TRENDS IN INTERNATIONAL CONSTRUCTION ARBITRATION

A Research Perspective Issued by the

Navigant Construction Forum™

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Building on the lessons learned in construction dispute avoidance and resolution.™

Notice

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Navigant Construction Forum™

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Navigant is the leading provider of expert services in the construction and engineering industries. Navigant's senior professionals have testified in U.S. Federal and State courts, more than a dozen international arbitration forums including the AAA, DIAC, ICC, SIAC, ICISD, CENAPI, LCIA and PCA, as well as ad hoc tribunals operating under UNCITRAL rules. Through lessons learned from Navigant's forensic cost/quantum and programme/schedule analysis of more than 5,000 projects located in 95 countries around the world, Navigant's construction experts work with owners, contractors, design professionals, providers of capital and legal counsel to proactively manage large capital investments through advisory services and to manage the risks associated with the resolution of claims or disputes on those projects, with an emphasis on the infrastructure, healthcare and energy industries.

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Purpose of Research Perspective

Navigant and the Navigant Construction Forum™ were recently tasked to research and synthesize the current status and trends related to arbitration in the international construction arena. A majority of international construction contracts specify arbitration in the Disputes clause. Almost all international construction contracts specify the governing law of the contract in the event of a dispute. Most international contracts also name the arbitral institution under which the dispute will proceed; the seat of the arbitration; and the language in which the hearings will be conducted.

Over the past few years there have been changes related to international construction arbitration. Among these changes are impacts to the typical duration and cost of arbitration; new arbitral institutions; more locations globally in which to hold hearings; etc. Some of these changes may cause those involved in international construction to re-examine their positions on arbitration.

After examining recent literature concerning international construction arbitration to form a picture of how it has recently changed, the Navigant Construction Forum™ also found a number of other potential future changes currently being discussed or considered in the international arbitration community. These developing trends – changes under consideration and in active debate – are also identified in this research perspective.

Abstract

International arbitration is a transnational dispute mechanism typically involving disputes between parties from different nations often performing work in yet another nation. A UK contractor constructing an ore processing facility in a sub-Saharan African nation on behalf of a Canadian minerals company, who files a claim for UK£1.45 million and seeks arbitration when the project owner refuses to settle, is an example of an international arbitration. As the world's economy has become more globalized, more corporations are working internationally. Over the past two to three decades, disputes on construction projects have become larger, more complicated and more common. A literature survey indicates that arbitration is the preferred dispute resolution mechanism for international corporations rather than transnational litigation. As the number of arbitration case filings has increased so has the number of arbitral institutions (which now number at least 28) and the seats of arbitration. Perhaps in reaction to growing criticism of the process, there have been and continue to be other changes concerning international arbitration.

Executive Summary

- A majority of international corporations have formalized internal policies on dispute resolution in order to minimize dispute escalation, control costs and promote consistent internal policies. Most corporate dispute resolution policies favor arbitration; have a strong preference concerning the choice of governing law; prefer specific arbitral institution rules (versus ad hoc arbitration rules); prefer a specific seat of arbitration; and mandate confidentiality of issues in arbitration. (Section A -- Corporate Policies on Dispute Resolution)
- International arbitration is growing with virtually all arbitral institutions reporting a growth in cases filed year after year. (Section B – Growth of Arbitration)
- Well over half of in-house legal counsel do not use existing retained legal counsel for international arbitration but seek out specialists in this field. In-house legal counsel generally agree on the attributes they are looking for in legal counsel for international arbitrations and their selection criteria. (Section C – Selection of Legal Counsel)

- In-house legal counsel are also remarkably consistent when asked what the top influences are when it comes to selecting arbitrators. (Section D – Selection of International Arbitrators)
- Likewise, in-house counsel are very consistent in their choice of governing law for international arbitration and consider this decision paramount when considering law, institution and seat. (Section E – Choice of Governing Law)
- Despite the substantial growth of arbitral institutions over the years, which now number at least 28 globally and perhaps more, three of these institutions continue to be preferred by international corporations – AAA-ICDR, ICC and LCIA. (Section F – Arbitral Institutions)
- London and New York continue to be the most favored seats of arbitration for international corporations but regional centers (e.g., Shanghai, Hong Kong, Singapore and Tokyo) are gaining on these two leading centers. (Section G –- Seats of Arbitration)
- Not surprisingly, all surveys, studies and articles agree that the time and the expense incurred when pursuing international arbitration continue to grow. Arbitration is no longer faster and less expensive than transnational litigation. It also appears that international arbitration is less expensive for all parties in common law versus civil law countries. (Section H – Time & Cost of Arbitration)
- It appears that a remarkably high percentage of disputes are settled by negotiation prior to issuance of award by the tribunal. However, it also appears that a very high percentage of non-prevailing parties voluntarily comply with arbitral awards with no need for legal enforcement action. (Section I – Outcomes of Arbitration)
- Conversely, only a very small percentage of survey participants reported difficulties in obtaining judicial enforcement of awards; the amount of time to obtain enforcement was not substantial; and the amounts recovered after enforcement action was complete were nearly the same as the arbitral awards. (Section J – Enforcement of Awards)
- A majority of international corporations would like to be able to grade or score the performance of arbitrators and report on the performance of arbitrators either publicly or privately. (Section K – Performance of Arbitrators)
- Confidentiality of arbitration has always been, and remains today, one of the strongest selling points for arbitration. Among in-house counsel there is a high degree of consistency on what aspects of arbitration should remain confidential. (Section L – Confidentiality of Arbitration)

In addition to the conclusions set forth above, the Navigant Construction Forum™ identified six developing trends concerning international arbitration on which practitioners and users should keep an eye. These trends are the following:

- There is a growing tendency in national legislatures to provide appellate rights concerning tribunal awards to national courts. Additionally, some arbitral institutions are crafting appellate review procedures. This trend may continue to grow if distrust and dissatisfaction with the international arbitration process grows. (Section M.1 – Right of Appeal)
- There is a growing trend to expand discovery rights in international arbitration especially with regard to e-discovery. This trend is likely to continue going forward. (Section M.2 – Discovery)
- There is also a trend toward providing informal or interim dispute resolution procedures. It is likely that this trend will continue in an effort to stave off criticism that international arbitration takes entirely too long to render decisions. (Section M.3 – Informal Resolution Procedures)

- There is a growing use of new methods intended to expedite international arbitration proceedings; among them are the Scott Schedule, hot tubbing, witness conferencing and exchange of early drafts of expert reports. Several international arbitration institutions now recommend use of these tools and thus they are likely to grow even further in use. (Section M.4 – Expediting Arbitration Proceedings)
- Several state regimes have renounced some international arbitration conventions thus placing international corporations doing business in those countries at risk. It does not appear that this trend will gain much traction globally as the downside risk of a nation state doing this is to drive foreign investors to other countries. The economics of international business will most likely contain the spread of this trend. (Section M.5 –State Regimes Denouncing International Arbitration Conventions)
- Finally, it appears that international arbitration has turned into a market and must be viewed through that lens. There will be more competition amongst the stakeholders (practitioners, arbitral institutions, experts, cities seeking to become arbitral seats, etc.). This trend is most likely to continue. The issue of regulation of the international arbitration market place is not as clear. National legislatures and national courts may or may not move into this regulatory space. Practitioners would be well advised to keep a wary eye on this trend. (Section M.6 –Arbitration As A Market: Opportunities & Risk)

Introduction: A Short History of Arbitration

"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,'seat of arbitration', arbitration institution … 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."[2]

Internationally arbitration is not new. In summarizing the history of arbitration in human endeavors the International Court of Justice comments:

> "Mediation and arbitration preceded judicial settlement in history. The former was known in ancient India and in the Islamic world, whilst numerous examples of the latter are to be found in ancient Greece[3], in China, among the Arabian tribes, in maritime customary law in medieval Europe and in Papal practice."[4]

In more modern times international arbitration grew out of a series of treaties between nations, among them the Jay Treaty of Amity, Commerce and Navigation between the United States and Great Britain in 1794; the Treaty of Washington between the United States and the United Kingdom in 1871; and the two Hague Peace Conferences of 1899 and 1907.

[2] 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary University of London School of International Arbitration and White & Case, page 2.

[3] See Aristotle, A Treatise on Government.

