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Corporate choices in International Arbitration
Industry perspectives

2013 International Arbitration Survey.

Queen Mary University of London

School of International Arbitration

pwc

Is arbitration well suited to your industry

strongly agree/agree results by industry and overall

Overall
73%

Energy
78%

£ **69%**
Financial Services

Construction
84%

Which is the most preferred dispute resolution mechanism in your industry

% of respondents that prefer (most preferred) international arbitration as a choice of resolving cross border disputes with a built in comparison between the

Overall results **52%**

and those by industry –

Energy **56%**

Construction **68%**

Financial Services **23%**

the crisis

35%

reported that the

2008

financial crisis

resulted in a noticeable increase in disputes

the outcome

57%

of disputes settled

32%

of disputes not settled are referred to litigation or arbitration

Introduction

PwC[1] is delighted to support this latest survey of corporate counsel on their experience of and views on international arbitration. Multinational businesses are an important segment of the users of international arbitration; their perspectives of what works well and of things that need improving should be valuable to both fellow in-house counsel and to arbitration practitioners.

The survey shows that major corporations, across different industry sectors, continue to affirm the benefits of arbitration to resolve transnational disputes. Corporations are becoming more sophisticated in procuring international arbitration services. Concerns over costs and delays in proceedings persist and in-house counsel are increasingly focused on getting value from the arbitration process. The survey shows corporations are investing in in-house resources and demanding a variety of alternative fee arrangements to share both the workload and the risks of proceedings more with external law firms. The evidence of arbitration becoming more embedded in corporations should be seen as a positive sign for the future of arbitration from a demanding segment of the market.

PwC is committed to invest in research that is relevant to multinational corporations. We hope this survey helps to inform debate and support the evolution of international arbitration to meet the needs of corporate users in their complex and transnational activities. We are very pleased with the work of the research team over the last year, led by Remy Gerbay, the PwC Research Fellow at the School of International Arbitration and supervised by Prof Loukas Mistelis.

Gerry Lagerberg
Partner
PwC (UK)

It is my great pleasure to introduce the 2013 International Arbitration Survey on Corporate choices in International Arbitration. This is the fifth survey released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and the third one prepared with the generous and unconditional support of PwC.

This survey differs from recent ones in two respects. First, we decided to look at arbitration 'from the outside in', in other words focusing on arbitration as an industry in itself, rather than looking at 'internal' aspects such as procedure or 'best practice'. Second and more importantly, we attempted to identify differences in perceptions and practices in three major sectors of the economy (Energy, Construction and Financial Services).

This "new generation" of surveys (with its sector-specific findings) allows us to delve into more detail than previous ones, offering a better and more nuanced understanding of a range of issues, such as the use of arbitration vis-à-vis other mechanisms, the selection of service providers (including outside counsel and experts), the funding of proceedings, and the impact of the economic climate on disputes. In this survey, we have paid particular attention to the sample of corporations canvassed for their views to ensure both appropriate regional representation and adequate size to qualify as major corporations.

We are delighted by our continued co-operation with PwC, which made it possible for us to conduct an independent academic survey with external funding, offering results which should be of interest to both arbitration practitioners and corporations.

Professor Loukas Mistelis
Director, School of International Arbitration
Queen Mary, University of London

1 "PwC" refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity.

This global survey investigates how corporations use international arbitration, with a particular emphasis on companies in three sectors of strategic importance to the world economy.

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Executive summary

This global survey investigates how corporations use international arbitration, with a particular emphasis on companies in three sectors of strategic importance to the world economy. Focusing exclusively on the views of in-house counsel, it aims to provide new insights on how arbitration can continue to meet the changing needs of global businesses.

The objective of the survey was to provide empirical evidence on a number of new areas of interest to both users of international arbitration and practitioners. Some of the key areas include:

1. the use of arbitration by corporations in different industries, with an emphasis on three key sectors (Financial Services, Energy, and Construction);[2]
2. the impact of the 2008 financial crisis and the 2012 eurozone crisis on the level of disputes, and methods for resolving them;
3. the factors impacting corporations' decisions on whether to pursue disputes and choice of external counsel; and
4. the prevalence and impact of third-party funding and alternative fee structures.

