



## 2010 International Arbitration Survey: Choices in International Arbitration

**International arbitration is a voluntary and consensual process and is widely used for the resolution of international disputes. One of the key advantages of arbitration is its flexibility. Faced with myriad potential choices, what drives the decisions of corporations about the law governing the substance of the dispute, the seat (i.e. legal place) of arbitration, the arbitration institution, the arbitrators and other main aspects of the arbitration?**

# Introduction

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**Paul Friedland**

**Head of International Arbitration Practice Group, White & Case LLP**

The sustained growth of international arbitration as the preferred method of dispute resolution for international contracts and investments has traditionally not been matched by empirical studies concerning international arbitration, particularly relating to corporate users' views and practices and whether international arbitration 'delivers' for them. The surveys conducted by the School of International Arbitration at Queen Mary, University of London have assisted in filling this void by providing significant insights into international arbitration and how and why its use has developed over recent years.

This year's survey, entitled 'Choices in International Arbitration', considers the key factors that influence corporate choices about international arbitration. The survey revisits and expands upon some of the themes of the first survey conducted in 2006 which examined corporate attitudes towards international arbitration, and in doing so allows an analysis of the changes over the past four years. In addition, it covers new areas in depth such as corporate policies toward international arbitration, how pro-active corporate choices seek to maximize the effectiveness of arbitration, and corporate perceptions

of confidentiality. The 2010 survey also has a broader global reach through a substantially larger, and a more geographically diverse, pool of questionnaire respondents and interviewees. In particular, a significant proportion of respondents and interviewees are based in emerging markets, reflecting the increased investment and infrastructure activity in those locations.

White & Case is proud to be the first law firm to sponsor this survey conducted by the distinguished School of International Arbitration. The School has produced a first rate assessment of current trends in international arbitration, which will be of great interest to the arbitration community. We extend our thanks to Professor Loukas Mistelis, White & Case Research Fellow Penny Martin and Dr Stavros Brekoulakis for their high quality work in producing this publication, as well as to all the corporate counsel who generously contributed their time and energy to this survey.

A handwritten signature in black ink, appearing to read 'Penny Martin'.



**Professor Loukas Mistelis**

**Director, School of International Arbitration, Centre for Commercial Law Studies,  
Queen Mary, University of London**

It is my great pleasure and privilege to present this third empirical survey of the School of International Arbitration, sponsored by White & Case. This time we focused on choices corporations have and make about arbitration clauses and the arbitration process: choice of law(s), choice of seat, choice of arbitrators and choice of institutions. We also explored the issues of confidentiality and delay. As in our previous surveys we have collected both quantitative data, based on 136 lengthy questionnaires, and qualitative data, based on an unprecedented 67 in-depth interviews. This remarkable sample has enabled us to shed more light on arbitration and how corporations perceive it.

International arbitration is an ever-expanding area of legal practice but also of academic study. We still have rather scarce empirical data and this survey aims to contribute to the foundation of knowledge essential for the further development of the subject. It appears from this survey that arbitration has a significant impact on the economy at the places where it is practised and competition is increasing amongst venues that wish to attract more arbitration proceedings: in addition to the well established London, Paris, Switzerland and New York it is

now clear that Singapore has made a mark on the arbitration landscape with a number of other places eagerly awaiting to enter this league.

Some of the themes of this survey appear similar to the themes we explored in the 2006 survey. In 2010, however, we no longer test perceptions: we rather go a few steps further in exploring choices and the motives behind these choices. In addition, we have significantly expanded the territorial and industry focus of the participating corporations to ensure that emerging economies are more fully represented in our sample. We have also conducted the largest ever number of face-to-face interviews.

The findings provide a great deal of food for thought and will also be analysed further in a much longer academic article to be published in the *American Review of International Arbitration*. What follows is a mere executive summary. I hope you will find the survey of interest to you and your business.

A handwritten signature in black ink, appearing to read 'Loukas Mistelis'.



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# Executive Summary

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**Arbitration is a voluntary and consensual process and is widely used for the resolution of international disputes. One of the key advantages of arbitration is its flexibility. Parties can choose the law governing the substance of the dispute,<sup>1</sup> seat of arbitration,<sup>2</sup> arbitration institution (if one is used) and the arbitrators, and also make a range of other decisions that shape the jurisdictional scope, the procedural make up and practical conduct of the arbitration. The choices made by the parties can result in important legal and tactical advantages.**

The objective of this study was to determine the key factors that drive corporate choices about arbitration: how are decisions made about arbitration, who influences these decisions and what considerations are uppermost in the minds of corporate counsel when they negotiate arbitration clauses.

This study of the views of corporate counsel at leading corporations around the world examines the factors that influence the choices made by corporations about the aspects of an international arbitration. The study was conducted over a seven month period and comprised two phases: an online questionnaire completed by 136 respondents<sup>3</sup> and 67 in-depth interviews. Further information about the sample of questionnaire respondents and interviewees can be found in the methodology section in the appendices. The results of the study are set out under thematic headings, each including statistics and analysis drawn from the empirical data.

The key findings from the study are:

## Choices about international arbitration

- 68% of corporations have a dispute resolution policy. Whether or not they have a policy, corporations generally take a reasonably flexible approach to negotiating arbitration clauses. They have strong preferences regarding confidentiality and language and reasonably strong preferences regarding governing law and seat. In all cases, the result depends on the nature of the contract and the relative bargaining positions of the parties.
- The law governing the substance of the dispute is usually selected first, followed by the seat and then the institution/rules. 68% of respondents believe that the choices made about these factors influence one another, particularly in relation to the governing law and seat.
- The general counsel is usually the lead decision-maker on arbitration clauses, although the legal department may only be brought into negotiations at a late stage.

## Choice of the law governing the substance of the dispute

- Choice of governing law is mostly influenced by the perceived neutrality and impartiality of the legal system with regard to the parties and their contract, the appropriateness of the law for the type of contract and the party's familiarity with the law.
- The decision about governing law is a complex issue to which most respondents and interviewees appear to take a considered and well thought out approach.
- 40% of respondents use English law most frequently, followed by 17% who use New York law.
- The use of transnational laws and rules to govern disputes, at least partially, is reasonably common (approximately 50% have used them at least 'sometimes'), but use varies depending on the particular law or rules.
- 53% of respondents believe that the impact of the governing law can be limited to some extent by an extensively drafted contract, 29% believe it can be limited to a great extent.

## Choice of the seat of arbitration

- Choice of seat is mostly influenced by 'formal legal infrastructure', the law governing the contract and convenience.
- London is the most preferred and widely used seat of arbitration.
- London, Paris, New York and Geneva are the seats that were used most frequently by respondents over the past five years. The level of user satisfaction for these seats is high. For all four seats a majority of users described them as either 'excellent' or 'very good'.
- Singapore has emerged as a regional leader in Asia.
- Respondents have the most negative perception of Moscow and mainland China as seats of arbitration.

1. We also refer to this as the 'governing law' in this report.

2. I.e. the legal place of arbitration.

3. We refer to questionnaire respondents as both 'questionnaire respondents' and 'respondents' in this report.

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## Choice of arbitration institution

- Corporations look for neutrality and 'internationalism' in their arbitration institutions and expect institutions to have a strong reputation and widespread recognition.
- The ICC is the most preferred and widely used arbitration institution.
- The ICC, LCIA and AAA/ICDR are the institutions used most frequently by respondents over the past five years. For all three institutions, a majority of users rated them as either 'good' or higher.
- Respondents have the most negative perception of CRCICA, DIAC and CIETAC.

## Appointment of arbitrators

- Open-mindedness and fairness, prior experience of arbitration, quality of awards, availability, knowledge of the applicable law and reputation are the key factors that influence corporations' choices about arbitrators.
- 50% of respondents have been disappointed with arbitrator performance.
- Corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators.
- 75% of respondents want to be able to assess arbitrators at the end of a dispute. Of these, 76% would like to report to the arbitration institution (if any). 30% would like to be able to submit publicly available reviews.

## Confidentiality

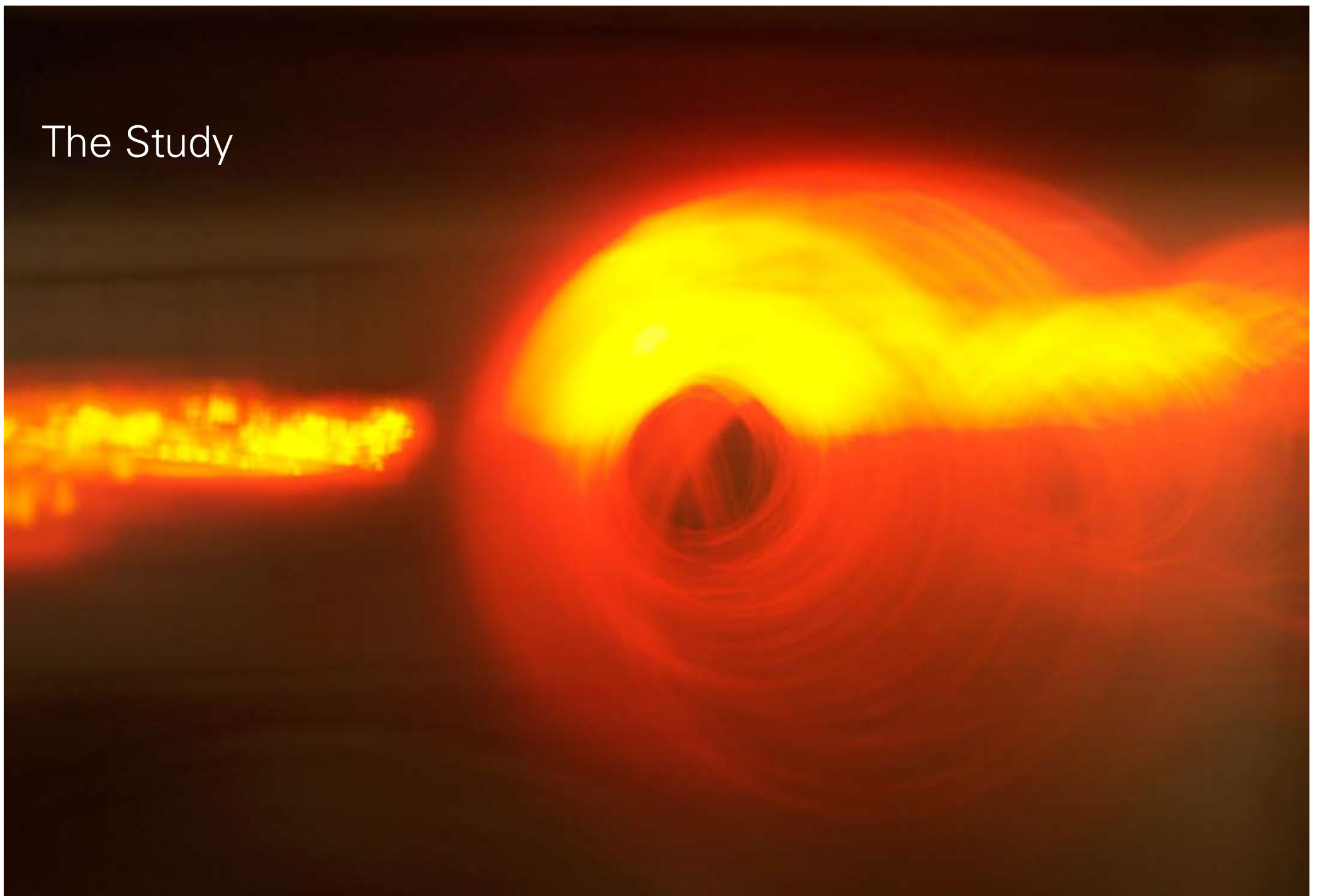
- The responses indicate that confidentiality is important to users of arbitration, but it is not the essential reason for recourse to arbitration.
- 50% of respondents erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement and 12% did not know whether arbitration is confidential in these circumstances.

