Introduction to International Commercial Arbitration and ICC Arbitration

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Housekeeping

- Introductions
- Materials
- Additional materials
- Assessment

Introduction

- What is arbitration? Blacks Law Dictionary:

  "*A method of dispute resolution involving neutral third parties who are usually agreed to by the disputing parties and who's decision is binding*"

- Most popular mechanism for resolving international commercial disputes, "the norm".

- Offers flexibility, neutrality, finality, and enforceability

Why companies choose International Arbitration

- **Queen Mary Law School study on international arbitration:**
  - Empirical study of international arbitration users: 2006, 2008 & 2010, 2012.
  - Surveyed legal departments of 100 major global companies
  - Written survey & face-to-face meetings
  - Full reports available free from QM website
- **Findings:**
  - 88% use international arbitration, 86% satisfied
  - Why arbitrate? Flexibility, enforcement of outcomes, expertise
  - 86% prefer institutional arbitration to ad hoc arbitration
  - ICC remains the most popular (50% prefer ICC; second most popular preferred by 16%)
- **Look at summary of W&C/QM 2010 survey**

Types of Commercial Arbitration

- this course focuses on international commercial arbitration, i.e. New York Convention ("**NYC**") arbitration
- Not: Domestic arbitration or ICSID arbitration
- NYC arbitration is by far the most common, even where states/ state entities are involved
- Don't forget non-NYC private commercial arbitration, i.e. where the NYC does not apply

History

- Natural evolution : tribal elder concept
- Ancient Greece; ancient Rome; ancient China, etc
- **George Washington's will :**

  "*My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants – each having the choice of one – and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.*"
- Alabama Claims Arbitration – first international arbitration as we know them today. Very interesting story

History

- Rapid growth with globalization in twentieth century. ICC role in Geneva Conventions, and ultimately in NYC
- Pressure by trade groups, notably the ICC
- 1923 Geneva Protocol on Arbitration Clauses
- 1927 Geneva Convention on the Execution of Foreign Arbitral Awards
- World War II sparks push towards improved international convention
- 1958 New York Convention:
  - facilitates the recognition and enforcement of foreign arbitral awards and agreements
  - Initially 25 states, now some 145 parties to the NYC