The research, which was conducted over a 10-month period, comprised two phases: an online questionnaire of 82 questions completed by 101 corporate counsel, which was followed, for qualitative purposes, by over 30 interviews. Further information about the sample of questionnaire respondents and interviewees can be found in the Methodology section in the appendices. The results of the study are set out under thematic headings, each including statistics and analysis drawn from the empirical data.

The key findings from the study are:

Choice of dispute resolution mechanisms

- Overall, businesses continue to show a preference for using arbitration over litigation for transnational disputes, although concerns remain about the costs of arbitration.
- The survey confirms that arbitration is more popular in some industry sectors than others, most notably in the Energy and Construction sectors.
- While most Financial Services sector organisations prefer litigation to arbitration, the benefits of arbitration are increasingly recognised; most corporations in this industry agree, in principle, that arbitration is "well suited" to the resolution of disputes in that sector.

Outlook for arbitration: reflecting on the impact of the 2008 financial crisis and the 2012 eurozone crisis

- Half of the respondents to our survey reported that the 2008 financial crisis did not result in a noticeable increase in international disputes for their organisations, although Financial Services sector companies, unsurprisingly, reported an increase in disputes after 2008. The overall picture is in contrast to the statistics of the major arbitral institutions pre- and post-crisis, which show a clear increase in case referrals (especially from 2007 to 2009, though with a relative decline thereafter).
- This may reflect the scope of operations of organisations that participated in the survey: several respondents whose activities were mostly in higher growth regions (such as Africa, Asia or Latin America) reported that the crisis had had a minimal impact on their operations.
- With the continuing threat of a eurozone debt crisis, there is uncertainty over the extent to which the current financial and economic conditions may result in more international disputes. Respondents predicting no increase in disputes in the months ahead outnumber those predicting an increase in disputes by two to one.

Choice and role of outside counsel

- The two most influential factors in selecting outside counsel are previous experience of the firm/lawyer in contentious proceedings and personal knowledge of the lawyer being selected. Rankings of law firms in directories were not regarded as particularly influential.
- In selecting outside counsel, respondents showed a slight preference for arbitration specialists over those with industry specialism (55% versus 45%), although industry knowledge is the most important factor in selecting outside counsel for respondents in the Construction sector. In defining "industry knowledge", corporations attach more importance to a commercial understanding of their industry, rather than pure technical knowledge or qualifications.
- There is a trend towards increased involvement of in-house counsel in case management driven, in part, by a desire to control costs better. More corporations are employing dispute resolution lawyers to augment their in-house capabilities.

2 In this study, respondents from the Financial Services sector are respondents who identified their primary industry as being financial Services including *"rating agencies, investment research providers and financial consultancy"*. Energy excludes *"mining and natural resources"*. Construction includes *"engineering and infrastructure"*. In this report, a reference to the "overall results" is a reference to the results across all industry sectors.

Internal decision-making on arbitration matters

- On average, respondents said that they managed to settle 57% of their disputes through direct negotiation or mediation. Interestingly, of those disputes that do not settle, only a minority (32%) are referred to litigation or arbitration.
- In deciding whether to commence arbitration, the most important factors are the strength of an organisation's legal position, followed by the strength of the available evidence and thirdly, the amount of recoverable damages. While the costs of arbitration are a repeated concern, the prospect of high legal fees was not cited as an important factor in deciding whether to commence arbitration.
- Although senior executives and officers often have the final say on whether to initiate arbitration or litigation proceedings, in-house counsel have most influence over the selection of outside lawyers.

Funding

- Once a decision to arbitrate has been made, few corporations (11%) withdraw from proceedings because of funding difficulties.
- Most corporations have used alternative fee structures for their external lawyers (i.e. other than hourly rates); the most common types are "capped fees", or combinations of discounted hourly rates with success-based fees. Pure contingency fees are rare.
- The use of third-party funding and "before the event" insurance remains relatively uncommon with, respectively, 6% and 20% of participating organisations having used these options to fund disputes.