[4] http://www.icj-cij.org/court/index

Arbitration entered the construction industry in the United States ("U.S.") more than a century ago. The first standardized construction contract in the U.S. was issued by the American Institute of Architects ("AIA") in 1888. Initial dispute resolution decisions under the AIA contract were to be rendered by the architect, but if either party "dissented" from an initial decision the issue could be referred to binding arbitration.[5] The 1905 edition of the AIA Uniform Contract provided for submittal of any dispute, not resolved by the architect, to a Board of Arbitration.[6] Thus, alternative dispute resolution ("ADR") processes entered the U.S. construction industry on a permanent basis.

> "The American construction industry's centuries old love affair with ADR arose out of a perception that private, non-judicial dispute resolution methods were more suitable than court litigation for resolution of construction disputes."[7]

International commercial arbitration began in Continental Europe in the early 1920s. In 1922 the International Chamber of Commerce adopted their first rules and in 1923 the ICC established the Court of Arbitration. Also in 1923 the Geneva Protocol on Arbitration Clauses was adopted by the League of Nations. The Protocol was later modified, in 1927, by the Geneva Convention for Execution of Foreign Arbitral Awards.[8] As construction became more global in nature, contractors used to arbitration in their home countries and leery of litigation in foreign locations, sought to use arbitration as an alternative form of dispute resolution.

Internationally –

> "Arbitration grew up as a method to resolve trade, commercial or industry disputes where those within the industry would agree privately to appoint a respected member of that industry to resolve their disputes. The arbitrator was almost always an individual with a wealth of experience in the relevant industry or somebody with a background relevant to the technical issues in dispute. Very few arbitrators were lawyers. Having adopted arbitration as the means to resolve disputes, the parties would generally abide by the decision of the arbitrator and the courts were little involved in monitoring or supervising the process."[9]

Over the years, however, arbitration has become more like litigation and not necessarily an alternative resolution method. Many have commented that "arbitration is simply litigation in another guise". No longer is arbitration necessarily faster or less expensive. Oftentimes the parties are not willing to cooperate once a dispute has arisen. The parties often adopt litigation like approach to arbitration with discovery, depositions, formal witness statements, expert reports, etc. And, it is rare today to have a technically experienced non-attorney arbitrator appointed.

[5] American Institute of Architects, Uniform Contract, Articles II and V, 1888.

[6] American Institute of Architects, Form 19642-PL, Uniform Contract, Article XIII, 1905.

[7] Philip L. Bruner, *Rapid Resolution ADR*, The Construction Lawyer, Vol. 31, No. 2, Spring, 2011.

[8] Dispute Settlement: International Commercial Arbitration, United Nations Conference on Trade and Development, New York, 2005.

[9] Gordon Bell, *Construction Arbitration – Past and Present*, Construction Law, August 2006, Pinsent Masons, page 1.

Notwithstanding this historical trend, one recent survey of 103 in-house legal counsel at leading international corporations indicated that some 73% of those surveyed preferred the use of arbitration either as a stand-alone dispute resolution method (29%) or in combination with other ADR methods in a multi-tiered or escalating dispute resolution process (44%).[10] When asked why respondents favored arbitration in cross border disputes the most frequent responses were – flexibility of procedure, enforceability of awards, privacy of proceedings and outcome, and the ability to select arbitrators with the necessary skills and experience with the type of dispute(s).

Despite the overwhelming support for international arbitration, when the respondents were queried about the disadvantages of international arbitration their top responses were – cost of the international arbitration process (including legal costs, the cost of the arbitration panels, and the fees paid to arbitral institutions); the lengthy time the arbitration process takes from filing to award; the potential for national court intervention in some countries; the lack of an appellate mechanism; and the lack of ability to involve third parties in an international arbitration proceeding.

A follow-on survey, performed some two years later, produced some additional conclusions. Among them are the following:

» Construction arbitration comprises only 14% of international arbitration case filings.[11]

» Private sector entities are the most predominant users of international arbitration with 74% of arbitrations being against private organizations; 21% against state enterprises (e.g., a national oil company); and 5% against a nation state.

» Despite the disadvantages discussed in the 2006 report, some 86% of the survey respondents were either "fairly satisfied" (68%) or "very satisfied" (18%) while only 5% were "disappointed" or "very disappointed" with the process and the outcome.[12]

Perhaps as a result of the growing perceived disadvantages of arbitration, Jaffe and McHugh[13] commented that "Over the past five years there has been in the construction industry increased interest in ADR methods, particularly mediation, adjudication, non-binding mini trials, expert determination, dispute boards." In their opinion, this interest has been driven by:

» the contentious nature of construction projects;

» the desire to preserve and maintain relationships; and

» the fundamental business desire to get projects built sooner and at less cost than if projects went into lengthy litigation at the end.

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[10] *International Arbitration: Corporate Attitudes and Practices*, Queen Mary University of London School of International Arbitration and Price Waterhouse Coopers, 2006, page 5.

[11] However see Dr. Jalal El Ahdab, The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges, International Commercial and Investment Arbitration in the Mediterranean, Palau de Pedralbes, Barcelona, Spain, 13 – 14 May 2010, where he reported that construction disputes comprised 17.7% of the arbitration cases in the 21 arbitral institutions he surveyed in 1998 versus 15% of the cases in these same institutions in 2008.

[12] International Arbitration: Corporate Attitudes and Practices, Queen Mary University of London School of International Arbitration and PriceWaterhouseCoopers, 2008, page 5.

[13] Michael Evan Jaffe and Ronan J. McHugh, International Construction Disputes in Today's Economy, PLC Arbitration Handbook, Practical Law Company, London, October 2009.

Jaffe and McHugh believe that "In this regard, arbitration can no longer be considered 'alternative' dispute resolution." Despite this belief Jaffe and McHugh recognize that international construction projects seem to spawn disputes and conclude that:

> "International arbitration remains, and is likely to remain, the default choice for deciding international project disputes, due to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) (at least until more countries decide to sign up to the Hague Convention on Choice of Court Agreements, which allows reciprocal recognition and enforcement of court judgments)."

With this as a backdrop the remainder of this research perspective will identify and examine the current trends regarding international construction arbitration and those trends which seem to be developing.

A. Corporate Policies on Dispute Resolution

The 2006 Queen Mary University study[14] documented that 65% of the international corporations participating in the study maintain formal dispute resolution policies – 37% in the form of a crystallized policy with standard terms or model contract clauses while the other 28% maintained the policy in a non-crystallized form, which serves as a guideline subject to negotiation. Only 35% of these international corporations have no dispute resolution policy. The perceived advantages of having a corporate policy on dispute resolution identified by the survey respondents were identified as minimizing dispute escalation (69%); saving costs (17%); and promoting consistent internal practices (14%).

A follow-on study performed in 2010 by the Queen Mary University [15] found a slight increase in corporations maintaining a formal dispute resolution policy – 68% versus the earlier 65%. The main features of these corporate dispute resolution policies are set forth below.

FEATURES	MUST COMPLY	DEVIATE IF A DEAL BREAKER	FLEXIBLE, LEFT TO NEGOTIATOR	NOT A FEATURE OF POLICY
Arbitration not Litigation	10%	40%	31%	19%
Preferred Seat	8%	43%	33%	15%
Preferred Rules	9%	37%	46%	8%
Law of Contract	17%	41%	36%	6%
Language	28%	37%	27%	10%
Confidentiality	33%	29%	21%	16%
Discovery	15%	20%	33%	32%

[14] *International Arbitration: Corporate Attitudes and Practices*, 2006, pp. 8 – 9.

[15] *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 5 - 7.

CORPORATE STANCE	TOUGH STANCE[16]	NO STANCE[17]
Law governing dispute	87%	13%
Law governing arbitration agreement	84%	16%
Seat of arbitration	81%	19%
Language of arbitration	80%	20%
Selection of institutional rules	79%	21%
Confidentiality	79%	21%
Process for appointment of arbitrators	69%	31%
Extent of disclosure, discovery, document production	69%	31%
Method of allocating costs	69%	31%
Selection of non-administered ad hoc rules	64%	36%
Choice of appointing authority	62%	38%
Selection of additional procedural rules	57%	43%

This survey also determined the negotiation stance of international corporations concerning key arbitration issues as shown above.

Finally, the 2010 study determined who within the corporation makes the ultimate decision about arbitration clauses concerning the choice of law, seat of arbitration and arbitral institution. The response to this question is set forth below.

General counsel	33%
General counsel in consultation with external counsel	15%
Specialist corporate counsel	14%
Commercial business unit	11%
Regional corporate counsel	11%
Board	5%
Other[18]	11%

With respect to arbitration, the 2006 Queen Mary University study showed that 62% of the respondents "insist upon including an international arbitration clause" while only 34% did not.[19] However, some 60% of in-house counsel stated that their corporation will concede somewhat when negotiating these clauses if faced with strong objections from the other side. Of those respondents that insist upon an arbitration clause in international contracts 48% utilize a standard clause while 43% tailor such clauses to each particular contract.[20] The study also determined that 76% of the respondents opt for institutional arbitration versus only 24% that seek mutual agreement on ad hoc processes.

