes that as regional institutions become more experienced, corporations will opt more for arbitration in such regional institutions since they will be geographically closer to the subject matter of the dispute and will charge less for comparable services (to the ICC). This assertion appears to be confirmed by the rankings from respondents of the online questionnaire.

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[52] I.e., 3 points for first choice, 2 points for second choice, 1 point for third choice.
[53] 3 online respondents and 12 interviewees expressed preference for JCAA.
[54] 2 online respondents referred to CRCICA.
[55] 2 online respondents expressed preference for CANACO
[56] 1 online respondent referred to ACICA.
[57] 1 online respondent and 10 interviewees expressed preference for the Singapore International Arbitration Centre.

In house lawyers interviewed gave varying but related reasons for their preference. These reasons include:

- Reputation (cache)
- Quality of applicable rules
- Comfort of knowing the institution administers many cases.

A strongly perceived advantage of institutional arbitration is the cache behind the name of the institution. Whilst there are doubts as to the overall value of such cache, there is a widespread perception that ultimately being able to have an arbitration award issued under the name of a well known institution is considered to be helpful. Another advantage of institutional arbitration is the fact that there is a "comfort" element: there have been many cases under the rules of each institution, and every year it has a continuing number of new arbitrations. This provides an obvious comfort as the parties know that the institution has experience in the way it establishes the tribunal and arranges for the award to be issued and has in turn acquired good recognition from users.

Through the structure of the institutions, there is often someone to turn to for assistance. It is also a convenient way to ensure that the arbitrators are aware of the needs and concerns of the parties where they are not necessarily addressing the arbitrators directly. An important advantage of institutional arbitration is that it avoids the discomfort of the parties and the arbitrators discussing, agreeing and fixing their remuneration.

The data collected from the online questionnaires and the interviews conducted support the original hypothesis. Institutional arbitration is the preferred option for 76% of the corporations participating in the survey. This does not, however, mean that most arbitration cases are institutional, as this specific assertion remains untested.

Although disputing parties clearly prefer institutional arbitration, this preference is not limited to well-established centres. A plethora of regional institutions were cited as preferred options. This may be the result of the tightening up of the law in the countries where the regional institutions are established, and the regional institutions improving their procedures to be more attractive to corporations, but it may also be the indicative of parties opting for convenience

From the choice of the top three institutions, it can be concluded that the geographical location of corporations also plays an important role. About 55% of in-house lawyers interviewed said they would prefer their arbitration to be administered by an institution close to home if they could negotiate that. It is therefore not a question necessarily of one party imposing a particular institution on the other, though bargaining powers may play a significant role in such decisions.

In negotiating which institution to appoint, it is reputation of the institution and possible costs are the main factors. Although the ICC was particularly criticised for its cost and bureaucracy while most in-house lawyers interviewed still opt for the ICC because of its reputation. Another point in favour of the ICC as the preferred choice is the fact that in some jurisdictions (like South American countries) ICC arbitration is claimed by several interviewed in house lawyers to be the unwritten norm. Thus the negotiation starts from that point.

V. Venues for the Seat and Conduct of International Arbitration

Most arbitration practitioners would suggest that the three most popular venues for international arbitration are England, France and Switzerland. However, it is not clear what the ranking of arbitration venues is, according to corporations. In addition a popular perception is that legal considerations are the primary factor for corporations when choosing the seat of arbitration.

The importance of the seat of arbitration stems from the theory according to which arbitration operates within the framework of a national legal order and never in a vacuum. It can also be seen as an expression of territorial approaches in arbitration, which inevitably conflict with theories that favour full party autonomy.[58]

Supporters of the territorial approach argue that the law of the seat of arbitration (*lex loci arbitri*) has an automatic right to govern the proceedings or that alternatively, failing an agreement by the parties, it will govern the arbitration by default.[59] In any event, it is suggested that the seat of arbitration is relevant:

- For the support of local courts in the course of arbitration, e.g. with the taking of evidence,
- For the challenge of awards where basic procedural standards of fairness were not followed
- For gap-filling, when the choice of arbitral procedure by the parties is not comprehensive and the local law may provide some guidance.