## Time and delay

- Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.
- According to respondents, parties contribute most to the length of proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.

*Please note: Due to rounding, some percentages shown on charts may not equal 100%.*

# The Study





# 1 Choices about international arbitration

## Corporations generally adopt a flexible approach to negotiating arbitration clauses.

### Summary

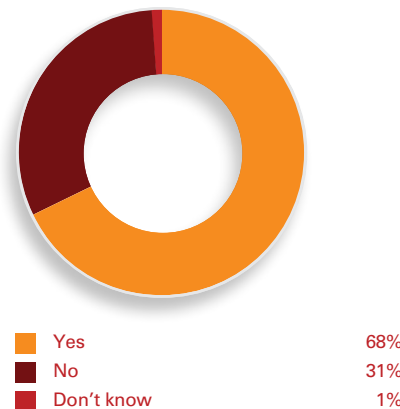
- 68% of corporations have a dispute resolution policy. Whether or not they have a policy, corporations generally take a reasonably flexible approach to negotiating arbitration clauses. They have strong preferences regarding confidentiality and language and reasonably strong preferences regarding governing law and seat. In all cases, the result depends on the nature of the contract and the relative bargaining positions of the parties.
- The law governing the substance of the dispute is usually selected first, followed by the seat and then the institution/rules. 68% of respondents believe that the choices made about these factors influence one another, particularly in relation to the governing law and seat.
- The general counsel is usually the lead decision-maker on arbitration clauses, although the legal department may only be brought into negotiations at a late stage.

### Do corporations have dispute resolution policies and to what extent are they mandatory?

Given the wide debate amongst corporate users about dispute resolution in general and international arbitration in particular, we sought to determine how important dispute resolution policies are to international corporations, whether corporations have formulated their own specific policies and how they use them during negotiations with other corporations.

We asked corporations if they have a policy regarding the dispute resolution mechanisms to be incorporated into their contracts. 68% of respondents said they do. The interviews revealed the broad scope of arrangements that are considered to be within the definition of 'policy': these range from informal understandings and practices established by conduct through to formal written policies, model clauses and standard terms.

**Chart 1: Do corporations have a dispute resolution policy?**



Corporations were asked to indicate the main features of their policy and the extent to which they are mandatory. The results indicate that the majority of corporations enter into contractual negotiations with a position on the main aspects of the dispute resolution clause. The vast majority of respondents that have a policy have a position on the preferred law to govern the substance of the dispute (94%, represented in Chart 2 as all categories apart

from 'Not a feature of policy'), the arbitral institution/rules (92%), language (90%), seat of arbitration (85%) and confidentiality (84%). Slightly less common was a position to adopt arbitration rather than state court litigation (81%) and regarding the extent of discovery and disclosure (68%). Respondents also mentioned other features such as the use of 'stepped' or 'tiered' clauses that require parties to engage in mediation or other forms of alternative dispute resolution before resorting to arbitration, or provisions as to the number of arbitrators.

Even though a high proportion of corporations have a position on the key aspects of the arbitration clause, they adopt a range of different approaches during negotiations. There were not a large number of policies with mandatory features: 33% of companies include confidentiality as a mandatory requirement and 28% specify the use of a particular language.

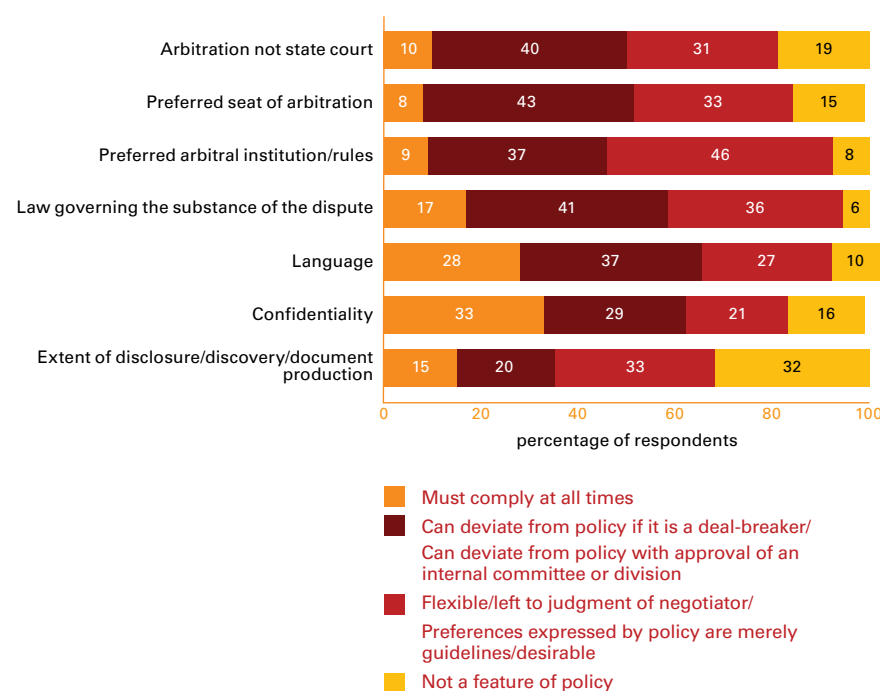
Otherwise, policies can be categorised under two broad headings. First, either they adopt a strong preference that can be deviated from if

# 1 Choices about international arbitration contd.

it is a deal-breaker, or if approval is obtained from an internal committee or division or, second, they are more permissive and provide a starting point for the negotiator who has discretion to make the final decision. These are represented in the two middle categories in Chart 2.

43% of policies adopt the stricter approach to selecting the seat of arbitration and 33% are more flexible. Regarding the law governing the substance of the dispute, 41% of policies adopt the stricter approach, with a further 17% taking a mandatory approach, whereas 36% are more permissive. 40% adopt a stricter approach regarding their preference for arbitration over state court litigation and 31% are more open to negotiation. In general, policies about preferred arbitral institutions/rules are more relaxed, with 46% adopting a permissive approach (however an appreciable 37% do adopt a stricter approach).

**Chart 2: Main features of corporations' dispute resolution policies and the extent to which they are mandatory**



Some interviewees explained how their policies operate as a blueprint for the negotiation of an arbitration clause. Some policies set out the 'acceptable' governing laws, seats and institutions that may be offered or accepted in negotiations. According to interviewees, this flexible approach is an effective way to encourage uniformity of approach in legal teams of large corporations. It can also provide an advantage in negotiations because the corporation has already weighed up the risks and advantages attaching to particular choices and can suggest strategically favourable alternatives to its counterparty.

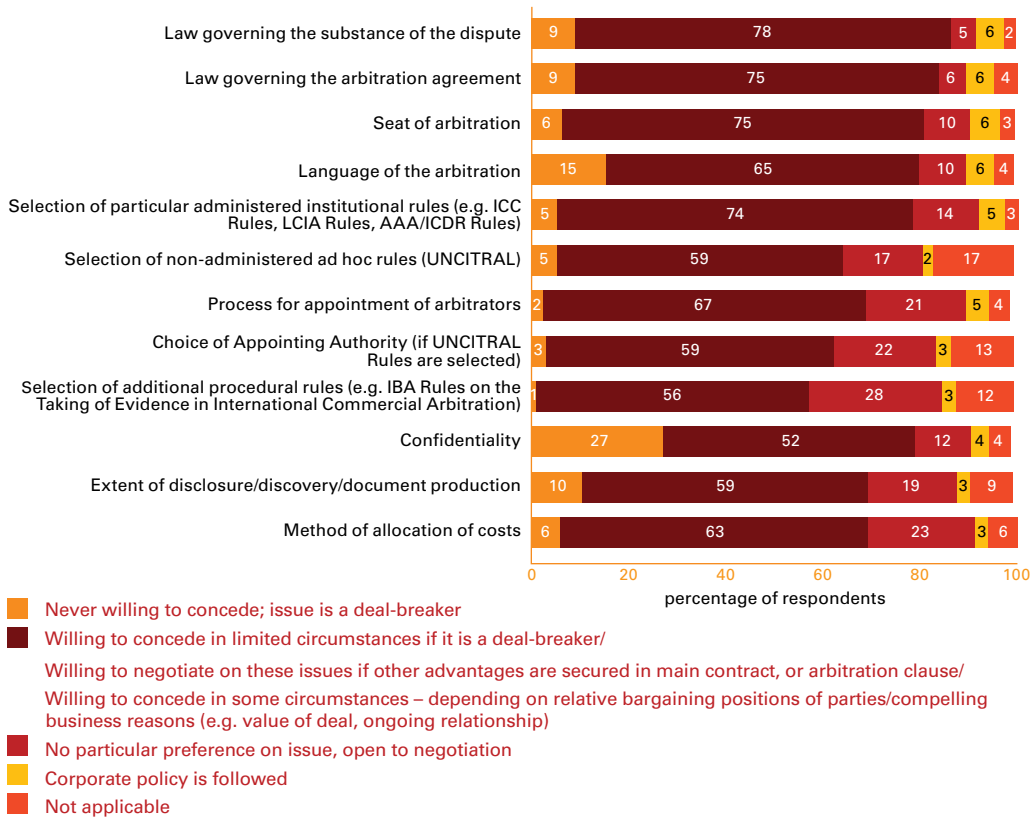
It is widely appreciated by corporate counsel that negotiations take on a dynamic character and that it is important to bear the business objectives in mind while securing the best possible dispute resolution agreement. In interviews, a frequent comment was that sometimes business negotiators do not keep lawyers up-to-date so that lawyers dealing with dispute design and resolution are often consulted only at the stage when the negotiations are nearly completed, an issue

that is discussed further below. In these circumstances, corporate counsel may be compelled to concede more issues than they would otherwise wish.

What negotiation stance do corporations adopt with regard to certain aspects of the arbitration?

Respondents were asked about their negotiation stance on a range of arbitration issues, regardless of whether their corporation has a dispute resolution policy. We were interested to understand how crucial it is for parties to control these issues and in what circumstances they may be willing to concede certain points. Reflecting the approach in corporations’ dispute resolution policies, most adopt a flexible and commercial approach.

Chart 3: The negotiation stance of corporations on key arbitration issues



Few issues are considered deal-breakers. Confidentiality was again identified as a significant issue (27% said it is a deal-breaker). In respect of confidentiality responses varied in relation to the industry sector. 15% of respondents said language is a deal-breaker, while 34% said that language will be conceded if it is a deal-breaker for the counterparty (included in the 65% in Chart 3).

The law governing the substance of the dispute, the seat and the institution/rules are also important issues, but the majority of respondents will concede these issues if there are compelling reasons or they receive something in return (represented in the three categories referring to party willingness to concede in Chart 3). 78% of respondents will concede the governing law in these circumstances, 75% will concede the seat and 74% will concede the institution/rules. 14% of respondents have ‘no particular preference’ regarding institution/rules, higher than the proportion for governing law and seat. This finding suggests that selecting the governing law and seat is more important for

# 1 Choices about international arbitration contd.

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corporations than selecting the arbitration institution/rules. This could be driven by the view expressed by some interviewees that the development of arbitration institutions and the competition between them has resulted in standardisation or homogenisation, so that the differences between seats and between governing laws are more significant than the differences between arbitration institutions.

Interviews revealed that elements of the arbitration clause may be traded off against one another, but it would be rare to trade these off against clauses in the main contract. Interviewees said that in most circumstances the dispute resolution clause is considered to be of lesser importance than the main commercial terms. Overall, the approach adopted by a corporation to a particular contractual negotiation depends to a high degree on the nature of the contract and the corporation's relative bargaining position, including the specific commercial interest in entering into this contract with this party. Other important commercial drivers are the need to penetrate a specific market or region.

## **In what order are choices made about governing law, seat and institution/rules and do the choices influence one another?**

We asked respondents whether decisions about governing law, seat and institution/rules are settled in a particular order.

26% of respondents consider that the order is governing law, seat and institution/rules. 24% think that the order is governing law, institution/rules and seat. 23% said that the three issues are decided at the same time.