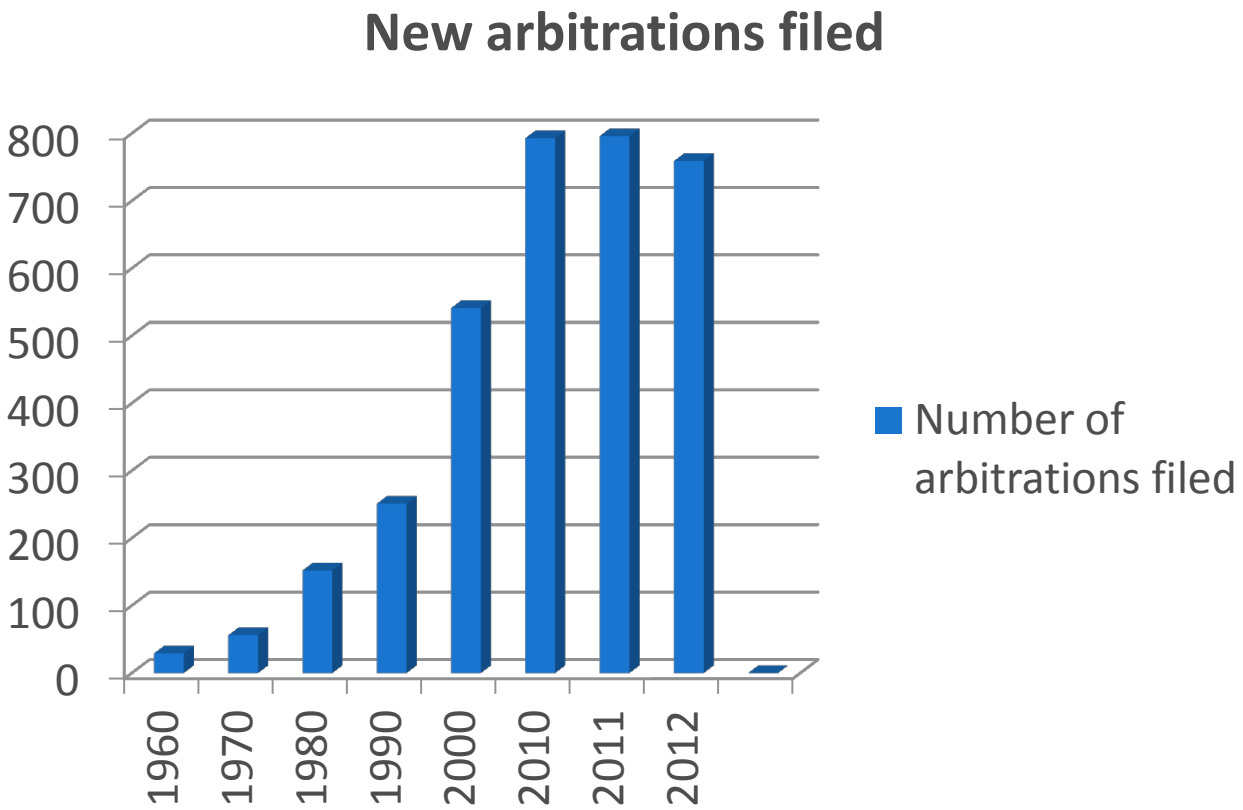
History

- Singapore High Court decision of Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd:

  "*the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad*."

History

NYC's success can be seen through ICC statistics:



History cont.

- 1965 ICSID Convention: world bank, states. (Romesh Sunday)
- 1966 United Nations Commission on International Trade Law (UNCITRAL)
- 1976 UNCITRAL Arbitration Rules (revised version in 2010)
  - “ad hoc” arbitration rules: what does that mean?
  - Have inspired virtually all modern arbitration rules as well as the UNCITRAL Model Law
- 1985 UNCITRAL Model Law on International Commercial Arbitration (revised version in 2006) (“ML”)
  - What is a “model law”?
  - Contrast with international conventions like NYC, ICSID convention, CISG…

History

- Indian Supreme Court in a decision of 2005 summarised UNCITRAL's purpose in creating a harmonised arbitration law:

  "*All these [features of the Model Law] aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that trade and commerce is not affected on account of litigations before a Court. [The] United Nations established [UNCITRAL] on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded [UNCITRAL] as a medium which could play a more active role in reducing or removing the obstacles. [UNCITRAL], therefore, was given a mandate for progressive harmonization and unification of the law of International Trade.*"

History

- About 60 states have used the ML to inspire their arbitration law.
- Important states which have not adopted ML: France, Switzerland, most US states and US Federal law, England and Wales
- **Interpretation of ML.** Article 2A of the 2006 version:

  1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

  2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

History

- Also:
  - London Court of International Arbitration: 1892 "*this Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.*"
  - Chartered Institute of Arbitrators: 1915
  - ICC: 1919 "merchants of peace"
  - ICC International Court of Arbitration (1923)
  - ICCA (1961)
  - IBA
  - Various other bodies such as Asian arbitral institutions between about the 1960's and 1990's

Difference between Arbitration and other forms of Dispute Resolution

- Arbitration vs. litigation
  - Source of jurisdiction: party choice v. jurisdiction rules
  - Choice of arbitrators v assigned judge
  - Party autonomy on procedure v fixed rules. Can agree cheap and fast or long and thorough
  - Confidentiality possible v generally open to public
  - Appeal v finality
  - International enforcement v difficult to enforce

Difference between Arbitration and other forms of Dispute Resolution

- Arbitration vs. ADR ("amicable" or "alternative" dispute resolution)
  - International arbitration is not "alternative" but is the norm. Not very amicable either
  - Juridical (decision imposed) v must get a settlement/ agreement
  - Parties cannot be compelled to participate in ADR
  - Some control (due process, independence etc) v complete flexibility
  - Enforcement of outcome v not enforceable (only contractually)
  - Notion of awards by consent?
  - Combining ADR and arbitration?

Difference between Arbitration and other forms of Dispute Resolution

- International vs. domestic arbitration
  - Can be governed by different laws a the seat of arbitration; at least different provisions or different requirements for domestic
  - Domestic laws may leave less room for the parties to determine the arbitral procedure and applicable laws; (ii) provide more possibilities for recourse, such as appeal, from the resulting award; and (iii) permit a greater degree of domestic court involvement.
  - How to define an international as opposed to domestic arbitration
    - How would you define it?