[16] "Tough Stance" defined as never willing to concede/issue is a deal breaker or concede only under very limited circumstances.

[17] "No Stance" defined as no preference on issue; corporate policy followed; or not applicable.

[18] "Other" defined as general counsel or specialist legal counsel in conjunction with relevant business unit.

[19] The remaining 4% were uncertain.

[20] The remaining 9% were uncertain.

B. Growth of Arbitration

In 2006, Gordon Bell, an English barrister, offered the observation that:

> "In England, arbitration was once an alternative to litigation. … Domestic arbitration has become less common in the construction industry following the erosion of many of its advantages. But international arbitration appears to be the dispute resolution mechanism of choice."[21]

In 2007, Born and Miles commented that "One of the most significant global trends in arbitration has been its increasing popularity as the preferred means of resolving international commercial disputes, and the corresponding increase in the support of arbitration by courts in most states."[22] To substantiate this remark they pointed to the increase in case filings – between three- and five-fold over the previous 25 years – with different international arbitral institutions. Some examples offered include:

- International Chamber of Commerce's International Court of Arbitration ("ICC") received 32 new requests for arbitration in 1956; 210 in 1976; 337 in 1992; 452 in 1997; 529 in 1999; and 593 in 2006 – a 20-fold increase in the last 50 years;
- American Arbitration Association ("AAA") administered 101 international arbitrations in 1980; 226 in 1991; and approximately 400 in 1997; and,
- AAA - International Centre for Dispute Resolution ("AAA/ICDR") received some 1,356 case filings in excess of US$1.0 million in 2006 alone.

The 2008 Queen Mary University study[23] documented that there was an 8.5% growth in case filings between 2003 and 2007 (from 3,023 cases in 2003 to 3,280 cases in 2007) for the 22 arbitral institutions reporting on annual case filings.

In a 2010 presentation at the International Commercial and Investment Arbitration in the Mediterranean conference, Dr. Jalal El Ahdab, Managing Editor of the Journal of Arab Arbitration reported on the percentage increase in cases between 2005 and 2009 for six arbitral institutions, as follows:[24]

ARBITRAL INSTITUTION	% INCREASE
American Arbitration Association ("AAA")	42%
Russian Federation Chamber of Commerce & Industry ("CCI")	58%
China International Economic & Trade Arbitration Association ("CIETAC")	24%
London Court of International Arbitration ("LCIA")	125%
Singapore International Arbitration Center ("SIAC")	150%
Hong Kong International Arbitration Center ("HKIAC")	145%

[21] *Construction Arbitration – Past and Present*, Construction Law, August 2006.

[22] Gary Born and Wendy Miles, *Global Trends in International Arbitration*, American Lawyer – Focus Europe, June 2007.

[23] *International Arbitration: Corporate Attitudes and Practices*, 2008, pp. 15 - 16

[24] *The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges*, 2010.

DAMAGES ASSERTED[25]	1998	2008
Less than $50,000	4%	2%
$50,000 - $200,000	9%	6%
$200,000 - $500,000	16%	12%
$500,000 - $1.0 million	13%	14%
$1.0 - $10.0 million	37%	40%
$10.0 - $50.0 million	16%	16%
$50.0 - $100.0 million	3%	4%
More than $100.0 million	2%	6%

Dr. El Ahdab also noted the growth in the approximate amounts in dispute for quantified claims in cases filed with the ICC between 1998 and 2008 as shown above. (All claimed damages are shown in U.S. dollars.)

Likewise, Fulbright's 8th Annual Litigation Trends Survey Report noted that 17% of the respondents to their 2009 survey reported having been party to at least one international arbitration in the previous year. In 2010, this number increased to 29% and increased even further in their 2011 report to 30%.[26] Fulbright & Jaworski's 2012 report reiterated and confirmed this growth in international arbitration.[27]

C. Selection of Legal Counsel

One of the very first decisions in-house legal counsel must make when considering filing an international arbitration demand is whether to use existing external legal counsel or seek assistance from firms that specialize in international arbitration. The Queen Mary University 2006 study[28] probed this issue and determined that 75% of in-house legal counsel participating in this study do not use existing or retained external counsel when international arbitration arises. Rather, they seek out and retain external firms that (1) specialize in international arbitration; (2) are experienced in the subject matter of the dispute; (3) have access to legal counsel in the place of the dispute to provide regional expertise; (4) have available staff to handle the case; and (5) have a good reputation.

[25] All claimed damages shown in US$.

[26] *Fulbright's 8th Annual Litigation Trends Survey Report – Trends in International Arbitration*, Fulbright & Jaworski, LLP, 2011, page 1.

[27] *2012 International Arbitration Report, Issue 1*, Fulbright & Jaworski, LLP, 2011, page 19

[28] *International Arbitration: Corporate Attitudes and Practices,* 2006, pp. 16 – 18.

D. Selection of International Arbitrators

Once the arbitration demand is filed, in-house counsel must then focus on selection of arbitrators (whether a single arbitrator or a panel). The 2006 study indicated that there are four methods that in-house counsel typically employ when selecting arbitrators. The percentage of in-house counsel using each method is set forth below.

Advice of external legal counsel	=	50%
Personal knowledge	=	33%
Appointed by the arbitral institution	=	14%
Advice of a third party	=	3%

Continuing along these lines, in-house counsel were asked to identify the attributes they look for in international arbitrators. The attributes identified by in-house counsel are identified by percentage below.[29]

Reputation	=	90%
Expertise	=	80%
Common sense	=	80%
Knowledge of applicable law	=	70%
Knowledge of relevant language	=	60%

Additionally, the 2006 Queen Mary University study[30] identified that in-house counsel generally favor appointing arbitrators with expertise in the subject matter of the dispute; specialization in project's industry sector; experience in the region or the country; and cross-disciplinary expertise (e.g., technical and financial) which may be helpful with respect to quantification of damages. The study indicates that in-house counsel feel that arbitrators with these skills can save their companies both time and money during arbitration.

The 2010 study[31] probed the issue of top influences concerning the choice of arbitrators in more depth and concluded that the following percentage of in-house counsel take into account the following attributes when choosing arbitrators.

Open mindedness & fairness	=	66%
Prior experience of arbitration	=	58%
Quality of awards	=	56%
Availability	=	55%
Reputation	=	52%
Knowledge of law applicable to contract & arbitration	=	51%
Likelihood arbitrator will be able to influence tribunal chair	=	47%
Relevant industry experience	=	42%
Languages	=	41%
Prior experiences of arbitral institution	=	39%
Experience with differing legal cultures	=	37%
Favorable disposition to the issues in dispute	=	37%
Willingness to consult with appointing party on selection of Chair	=	37%

This study also asked in-house counsel whether they gathered their own information concerning potential arbitrators for potential appointment in future disputes – 28% said "yes" while 68% said "no".[32] When asked if they felt they had enough information to make an informed choice about the appointment of arbitrators garnered from external counsel, 67% of in-house counsel responded affirmatively while 25% responded negatively.[33]

[29] The study presumed that the arbitrators under consideration were neutral, independent and impartial.

[30] International Arbitration: Corporate Attitudes and Practices, 2006, pp. 16 – 18.

[31] 2010 International Arbitration Survey: Choices in International Arbitration, pp. 25 – 27.

[32] The remaining 4% did not know.

[33] The remaining 8% said they did not know.

E. Choice of Governing Law

A survey of the literature on international arbitration indicates that the choice of governing law is of paramount concern. "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."[34] In terms of priority between the choice of law, the choice of arbitral institution and the choice of the seat of arbitration, 51% of the respondents stated that the choice of law was their first choice while 70% chose the choice of law higher than either of the other two choices.[35] And, the 2011 Fulbright & Jaworski study[36] asked the question "If your company had to concede either the governing law or the choice of seat, which one would it compromise on?" They found that, while 28% of the respondents would concede the governing law to get the seat of arbitration, 54% would concede the seat to get the governing law provision they want.

When asked to identify the top influences concerning the selection of the choice of governing law the respondents to this study reported the following:

Neutrality and impartiality of the legal system	=	66%
Appropriateness for type of contract	=	60%
Familiarity with and experience of the particular law	=	58%
Choice of law imposed by other party	=	37%
Corporate policy, standard terms and conditions	=	35%
Place of performance of the contract	=	32%
Location of company headquarters	=	29%
Location of the arbitration institution chosen	=	27%
Seat chosen for the arbitration	=	26%
Location of the legal team	=	23%
Recommendation of external counsel	=	22%
Location of the other party	=	21%

The 2011 Fulbright & Jaworski study[37] asked a similar question concerning what influences the selection of the choice of law provision in a contract. The responses are set forth below.