Overall, 51% of respondents consider that governing law is the first issue decided while 23% of respondents think that is an issue of primary importance, decided concurrently.

We also asked respondents whether the choices made by the parties influence one another, i.e. whether the choice of a particular law governing the substance of the dispute often leads to the selection of a particular seat or arbitration institution. 68% of respondents agreed that the choices influence one another. In interviews, a number of interviewees said

that in their experience, the governing law and the seat often 'go together' e.g. English law and seat in London. This is perceived as being more 'rational' or 'efficient' – both in terms of the cost and conduct of the arbitration (e.g. likely location of arbitrators and specialist lawyers), but also less risky from a legal perspective (e.g. if there is need for recourse to the courts of the seat during the arbitration or to enforce the award). The issue of institution often appears to be decoupled (e.g. English law and seat in London may not necessarily lead to use of the LCIA). However, practical considerations can sometimes be taken into account (e.g. the convenience of having the seat and headquarters of the institution in the same place). In most circumstances, the institution is considered a 'free-floating' issue. Furthermore, institutions such as the ICC are considered by some to have a type of 'a-national' profile and appeal.

Most interviewees confirmed the primacy of governing law over other choices. When exploring this further with interviewees, they indicated that this is natural: the governing law comes first and is decided by the corporate

lawyers before the negotiation of the dispute resolution agreement begins. This in turn is strongly influenced by the type of the contract and the counterparty.

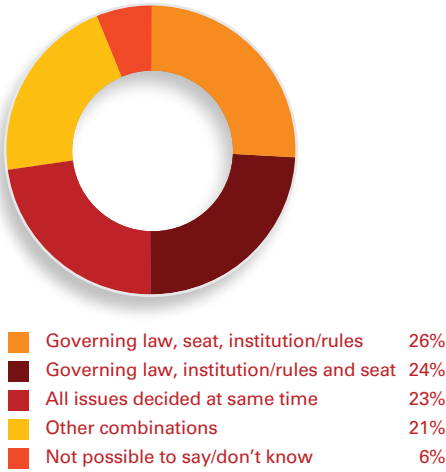
For example, finance agreements are highly likely to be subject to English or New York law, as these are very well established laws and are considered to deal efficiently with the issues raised in finance agreements. If this is correct, then the primacy of substantive law is a natural corollary of the fact that the parties are more interested in how the contractual relationship will work between them rather than how any potential disputes will be resolved. In other words, the parties choose the substantive law first, as this will apply throughout the contractual relationship, and the seat or the institution/rules second, as this choice will only matter if a dispute arises at a later stage. It seems that parties choose the governing law for the contract to work and then seat/institution in case the contract does not work.

The counterparty also plays a significant role in prioritising choices: a contracting party from a similar legal system will readily agree to a law that can reasonably be assumed to be

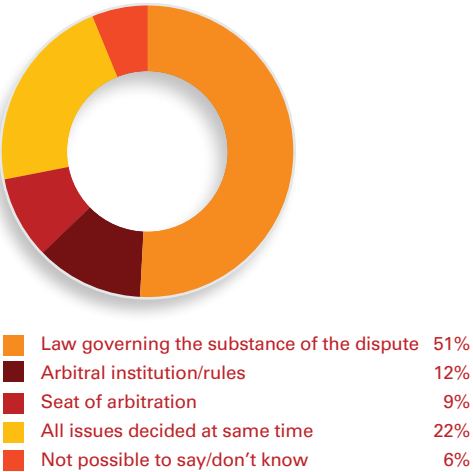
appropriate for the contract; a contracting party from a very different legal system will typically engage in a discussion as to which law is appropriate to govern the contract and often a neutral, well-established law will be preferred. Almost invariably, interviewees indicated that they would be most happy first with their own law and secondly with well-established and well-known laws, such as English, New York and Swiss law. These issues are discussed further in Section 2.

However, a number of interviewees also said that depending on the relative bargaining positions of the parties, their location, their legal cultures and the nature of the contract, the apparent ‘nexus’ between governing law and seat and, to a lesser extent, institution may be broken and the various parts of the clause traded off as part of negotiations.

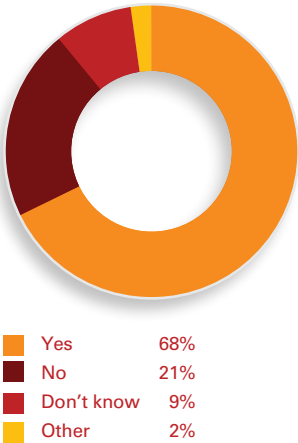
**Chart 4: The order of choices about the governing law, seat and institution/rules**



**Chart 5: First choice ranking: governing law, seat or institution/rules**



**Chart 6: Do the choices made by parties about aspects of arbitration clause influence one another?**





# 1 Choices about international arbitration contd.

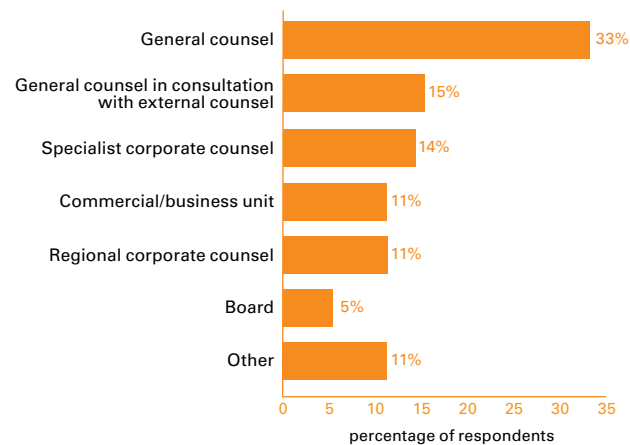
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## Who makes the ultimate decision about arbitration clauses?

Corporations vary significantly in terms of organisation of their internal legal teams. We asked questionnaire respondents who makes the ultimate decision about the choice of law, seat and institution. 33% of respondents said it is the general counsel and 15% said it is the general counsel in consultation with external counsel. 14% said that the decision is made by 'specialist corporate counsel'. Interestingly, in 11% of corporations the commercial or business unit will make the ultimate decision. The 11% who selected 'other' mainly said the decision is made by the general counsel or specialist legal counsel in consultation with the relevant business unit.

A number of interviewees referred to the difficulties in ensuring that arbitration clauses are considered early in the negotiation process. Many referred to it as the "2am clause" or similar and described how often they are brought into negotiations late and expected to conclude dispute resolution clauses with minimal negotiation because the commercial terms are settled.

**Chart 7: Who makes the ultimate decision about arbitration clauses?**



## 2 Choice of the law governing the substance of the dispute

**The perceived neutrality and impartiality of the legal system, the appropriateness of the law for the type of contract and the party's familiarity with the law are extremely important factors in the choice of governing law.**

### Summary

- Choice of governing law is mostly influenced by the perceived neutrality and impartiality of the legal system with regard to the parties and their contract, the appropriateness of the law for the type of contract and the party's familiarity with the law.
- The decision about governing law is a complex issue to which most respondents and interviewees appear to take a considered and well thought out approach.
- 40% of respondents use English law most frequently, followed by 17% who use New York law.
- The use of transnational laws and rules to govern disputes, at least partially, is reasonably common (approximately 50% have used them at least 'sometimes'), but use varies depending on the particular law or rules.
- 53% of respondents believe that the impact of the governing law can be limited to some extent by an extensively drafted contract, 29% believe it can be limited to a great extent.

### What drives decisions about the law governing the substance of the dispute?

We asked questionnaire respondents to rate the importance of a list of factors in influencing their corporations' choices about the law governing the substance of the dispute. Respondents could rate a particular factor as 'very important', 'quite important', 'somewhat important', 'not very important' or 'not important at all'. Respondents were also free to add and rate additional factors. We weighted the results to reveal the highest ranked influences on choice of governing law (as a percentage of the maximum possible weighted score for each factor).

The most important factor is the perceived neutrality and impartiality of the legal system (66%), followed by the appropriateness of the law for the type of contract (60%) and familiarity with and experience of the particular law (58%). The analysis of corporate counsel therefore appears to take into account a broad range of factors: namely the effectiveness of the law, its technical appropriateness and strategic aspects.

The interviews suggested that familiarity is a powerful influence. A number of interviewees said that if they cannot adopt their own national law as the governing law, they will seek alternatives that have a similarity with their law (this might include a law on which their national law has been modelled, e.g. Swiss law for Turkish companies, or a law from the same broad legal tradition, e.g. common law or civil law).

Strategy also has an impact. Some interviewees more experienced in international arbitration said that they will try to project forward to any potential disputes and anticipate which national laws may provide them with an advantage (e.g. limited latent defects period when the party is entering into a construction contract, or directors' liability and corporate governance in joint venture agreements).

More generally, a number of interviewees said they will research potential governing laws, or seek advice from their external counsel before making their decision. It also transpired from the interviews that corporations with substantial experience in international

business have unwritten, or even written, lists of the laws they are prepared to consider as governing laws.

Two respondents added an additional factor which they both ranked as 'very important', a factor that was also raised by a number of interviewees: the impact of choice of law on the enforceability of the award. Some interviewees explained that they will consider where the award is likely to be enforced and either select that law or another governing law that would be consistent with that jurisdiction (i.e. common law or civil law, or a law from which the law of that jurisdiction originated) or that is highly regarded by the courts of that jurisdiction.

The influence of corporate policy and robust negotiation stances of counterparties on governing law discussed in Section 1 are also reflected in the results (35% and 37%, respectively). Consistent with the finding in Section 1 that governing law is the first issue decided (according to 51% of respondents), the choice of seat and institution do not weigh heavily on the choice of law (26% and 27% respectively). Place of performance of the

## 2 Choice of the law governing the substance of the dispute contd.

contract (32%) is mainly a 'quite important' or 'somewhat important' factor and does not seem to have a particularly strong influence on the ultimate decision. Least important are the location of the legal team, recommendations of external counsel and the location of the other party.

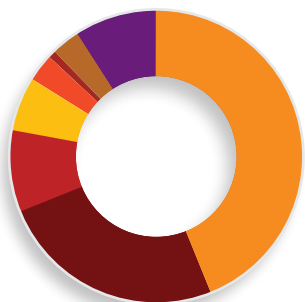
**Chart 8: Top influences on the choice of the law governing the substance of the dispute**



### **When they are free to do so, what governing law do corporations normally choose?**

44% of corporations said that they choose the law of their home jurisdiction if they are free to do so. Another 25% said that they choose English law, 9% Swiss law and 6% choose the laws of New York (where these are not the law of their home jurisdiction). Some respondents also pointed out that their preference as to choice of law will depend on the contract and the location of the specific business unit concerned.

**Chart 9: Governing law corporations most frequently choose when they are free to do so**



Law of home jurisdiction	44%
English law	25%
Swiss law	9%
New York law	6%
French law	3%
US law (other than New York law)	1%
Other	3%
Not possible to say/none in particular	9%

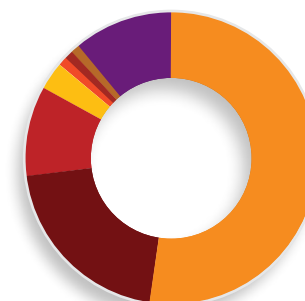
This is certainly a strong finding in favour of the application of English law. Except from the cases where for obvious reasons parties would like to apply their own law, English law is far more preferable for respondents than the next most popular choice.

We also asked respondents to explain why they choose their most frequently chosen law. Most respondents referred to “familiarity” and “predictability,” “foreseeability” or “certainty.” They also referred to the existence of a “well developed jurisprudence” and “international acceptance.” Some also referred to the appropriateness of the law for particular types of contracts (e.g. maritime, oil and gas, finance and reinsurance) and more general principles that are seen to be desirable (e.g. respect for freedom of contract). A number of interviewees referred to these factors when discussing why they select English law in particular, so the predominance of English law appears to derive from the fact that many consider it to be one of the national laws that best fulfils these criteria. In addition, the prevalence of the English language, the appeal of the English legal system historically throughout the Commonwealth and more recently in the Arab world may also explain this finding.