Cost, delay and the fear of "judicialisation" of arbitration

- While international arbitration is preferred to other dispute resolution mechanisms across industry sectors, many corporations continue to express concerns over costs and delays in arbitration proceedings.
- For respondents who considered arbitration not to be well suited to their industry, costs and delay were cited as the main reasons more than any other factors.
- Notwithstanding these concerns, lack of arbitrator availability was not cited as one of the most important factors when selecting arbitrators. This does not mean that corporations were unconcerned about availability but that, on balance, in-house counsel felt that it is more important to appoint the arbitrator best suited to the case rather than one who could potentially complete the mandate faster. This finding differs from that in previous surveys and suggests that, while not satisfied with delays, corporations appreciate that a larger pool of experienced arbitrators will take time to evolve.
- The most influential factors in the appointment of arbitrators were the individual's (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential.
- Some interviewees have expressed concerns over the "judicialisation" of arbitration, the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings. This trend is potentially damaging to the attractiveness of arbitration. In-house counsel value the features of the arbitration process that distinguish it from litigation.

Choice of dispute resolution mechanisms: is international arbitration the preferred choice across industries?

Introduction

Conventional wisdom, anecdotal evidence and prior research all suggest that arbitration is the business community's preferred mechanism for resolving international disputes.

Earlier surveys by Queen Mary, University of London, had confirmed arbitration's overall popularity. In the 2008 survey, 86% of respondents said they were "satisfied" with arbitration. Likewise in 2006, 73% of participants identified international arbitration as their preferred mechanism for dispute resolution – either on a standalone basis (29%), or in combination with ADR mechanisms as part of a multi-tiered, or escalating, dispute resolution process (44%).

Recently, however, intense debate surrounding costs and delay has raised concerns over the satisfaction of some of the largest corporate users of international arbitration. One of the aims of our *"2013 International Arbitration Survey"* was to assess the appeal of international arbitration in light of these criticisms.

Another common assumption is that international arbitration's popularity varies from industry to industry. Construction and Energy are often cited as industries where arbitration fares particularly well. Financial Services, on the other hand, is sometimes seen as a sector where corporations prefer litigation to arbitration. The *"2013 International Arbitration Survey"* sets out to assess whether this perception is consistent with reality.

The overall popularity of arbitration

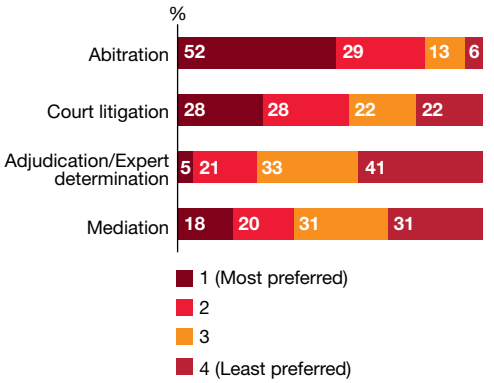
Arbitration compared with the other options available

Participating corporations were asked to rank, in order of preference, the following dispute resolution mechanisms: Litigation, Arbitration, Expert Determination/ Adjudication and Mediation.

Overall, the *"2013 International Arbitration Survey"* results confirm that, amongst the surveyed corporations, arbitration continues to be more popular than any of the other options available.

Arbitration ranked first more often than any of the other mechanisms (52% of respondents marked arbitration as most preferred). Arbitration was also ranked last less often than any other mechanism.

Rank the following dispute resolution mechanisms in order of preference.



Almost the same proportion of participants prefer arbitration when they are claimants (62%) as when they are respondents and have no counterclaim (60%).

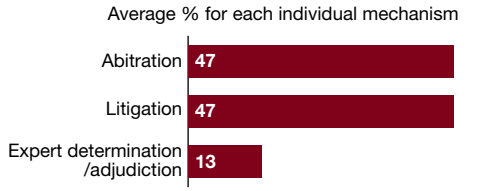
Several interviewees who are frequent users of arbitration explained that, regardless of whether they are a claimant or respondent, "fairness" – above all other considerations – is what companies look for in a dispute resolution mechanism. One interviewee from the Energy sector indicated that it was easier to explain to senior executives, or the Board of Directors, why the company had been unsuccessful if the board felt that the process had been fair. The interviewee went on to say that arbitration, because of its neutrality, gives a sense of fairness that litigation in foreign courts sometimes cannot provide.

How frequently is arbitration used?