Difference between Arbitration and other forms of Dispute Resolution

- Article 1(3) of the Model Law:

"*An arbitration is international if:*

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

Key concepts in International Arbitration

- Arbitration agreement
  - Required for an arbitration
  - Effectively it is specifically enforceable (Art II NYC; Art 8 ML)
- Arbitrators
  - Chosen by parties
  - Virtually anyone can sit; no restrictions
- Seat of arbitration (or place)
  - Important legal link
  - Chosen by parties
  - No need for connection with parties or underlying dispute; no need to go there

Key concepts in International Arbitration

- Party autonomy and procedure
  - Parties choose everything from whether to arbitrate, where, how, which institution, whether to have an institution at all; place of arbitration, governing law: EVERYTHING
  - Can choose to have no law: ex aequo et bono
- Finality of outcomes
  - Some laws allow limited appeal (e.g. England)
  - Most laws only allow review based on procedural grounds and public policy (see e.g. Art 34 ML)
  - Generally cannot opt into further appeals (e.g. US Supreme Court 2008 Hall St v Mattel)
- Enforcement of arbitration agreements and awards
  - NYC and arbitration laws for agreements
  - NYC for awards

International Arbitral Institutions

- Do not need one (except mainland China)
- Matter of choice whether and which
- Great variation in size, approach, quality
- Be very cautious about choosing smaller ones
- Larger ones (especially ICC) are also important industry players organising publications, conferences and training, producing notes and guidelines etc.

International Arbitral Institutions

- As Thomas Carbonneau explains:

  "[Ad hoc arbitration*] places a substantial burden upon the parties to cooperate in the circumstances of dispute. The expectation of cooperation is likely to be unrealistic. Moreover, arbitral institutions have a good professional track record and have significant experience in the administrative aspects of arbitrations. Unless the parties themselves have substantial expertise in the arbitration process, institutional arbitration becomes a virtual necessity. Also, an award rendered under the auspices of a recognized arbitral institution may have a greater likelihood of enforcement for reasons of institutional reputation. The real question involves choosing among the arbitral institutions.*"

International Arbitral Institutions

- PWC/ QM study mentioned earlier found:
  - 86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations'.
  - ICC is the preferred institution, with 45% of participating corporations preferring the ICC. This was followed by the AAA-ICDR (16%) and the LCIA (11%)
  - In the 2010 survey, the preference for ICC increased to 50% of all participants

International Arbitral Institutions

- Services offered by institutions at the higher supervised end may include:
  - checking that there is a prima facie arbitration agreement (certain institutions only)
  - (appointing arbitrators if a party fails to appoint one, or if the two party-appointed arbitrators(or the parties themselves) cannot agree on the chair-person (or sole arbitrator)
  - removing and replacing an arbitrator who has become unable to complete his or her role for any reason
  - deciding challenges as to the independence and/or impartiality of an arbitrator;
  - keeping an up-to-date file on the arbitration proceedings
  - scrutinising the arbitration award before it is finalised (certain institutions only)
  - managing the administrative and financial aspects of the arbitration.