### Which law is most frequently imposed by counterparties?

Respondents were also asked which law is chosen if the governing law is imposed by their counterparties. 53% of respondents said that the counterparty usually chooses its home jurisdiction, whereas English law (21%) and New York law (10%) are also frequent choices.

**Chart 10: Governing laws most frequently imposed by counterparties**



Law of home jurisdiction	53%
English law	21%
New York law	10%
US law (other than New York law)	3%
Swiss law	1%
French law	1%
Other	1%
Not possible to say/none in particular	11%

## 2 Choice of the law governing the substance of the dispute contd.

### Which law is used most frequently overall?

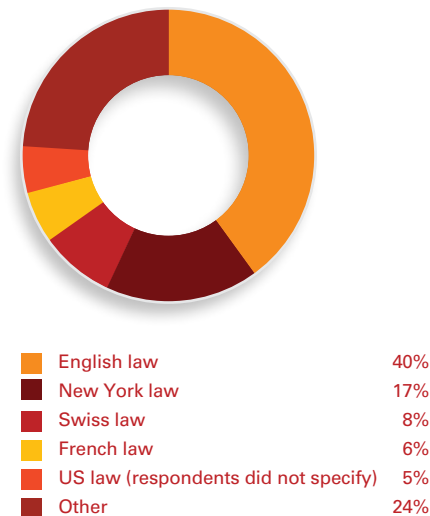
How is the choice of governing law finally arrived at? Interviewees described how in contractual negotiations each party normally proposes its national law as the governing law of the contract, or one party puts forward its national law in its standard terms and conditions. When the bargaining power of the parties is equally matched, the 'home' law will normally be rejected and the parties will find a mutually acceptable solution, taking into account the factors indicated above. In such a case a 'neutral' law will be chosen.

The interviews indicated that there are some generally acceptable governing laws for parties of certain nationalities which will be 'pooled' in negotiations in order to reach an acceptable solution: for example, Hong Kong, Singapore and English law may be acceptable in Asia. In Europe, English, Swiss or French law may be strong possibilities. Alternatively, a law from the same region or legal culture may be acceptable: an interviewee from Eastern Europe said that if he cannot get his own law,

he will try to negotiate at least the law of another Eastern European country. In the US, New York law is generally preferable, although other preferred options include Texas, Delaware and Maryland law. In Latin America, the law of one of the South American countries, English law and New York law are the main choices. Which law is ultimately chosen will depend on the particular parties and the contract.

According to the responses,<sup>4</sup> the most frequently used governing law is English law (40%), followed by New York law (17%). The 'other' laws include a broad range of national laws. The most commonly cited by respondents were Californian law, German law and Australian law.

**Chart 11: Governing laws most frequently used by corporations**



4. A small number of respondents listed more than one equally preferred law governing the substance of the dispute and these were taken into account in the final statistics.



## Do corporations use transnational laws or rules to govern their disputes?

To complete the picture regarding governing law, we asked respondents whether they have used a number of international laws, transnational rules or principles to govern their disputes.

We referred to four main categories: first, unwritten international principles (e.g. broad concepts fairness and equity, determination *ex aequo et bono*); second, international treaties and conventions (e.g. the United Nations Convention on Contracts for the International Sale of Goods (CISG)); third, commercial law rules relating to trade and international contracts (e.g. UNIDROIT Principles of International Commercial Contracts 2004 (UNIDROIT Principles) and INCOTERMS); fourth, other international rules (e.g. Uniform Customs and Practice for Documentary Credits (UCP). The extent to which respondents use the laws or rules in each of the four categories varied.

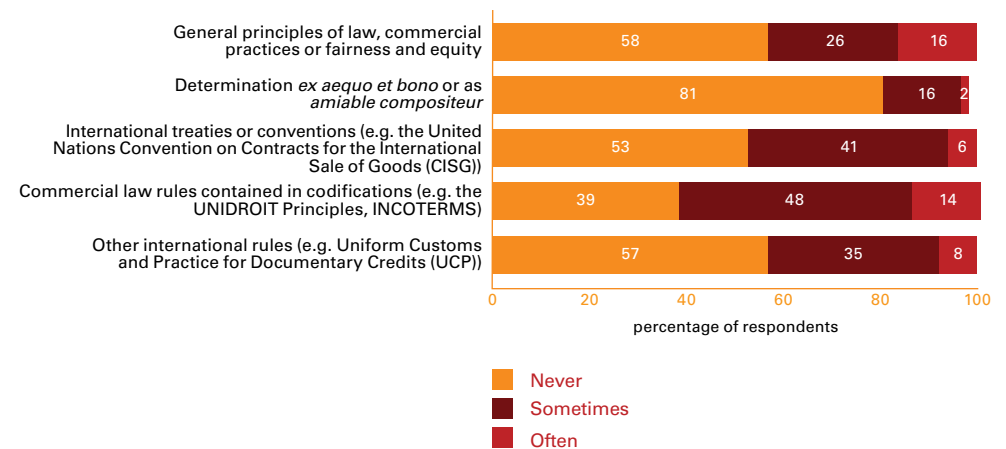
The uptake of international principles is generally more limited than the other categories (81% have never used determination *ex aequo et bono* or as *amiable compositeur*, 58% have never used general principles of law, commercial practices or fairness and equity). This can perhaps be explained by the fact that these principles are more uncertain in terms of their content than other transnational laws or rules. However, it is significant that 26% said that they use general principles of law, commercial practices or fairness and equity 'sometimes' and 16% said they use them 'often'.

As for the more concrete international rules and laws, the majority of respondents have never used the UCP and the CISG in their contracts: 57% and 53% respectively. However, the remaining 43% and 47% have used them at least 'sometimes'.

The use of UNIDROIT Principles and INCOTERMS is higher amongst respondents. 62% of respondents have used UNIDROIT Principles and/or INCOTERMS at least 'sometimes'. Interviews clarified that of the two, INCOTERMS are used more frequently.

Interviewees said that transnational rules are often used as supplementary or definitional concepts alongside a governing national law (e.g. the use of INCOTERMS or the UCP to define certain concepts under a contract), rather than as a law that is intended to regulate all substantive legal issues.

**Chart 12: How often do corporations use certain transnational laws or rules to govern their disputes?**



## 2 Choice of the law governing the substance of the dispute contd.

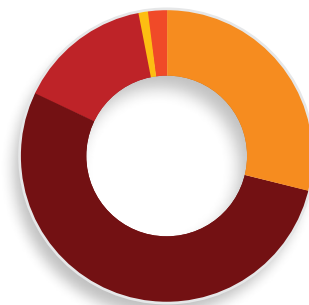
### To what extent can an extensively drafted contract limit the impact of the governing law?

We were also interested to ask corporate counsel whether they think that an extensively drafted contract (often referred to as a 'regulatory' contract) can limit the impact of the governing law. In some circumstances, corporations may seek to 'cover the field' with extensive contractual terms in order to reduce uncertainty and deal with all anticipated issues during negotiations.

53% of respondents think that an extensively drafted contract can limit the impact of the governing law 'to some extent'. 29% think that the impact could be limited 'to a great extent'. This suggests that corporate counsel do seek to cover off at least some substantive legal issues in their contracts. Some parties will routinely draft extensive contracts in an effort to cover all eventualities in the performance of the contract, thereby limiting

the reliance on the governing laws. Examples can be found in the contract drafting practices in the US and other jurisdictions influenced by the US, both in Latin America and Asia.

**Chart 13: An extensively drafted contract can limit the impact of the governing law**



To a great extent	29%
To some extent	53%
To a limited extent	15%
Not at all	1%
Don't know	2%

# 3 Choice of the seat of arbitration

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**‘Formal legal infrastructure’, the law governing the contract and convenience are important factors that drive the choice of the seat of arbitration.**

## Summary

- Choice of seat is mostly influenced by ‘formal legal infrastructure’, the law governing the contract and convenience.
- London is the most preferred and widely used seat of arbitration.
- London, Paris, New York and Geneva are the seats that were used most frequently by respondents over the past five years. The level of user satisfaction for these seats is high. For all four seats a majority of users described them as either ‘excellent’ or ‘very good’.
- Singapore has emerged as a regional leader in Asia.
- Respondents have the most negative perception of Moscow and mainland China as seats of arbitration.

## What drives decisions about the seat of arbitration?

We asked questionnaire respondents to rate the importance of a list of factors in influencing their corporations’ choices about the seat of arbitration (the legal place of arbitration). Respondents could rate a particular factor as ‘very important’, ‘quite important’, ‘somewhat important’, ‘not very important’ or ‘not important at all’. Respondents were also free to add and rate additional factors. We weighted the results to reveal the highest ranked influences on choice of seat (as a percentage of the maximum possible weighted score for each factor).

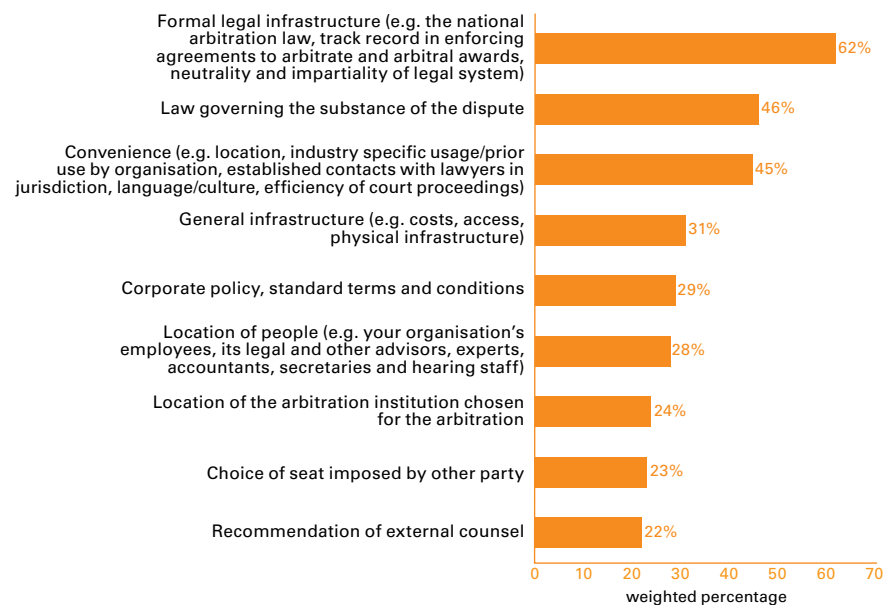
The most important factor is the ‘formal legal infrastructure’ at the seat (62%), which includes the national arbitration law and also the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction and its neutrality and impartiality. This was followed by the law governing the substance of the dispute (46%), reflecting the findings on the nexus between law and seat in

Section 1. Convenience is also an important factor (45%) including location, industry specific usage, prior use by the organisation, established contacts with lawyers in the jurisdiction, language and culture and the efficiency of court proceedings. Also consistent with the results in Section 1 regarding the order of choices about law, seat and institution and the influences between them, the choice of institution is of low importance in influencing the choice of seat.

As with the choice of governing law, corporations are focused on both the technical and practical issues when they choose a seat. Similarly, the location of the relevant people involved in the arbitration and the recommendations of external counsel are the least important factors.

### 3 Choice of the seat of arbitration contd.

Chart 14: Top influences on the choice of the seat of arbitration



We also asked respondents to further specify which aspects of formal legal infrastructure, general infrastructure, convenience and the location of people most influence the choice of seat. Respondents were asked to rank the

top three factors from a list under each of these headings. We weighted the results to reveal the highest ranked influences on choice of seat (as a percentage of the total score allocated by respondents across all factors).