Given the greater appeal of arbitration to corporations across all sectors, one might expect it to be used by them more frequently than litigation. This hypothesis was not borne out by our research. We asked respondents to identify the proportion of international disputes that could not be resolved amicably which were subsequently referred to litigation, arbitration or expert determination/adjudication. Across all sectors, the survey showed that respondents refer as many disputes to arbitration (47%) as they do to litigation (47%).

Several interviewees commented that, for certain cases, the use of litigation is unavoidable. This is because arbitration is sometimes unavailable by operation of law – for example, in non-contractual claims like breach of patent rights, as well as in potentially non-arbitrable disputes (e.g. in employment).

Of the international disputes that your organisation was not able to settle amicably (including through mediation), what proportion was referred to arbitration, litigation and expert determination/adjudication?



The choice of dispute resolution mechanism may sometimes depend on the other party's identity. For example, several interviewees from the Construction sector pointed out that while disputes against sub-contractors are often referred to arbitration, disputes with "customers" that could not be settled amicably sometimes were referred to litigation.

The popularity of arbitration by industry

Construction and Energy are industries where arbitration is perceived as the preferred mechanism of dispute resolution. It is often said that the enhanced technical nature of disputes in these sectors favours a process where the parties can select the person who will decide the claims.

By contrast, there is a perception that, because of the "legal" nature of many of their disputes, organisations in the Financial Services sector use litigation more than arbitration. This is in part because of a need for binding precedent in the construction of the terms in finance documents. In addition, many disputes arising out of defaults under loan agreements are "simple debt collection" cases that are well suited to the courts rather than a flexible and potentially costly dispute resolution mechanism such as arbitration.

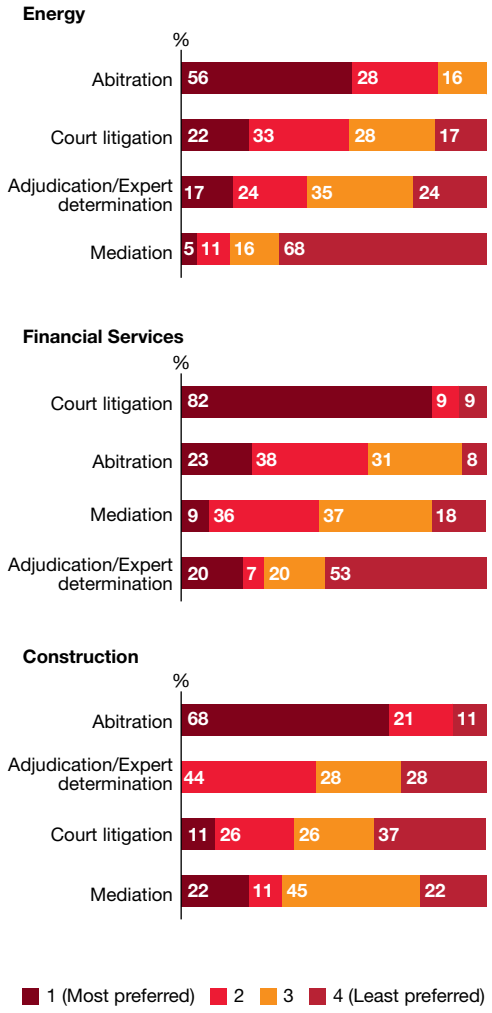
Is arbitration more popular in certain industries than others? If so, which ones?

The survey confirms that arbitration's popularity depends on the industry concerned, with Financial Services at one end of the spectrum and Energy and/or Construction at the other.

In the Energy sector, arbitration is clearly the preferred dispute resolution mechanism, followed by litigation, adjudication and mediation. In the Construction sector arbitration, is overwhelmingly cited as the preferred option, ahead of litigation.

By contrast, litigation is the clear favourite for respondents in the Financial Services sector. While this is not surprising, it is interesting to note that arbitration still fares relatively well, being ranked as 'most preferred' more often than any other dispute resolution mechanism except litigation.

Rank the following dispute resolution mechanisms in order of preference for your industry sector.



Why is arbitration more popular in certain sectors than others?