Familiarity with law	=	81%
Location of company	=	51%
Location of legal team	=	50%
Place of performance	=	47%
Impartiality	=	38%
Seat of arbitration	=	31%

[34] *2010 International Arbitration Survey: Choices in International Arbitration*, page 11 - 16.

[35] *2010 International Arbitration Survey: Choices in International Arbitration*, pages 8 – 9 and 11 – 16.

[36] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 8.

[37] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 5.

CHOICE OF LAW	WHEN FREE TO CHOOSE	WHEN IMPOSED	MOST FREQUENTLY USED
Law of home jurisdiction	44%	53%	
English law	25%	21%	40%
Swiss law	9%	1%	8%
New York law	6%	10%	17%
French law	3%	1%	6%
US law (other than New York law)	1%	3%	5%
Other	3%	1%	24%
Not possible to say/none in particular	9%	10%	

The 2010 Queen Mary University study[38] posed three parallel questions concerning the choice of law, the responses to which are summarized above.

The 2011 Fulbright & Jaworski study[39] also asked what the preferred choice of law provision is. The responses received are set forth below.

Company's home jurisdiction	=	55%
Neutral jurisdiction	=	16%
Other	=	6%
Don't know	=	23%

F. Arbitral Institutions

Numerous authors have commented on the growth in the number of arbitral institutions over the years. Between the 2008 Queen Mary University study[40] and Dr. Jalal El Ahdab's presentation[41] the Navigant Construction Forum™ identified 28 different arbitral institutions globally as follows.

- AAA-ICDR – American Arbitration Association - International Center for Dispute Resolution
- ACICA – Australian Centre for International Commercial Arbitration
- BAC – Beijing Arbitration Commission
- CAM – Centro de Arbitraje de Mexico
- CICA – Court of International Commercial Arbitration (attached to the Chamber of Commerce and Industry of Romania and Bucharest)

[38] *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 11 – 16.

[39] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 4.

[40] *International Arbitration: Corporate Attitudes and Practices*, 2008.

[41] *The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges*, 2010.

- CIETAC – China International Economic and Trade Arbitration Commission
- CRCICA – Cairo Regional Center for International Commercial Arbitration
- DIAC – Dubai International Arbitration Center
- DIS – The German Institution for Arbitration
- FEISPI – Federation of Industries of the State of Sao Paulo
- HKIAC – Hong Kong International Arbitration Centre
- ICAC (Ukraine) – The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
- ICC – International Chamber of Commerce, International Court of Arbitration
- ICSID – International Centre for Settlement of Investment Disputes
- JCAA – The Japan Commercial Arbitration Association
- KCAB – Korean Commercial Arbitration Board
- LCIA – The London Court of International Arbitration
- LMAA – London Maritime Arbitrators Association
- MCNIA – Milan Chamber of National and International Arbitration
- MNAC – Mongolian National Arbitration Court at the Mongolian National Chamber of Commerce and Industry
- NAI – The Netherlands Arbitration Institute
- PCA – Permanent Court of Arbitration, The Hague
- SAKIG – Court of Arbitration at the Polish Chamber of Commerce
- SCC – The Arbitration Institute of the Stockholm Chamber of Commerce
- SIAC – Singapore International Arbitration Centre
- Swiss Chambers – Swiss Chambers' Court of Arbitration and Mediation
- VIAC – The International Arbitration Centre of the Austrian Federal Economic Chamber
- WIPO Arbitration and Mediation Centre – World Intellectual Property Organisation Arbitration and Mediation Centre

One choice in-house legal counsel must make when negotiating the Disputes clause of a contract is whether to stipulate institutional arbitration or ad hoc arbitration. Both the 2008 Queen Mary University study[42] and Dr. Jalal El Ahdab's 2010 presentation[43] noted that 86% of the arbitration awards rendered over the past ten years have been awarded by arbitration institutions. Only 14% of reported arbitration awards resulted from ad hoc arbitrations.

Assuming in-house counsel elects to specify an institutional arbitration, other decisions must also be made insofar as the choices of:

- Governing law
- Seat of arbitration
- Arbitral institution and rules.

[42] *International Arbitration: Corporate Attitudes and Practices,* 2008, pp. 15 – 16.

[43] *The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges,* 2010.

The 2010 Queen Mary University study[44] queried the survey respondents on this interplay between these three decisions and determined the following:

ORDER OF CHOICES – GOVERNING LAW, SEAT & INSTITUTION/RULES		
Governing law, seat, institution/rules	=	26%
Governing law, institution/rules, seat	=	24%
All issues decided at same time	=	23%
Other combinations	=	21%
Not possible to say/don't know	=	6%

FIRST CHOICE – GOVERNING LAW, SEAT & INSTITUTION/RULES		
Law governing substance of dispute	=	51%
Arbitral institution/rules	=	12%
Seat of arbitration	=	9%
All issues decided at same time	=	22%
Not possible to say/don't know	=	6%

Finally, when asked whether the choices made by the parties about the various aspects of the arbitration clause influence one another, 68% of the respondents said "Yes", 21% said"No", 9% did not know, and 2% provided other answers.

This study also attempted to ascertain what are the most significant influences concerning the choice arbitral institutions and determined the following:

Neutrality/"internationalism"	=	66%
Reputation/recognition	=	56%
Arbitral rules	=	46%
Law governing substance of dispute	=	46%
Previous experience of institution	=	42%
Overall cost of service	=	41%
Global presence/ability to administer arbitrations worldwide	=	39%
Expertise in certain types of cases	=	38%
Free choice of arbitrators (i.e., no exclusive institutional list)	=	38%
Seat chosen for arbitration	=	35%
High level of administration (including pro-activeness, facilities, quality of staff)	=	33%
Scrutiny of award by institution	=	33%
Regional presence/knowledge	=	32%
Recommendation of external counsel	=	29%
Corporate policy, standard terms and conditions	=	28%
Advice/recommendation of others	=	21%
Method of remunerating arbitrators (cost per hour)	=	19%
Choice of institution imposed by other party	=	19%
Method of remunerating arbitrators *(ad valorem)*	=	18%
Payment to institution required up front	=	16%
Similarity to rules to UNCITRAL rules	=	16%
Payment to institution required at end of arbitration	=	15%

[44] *2010 International Arbitration Survey: Choices in International Arbitration, pp. 5 – 10.*

Three different surveys, all prepared by the Queen Mary University between 2006 and 2010, demonstrated a preference for a select few international arbitral institutions, but also showed a slight shifting of preferences as follows.

ARBITRAL INSTITUTION	2006 STUDY[45]	2008 STUDY[46]	2010 STUDY[47]
ICC	42%	45%	56%
LCIA	20%	11%	10%
"Regional"/ "Other"	15%	9%	9%
AAA-ICDR	13%	16%	10%
SCC	4%	2%	3%
Swiss Chambers	3%	4%	
CIETAC	2%	2%	
HKIAC	1%	1%	
SIAC		3%	2%
JCAA		2%	
DIS		1%	6%
ICISD		2%	3%
CRCICA		1%	
WIPO		1%	

The 2011 Fulbright & Jaworski study[48] commented in similar fashion with respect to the overall preferences for international arbitration institutions as follows.

> "The preferences shown by respondents for international arbitration institutions have remained largely constant over the years. The International Center for Dispute Resolution (ICDR), LCIA and ICC has occupied the top spots since the inception of the survey. Back in 2005, 56% of respondents preferred the ICDR, and 51% of respondents recommend the ICDR in 2011. The ICDR and the ICC are the predominant international arbitration institutions…"

[45] *International Arbitration: Corporate Attitudes and Practices,* 2006, page 12.

[46] *International Arbitration: Corporate Attitudes and Practices,* 2008, page 15.

[47] *2010 International Arbitration Survey: Choices in International Arbitration,* page 23.

[48] *Litigation Trends Survey Report – Trends in International Arbitration,* 2011.

While the 2008 Queen Mary University study[49] acknowledged the clear preference for ICC, LCIA and AAA-ICDR as arbitral institutions the study also offered the following observation concerning in-house legal counsel preferences for arbitral institutions.