#### What aspects of the formal legal infrastructure of a seat are most important?

Neutrality and impartiality (34%) and 'arbitration-friendliness' of a seat (i.e. the record of the courts in enforcing agreements to arbitrate and arbitral awards) (25%) are the aspects of 'formal' legal infrastructure that most influence the choice of seat. Also important is whether the country concerned is a signatory to the New York Convention 1958 (20%), a factor that might be expected to be a higher priority for corporations, but given the wide acceptance of the New York Convention internationally it appears to be expected in most countries. Whether the national arbitration law is based on the UNCITRAL Model Law, the ability to join third parties and the availability of appeals against awards are relatively unimportant compared to these factors.

It appears that parties will usually first negatively delimit the seats that meet a basic neutrality and impartiality threshold by excluding those they consider do not meet this basic requirement, which would normally

include the home jurisdictions of the two parties. They will then positively select from amongst the acceptable seats depending on which is considered to be most 'arbitration-friendly'.

#### What aspects of the general infrastructure of a seat are most important?

Cost is the most important aspect of general infrastructure that influences that choice of seat (42%), followed by good transport connections (26%) and hearing facilities (including translators, interpreters and court reporters) (21%). Respondents also listed safety and the absence of bribery as important factors.

#### What aspects of the convenience of a seat are most important?

Efficiency and promptness of court proceedings is the most important aspect of the convenience of a seat (20%), followed by language (16%), established contacts with specialised lawyers operating at the seat (15%) and the location of the parties (11%). Cultural

familiarity is also an important factor (10%). Interestingly, previous experience of the seat is not a particularly important factor (7%), nor is the location of the arbitrators (6%).

### What aspects of the location of people are most important?

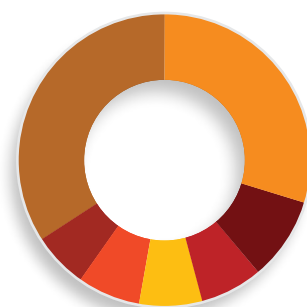
The location of specialised lawyers is the most important aspect of the location of people that affects the choice of seat (39%). This is an interesting finding that would confirm an anecdotal impression that high quality legal services are a wealth generating resource: they attract people and consequently income to that country. The location of the organisation's employees (27%) and the availability of hearing staff (20%) are the next most important factors.

### Which seats do corporations prefer?

Respondents were asked to indicate their preferred seat of arbitration and the reasons for their preference. According to the responses,<sup>5</sup> London is most preferred (30%),

followed by Geneva (9%) and Paris, Tokyo and Singapore (each 7%) and New York (6%). Respondents also referred to a broad range of other seats, suggesting that parties may be increasingly looking beyond the 'traditional' seats of arbitration.

**Chart 15: Preferred seats of arbitration**



London	30%
Geneva	9%
Paris	7%
Tokyo	7%
Singapore	7%
New York	6%
Other	34%

The main reasons cited by respondents for their preferences mirrored the top reasons for the selection of seat indicated above. Overall, factors such as proximity, availability of quality arbitrators and expert legal advice, 'arbitration-friendliness', the national arbitration law, neutrality, reliability, track record and stability were mentioned by respondents.

In the 2006 School of International Arbitration/ PricewaterhouseCoopers survey, we also asked respondents about their preferred arbitration venues. In that survey, respondents were asked to rank their top three preferred venues. Of the first choices (using the terms adopted in that report), 38% preferred England, 12% each preferred Switzerland and United States, 10% preferred France, 5% preferred Japan and 3% preferred Sweden. A further 21% of respondents chose other seats as their first choice. Taking into account the differences of the current respondent sample, it appears that the general pattern of preferences has remained similar over the past four years, with corporations displaying a strong preference for London. In the 2010 results, it appears that the wider sample has

diluted some of the preferences for more 'traditional' seats, reflecting the broad range of preferences regarding seat.

### Which seats have corporations used most frequently over the past five years, why were they selected and how do their users rate them?

We asked respondents to note the five seats their organisation has used most frequently over the past five years (or a shorter specified period), indicate the top three reasons why the seat was selected and rate each of them overall as either 'excellent', 'very good', 'good', 'adequate' or 'poor' without reference to any specific criteria.

The most commonly referred to seat was London (45 respondents). 29% of respondents rated London 'excellent' and 40% rated it 'very good', i.e. almost 70% are very happy with London as a seat of arbitration. Some of the main reasons parties used London were its reputation as a neutral and impartial jurisdiction, the law governing

5. A small number of respondents listed more than one equally preferred seat and these were taken into account in the final statistics.



### 3 Choice of the seat of arbitration contd.

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the substance of the dispute and established contacts with specialist lawyers. Language and cultural familiarity were also mentioned by some respondents.

Paris was the second most referred to seat (28 respondents). 18% rated it as 'excellent' and 64% said it was 'very good', i.e. 82% rated Paris at least as very good as a place to arbitrate. The main reasons parties came to Paris were its reputation as a neutral and impartial jurisdiction, its 'arbitration-friendliness' and more practical aspects such as hearing facilities and transport connections.

New York was mentioned by 23 respondents, 17% of which rated it as 'excellent' and 39% as 'very good', i.e. 56% had high praise for New York as an arbitral seat. The attractions of New York were its reputation as a neutral and impartial jurisdiction, transport connections, language, location of arbitrators and other key participants in the arbitration and established contacts with specialist lawyers.

17 respondents mentioned Geneva, 24% rating it as 'excellent' and 59% as 'very good', i.e. 83% rated Geneva at least very good. The two

key factors for Geneva are its reputation as a neutral and impartial jurisdiction and its 'arbitration-friendliness'.

Singapore was the next most commonly referred to seat (15 respondents), 27% rating it 'excellent' and 20% as 'very good', i.e. 47% rated Singapore very good or excellent. Respondents identified a broad range of factors that led them to select Singapore as a seat. Although the sample from Asia was slightly higher in the present survey, this suggests that Singapore has grown as a regional leader since the 2006 survey. Singapore is a new entry and it appears that the promotion of Singapore as an arbitral seat with conferences and the active involvement of more arbitral institutions (such as ICC and AAA/ICDR) have paid dividends and Singapore clearly emerges as the most popular Asian seat. Its movement (and those of regional institutions discussed in Section 4) are evidence of the trend towards regionalisation in arbitration we identified in 2006.

Other seats mentioned by respondents included Stockholm, Vienna, Hong Kong, Zurich, Tokyo and mainland China.

We did not ask respondents to further define the terms 'neutral and impartial', which was mentioned by a number of respondents in relation to London, Paris, New York and Geneva. From the interviews, it appears that this factor has two main components: neutrality and impartiality in relation to the parties (i.e. a third country for both/all of them and not otherwise disposed towards them) and a broader concept of the neutrality and impartiality of the jurisdiction as a whole, including its national courts. In relation to the latter, a number of interviewees referred to Geneva and its tradition of being politically neutral which is reflected in respondents' perceptions of it as a neutral seat.

#### **What are the perceptions held by corporations of seats they have not used before?**

Respondents were invited to rank up to five seats that they and their organisation have not used before, based on their perception of those seats. The options were 'excellent', 'very good', 'good', 'adequate' or 'poor'. However, the uptake of this question was low and only a small number of respondents shared their perceptions.

Moscow was the lowest rated in terms of perception – all nine respondents rated it as 'poor'. Mainland China was rated as 'poor' by nine respondents and 'adequate' by four respondents.

Highest rated was Singapore – three respondents rated it as 'excellent', four respondents rated it as 'very good' and three respondents 'good'. Following Singapore was Hong Kong – two respondents rated it as 'excellent', three 'very good', two 'good' and one each 'adequate' and 'poor'.

# 4 Choice of arbitration institution

## Corporations look for internationalism and neutrality in their arbitration institutions and a strong reputation in the marketplace.

### Summary

- Corporations look for neutrality and 'internationalism' in their arbitration institutions and expect institutions to have a strong reputation and widespread recognition.
- The ICC is the most preferred and widely used arbitration institution.
- The ICC, LCIA and AAA/ICDR are the institutions used most frequently by respondents over the past five years. For all three institutions, a majority of users rated them as either 'good' or higher.
- Respondents have the most negative perception of CRCICA, DIAC and CIETAC.

### What drives decisions about arbitration institutions?

We asked questionnaire respondents to rate the importance of a list of factors in influencing their corporations' choices about selecting an arbitration institution (if one is used). Respondents could rate a particular factor as 'very important', 'quite important', 'somewhat important', 'not very important' or 'not important at all'. Respondents were also free to add and rate additional factors. We weighted the results to reveal the highest ranked influences on choice of institution (as a percentage of the maximum possible weighted score for each factor).

The most important factor is neutrality/ 'internationalism' (66%), followed by reputation and recognition (56%). The arbitral rules of the institution and the law governing the substance of the dispute exert equal influence at 46%. The position of the governing law is perhaps higher than might be expected considering the finding in Section 1 that the influence between the law and the institution is not particularly strong.

Nevertheless, the closeness of the top ranked factors strongly suggests that there are a wide range of factors that influence the selection of an institution. Previous experience of the institution is also important (42%), as is the overall cost of the service (41%) and whether an institution has a global presence and/or the ability to administer arbitrations worldwide (39%). Also important is expertise in certain types of cases and free choice of arbitrators (i.e. no exclusive institutional list) (both at 38%). Reflecting the findings in Section 1, the seat exerts some influence at 35%. Least important factors are modes of payment, the similarity of the rules to the UNCITRAL Arbitration Rules and methods of arbitrator remuneration.

Interviewees said that it is important for an institution to have a strong profile and enjoy broad acceptance amongst arbitration users. This is more significant for parties than mere prestige. It increases the likelihood that the counterparty will accept the institution: one respondent referred to "name recognition sufficient to avoid a 'trigger' that would require a trade with other parts of a contract

negotiation." It may also help to ensure the effective enforcement of any award (it may have an impact on a decision of a court to only accept, or give preference to, awards made by tribunals administered by certain institutions or it may influence a court's views about the quality of a particular award).

Some interviewees also mentioned the ICC review procedure and said that this type of mechanism would attract them to an institution (note also that 'scrutiny of award by institution' scored 33%). A number of interviewees also mentioned that they like to see institutions actively involved in managing cases and ensuring parties keep to their timetable, reflected in the score of 33% for 'high level of administration'. This is discussed further in Section 7.

Cost remains an extremely important issue: amongst a majority of interviewees there was a perception that ICC arbitration is too expensive (especially beyond a certain monetary threshold of the amount in dispute) and that arbitration institutions in general are costly. The responses were inconclusive on

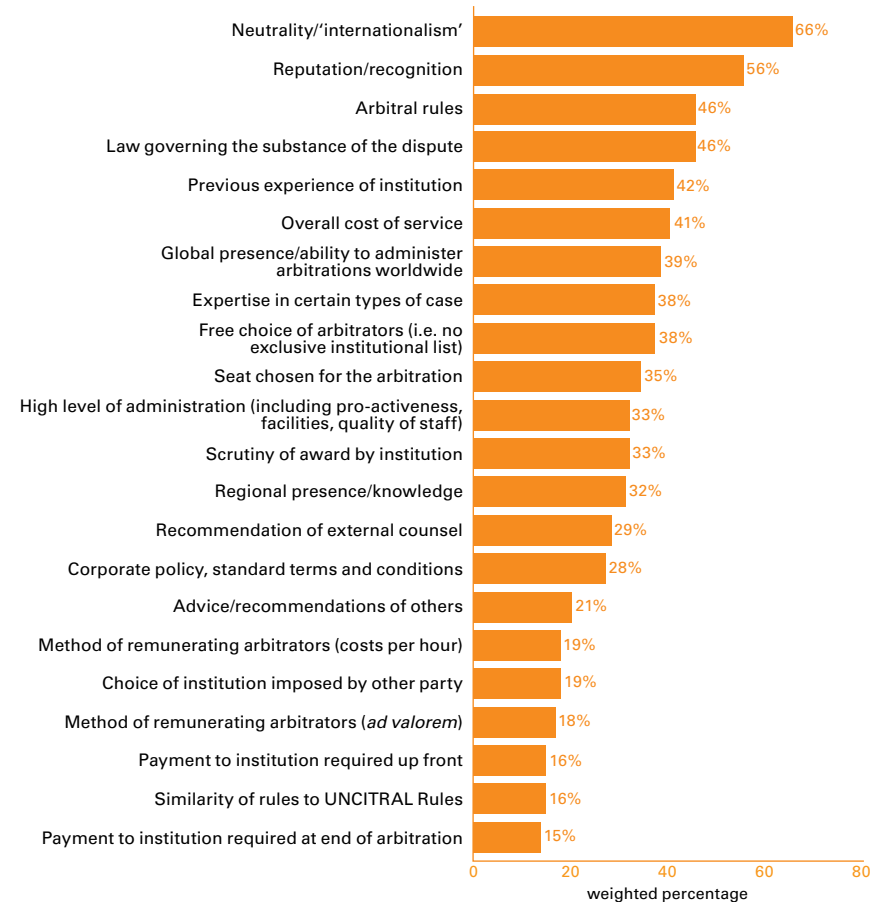
## 4 Choice of arbitration institution contd.

whether corporations prefer *ad valorem* or hourly arbitrator fees as a matter of principle and the consideration of fees is apparently low on the agenda (*ad valorem* fees scored 18% and hourly fees 19%).