The importance of the seat of arbitration has been criticised by scholars and practitioners. In particular, it is argued[60] that the choice of seat is often:

- a matter of convenience
- determined not by the parties but by the arbitration institution they have selected
- governed by the desire for neutrality and

the role of the arbitral tribunal is transitory and the seat has no necessary connection with the dispute.

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[58] For a comprehensive discussion of the various models representing the territoriality versus autonomy debate see Julian Lew, "Achieving the Dream: Autonomous Arbitration", 20th Annual Lecture of the School of International Arbitration, sponsored by Freshfields Bruckhaus Deringer, forthcoming in 22(2) *Arbitration International* (2006); Roy Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration", 17 *Arbitration International* 19 (2001) 24-29. See also the recent debate: Tetsuya Nakamura, "The Place of Arbitration - Its Fictitious Nature and Lex Arbitri", 15(10) *Mealey's International Arbitration Report* 23-29 (2000); Noah Rubins, "The Arbitral Seat is No Fiction: A Brief Reply to Tetsuya Nakamura's Commentary, 'The Place of Arbitration - Its Fictitious Nature and Lex Arbitri'", 16(1) *Mealey's IAR* 23-28 (2001); Philippe Pinsolle, "Parties to An International Arbitration With the Seat in France are at Full Liberty to Organise the Procedure as They See Fit: A Reply to the Article By Noah Rubins", 16(3) *Mealey's IAR* 30 (2001); Tetsuya Nakamura, "The Fictitious Nature of the Place of Arbitration May not Be Denied", 16(5) *Mealey's IAR* (2001).

[59] William W Park, "The Lex Loci Arbitri and International Commercial Arbitration, 32 ICLQ 21 (1983); F A Mann, "England rejects delocalised contracts and arbitration", 33 ICLQ 193 (1984)

[60] See the comprehensive summary in Goode, supra note 62, at 32-33; see also Lew Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) paras. 4-46 et seq.

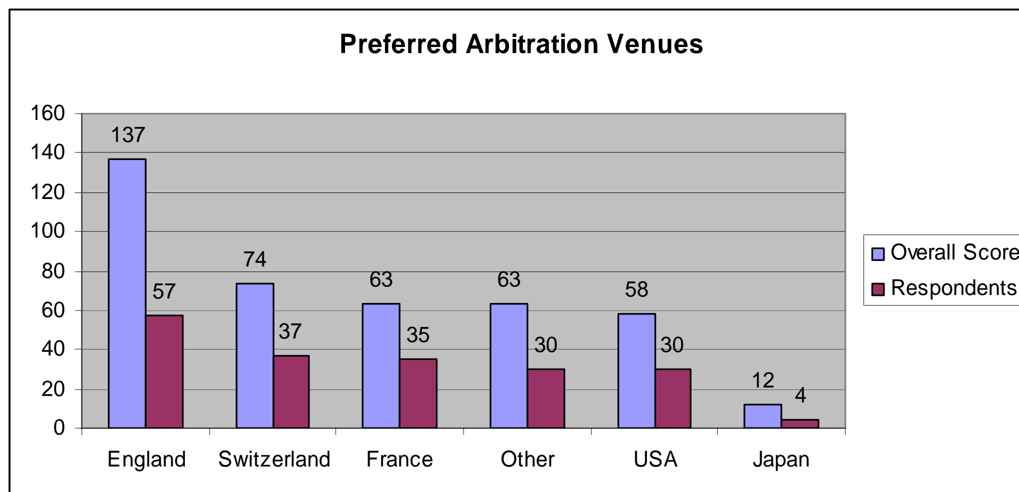
In the light of the above arguments it has been debated that the seat of arbitration, to the extent there are is no need for support by local courts or enforcement purposes, may be merely fictitious.[61] There is agreement that only the "juridical seat" of arbitration,[62] not the physical place of proceedings deserves a role in international arbitration.

However, there is no empirical support for the one or the other view.

The surveys reports on findings on parties' choice of place of arbitration, identifying the top countries and reasons for their choice. Countries were listed instead of cities to give respondents wider choice. There was an option for respondents to add cities or states. The questionnaire referred to arbitration venues rather than the legally laden terms "place" or "seat" of arbitration. In the interviews conducted 90% of the respondents read into the term "venue" the legal meaning associated with "seat" or arbitration, i.e. the connection of the proceedings with the local courts and, where applicable, with the local arbitration law.