> "…the participants reported an increased preference for regional arbitration institutions, with several of [the] corporations using the CAM, NAI, FIESPI and KCAB as a viable alternative to the more international institutions.
>
> There is significant support for the ICC, AAA-ICDR and regional institutions coming from South American corporations. Asian corporations prefer to submit their disputes to CIETAC, ICC or LCIA, while US corporations have a preference to AAA-ICDR and HKIAC. Swiss corporations reported that they submitted more disputes to the ICC or AAA-ICDR than the Swiss Chambers." (Underscoring added.)"

This observation is supported by the 2010 Queen Mary University of London study[50] which reported that, notwithstanding the preference for ICC, LCIA and AAA-ICDR arbitral institutions, over the preceding five years the institutions "most frequently used" were as follows.

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

Similarly, the 2011 Fulbright & Jaworski study[51] reported that over the past five years the respondents to their survey had experience with the following international arbitration institutions.[52]

AAA-ICDR	=	58%
LCIA	=	44%
ICC	=	43%
ICSID	=	9%
SCC	=	10%
SIAC	=	13%
Other	=	4%

The Navigant Construction Forum™ believes the difference in the outcome of these two studies perhaps may be explained by examining the difference in the survey participants. A breakdown of the location of the 2010 Queen Mary University study participants follows.[53]

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

A breakdown of the location of the 2011 Fulbright & Jaworski study participants, on the other hand, is set forth below.[54]

US	=	47%
UK	=	53%

[49] *International Arbitration: Corporate Attitudes and Practices*, 2008, page 15.

[50] *2010 International Arbitration Survey: Choices in International Arbitration*, page 23.

[51] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 35.

[52] The total adds up to more than 100% as some respondents had experience with multiple international arbitrations in different venues over the previous five years.

[53] *2010 International Arbitration Survey: Choices in International Arbitration.*

[54] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 9..

G. Seats of Arbitration

"Since 2005, New York and London have occupied the top positions in terms of favored seats for international arbitration."[55] However, in surveying the literature on international arbitration, the choice of the seat of arbitration is not that simple.

The 2006 Queen Mary University study[56] pointed out that while "The seat of the international arbitration determines the procedural law… There are conflicting views on the importance of the seat…" One view approaches the issue from the point of view of what support can/will local courts offer the arbitration proceeding while the other view tends to look more at the issue of neutrality and convenience. The study demonstrated that 41% of the respondents thought that legal considerations were paramount in choosing the seat whereas 36% thought convenience a predominant issue. Neutrality of location came in a distant third with only 24% choosing the seat on this basis. Proximity to evidence came in last with only 9% making the choice of seat based on this factor.

The 2010 Queen Mary University study[57] showed that choice of law and arbitral institution always took precedence over the seat of arbitration. The study went on to inquire about the top influences concerning the choice of the seat and determined the following:

Formal legal infrastructure (e.g., national arbitration law)	=	62%
Law governing substance of dispute	=	46%
Convenience (e.g., location, prior use, language, etc.)	=	45%
General infrastructure (e.g., costs, access, etc.)	=	31%
Corporate policy, standard terms and conditions	=	29%
Location of people (e.g., organization's personnel)	=	28%
Location of arbitral institution chosen	=	24%
Choice of seat imposed by other party	=	23%
Recommendation of external legal counsel	=	22%

The 2011 Fulbright & Jaworski study[58] offered a somewhat different picture of the top influences on the seat, as follows.

Logistical convenience	=	59%
Impartiality	=	55%
Location of arbitral institution	=	46%
Location of legal team	=	50%
Location of company	=	35%
Governing law	=	46%
Familiarity with location of seat	=	22%
Arbitration experienced courts	=	16%
Arbitration legislation	=	18%

[55] *Litigation Trends Survey Report – Trends in International Arbitration,* 2011, page 1.

[56] *International Arbitration: Corporate Attitudes and Practices*, 2006, pp. 13 – 14.

[57] *2010 International Arbitration Survey: Choices in International Arbitration,* page 9 & 17 - 18.

[58] *Litigation Trends Survey Report – Trends in International Arbitration,* 2011, pp. 7 - 8.

As noted previously, this study illustrates that if a corporation had to concede either the governing law or the choice of the seat, only 20% of the respondents would concede on governing law whereas 54% would concede on the seat of arbitration.

When asked which are the preferred seats of arbitrations the 2006 Queen Mary University study[59] indicated that the four most popular venues are the following:

LOCATION	1ST CHOICE	2ND CHOICE	3RD CHOICE
England	48%	37%	10%
Switzerland	15%	28%	17%
France	13%	28%	17%
United States	15%	17%	18%

The 2010 Queen Mary University study[60] showed the preferences somewhat more discretely as follows.

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

More recently, the Chartered Institute of Arbitrators issued a study in 2011[61] wherein they asked the study participants to identify the most common seats of arbitration by region. A summary of these responses follows.

Other Regions	=	32%
United Kingdon	=	28%
Europe (excluding UK)	=	22%
Asia	=	11%
North America	=	7%

The 2011 Fulbright & Jaworski study[62] looked at the issue of preference for the seat of arbitration a little differently and found the following when the question posed was "…which jurisdiction does your company select as the seat of the arbitration?"

Home jurisdiction	=	42%
Neutral jurisdiction	=	11%
Requested by other party	=	38%
Other	=	8%

A December 2011 article published by Seraglini, Nyer, Brumpton, Templeman and de Ferrari offered the opinion that "Paris, London and New York have traditionally been three of the most popular seats for international arbitration. The seat may also influence the nationality of the chair of the arbitral tribunal, especially if the chair is institutionally appointed."[63]

[59] *International Arbitration: Corporate Attitudes and Practices*, 2006, pp. 13 – 14. Totals do not add up to 100% as some respondents indicated other locations or had no preference.

[60] *2010 International Arbitration Survey: Choices in International Arbitration*, page 19.

[61] Chartered Institute of Arbitrators, *CIArb Costs of International Arbitration Survey* 2011, page 7.

[62] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 6.

[63] Christophe Seraglini, Damien Nyer, Paul Brumpton, John Templeman and Lucas de Ferrari, *The Battle of the Seats: Paris, London or New York?*, PLC Arbitration – PLC Dispute Resolution, Practical Law Company Ltd., London, 2011.

H. Time & Cost of Arbitration

The 2006 Queen Mary University study concluded that

> "International arbitration is considered at least as expensive as transnational litigation for middle and smaller size cases. In larger, more complex cases, international arbitration may represent better value for money."[64]

The 2011 and 2012 Fulbright & Jaworski studies[65] were more expansive in regards to the issue of the time and cost of international arbitration stating that:

> "During the last decade, there has been a growing awareness that arbitration is no longer perceived to be a quicker and cheaper alternative to national court proceedings. The 2007 survey found that only 9% of respondents believed that international arbitration was cheaper than litigation (down from 26% in 2006 and 32% in 2005). The survey concluded that '*the overall trend among the survey respondents seems to be that international arbitration is not seen as offering significant cost benefits over litigation.*' The 2007 survey also found that the percentage of respondents who believed that arbitration was quicker than litigation fell dramatically from 43% in 2006 to 11% in 2007.
>
> In our 2009 survey respondents observed that '*Arbitration is no faster, no less expensive and less reliable*' and '*Arbitration has proven to be almost as involved and costly as litigation, so there has been no advantage.*' Recent comments from our 2011 survey still show distrust with the international arbitration process, with one respondent stating: '*Arbitration still needs more controls built into the process before it is distinguishable from litigation in terms of costs and speed.*'"

The 2006 Queen Mary University study[66] agrees with the above statements but tried to parse the responses to their survey with additional granularity. In response to the question "Is international arbitration more expensive than transnational litigation?" they received the following responses.

More expensive to some extent	=	39%
More expensive to a great extent	=	26%
Costs about the same	=	23%
Costs less	=	12%

The study went further to inquire about the costs of recent international arbitration cases and determined the range of costs set forth below:[67]

- 52% cost between $100,000 and $500,000
- 14% cost between $500,000 and $1.0 million
- 22% cost between $1.0 million and $5.0 million, and
- 12% cost more than $5.0 million.

[64] *International Arbitration: Corporate Attitudes and Practices*, 2006, pp. 6 – 6 & 19 - 20.

[65] *Litigation Trends Survey Report – Trends in International Arbitration, 2011*, page 1 and 2012 *International Arbitration Report*, page 20.

[66] *International Arbitration: Corporate Attitudes and Practices*, 2006, pp. 19 - 20.

[67] All costs shown in US$.

Concerning what percentage of total cost were legal counsel fees the study determined that:

» In 36% of the cases legal fees were less than 50% of the total cost

» In 36% legal fees ranged from 50% to 75% of total cost, and

» In 28% legal fees were greater than 75% of total cost.