As for newer regional institutions, as also identified in the 2006 survey, there appears to be general support for newer institutions, with regional knowledge and presence scoring 32%. Nevertheless, interviewees indicated that corporations are not prepared to use them until they are considered to have “proven themselves” or have a “track record”. Overall, it is clear that increasingly parties are considering ‘non-traditional’ institutions in order to accommodate a counterparty in another region, particularly as the reputations of those institutions grow (e.g. the use of SIAC, HKIAC and possibly CIETAC for US/European/Asian counterparties; the use of DIAC, DIFC LCIA Arbitration Centre or CRCICA for US/European/Asian/Middle Eastern/African counterparties). The move of the LCIA and ICC into emerging markets such as India and Turkey has increased interest in those institutions amongst companies based in

those countries. Parties are also interested in institutions that can deliver expertise in certain types of cases, as the ‘specialisation’ of arbitration increases - a trend also reflected in party preferences for arbitrators with specialised experience (as discussed in Section 5).

**Chart 16: Top influences on the choice of arbitration institution**

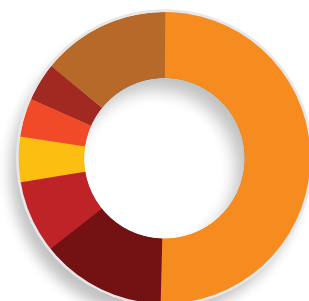


## Which institutions do corporations prefer?

Respondents were asked to indicate their preferred institution and the reasons for their preference. According to the responses,<sup>6</sup> the ICC is the most preferred institution (50%), followed by the LCIA (14%), AAA/ICDR (8%) and SIAC (5%).

Again, this pattern broadly reflects the preferences expressed in the 2006 survey, with some evidence of a shift towards SIAC and reduced preference for the SCC and the Swiss Chambers.

**Chart 17: Preferred arbitration institutions**



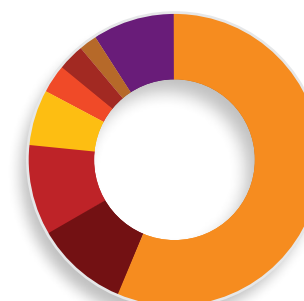
ICC	50%
LCIA	14%
AAA/ICDR	8%
SIAC	5%
JCAA	4%
HKIAC	4%
Other	14%

The main reasons cited by respondents for their preferences mirrored the top reasons for the selection of institution indicated above. Overall, factors such as neutrality, reputation, familiarity, international acceptance and global presence were mentioned by respondents.

## Which institutions have corporations used most frequently over the past five years, why were they selected and how do their users rate them?

First, we asked respondents how many times their organisation had used some of the most commonly used arbitration institutions over the past five years. Amongst respondents, the most commonly used institution over the past five years was the ICC (56%), followed by AAA/ICDR and LCIA (both at 10%). It follows that the perception and the preferences reflected in Chart 17 are matched with actual experience and arguably popularity of arbitration institutions as presented in Chart 18. It should be noted, however, that in real number terms, AAA/ICDR has significantly more cases than the LCIA and its numbers are comparable to those of the ICC.

**Chart 18: Arbitration institutions used most frequently over the past five years**



ICC	56%
AAA/ICDR	10%
LCIA	10%
DIS	6%
SCC	3%
ICSID	3%
SIAC	2%
Other	9%

6. A small number of respondents listed more than one equally preferred institution and these were taken into account in the final statistics.

## 4 Choice of arbitration institution contd.

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Second, as we did with seats of arbitration, we asked respondents to note the five institutions their organisation has used most frequently over the past five years (or a shorter specified period), indicate the top three reasons why the institution was selected and rate each of them overall as either 'excellent', 'very good', 'good', 'adequate' or 'poor' without reference to any specific criteria.

The most commonly referred to institution was the ICC (56 respondents). 21% of respondents rated the ICC as 'excellent' and 32% rated it 'very good'. Accordingly, 53% of users were generally very satisfied with the quality of the ICC. Some of the main reasons parties used the ICC were its reputation, global presence, arbitral rules, high level of administration and free choice of arbitrators.

The LCIA was the second most referred to institution (22 respondents). 50% rated it as 'very good' and 32% said it was 'good'. Overall, 82% of users were satisfied with the LCIA. The main reasons parties opted for the LCIA were its reputation, neutrality and

expertise in certain types of cases. The governing law also had a significant impact on the choice of the LCIA. Therefore, it appears that the LCIA may be more closely identified by parties with the law of the country in which it is located than the ICC, which is considered to be more 'a-national'.

The AAA/ICDR was mentioned by 18 respondents, 39% of which rated it as 'very good' and 33% as 'good'. Respondents cited a broad range of reasons for selecting the AAA/ICDR and no clear themes emerged from the data.

Other institutions mentioned by respondents included the SCC and the JCAA.

### **What are the perceptions held by corporations of institutions they have not used before?**

Respondents were invited to rank up to five institutions that they and their organisation have not used before, based on their perception of those institutions. The options were 'excellent', 'very good', 'good', 'adequate' or 'poor'. Again, the uptake of this question was low and only a small number of respondents shared their perceptions.

CRCICA was the lowest rated in terms of perception – five respondents rated it as 'poor' and two as 'adequate'. DIAC and CIETAC were each rated as 'poor' by four respondents and 'adequate' by two respondents. There were no institutions that were consistently highly rated in terms of corporate perception. For most institutions the ratings were spread across the five categories.



# 5 Appointment of arbitrators

**Corporations want greater transparency regarding arbitrator availability and performance. They want the opportunity to assess arbitrators at the end of the dispute.**

## Summary

- Open-mindedness and fairness, prior experience of arbitration, quality of awards, availability, knowledge of the applicable law and reputation are the key factors that influence corporations' choices about arbitrators.
- 50% of respondents have been disappointed with arbitrator performance.
- Corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators.
- 75% of respondents want to be able to assess arbitrators at the end of a dispute. Of these, 76% would like to report to the arbitration institution (if any). 30% would like to be able to submit publicly available reviews.

## How many arbitrators do corporations prefer?

73% of respondents have a general preference as to the number of arbitrators, of which 87% prefer three arbitrators. Respondents said that three arbitrators lead to greater neutrality, less risk of a poor decision and a more 'balanced' award. The desirability of being able to appoint one of the three arbitrators was another factor cited by respondents. A panel of three arbitrators also offers the opportunity to have a diversity of background and experience that may be useful in particular disputes, such as those with a great deal of technical evidence.

In high stakes disputes, many corporations prefer three arbitrators, but this decision can also depend on the complexity of the case and the fee structure (ad valorem or per hour). According to respondents and interviewees, a sole arbitrator may be more appropriate for cases with low amounts in dispute or of lesser complexity. One respondent said that a sole arbitrator may assess the law and facts more fully, whereas with three arbitrators the "result reflects closed door bargaining".

## What drives decisions about arbitrators?

Once again, we asked respondents to rate the importance of a list of factors in influencing their corporations' choices about arbitrators. There were two categories of questions: the first regarding sole arbitrators or the Chair of an arbitral tribunal and the second regarding co-arbitrators. Respondents could rate a particular factor as 'very important', 'quite important', 'somewhat important', 'not very important' or 'not important at all'. Respondents were also free to add and rate additional factors. We weighted the results to reveal the highest ranked influences on choice of arbitrator (as a percentage of the maximum possible weighted score for each factor).

With respect to the choice of a sole arbitrator or Chair, the most important factor is open-mindedness and fairness (68%), followed by prior experience of arbitration (62%), quality of awards (58%), knowledge of the applicable law (55%) and reputation (54%). Availability also scored highly (51%) and was emphasised by a number of interviewees as an extremely

important factor and an issue of increasing concern. It is noteworthy that respondents prefer a pro-active case management style rather than a deferential or reactive style (43% vs. 21%) and an arbitrator that focuses on the commercial disposition rather than the legal determination of disputes (32% vs. 24%). Relevant industry experience and languages are also seen as important (43% and 44% respectively).

The least important factors were gender, religion/faith and nationality. Respondents are also not strongly influenced by the arbitrator's disposition towards the issues in dispute, their organisation or their external counsel.

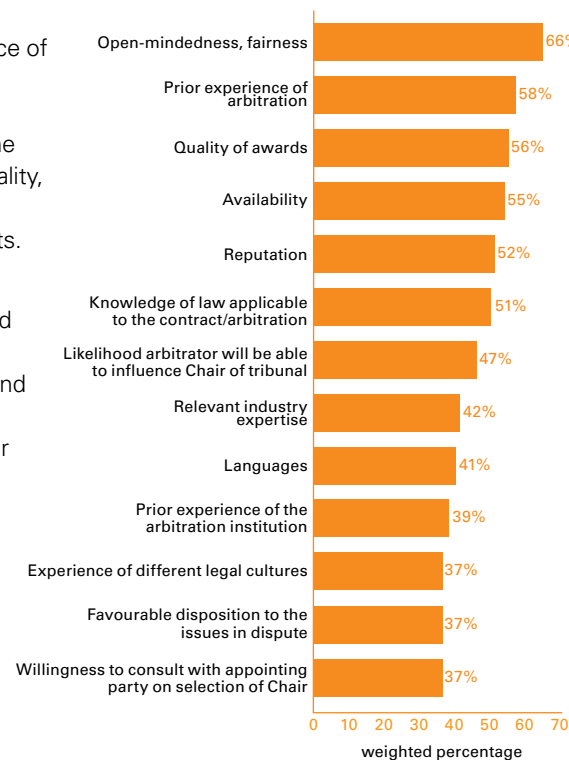
Interviewees also emphasised the importance of 'soft skills', including the ability to work well with the other members of the panel, the parties and their lawyers and generally adopt a helpful and friendly demeanour. Interviewees said that soft skills can have a positive impact on the efficiency (and hence cost) and the overall experience of conducting an arbitration.

## 5 Appointment of arbitrators contd.

The factors driving the choice of co-arbitrators track those mentioned above: the most important factor is open-mindedness and fairness (66%), followed by prior experience of arbitration (58%), quality of awards (56%), availability (55%), reputation (52%) and knowledge of the applicable law (51%). The preferences for pro-activeness, commerciality, languages and relevant industry expertise noted above are also mirrored in the results.

Two additional factors were added to the question about co-arbitrators: the likelihood the arbitrator will be able to influence the Chair of the tribunal (which scored 47%) and their willingness to consult with their appointing party on the selection of a Chair (scoring 37%).

**Chart 19: Top influences on choice of co-arbitrators**



### Have corporations ever been disappointed by the performance of an arbitrator?

A very significant 50% of respondents said that they have been disappointed by the performance of an arbitrator. The remaining 50% of respondents said they had not been disappointed.