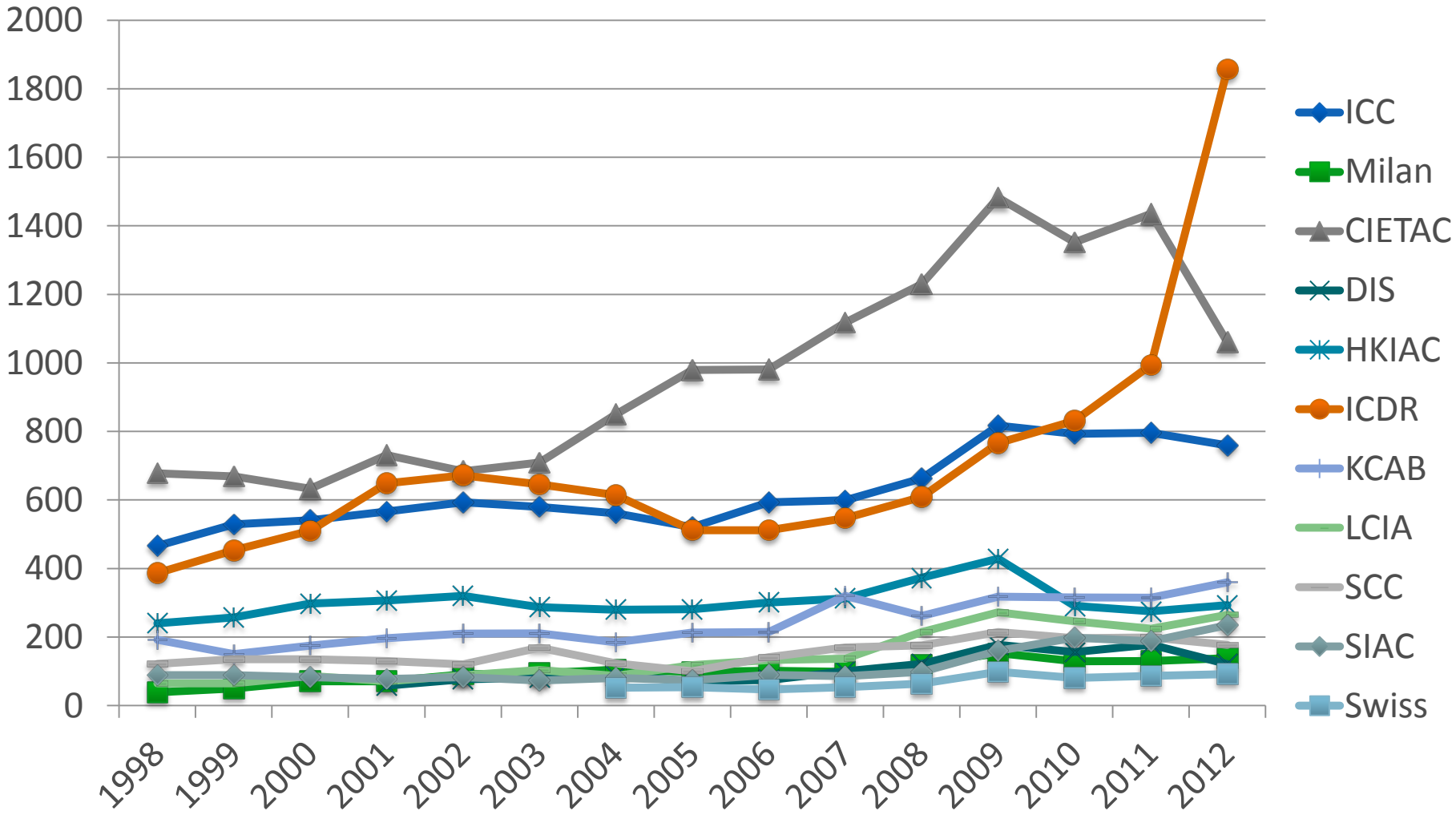
Sources of International Arbitration Procedural "Law"

- Very different from domestic legal practice
- National/domestic sources
  - Local arbitration laws including statutes or codes and case law
  - At the place of arbitration (most important) and at the place of enforcement
- International legal sources
  - International conventions, ie mainly NYC
  - Some regional conventions, eg Europe
  - Free Trade Agreements and investment treaties such as BITs

Sources of International Arbitration Procedural "Law"

- Quasi legal and supra national sources
  - Soft law
  - Arbitral rules (even if not directly applicable can be used for inspiration)
  - Model laws (ditto)
  - Learned publications (articles, books)
  - Guidelines (e.g. IBA conflicts guidelines and rules of evidence; reports and guidelines of the ICC Commission on Arbitration)
  - Do these decrease the flexibility of arbitration?
  - Seminal cases from different jurisdictions around the world
  - Published arbitral awards (although generally confidential in commercial arbitration they can be published in a sanitised format)

Number of New Arbitrations for Major Arbitral Institutions



Number of New Arbitrations
Major Arbitral Institutions

Total cases

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
ICC	466	529	541	566	593	580	561	521	593	599	663	817	793	796	759
Milan	39	50	71	71	91	95	105	99	102	99	118	153	129	130	138
CIETAC	678	669	633	731	684	709	850	979	981	1118	1230	1482	1352	1435	1060
DIS				58	77	81	87	72	75	100	122	177	156	178	121
HKIAC	240	257	298	307	320	287	280	281	301	313	373	429	291	275	293
ICDR	387	453	510	649	672	646	614	512	512	547	609	766	831	994	1857
KCAB	192	150	175	197	210	211	185	213	215	320	262	318	316	315	360
LCIA	65	65	87	71	88	104	87	118	133	137	215	272	246	224	265
SCC	122	135	135	130	120	169	123	100	141	170	176	215	197	199	177
SIAC	89	89	83	78	83	73	81	74	90	86	99	160	198	188	235
Swiss							52	54	47	54	64	99	81	87	92

International Chamber of Commerce (ICC)