The 2011 CIArb study[68] delved more deeply into the cost of international arbitration and determined the following:

» 48% of respondents reported spending no more than UK£250,000 on claims of UK£1,000,000 or less.

» 44% of indicated that the average spend on claims between UK£1,000,000 and UK£10,000,000 was no more than UK£1,000,000.

» And 50% reported spending no more than UK£1,500,000 on claims of UK£10,000,000 and UK£50,000,000.

When asked where the money was expended, respondents to this survey provided the following information.

External legal fees	=	63%
Barrister fees	=	11%
External expenses	=	8%
Witness costs	=	5%
Expert fees	=	10%
Management cost	=	3%

The study also provided a breakdown of party external legal and barrister costs as follows.

Pre-commencement	=	9%
Discovery	=	5%
Hearing preparation	=	12%
Commencement	=	10%
Fact witness	=	7%
Hearings	=	16%
Exchange of pleadings	=	25%
Expert witness	=	7%
Post hearing	=	9%

The study went further to determine the breakdown of the common or shared costs involved in an international arbitration as follows.

Transcripts	=	4%
Arbitral fees	=	60%
Arbitral expenses	=	10%
Hearing venue	=	7%
Other	=	19%

In response to the question "Who spends more – claimant or respondent?" this study indicates that overall claimants spend approximately 12% more than respondents; however, with regard to expert witnesses respondents spend approximately 55% more than claimants.

[68] *CIArb Costs of International Arbitration Survey 2011*, pp. 10 – 13.

In a final comment concerning the cost of international arbitration, the 2011 CIArb study[69] concluded that international arbitration in common law countries is less costly than in civil law countries. This conclusion was based on a comparison of the costs between common law and civil law jurisdictions where it was determined that the party costs are some 13% lower in common law countries. In concert with this conclusion, an article published on line on 30 July 2012 by Frederick Gillion, an English barrister, reviewed the 2011 CIArb study and noted that the average legal costs for a UK claimant are UK£1.54 million while the average legal costs for claimants in the rest of Europe (almost all of which are civil law countries) equals approximately UK£1.69 million some 9% higher.[70]

With respect to the time required for arbitration this study reported that the "average arbitration" took between 17 and 20 months depending on the nature of the dispute. However, a closer look at this portion of the study leads the Navigant Construction Forum™ to believe that this study only addressed the time from the beginning of the arbitration hearings until the award was issued.[71] Therefore, this estimate of time is most likely very low as it does not appear to account for the time between filing the demand for arbitration and the start of the hearings.

An interesting adjunct to the question of how long international arbitration takes, the 2010 Queen Mary University study[72] asked the respondents to rank which stages of the arbitration process contribute the most to process delay. According to the respondents the following issues contributed these percentages to the total delay.

Disclosure of documents	=	24%
Written submissions	=	18%
Constitution of tribunal	=	17%
Hearings/proceedings	=	15%
Rendering of the award	=	14%
Enforcement	=	10%
Written questions from arbitrators	=	2%

I. Outcomes of Arbitration

The 2008 Queen Mary University study[73] examined the outcomes of international arbitrations, looking at "outcome" from several different perspectives. Some of the findings concerning outcomes follow.

In the first instance this study found that a total of 25% of disputes were settled prior to issuance of the award. Another 7% were settled with an arbitral award by consent. And another 49% resulted in voluntary compliance with an award (i.e., there was no need for the prevailing party to take legal action to enforce the award). The study also concluded that settlements most often occur either before the first hearing (43%) or before the hearing on the merits (31%). The remaining 26% settle prior to issuance of award.

[69] *CIArb Costs of International Arbitration Survey 2011*, pp. 15.

[70] Frederick Gillion, *Trends in ICC Arbitration: Construction and Engineering Disputes*, http://construction.practicallaw.com, 30 July 2012.

[71] The Navigant Construction Forum™ concluded this because the costs associated with this part of the study include only transcripts, hearing venue, arbitral expenses, arbitral fees and other costs. There are no costs for discovery and pleadings which tend to be pre-hearing costs.

[72] *2010 International Arbitration Survey: Choices in International Arbitration*, page 32.

[73] *International Arbitration: Corporate Attitudes and Practices*, 2008, pp. 6 - 7.

The stated reasons for reaching settlement rather than staying the course and obtaining an award were:

Weak position	=	21%
Reduced costs	=	23%
Reduced time	=	17%
Concern with likely place of enforcement	=	5%
Lack of assets of opposing party	=	5%
Preservation of relationship	=	27%
Other	=	2%

The study also concluded that once an award was issued 84% of the respondents reported that the opposing party honored the award in full in approximately 76% of their cases. Another finding is that some 40% of the respondents reached a settlement after the award was issued for less than the award. 54% of those surveyed reached post award settlement agreements for more than 50% of the award while 35% settled for amounts in excess of 75% of the award.

Notwithstanding some of the issues indicated above, the 2008 Queen Mary University study[74] found that 86% of the survey respondents were either "very satisfied" (18%) or "fairly satisfied" (68%). Only 5% of the respondents were "disappointed" and the remaining 9% were "undecided".

J. Enforcement of Awards

The 2008 Queen Mary University study[75] determined that in 89% of the cases the prevailing party did not have to initiate enforcement actions to collect the award. The 2011 Fulbright & Jaworski study[76] found a voluntary compliance rate of between 87% and 90%.

However, that leaves a small tranche of cases where the non-prevailing party does not comply with the award, requiring the prevailing party to initiate enforcement proceedings in a national court. Should a prevailing party decide to seek enforcement of an award, the first consideration is most likely to be where enforcement should be sought. The 2008 study cited above determined that this decision is typically based on the following factors.

State in which award debtor has sufficient assets	=	27%
Recognition and enforcement mechanisms in country of enforcement	=	22%
Applicability of New York Convention of 1958	=	20%
Attitude of local courts at place of enforcement	=	18%
Concerns related to State immunity	=	12%
Other	=	1%

In this study, only 19% of the survey respondents had difficulties in obtaining enforcement of foreign arbitral awards. When there was difficulty the causes were reported to be:

Place of enforcement hostile to foreign awards	=	17%
Lack of assets of award debtor	=	46%
Unable to identify or access assets of debtor	=	24%
Inapplicability of New York Convention of 1958	=	6%
Local Law allows enforcement within certain time limits	=	2%
Other	=	5%

[74] *International Arbitration: Corporate Attitudes and Practices*, 2008, page 5.

[75] *International Arbitration: Corporate Attitudes and Practices*, 2008, pp. 10 - 12.

[76] *Litigation Trends Survey Report – Trends in International Arbitration*, 2011, page 2.

The most typical problems encountered when seeking enforcement of a foreign arbitral award were reported to be:

Recognition and enforcement procedure	=	32%
Local execution procedure	=	24%
High costs	=	12%
Time	=	22%
Perceived corruption issues	=	10%

The study inquired about the amount of time it takes to obtain enforcement of a foreign arbitral award in a national court and determined found:

Between 2 and 4 years	=	5%
Between 1 and 2 years	=	18%
Between 6 months and 1 year	=	43%
Less than 6 months	=	14%
Not sure	=	20%

Finally, this study asked about the percentage recovery of arbitral awards after national court enforcement proceedings and found that:

- 44% of participants recovered 100% of the arbitral award
- 40% recovered between 76% and 99%
- 2% recovered between 51% and 75%
- 0% recovered between 26% and 50%
- 0% recovered less than 25%
- 14% were not sure of what recovery had been achieved.

K. Performance of Arbitrators

The 2010 Queen Mary University study[77] asked respondents to list the top reasons why they were disappointed in the performance of arbitrators and found the following:

Bad decision/outcome	=	20%
Overly flexible/failed to control process	=	12%
Arbitrators caused delay	=	11%
Poor reasoning in award	=	9%
Lacked knowledge of subject matter	=	9%
Tardiness in rendering award	=	8%
Other reasons[78]	=	31%

As a follow-up to this question, this study also asked if the respondents would like to be able to assess arbitrator performance at the end of a dispute. Not surprisingly, some 75% said they would like to be able to do this while 13% said "no" and the remaining 12% had no opinion. Respondents were equally clear on how they would like to assess arbitrator performance with 76% stating they would like to report to the arbitral institution; 30% saying they would opt for publicly available reviews; 27% would like to report back to the arbitrators directly; 9% had no opinion; and the remaining 2% had other ideas.

[77] *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 26 & 28.