Top Venues

The following venues were ranked highest as the most preferred ones. Our scoring pattern is applicable here as well:[63]



85 online respondents ranked their preferred countries as follows:

- England is the most preferred place to 29 respondents, second most referred place to 22 respondents and third most preferred place to 6 respondents.
- Switzerland is the most preferred venue to 9 respondents, second most preferred to 17 respondents and third choice to 10 respondents.
- France is the best option to 8 respondents, second best to 12 and third best to 15 respondents.
- The United States was considered the most preferred venue by 9 respondents, second best to 10 and third best to 11 respondents.

[61] Nakamura, supra note 78; Rubins, supra note 78.

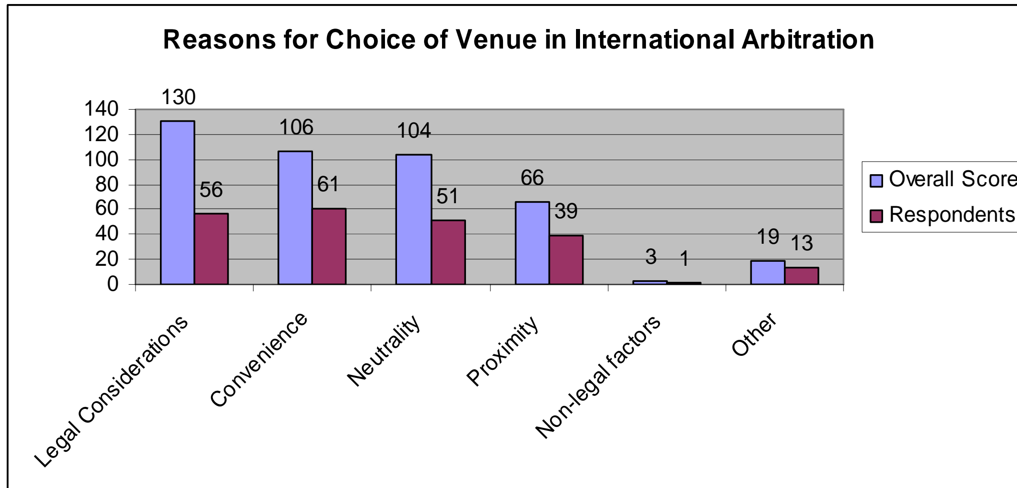
[62] See, for example, *Union of India v. McDonnell Douglas* [1993] 2 Lloyd's Rep 48.

[63] 3 points for top choice, 2 points for second choice, 1 point for third choice.

- Japan was chosen as the most preferred venue by 4 respondents.
- Sweden, which did not make it to the top 5, was considered by 2 respondents the most preferred venue, 3 respondents considered it the second best venue while to 4 respondents, it is the third most preferred venue.
- Other venues not listed were chosen by 16 respondents as the most preferred venue, with 7 each choosing them as second and third most preferred venues. The venues mentioned (and numbers of respondents choosing them) are
    - Singapore (6)
    - Italy (5)
    - Nigeria (5)
    - Cairo (4)
    - Hong Kong (3)
    - Australia (2)
    - Greece (2)
    - The Netherlands (2)
    - Mexico (2)
    - Austria (1)
    - Belgium (1)
    - Taiwan (1)
    - Argentina (1) and
    - United Arab Emirates (1).

Determining Factors

The top five factors that influence corporations' choice of venue are:

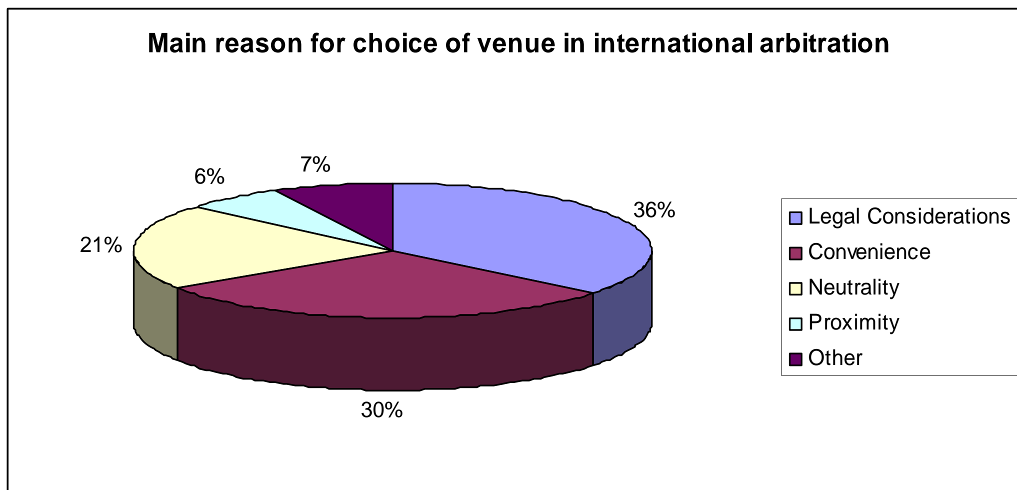


These are based on answers by 81 respondents and the scoring pattern used throughout this survey. In particular:

- Legal considerations topped the list with an overall score of 130. 56 respondents in total expressed their views that legal considerations are important: 29 respondents (about one third) considered it the most important factor, 16 considered it the second most important factor while 11 considered it the third most important factor considered when choice of venue is made.

- Convenience followed with an overall score of 106. 61 respondents opted for convenience: 24 respondents considered it the most important factor, 17 considered it the second most important factor, while 20 considered it the third most important factor.
- Neutrality of venue scored as the most important factor with a total of 104. 51 respondents in total voted for it: 17 respondents considered it their top choice, 19 respondents considered it the second most important factor and 15 respondents voted it the third most important factor by 15 respondents.
- Proximity of evidence, witnesses and exhibits was voted the most important factor by 6 respondents, second most important factor by 15 respondents and third most important factor by 18 respondents.
- Convenience of parties was the least relevant factor. However, one respondent voted it the most important factor while another voted it the third most important factor.
- Other factors were considered most important by 6 respondents, second most important by 4 respondents and third most important by 3 respondents. These factors are: extent of local knowledge, perceived advantage, cost and speed.

In absolute terms of main reason for choice of venue in international arbitration here are the findings:



While legal consideration come first, they are critical to only 36% of the respondents, while convenience and neutrality together are essential to 51% of the respondents. Looking at the "other" reasons, in house lawyers interviewed cited various factors including accessibility, competent courts, modern law, availability of competent counsel and overall infrastructure. It is intriguing that these "other" factors could be subsumed in the main headings of the main reasons for choice of venue in international arbitration.

The survey confirmed that legal considerations are important. However, convenience came a surprisingly close second, and if combined with neutrality of venue it accounts for the most reason for choice of venue in one of two corporations.

The survey deliberately used the word "venue" rather than the legally laden terms of seat or place of arbitration. The question is would the respondents have regarded these questions as concerning the seat of arbitration, or the location of any hearings? The interviews revealed that most in-house lawyers would read "seat" or "place" of arbitration in the word venue.

It is more intriguing that convenience and neutrality are rated so highly as a consideration. Although corporations are aware of the connotations of the choice of seat[64] they do not assume that the arbitration procedure automatically will be governed by the law of the place of arbitration, nor that the local courts would intervene as the supervisory or supporting courts, unless the parties and the tribunal decide otherwise. It appears that corporations accept the minimum or basic role of local courts but they do hope that arbitrators can decide most if not all matters without having to resort to national courts.

It appears that the argument of transnationalists,[65] that a venue for arbitration is chosen for reasons of convenience and/or neutrality, finds empirical research. While legal considerations are relevant and important (and would include, for example, the fact that the country has ratified the New York Convention, the local law is arbitration friendly), most respondents seem to take them for granted. Overall it seems that most parties choose a venue for convenience and its perceived neutrality. Also parties include in legal considerations, not only the law and its application on the procedures but also the relevant legal infrastructure and the quality of legal services provided by lawyers and judges. There is no evidence that the parties expect that the law of the place of arbitration would necessarily apply, but when they know that it may apply they are prepared to take the risk.