We asked respondents to rank the top three reasons for their disappointment, which we weighted to find what factors have been most problematic for respondents (as a percentage of the total score allocated by respondents across all factors).

The top reason respondents were disappointed with an arbitrator was a 'bad decision or outcome' (20%), followed by excessive flexibility or failure to control the process (12%). 11% said the arbitrator caused delays and 9% each said that there was poor reasoning in the award and the arbitrator lacked knowledge or expertise in the subject matter of the dispute. 8% said that the arbitrator was tardy in rendering the award.

Lack of independence, bias and awarding oneself excessive fees were other concerns expressed by respondents.

**Chart 20: Top reasons for corporations' disappointment with arbitrator performance**



### Do corporations feel that they are able to make informed decisions about arbitrators?

We asked corporations whether they routinely gather information about potential arbitrators whom they may appoint to arbitrate potential disputes: 68% do not. A number of interviewees said that this is not cost efficient particularly in light of the relatively small number of arbitrations in which most companies become involved. Corporate counsel normally rely on their external counsel to provide up to date information and a number of arbitrator CVs to choose from when a dispute arises.

Reflective of this, 68% of respondents said they do not feel they have enough information to make an informed choice about arbitrators independent of input from external counsel, but with the input 67% feel able to make an informed choice. However, 67% still seems rather low considering the importance of making a good appointment.

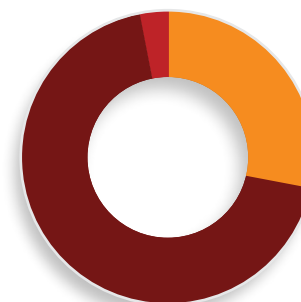
It follows that the choice of the arbitrators is a matter very much dependent on the

recommendation and advice of external counsel. This raises a potential issue for the 'arbitration system' as a whole. It may be questioned whether the influence of external counsel over arbitrator selection gives those firms disproportionate influence over the participants in the process, making them virtually 'gatekeepers'. This may reduce the diversity of the arbitration community and mean that undue importance is placed on arbitrator relationships with law firms.

The response to this issue may come from the user side. It was apparent from the questionnaire responses and the interviews that some corporate counsel would like to take a greater role in arbitrator selection and would like to see greater transparency regarding arbitrators and have increased ability to influence appointment decisions.

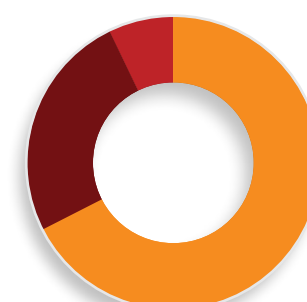
When we asked respondents what should be done to increase or improve the information available about arbitrators, corporate counsel proposed a number of ideas for increasing transparency about arbitrator skills, experience and arbitration track records: for example, a joint publication by arbitration institutions with

**Chart 21: Do corporations gather their own information about arbitrators for potential appointment in future disputes?**



Yes	28%
No	68%
Don't know	3%

**Chart 22: Do corporations have enough information to make an informed choice about the appointment of arbitrators, with information from external counsel?**



Yes	67%
No	25%
Don't know	7%

# 5 Appointment of arbitrators contd.

biographies of arbitrators, a public rating system for arbitrators, published awards and published information about the enforcement of awards (if not protected by confidentiality), information available from institutions about arbitrators on request, more specific information about duration and costs, template CVs and an independent manual of available arbitrators.

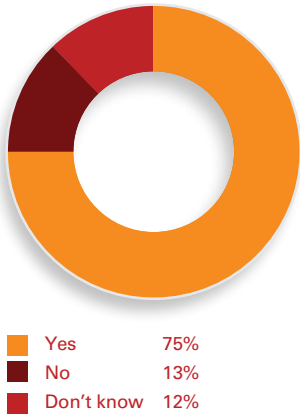
Availability was a specific issue focused on by respondents and interviewees: many felt that arbitrators should be required to publish information about their pending commitments (without the need to mention specific case names) so parties could have a better idea of the time the arbitrator would have to commit to the matter, as this is a factor that can lead to delays.

## Would corporations like to assess arbitrators at the end of a dispute?

There is very strong support for the review or assessment of arbitrators at the end of a dispute: 75% said they would like to be able to do this.

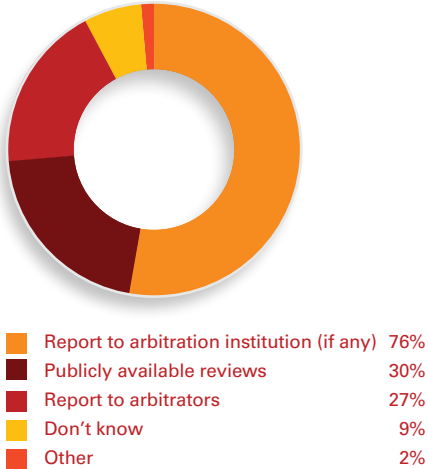
This finding provides further support for the view that corporations strongly wish to develop a more influential role in the selection of the tribunal. Corporations are increasingly becoming more self-aware of their strong position as the main ‘consumers’ of the arbitration product and thus they feel that they should have more input into this decision. They also have inventive suggestions as to how they may contribute.

Chart 23: Would corporations like to be able to assess arbitrators at the end of a dispute?



Respondents were equally clear on how they would like to assess arbitrators: 76% would like to submit a report to the arbitration institution (if one is used); while 30% said they would like to submit publicly available reviews. Some interviewees thought that the institution would be well placed to receive this information and could make decisions about whether a particular arbitrator should be retained on their list and could provide feedback to the arbitrator.

Chart 24: How would corporations like to assess arbitrators? (based on multiple responses)



A minority of respondents and interviewees expressed reservations about assessing arbitrators. A number of them doubted the ability of parties (whether successful or not) to make an objective assessment of arbitrators. However, some of them accepted that reviews could be based on more objective data such as case management style, duration and costs that could provide valuable information to potential subsequent users.

# 6 Confidentiality

## Confidentiality in international arbitration is important to corporations but it is not the essential reason for recourse to arbitration.

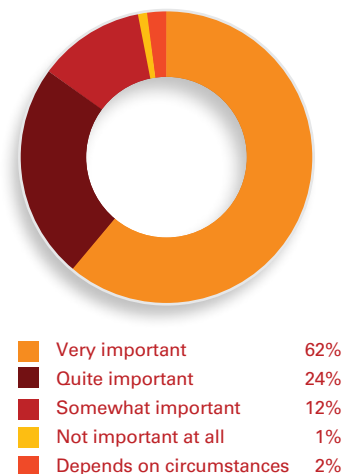
### Summary

- The responses indicate that confidentiality is important to users of arbitration, but it is not the essential reason for recourse to arbitration.
- 50% of respondents erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement and 12% did not know whether arbitration is confidential in these circumstances.

### How important is confidentiality to corporations?

62% of respondents said confidentiality is 'very important' to them in international arbitration.

**Chart 25: Importance of confidentiality in international arbitration**

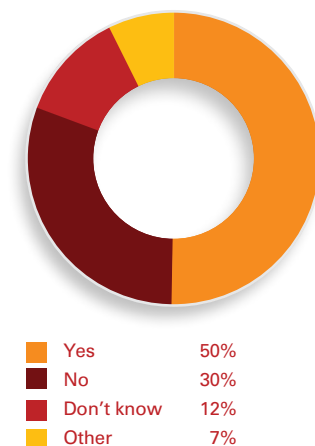


A number of interviewees, however, noted the various obligations of corporations to report to shareholders, make disclosures in their annual accounts and reports and otherwise announce significant information to the market (in the case of publicly listed companies) that may cut across confidentiality in its strictest sense. Corporate counsel accept that this can make confidentiality 'porous', but a number said that often commercial arbitration matters are not of great interest to outsiders and do not involve sensitive commercial information. Therefore, in many cases confidentiality is not an extremely serious concern.

Respondents were also asked whether they consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement: 50% said they consider it is confidential and 30% do not. While international arbitration is private, it is not necessarily confidential and may not be considered so by the counterparty. Corporations may wish to consider including specific clauses relating to the confidentiality

of arbitration to protect their commercial interests.

**Chart 26: Do corporations consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement?**



## 6 Confidentiality contd.

### Are the considerations relating to confidentiality different when one party is a state?

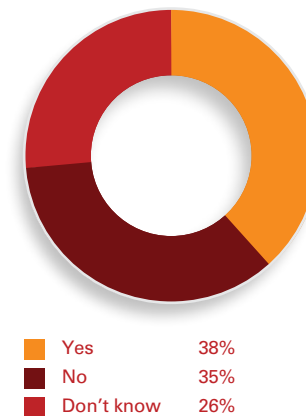
We asked respondents whether the considerations regarding confidentiality are different when dealing with a state party: 37% said yes (although a further 37% said they did not know). We received a broad range of responses: some respondents believe that states may seek greater confidentiality (on the basis of state security and similar grounds), whereas others think that states may seek to breach confidentiality due to their disclosure obligations (e.g. freedom of information). Some respondents also noted that there is usually greater media interest in matters involving states and greater risk of leaks.

Others consider that when states are engaging in commercial contracts they should be subject to the same obligations of confidentiality as private parties.

### What is the impact of confidentiality on the decision to have recourse to arbitration?

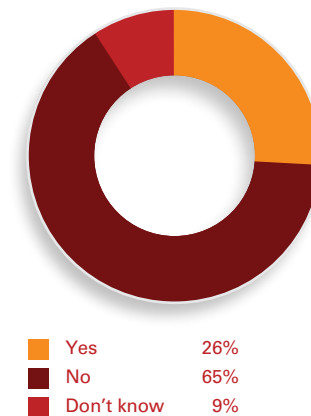
Anecdotally, confidentiality has been frequently touted as one of the leading attractions, if not the leading attraction, of arbitration. To test this assumption, we asked corporations whether they would still use arbitration if it did not offer the potential for confidentiality. 38% said they would still use it and 35% said they would not. This suggests that confidentiality is highly important but not the only reason parties use arbitration.

Chart 27: Would corporations still use arbitration if it did not offer the potential for confidentiality?



Respondents cited a number of the reasons they would still use arbitration: the ability to appoint arbitrators, the absence of appeals, procedural flexibility, enforceability of awards and its value in situations where the national court alternatives lack independence, impartiality and predictability. In certain circumstances arbitration is also perceived to be faster than state court litigation.

Chart 28: Is lack of confidentiality in state court litigation a principal reason for choosing arbitration?

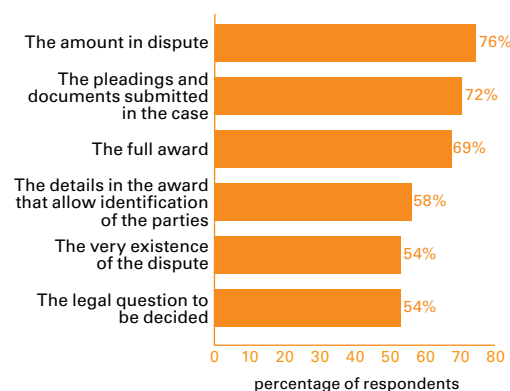


The responses reflect the broad range of reasons parties decide to use arbitration. In most circumstances, corporations will consider on a case by case basis which form of dispute resolution is appropriate in the particular circumstances.

## What should be kept confidential?

Respondents identified the key aspects of the arbitration that they think should be kept confidential: top choices included the amount in dispute (76%), the pleadings and documents submitted in the case (72%) and the full award (69%).

**Chart 29: Top aspects of the arbitration that should be kept confidential (based on multiple responses)**



It was generally noted in interviews that arbitration is increasingly 'porous' as there is a greater public interest in arbitration and "leaks to the press" seem increasingly common (particularly in cases involving a state party, as noted above, or high profile corporations).

A number of interviewees said that they are pragmatic about what is released. Many said that it would not be particularly problematic if information that is not of a commercially sensitive nature (e.g. intellectual property or trade secrets) is released.