[78] Including lack of independence, bias and awarding excessive fees to the arbitrators. Not specifically mentioned but potentially lurking in the background, is the issue of corruption in some countries. *See* Osai Boateng, *How Corrupt is Europe?*, New African, No. 520, August/September 2012.

L. Confidentiality of Arbitration

The responses to the 2010 Queen Mary University study[79] indicate that confidentiality ranges from "somewhat important" (12%), to "important" (24%) to "very important" (62%) to participants in international arbitration. The remaining 3% was made up of "not important" and "depends on circumstances". Having said this, a number of respondents reported that other legal obligations cut across confidentiality and make it porous. (These other obligations include obligations to report to shareholders; make disclosures in annual reports; or make disclosures to the market in the event they are a publicly traded corporation.)

When asked if arbitration is confidential even when there is no specific clause to that effect in the adopted arbitration rules or agreement some 50% said "yes", 30% said "no", 12% said "do not know" and the remaining 7% gave some other response. The study noted that "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."

Additional questions concerning confidentiality of arbitration were included in this study such as –

- Would corporations still use arbitration if it did not offer the potential for confidentiality?
  - 38% said "yes"; 35% said "no"; and the remaining 26% had no opinion.
- Is the lack of confidentiality in state court litigation a principal reason for choosing arbitration?
  - 25% responded affirmatively; 65% responded negatively; and the remaining 9% offered no opinion.

The study also asked respondents to identify the top aspects of arbitration that should be kept confidential. The responses are summarized below.

Amount in dispute	=	76%
Pleadings and documents submitted in case	=	72%
Full award	=	69%
Details in award that allow identification of parties	=	58%
Existence of dispute	=	54%
Legal question(s) to be decided	=	54%

[79] *2010 International Arbitration Survey: Choices in International Arbitration*, pp. 29 & 31.

M. Developing Trends Concerning Arbitration

In performing this literature review concerning international arbitration the Navigant Construction Forum™ found a number of developing trends. These are issues being discussed and debated, but not yet decided. Some of the more important trends are identified below to raise awareness that international arbitration may be moving in these directions.

1. **Right of Appeal** – The 2006 Queen Mary University study[80] clearly showed that 91% of the survey respondents rejected the idea of building an appeal mechanism into the international arbitration process. One of the primary reasons international corporations favor arbitration is the finality of the process. However, in 2009 William H. Knull made a presentation to the Association of Corporate Counsel[81] in which he noted appellate rights are starting to enter the international arbitration process. Mr. Knull pointed out that:
   - The 1996 English Arbitration Act permits appeal of arbitration awards on points of law by agreement of the parties or by order of the court;
   - The Israeli Arbitration Act now permits parties to elect private or public review of arbitration awards; and
   - The International Institute for Conflict Prevention & Resolution ("CPR") Rules now has a structure for review of awards by an arbitral appellate panel.

   The 2012 Fulbright & Jaworski study[82] also noted that Section 1520 of the 2011 French Arbitration Law[83] allows actions to set aside arbitral awards providing five different grounds for doing so. It is also noted that Section 10 of the U.S. Federal Arbitration Act[84] provides for judicial review of arbitral awards on specified grounds.

   The Navigant Construction Forum™ believes the trend for increased appellate rights subsequent to arbitration awards may continue in the future especially if international corporations and national judicial systems become distrustful of the international arbitration process. For practitioners of international arbitration this is a trend to keep an eye on.

2. **Discovery** – The 2009 Knull presentation discussed the issue of discovery in international arbitration and noted that discovery rights are being expanded in international arbitration as follows.
   a. AAA-ICDR Guidelines now provide some broad principles concerning discovery and resolution of discovery issues by the tribunal.
   b. The CPR Protocols allow for discovery and provide pre-fab modules for discovery requests.
   c. The CIArb rules now allow e-discovery.
   d. The International Bar Association ("IBA") Rules allow for wide ranging discovery.

[80] *International Arbitration: Corporate Attitudes and Practices*, 2006, page 15.

[81] William H. Knull, *Recent Developments in International Arbitration*, presented at the 2009 Annual Meeting of the Association of Corporate Counsel, May 2009, Mayer Brown LLP.

[82] *2012 International Arbitration Report*, page 11.

[83] Decree No. 2011-48 of 13 January 2011 (which replaced the 1980 and 1981 arbitration acts).

[84] 9 U.S.C. Section 1 et seq.

Knull noted in this presentation that the ICC has abstained from revising their rules to allow broad discovery of hard and e-copy documents, preferring instead to preserve the flexibility of the tribunal to decide on a case-by-case basis. He also noted that "More than 80% of documents and data now exist only in electronic format." Knull concluded that "If there is to be disclosure, electronic disclosure is unavoidable."

It is noted that subsequent to the U.S. Supreme Court's decision in *Intel Corp. v Advance Micro Devices, Inc.*[85] Section 1782 of the U.S. Code[86] may be relied upon to obtain discovery of evidence in the United States for use in international arbitrations before foreign or international tribunals. Having said this, the 2012 Fulbright & Jaworski study[87] notes that "U.S. discovery in private international arbitration remains unsettled under Section 1782" and discusses cases which allowed and others which denied such discovery requests.

Despite the fact that many users complain about excessive discovery and that it is a potential disincentive to the use of international arbitration, the Navigant Construction Forum™ is of the opinion the trend for more discovery during international arbitration will continue as the global legal and business community become more comfortable with electronic documentation. This is likely to result as the amount of electronic communication and project documentation grows and expectations of privacy erode.

3. **Informal Resolution Procedures** – In an article published in 2008, David D. Hammargren[88] discussed the use of "earlier and less formal resolution of disputes" and "a trend to utilize independent third parties as the initial arbiter in the early dispute resolution process." In this article Hammargren was discussing the 2007 revisions to the AIA documents. However, he noted that ConsensusDOCS also adopted a similar approach in their current set of contract documents. Taking these ideas into the international arbitration realm, Dr. Jalal El Ahdab's 2010 presentation[89] commented on the need for interim measures in international arbitration stating that "…with the ever increasing length of arbitrations, the issue of interim measures has been brought to the front of the scene" and noted that the UNCITRAL Rules are being changed to provide for such interim measures. Dr. El Ahdab noted that "For interim measures to work, there must be a genuine 'judge d'appui' [support judge]…"who serves as an independent third party or the initial arbiter." An article published by Secomb, von Krause, Nacimiento, Ray, Turrini and Goldberg in 2011 noted that

> "Since 1 October 2009, a party can apply to the SCC [Arbitration Institute of the Swedish Chamber of Commerce] institute for the appointment of an emergency arbitrator with the power to decide urgent interim measures even before a request for arbitration is filed and before an arbitral tribunal has been established. The emergency arbitrator must be appointed within 24 hours and a decision on the interim relief must, as a rule, be made within five days of the registered application."[90]

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[85] (02-572) 542 U.S. 241 (2004), 292 F.3d 664, affirmed.

[86] 28 USC § 1782, Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals.

[87] *2012 International Arbitration Report,* page 25.

[88] David D. Hammargren, *Trends in Construction Dispute Resolution: Opportunity for Small Firm and Solo Practitioners*, Law Trends and News Practice Area Newsletter, ABA General Practice, Solo & Small Firm Division, Washington, D.C., Vol. 4, No. 4, Summer 2008.

[89] *The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges*, 2010

[90] Matthew Secomb, Christophe von Krause, Patricia Nacimiento, Aloke Ray, Michael Turrini and David Goldberg, *International Arbitration: Streamlining While Competition Heats Up*, PLC Magazine, April 2011.

This article also noted that, similar to Swedish law, Russian arbitration law[91] provides for applications for interim measures likewise.

The Navigant Construction Forum™ is confident this trend will continue. Nearly everyone involved in international arbitration agrees that the process takes entirely too long. Even if the tribunal "gets it right" at the end of the process, damages may be substantially increased simply because a decision was not reached some months or even years previously. Arbitral institutions are very likely to start introducing interim dispute resolution procedures in order to make the entire arbitration process more palatable to their customers.