VI. Cost

There is little data available on the issue of costs awarded in international commercial arbitration cases but the issue has attracted considerable scholarly discussion.[66]

One of the main advantages of international arbitration is that it can be cheaper than litigation. However, in recent years corporations have started to complain that arbitration has become increasingly expensive. Are corporations put off by the costs of arbitration proceedings? What aspects of the costs of are problematic? Is there any relationship between complaints or mere concerns about the costs of international arbitration and the size of company or industry sector?

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[64] See, e.g., Article V(1)(d) New York Convention.

[65] These include, Philippe Fouchard, Berthold Goldman, Pierre Lalive, Julian Lew, Jan Paulsson and Clive Schmitthoff.

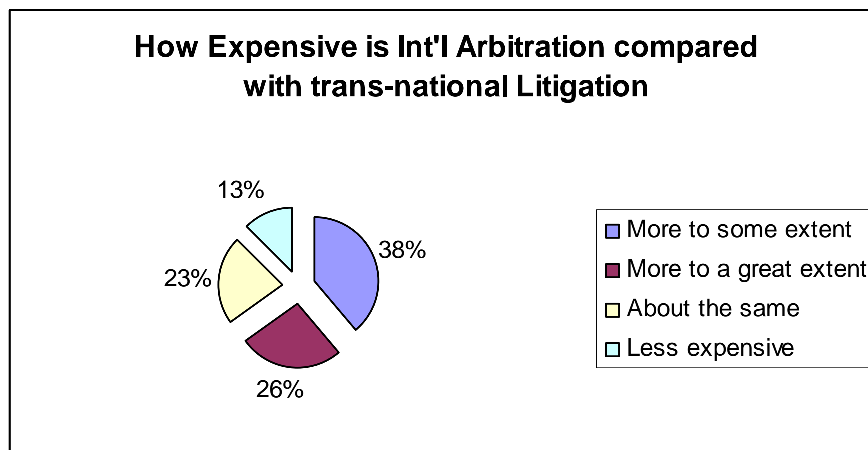
[66] See, for example, John Gotanda, "Awarding Costs and Attorney Fees in International Commercial Arbitrations", 21 *Michigan Journal of International Law* 1 (1999); Michael O'Reilly, *Costs in Arbitration Proceedings* (LLP 1995); Kent Wilson, "Saving Costs in International Arbitration", 6 *Arbitration International* 151 (1990); Gillis Wetter and Charl Priem, "Costs and their Allocation in International Commercial Arbitrations", 2 *American Review of International Arbitration* 249 (1991); Francis Gurry, "Fees and Costs", 6(10) *World Arbitration and Mediation Reports* 227 (1995); Michael Buehler, "Correction and Interpretation of Awards and Advances on Costs", *ICC Bulletin - Supplement* 53 (1997); Murray Smith, "Costs in International Commercial Arbitration", 56(4) *Dispute Resolution Journal* 30 (2001) with assessment of laws and rules and practical proposals.

Costs related to arbitration can be divided into two main groups: arbitration costs and legal costs. Arbitration costs include the arbitrators' fees,[67] 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. In institutional arbitration, the institution is responsible for obtaining an advance from the parties in respect of these fees and expenses.[68]

What is the truth? Cost is seen as both an advantage and a disadvantage of international arbitration! The perception put to test is that corporation believe that international arbitration is cheaper than international litigation.

There were 80 online responses to the question whether arbitration is expensive when compared with transnational litigation. The following responses were given:

- 31 believe arbitration is more expensive to some extent.
- 21 believe arbitration is more expensive to a great extent.
- 18 believe both processes cost about the same.
- 10 believe arbitration is not more expensive.



Overall a clear majority perceives arbitration to be more expensive that litigation, but a substantial 38% considers that is more expensive to some extent and 26% believes that it is more or less the same as transnational litigation. One quarter is clear that it is significantly more expensive.

This is not a surprising finding and arbitration institutions and arbitrators are and should be concerned about this trend. For users of arbitration, although arbitration is considered expensive, it is also an efficient process and several benefits of the process outweigh the problem of costs. This is why there is constant increase in the number of arbitration cases.