Some interviewees said that they would like to have access to more awards, in order to understand the arbitral process better and to look at the previous decisions of potential arbitrators, but they acknowledged that this may be inconsistent with their desire for confidentiality of their own awards.

61% of respondents consider that the arbitration institution, the lawyers involved, the national courts, the parties and the tribunal should all bear the responsibility of keeping the arbitration confidential. Approximately 40% of respondents each believe that the primary responsibility should be borne by the arbitration institution or the lawyers involved.



# 7 Time and delay

**The main causes of delay are within the control of the parties, although corporations feel that arbitrators and arbitration institutions are best placed to reduce delay.**

## Summary

- Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.
- According to respondents, parties contribute most to the length of proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.

## What aspects of the arbitration contribute most to delay?

We asked respondents to rank the top three stages of the arbitration that contribute to delay, which we weighted to find what factors have the greatest impact on the length of proceedings (as a percentage of the total score allocated by respondents across all factors).

According to respondents, disclosure of documents is the longest stage (24%), followed by written submissions (18%), the constitution of the tribunal (17%) and hearings (15%). It is noteworthy that these factors are very much within the control of the parties. On the other hand, in the interviews, particularly in North America, it was noted that corporate users are not happy with the time it takes between the final hearing and the rendering of the award. Most interviewees said that they would consider it appropriate for an award to be delivered around three to six months after the close of hearings, whereas it is common for awards to be rendered more than 12 months after the close of hearings (with some 'horror stories' of awards not being rendered for up to three years).

**Chart 30: Aspects of the arbitration that contribute most to length of proceedings**



Respondents believe that the parties contribute most to the length of proceedings (weighted score of 31%), followed by the tribunal (23%) and external counsel (21%). However, 30% consider that the tribunal is in the best position to render arbitration expeditious (by keeping themselves and the parties to the timetable) and 29% feel that the arbitration institution is in the best position to do this. 19% believe that the parties are in the best position to render arbitration expeditious.

Control of proceedings was an issue raised by a number of interviewees and it was felt by many to be key to questions of cost and delay. A number of interviewees feel that arbitration must become more streamlined and disciplined to provide an entirely effective form of dispute resolution. It was pervasive throughout the questionnaire results and the interviews that parties prefer pro-active arbitrators who take control of proceedings. This is seen as an effective mechanism to limit cost and delay and reduce the risks of later challenge. Parties also prefer pro-active arbitration institutions that firmly adhere to deadlines and communicate effectively with the parties.

# Appendices



The research for this study was conducted from January to August 2010 by Ms. Penny Martin BA, LLB (Hons), LLM (Dist), White & Case Research Fellow in International Arbitration, Barrister and Solicitor of the Supreme Court of Victoria and the Federal and High Courts of Australia, together with Professor Dr. Loukas Mistelis, LLB (Hons, Athens), MLE (Magna cum Laude), Dr. Iuris (summa cum laude) (Hanover), MCI Arb, 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. They were assisted by Dr. Stavros Brekoulakis, LLB (Athens), LLM (London), Senior Lecturer in International Dispute Resolution, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London.

An external focus group comprised of senior corporate counsel, external counsel and academics provided comments on the draft questionnaire.

The research was conducted in two phases: the first quantitative and the second qualitative.

**Phase 1:** an online questionnaire comprising 78 questions completed by 136 respondents from February to August 2010. Respondents were general counsel, heads of legal departments, specialist legal counsel and regional legal counsel. The questionnaire responses were analysed to produce the statistical data presented in this report. Information taken solely from this group is referred to as from ‘questionnaire respondents’ or ‘respondents’ throughout this report.

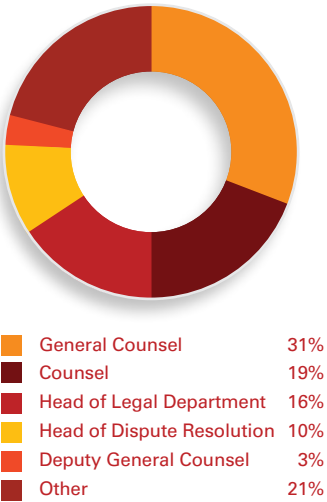
**Phase 2:** 67 face-to-face or telephone interviews with corporate counsel from May to August 2010. Interviews were based on a set of guideline questions and ranged from 15 minutes for phone interviews to 90 minutes for interviews in person. Interviews were conducted in London, Paris, Mumbai, Florence, Milan, Istanbul, Tokyo, Beijing, Houston, New York, Washington, DC, Rio de Janeiro, Sao Paulo, Dubai, Frankfurt, Moscow, Warsaw and other locations. A significant number of interviewees completed the questionnaire

prior to, or during, the interview. The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, contextualise the findings and cast further light on particular issues raised by the survey. Information taken solely from this group is referred to as from ‘interviewees’ or ‘interviews’ throughout this report.

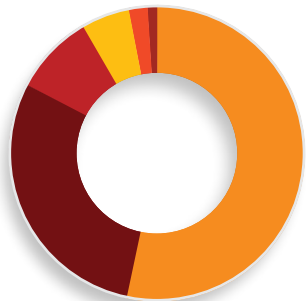
The following charts illustrate the composition of respondents and, where applicable, interviewees by: position, company turnover, industry sector and geographic location. The final chart indicates the proportion of respondents/interviewees based in emerging markets.

For the 2010 survey we sought to expand the range of corporations that had participated in previous years and also expand the survey into new geographical areas and emerging markets. We identified questionnaire and interview invitees from the lists previously used for the 2006 and 2008 surveys (as updated), supplementing them with further contacts obtained through internet research based on a list drawn from the *Forbes Global 2000* and other regional company rankings.

**Chart 31: Position of respondents**

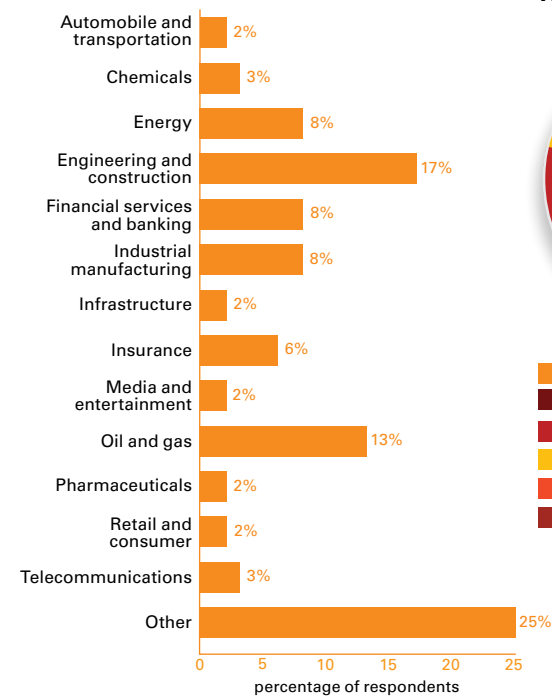


**Chart 32: Annual turnover of respondent corporations**

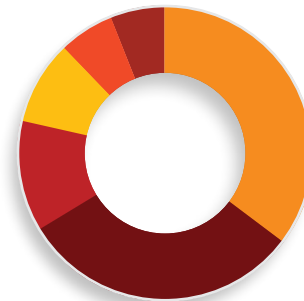


More than US\$5 billion	53%
Between US\$500 million and US\$5 billion	29%
Between US\$100 million and US\$500 million	9%
Between US\$10 million and US\$100 million	5%
Between US\$1 million and US\$10 million	2%
Less than US\$1 million	1%

**Chart 33: Respondents by industry sector**

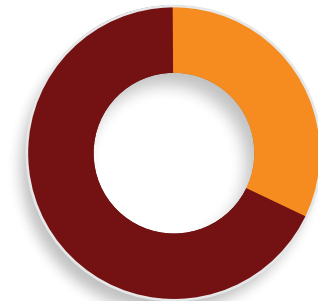


**Chart 34: Geographic location of respondents/interviewees**



Asia	35%
Western Europe	31%
North America	12%
Africa and Middle East	9%
South and Central America	6%
Eastern Europe	6%

**Chart 35: Respondents/interviewees based in emerging markets<sup>7</sup>**



Emerging markets	32%
Non-emerging markets	68%

7. The emerging markets in the sample were Argentina, Brazil, Chile, Czech Republic, Egypt, Hungary, India, Indonesia, Mexico, People's Republic of China, Poland, Romania, Russian Federation, South Africa, Turkey and United Arab Emirates. These countries appear in at least one of the lists of emerging markets published by the FTSE Group, MSCI Barra and Dow Jones.

# Methodology contd.

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We sought as much as possible to have a balanced invitee sample across varying regions, industries and company sizes. We sent out questionnaire and/or interview requests by mail and where possible by email. Follow up emails were sent seeking further responses. Information about the questionnaire was distributed through a number of channels including, corporate counsel member organisations, several trade journals (such as *Global Arbitration Review*) and websites, such as the Chartered Institute of Arbitrators (CI Arb).

To encourage further responses from harder to reach regions (such as Africa, South America, Middle East, Eastern Europe and Central Asia), we conducted intensive multiple follow up telephone calls in mid-2010. We also carried out intensive follow up of companies in North America to seek further responses. Finally, we sought the names of appropriate contacts from questionnaire respondents and interviewees and approached those contacts.

# Glossary

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

**CIETAC** – China International Economic and  
Trade Arbitration Commission

**CRCICA** – Cairo Regional Centre for  
International Commercial Arbitration

**DIAC** – Dubai International Arbitration Centre

**DIFC LCIA Arbitration Centre** – Dubai  
International Financial Centre/London Court of  
International Arbitration Arbitration Centre

**DIS** – The German Institution for Arbitration  
(Deutsche Institution für Schiedsgerichtsbarkeit)

**HKIAC** – Hong Kong International Arbitration  
Centre

**ICC** – International Chamber of Commerce,  
International Court of Arbitration

**ICSID** – International Centre for Settlement of  
Investment Disputes

**JCAA** – Japan Commercial Arbitration  
Association

**LCIA** – London Court of International  
Arbitration

**New York Convention 1958** – Convention on  
the Recognition and Enforcement of Arbitral  
Awards, New York, 1958

**SIAC** – Singapore International Arbitration  
Centre

**SCC** – The Arbitration Institute of the  
Stockholm Chamber of Commerce

**Swiss Chambers** – Swiss Chambers' Court of  
Arbitration and Mediation

# School of International Arbitration, Queen Mary, University of London

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The School of International Arbitration (SIA) is a centre of excellence in research and teaching of international arbitration and is part of the Centre for Commercial Law Studies (CCLS) at Queen Mary, University of London.

The School was established in 1985 to develop international arbitration as an independent subject and specialist area and to promote advanced teaching and research in the law and practice affecting international arbitration. Today the School is widely acknowledged as the leading teaching and research centre on international arbitration in the world. The School offers a range of international arbitration courses including: specialist LLM modules, postgraduate diplomas, professional courses and training and one of the largest specialist PhD programmes in the world.

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The impact of the School, both in terms of research and teaching, has been constantly increasing over the years and it is now generally considered a leading contributor to the science of international arbitration and litigation.

Further, the School has close links with major arbitration institutions and international organisations working in the area of arbitration. It also offers consulting services and advice to governments and non-governmental agencies which wish to develop a non-judicial settlement of dispute mechanism as well as training for lawyers in private practice, in-house lawyers, judges, arbitrators and mediators.

Further information can be obtained on the School's website at <http://www.arbitrationonline.org/>.

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We have significant arbitration practices in New York, Washington DC, London, Paris, Stockholm, Frankfurt, Moscow, Singapore, Tokyo and elsewhere. All of our arbitration practices are highly ranked by leading independent legal directories and work together as a fully-integrated global team. Arbitrations are often staffed by lawyers from different offices, depending on the applicable law and arbitral institution, industry, language and cultural requirements. Our lawyers have conducted arbitrations in Arabic, Czech, Dutch, English, French, German, Russian, Spanish, Swedish and Thai.

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