4. **Expediting Arbitration Proceedings -**

   a. **The Scott Schedule** – One mechanism being more widely used to expedite the arbitration process is the Scott Schedule. The Scott Schedule (or Official Referee Schedule) is simply a tabular presentation of the key issues involved in the dispute setting forth both the claimant's and the respondent's positions and reasons. The synopsis of positions has become commonly used in construction disputes. The schedule includes a statement of which of the claimant's allegations are admitted or agreed; which of the claimant's allegations are denied; and for allegations that are denied, the reason(s) for that position. The Scott Schedule assists the tribunal in identifying issues agreed to and those still in dispute; allows the arbitrators to focus on the disputed issues with the most significant monetary amounts claimed; and eliminates the need to constantly refer back to large volumes of pleadings.[92] Since its creation in the UK for use by the Consumer Trade and Tenancy Tribunals, the Scott Schedule has been recommended for use by the ICC Commission on International Arbitration and found to be consistent with the UNCITRAL Notes on Organizing Arbitral Proceedings and the IBA's Rules on the Taking of Evidence in International Commercial Arbitration.

   b. **Hot Tubbing, Witness Conferencing and Exchange of Early Drafts of Expert Reports** – Some other trends in intended to expedite the international arbitration process include hot tubbing or concurrent evidence as it is formally known. This is a procedure where opposing experts are at the hearing together with the arbitrator asking questions of both and leading the discussion between the experts. This new approach "…encourages[s] an open and frank discussion between both sides. As such, this model differs from a traditional cross-examination, since there are no barristers shaping the way in which the experts give their evidence."[93] In

[91] Arbitrazh Procedure Code 2002.

[92] *Use of the "Scott Schedule" to Expedite the Resolution of Quantum Issues*, International Arbitration: Managing Risk in High Growth/High Risk Markets – A Conference to In-House Counsel and Executive Involved in International Arbitration, K&L Gates and Navigant Consulting, Inc., September 10, 2008

[93] Paul Barry, *Hot-Tubbing: Is It Time to Take the Plunge?*, The Journal of the Law Society of Scotland, January, 2011.

a 2012 presentation to the Society of Construction Law, Professor Doug Jones and Clayton Utz[94] discussed and endorsed the use of hot tubbing as a way to expedite the proceedings. They went on to recommend the use of witness conferencing a "…process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other to test the accuracy of their opinions. Frequently, the term 'hot tubbing' is used in relation to expert witnesses and 'conferencing' to refer to both lay and expert witnesses…" In both cases, the witnesses in conference can effectively confront each other's evidence on the spot.

Professor Jones went on to comment that "All major international arbitration rules and institutions permit the arbitral tribunal considerable flexibility in dealing with witnesses, and some specifically empower the tribunal to adopt hot-tubbing techniques."[95] Professor Jones recommended requiring experts to exchange drafts of their reports early in the proceedings to allow clarification of contentious issues and, perhaps, reach consensus on some issues. It is noted that the CIArb Protocol provides for early exchange of draft reports if directed by the tribunal.[96]

As various arbitral institutions search for ways to expedite the international arbitration process the Navigant Construction Forum™ believes the use of techniques such as the Scott Schedule, hot tubbing, witness conferencing and early exchange of draft expert reports will gain in popularity and become more frequent going forward.

5. **State Regimes Denouncing International Arbitration Conventions** – Both the Knull presentation[97] and the 2012 Fulbright & Jaworski study[98] noted that some countries are withdrawing from international arbitration conventions. It was noted that Ecuador notified the ICISD in 2007 of its withdrawal of consent to arbitrate disputes related to natural resources before the ICISD. In 2009, Bolivia denounced the ICISD Convention. Venezuela has denounced its bilateral investment treaty ("BIT") with The Netherlands and more recently, on January 24, 2012, withdrew from the ICISD Convention a few weeks after an ICC arbitration tribunal awarded US$907 million to an ExxonMobil subsidiary in a dispute with PDVSA, the Venezuelan national oil company, as compensation for appropriation and breach of contract related to ExxonMobil's Cerro Negro and La Ceiba projects.

The Navigant Construction Forum™ is not convinced that repudiation of international arbitration conventions will spread widely. Statist regimes that follow this course of action place themselves at extreme economic risk as foreign capital investors are very likely to look to other countries, with more stable economic and legal systems, for investment opportunities.

[94] Doug Jones and Clayton Utz, *Arbitration Around the World: Alive or Dead?*, Fourth Annual Construction Law Conference, Society of Construction Law, Melbourne, Australia, May 2012.

[95] Professor Jones specifically referred to the current IBA and CIArb Rules in this regard.

[96] CIArb Protocol, Art. 6.1.

[97] *Recent Developments in International Arbitration*, 2009.

[98] *2012 International Arbitration Report*, page 18.

6. **Arbitration as a Market: Opportunities and Risk** – Dr. Jalal El Ahdab's 2010 presentation synthesized and put word to an idea to which many participants and practitioners in international arbitration have alluded previously. Dr. El Ahdab suggested that international arbitration is a "market" and should be viewed and dealt with in that manner. Specifically, Dr. El Ahdab stated;

> "Some call it a dispute resolution method, others a transnational legal order but it should also be reminded that arbitration is [a] market. Arbitration is not only a legal concept, a form of justice. It is also more concretely, a market which includes legal services by counsels, arbitrators and institutions but also many other services such as translators, financial experts, hotels, transports, conferences, taxes, etc. Enormous amounts are at stake (hundreds of millions at least) which have macroeconomic impacts … There has never been a true and thorough study on the value and economics of the arbitration 'market'. It will deserve, at some point in time, an in-depth scientific contribution."[99]

Put in these terms, the Navigant Construction Forum™ believes international arbitration is already a market but a loose one and not especially organized. Markets are systems of commercial activity where goods and services are bought and sold. As such, markets respond to market forces theory – offer and acceptance, competition, etc. This helps explain the rapid growth of arbitral institutions over the last two decades as well as the competition for seats of arbitration.

But Dr. El Ahdab poses some other questions that, depending upon the answer, may develop into future trends with respect to international arbitration. Among these questions are the following:

- If arbitration is a market, what is at stake?
  - Law firms are creating more specialized teams that deal exclusively with international arbitration.
  - Arbitration in atypical languages is growing (i.e., Arabic, Chinese, Portuguese) which creates opportunities for counsel and arbitrators with working knowledge of these languages.
  - Arbitration involves more technical issues which may give rise to the "expert arbitrator" – one knowledgeable in both law and technology. It is probable that the best arbitrators in the future will have to be knowledgeable with technology to remain continually engaged.
  - A new generation of arbitrators with new skills, fluent in several languages and familiar with multiple cultures and legal systems and with truly transnational profiles will rise.
  - Practitioners from a region will have to be increasingly specialized in those fields most relevant to their region.
  - Arbitrators will compete for appointments.
  - Arbitration centers will compete for their share of cases and new arbitration centers will grow up.
  - Older, established arbitral institutions are opening new offices in foreign locations (e.g., ICC in Asia, AAA-ICDR in the Mideast and the LCIA in the Mideast and India).
- If arbitration is a market, should it be regulated?
  - If so, how, in what manner and by whom?

[99] *The Increasing Importance of Arbitration in Trade and Investment in the World – General Trends, Opportunities and Challenges*, 2010.

The Navigant Construction Forum™ believes international arbitration is already a market which explains the rise of specialty teams within law firms; the increase in arbitral institutions; an increase in cities holding themselves forward as seats of arbitration; etc.

However, the Navigant Construction Forum™ is unable to form an opinion on whether international arbitration can or should be regulated. There is, at present, inadequate information available to warrant reaching any conclusions on this issue. Having said this, the Forum recommends that practitioners watch carefully for signs of national government attempts to regulate international arbitration.[100]

Conclusion

Arbitration is well established in international construction. Despite complaints about the time and cost of arbitration it likely will continue to be the dispute resolution method of choice amongst most transnational contractors. Steps are being implemented in an attempt to reform the process and address many of the concerns and complaints. If these various reforms are adopted widely then arbitration may start to move slowly back to the status of being faster and cheaper than litigation.

Future Efforts of the Navigant Construction Forum™

In the fourth quarter of 2012, the Navigant Construction Forum™ will continue its analysis of construction industry issues. The Navigant Construction Forum™ is in the process of conducting a survey of current trends in construction claims within the construction industry. It is believed that the results of this survey will enable construction industry participants to become more attuned to such new trends.

Further research will continue to be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this research perspective have ideas on further construction dispute related research that would be helpful to the industry, you are invited to e-mail suggestions to jim.zack@navigant.com.

[100] An example are bills introduced in the U.S. Congress that invalidate pre-dispute arbitration agreements in transactions between parties of unequal bargaining power or that assign responsibility for determining the validity of arbitration agreements to courts rather than arbitral tribunals. Such domestic legislation might, due to the law of unintended consequences, impact international arbitration. Another example is the recent modification to Chapter 4 of the U.S. Federal Arbitration Act which would have impacted international arbitration had it not been for the active efforts of the international arbitration bar which excluded international arbitration from coverage of this statute.