65 in house lawyers answered the question on the total cost of their most recent arbitration. The results were as follows:

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[67] See John Gotanda, "Setting Arbitrators' Fees: An International Survey", 33 *Vanderbilt Journal of Transnational Law* 779 (2000) with further references.

[68] See, for example, ICC Rules Article 31.

- 34 paid between US$100,000 and US$500,000,
- 9 paid between US$500,000 and US$1 million
- 14 paid between US$1 million and US$5 million, while
- 8 paid over US$5 million.

Unfortunately the respondents did not indicate what the amounts in dispute were and what percentage the costs represented.

These costs include all monies spent on the dispute from commencement to completion of the arbitration proceedings, including costs of external counsel and arbitration institutions, administrative costs, arbitrators' fees and reimbursable expenses, but not including the cost of in house counsel.

The responses from the interviews revealed that geographical location of corporations may be relevant in this regard. Corporations operating in the West appeared to be less worried about the cost incurred in international arbitration proceedings. They would almost certainly use external counsel specialist in either the subject matter of the dispute and/or international arbitration. Lack of familiarity and the threat of cost are putting off parties from developing countries. At the same time corporations from common law jurisdictions as well as several civil law jurisdictions (such as Sweden France and Italy) consider the costs to be adequate given the expertise of arbitrators and overall quality of services provided in arbitration.

The following represents Counsel's fees:
- In 18 cases counsel fees accounted for 75% of the total cost of arbitration.
- In 24 cases counsel fees was between 50% and 74% of the total cost of arbitration.
- In 24 cases counsel fees was less than 50%.

These figures confirm that the cost of using external counsel in international arbitration proceedings is at least almost 50% of the total cost of arbitration and could be as high as 75% of the total cost incurred. In a survey conducted by Klaus Sachs[69] the conclusion was that most of the money is spent on lawyers (about 85%) not on arbitrators or arbitration institutions. He has compared several ICC cases:[70]

Amount in dispute *	Total fees of Arbitrators	Total fees of Counsel to Parties	share of Arbitrators' fees on total fees
USD 218,836,536	USD 624,800	USD 4,294,631	13% USD 4,919,431
USD 59,148,553	USD 404,790	USD 4,288,926	8.6% USD 4,693,716
USD 12,598,548	USD 225,313	USD 1,874,472	10.7% USD 2,099,785
USD 40,520,624	USD 126,722	USD 2,116,365	5.6% USD 2,243,087
USD 50,328,666	USD 650,000	USD 2,506,988	20.6% USD 3,156,988

[69] Klaus Sachs, "Time and Money", in: Loukas Mistelis and Julian D M Lew, *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 103-115

[70] Ibid, at p. 111.

* Conversion rates to USD at the date of issuance of award

If compared to the considerable amounts in dispute, counsel fees in such amounts seem less remarkable; in absolute terms, they are impressive. It is further interesting to note that the relative importance of the costs of the tribunal compared to the total cost of the proceeding is not insignificant, but clearly the tribunal's cost represent the lower share, spanning from a 5.6% to a 20.6%, the average being 12.12%.

On the time spent on arbitration proceedings, some in-house lawyers interviewed agreed that as compared with litigation in their home jurisdiction, international arbitration may be quicker. However, in terms of the time required by the standards of modern business and turn around times, the time spent on arbitral proceedings from commencement to rendering of the final award may still be too long. Linked to this is the time it takes to enforce an award. In one of the well known investment (or BIT) arbitrations in the 1990s the in house lawyer to the winning party explained that the State party paid up immediately after losing the setting aside challenge before the Swedish courts. This was in her opinion because the award had included the payment of a daily interest for each day the award remained unpaid. The corporation also sought enforcement against an individual in a sister dispute. This enforcement took the corporation to over 15 jurisdictions and a period of 18 months in which the full sum awarded was not recovered. The arbitration proceedings themselves took three years from commencement to the rendering of award.