- ICC Founded in 1919 by entrepreneurs ("Merchants of Peace"), ashes of WW1
- Realised importance of resolving international commercial disputes
- ICC International Court of Arbitration established 1923
- First case: Feb 1921 (before Court established). USA v French Co. Unlawful use of trade mark/ breach of non-compete clause
- Today global dispute resolution is more about fostering international trade ; but still examples of contributing to world peace

Experience of ICC Court

- Over 20,000 arbitration cases since 1923
- 2013: 767 new cases involving 2120 parties; 1329 arbitrators confirmed or appointed; 471 arbitral awards
- A total of 1,500 ongoing procedures
- States/ Govt. entities: over 10% of the parties
- Growing number of investment disputes, BITs

Case values as at end of 2013:

- Total value of cases: US$ 153 Bil
- Average value: US$ 81 Mil
- Small cases: 22% less than US$ 1 Mil

Geographic spread of case load

- In 2013:
  - The 2120 parties came from 138 different countries
    - Europe: 952 (44,9%), Asia & Pacific: 511 (24,1%)
    - Americas: 483 (22,8%), Africa: 174 (8,2%)
  - The 1329 arbitrators came from 86 different countries
    - United Kingdom: 170 (12,79%)
    - Switzerland: 141 (10,61%)
    - Lebanon: 24 (1,8%)
  - The “seats” of arbitration were in 104 different cities in 63 different countries
    - European cities: 79,1 % (Paris 118, London 70, Geneva 56)
    - Asian cities: 11,84% (Hong Kong 14)

Arbitrators in 2013 - Leading nationalities

Country of origin	No. of appointments/ confirmations	% of total number of appointments/ confirmations
United Kingdom	170	12.79%
Switzerland	141	10.61%
France	128	9.63%
USA	93	7.00%
Germany	74	5.57%
Brazil	51	3.84%
Singapore	47	3.54%
Austria	45	3.39%
Australia	39	2.93%
Belgium	34	2.56%
Canada	33	2.48%
Italy	33	2.48%
Mexico	31	2.33%
Spain	31	2.33%

Places of arbitration Top cities selected in 2013

City	Number of cases
Paris	118
London	70
Geneva	56
Zurich	34
Singapore	33
New York	24
Hong Kong	14
Stockholm	14
São Paulo	12
Vienna	11
Frankfurt/Main	11

Overview of Arbitration Rules

- Short, simple, flexible Rules (new version a bit longer)
- Quality control by Court, with assistance from Secretariat
- Control of arbitrators
  - Confirmation/ appointment/ challenge etc.
  - Remove non-performing arbitrators
- Terms of Reference
- Prima facie jurisdictional objections
- Continuous monitoring of proceedings
- Time control: Court closely monitors time; pressure re awards
- Full cost control
- Award scrutiny – all draft awards scrutinised

ICC Court & Secretariat Vs. Tribunal

Court & Secretariat	Arbitral Tribunal
• Does not settle disputes, rather supervises the work of the Arbitral Tribunal • Basic procedural decisions • Appointments, confirmations, challenges, replacements of arbitrators • Control of time limits • Scrutiny of Awards • Case budget	• Settlement of the dispute • Management of the case in consultation with the parties • Rapidity and diligence • Contradictory process • Interim/Partial and Final Awards

Cost Control

- Financial aspects exclusively dealt with by ICC (avoid problems like in ICT Pty Ltd v Sea Containers Ltd [2002] NSWSC 77)
- Lump sum system for arbitrators' fees and ICC's costs
  - Based on the value at stake
  - Predictable
  - But: flexibility when special circumstances require
  - Constant monitoring by Secretariat
- Close attention to time & costs : Commission on Arbitration's Task Force, plus special provisions in new Rules

Time Control

- Time limit for Terms of Reference (“TOR”) : two months from receipt of the file by the Arbitral Tribunal
- Time limit for Award: fixed by Court according to needs, if not default of six months from date of signature of TOR or its approval by the Court
- Role of the Court and Secretariat generally: continuous monitoring, particularly after closure of proceedings

Arbitrator Appointment Process

- About 75% nominated by parties or co-arb for confirmation by Court or Sec Gen
  - Bases for non-confirmation: independence (& new Rules impartiality); availability; lacking skills (eg specifically agreed skills or language skills)
  - Also past performance as ICC arbitrator
  - Does non-confirmation require a party objection?
  - Declaration of independence and availability form
- About 25% appointed by Court via a National Committee
  - Court may accept or reject NC proposal; normally accepted but can be rejected
  - Stricter on conflicts of interest and availability; very strict on past performance
  - New Rules: more flexibility for the Court to appoint directly

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