The average duration of institutional arbitration proceedings for international disputes, according to the ICC and AAA, is in the range of 18 months which compares favourably to most court proceedings.[71] In addition the finality of awards also ensures that there will be no further delays. And the enforcement process will often be automatic. Matters are of course complicated if assets have been dissipated but this is problem common to arbitration and litigation. Statistically over 90% of arbitration awards are complied with voluntarily, pursuant anecdotal evidence from arbitration institutions and arbitration practitioners.

The general counsel of a state owned petroleum corporation in a developing jurisdiction said arbitration, "is very expensive and not cost effective", while the general counsel in a machine tools manufacturing corporation in Japan on his part believes, "Arbitration is expensive for low value disputes but for high value disputes, the value and cost even out as it is cost and time effective."

The senior counsel in a multinational mining group said "[arbitration] is obviously a more expensive process when compared to litigation or other dispute resolution processes. … Its outcome is unpredictable unlike litigation…" However, the general counsel of a major international automobile manufacturer in Japan said that arbitration of larger scale dispute is cheaper than litigation of the same in the United States and his firm estimates that it costs $4,000,000 for each year they are involved in litigation in the United States.

[71] It is reported in the interviews that court proceedings can take any time between 18 months and ten years, if one were to exhaust all remedies instances available in legal systems. Proceedings appear to last longer in civil law jurisdictions.

It is not surprising that cost is a controversial issue. Interestingly enough the respondents do not distinguish between the cost of arbitration and specific costs. This survey provides evidence that most of the costs are legal costs, which in principle should be the same as in transnational litigation. The survey, however, makes a different point: international arbitration is at least as expensive as litigation for middle and smaller size cases. It is better value for money on larger, more complex cases? The fact is that the costs of international arbitration are comparable to transnational litigation indicate that although arbitration costs may be substantial in actual terms they do not excessively overburden the totality of expenses. What seems to be the issue here is that the perception that arbitration is inexpensive can no longer be supported. The number of respondents who express concern about costs is significant, so that the issue should be explored and discussed further.

Consequently, the various debates on the costs and the concerns expressed in the survey by at least 38%, possibly 64% of the respondents, mandate a discussion on the cost of international arbitration. Such a discussion should not only address actual figures, but also whether arbitration has become too complicated and litigation like in a way that the costs are amplified.

VII. The future of international arbitration

It follows from the survey that 95% of the corporations currently involved in international arbitration, will continue to use it. In an exceptional interview with the CEO of a US based corporation, however, this shall not be the case. The CEO's major complaint was relating to the quality and ability of the sole arbitrator appointed by a major institution under whose rules the dispute was arbitrated. All interviewees expressed the view that there will be a further steady increase in the number of arbitration cases, proportional to the increase of international trade.

Several issues of concern were also noted. These include specifically:

- The need for more countries to become members of the New York Convention.
- Difficulties with enforcement of interim measures in international arbitration especially where the place where enforcement is sought is different from the place of arbitration.
- A mechanism for reducing the cost of arbitration needs to be found.
- The need to improve the framework for multiparty, multi-contract and multi-claim disputes.

A well defined trend appears to be towards escalating (multi-tier) dispute resolution clauses. It appears that in the future dispute resolution clauses will no longer constitute a direct reference to arbitration but a combination of non-biding processes leading up to arbitration or litigation. The choice of a non-binding process will be dependent on the subject matter of the contract and industry sector.

As mentioned above in section four the available pool of international arbitrators require overhauling. In-house lawyers would like to see more specialist arbitrators available for appointment.

Appeal on the merits is not attractive to corporations; in house lawyers would prefer to have an end to dispute rather than take another bite at the cherry, however 7.5% of the interviewees believe this issue should be left to the parties in exercise of their party autonomy. The parties should have the power to decide whether they want an appeal on the merits or not and make adequate provisions

The future of international arbitration is quite rosy. Corporations identify specific issues which have to be addressed, including cost, multiparty disputes, enforcement, but they appear confident that the law and practice can generate adequate solutions. The expectation is that there will be more arbitration cases in the future, but the arbitration clauses will develop to rather complex, multi-step dispute resolution policies. The need is also expressed for a larger pool of arbitrators.

Some future challenges include:

- issue of arbitrability
- arbitration and third parties
- excessive regulation
- increased reliance on mandatory rules
- control or arbitral process – parties, arbitrators, courts?

But these are for another occasion!