Perceived benefits of arbitration in different sectors

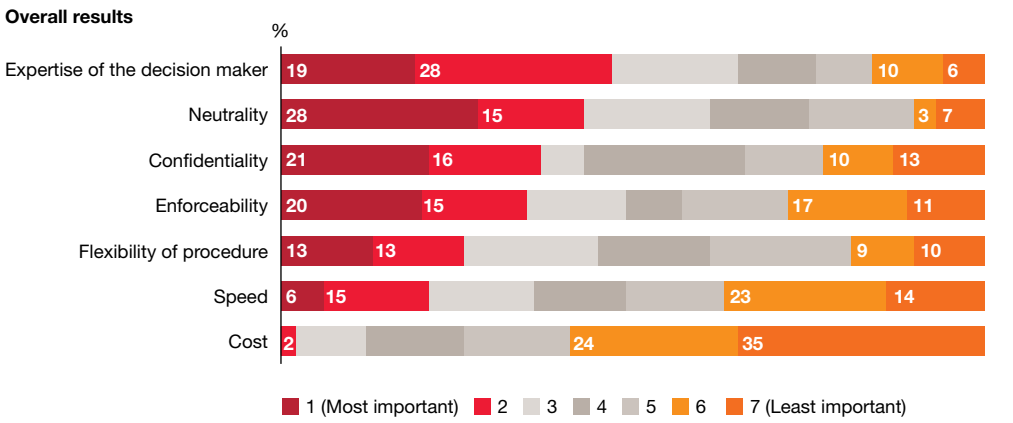
Respondents were asked to rank the following perceived benefits of arbitration in order of importance for their industry sector: neutrality, expertise of decision-maker, flexibility of procedure, costs, speed, enforceability, and confidentiality.

In Energy, neutrality, flexibility, confidentiality and expertise of decision-maker are the top four perceived benefits. At the other end of the spectrum, costs and speed are least likely to be viewed as benefits of arbitration. Surprisingly, enforceability appears in the middle of this range.

Similar results were obtained from companies in the Construction sector. Neutrality and expertise of decision-maker are both considered to be strong benefits of arbitration – costs and speed less so. On the other hand, confidentiality, flexibility and enforceability are apparently less important than they are in the Energy sector.

In Financial Services, the number one benefit is the expertise of decision-maker. This appears to be in line with the perception that many disputes in the Financial Services sector are highly technical and parties select industry specialists for their cases. Speed is also cited as a benefit of arbitration. This may be explained by the fact that time is often of the essence in the recovery of a loan. Financial Services sector companies view the cost of arbitration as its least important benefit.

Rank the following perceived benefits of arbitration in order of importance for disputes in your industry sector.



Is arbitration well suited to all industry sectors? If not, why?

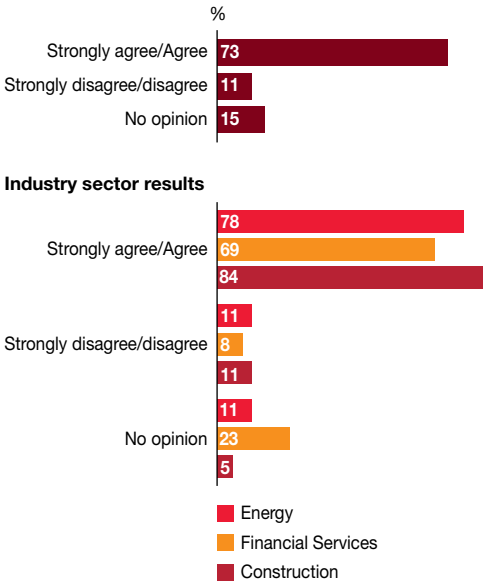
We asked respondents whether they felt that arbitration was well suited to the types of disputes encountered in their respective industry sectors.

In the Energy sector, participating companies most often "Agree" or "Strongly Agree" that arbitration is well suited. Taken together, "Agree" and "Strongly Agree" represent 78% of the responses; whereas "Disagree" represents only 11%. A similar proportion (11%) had no opinion, and no respondents strongly disagreed.

In the Construction sector, the results are even more strongly in favour of arbitration: "Agree" and "Strongly Agree" represent 84% of responses; and "Disagree" 11%.

As expected, in the Financial Services sector, arbitration fares slightly less well (in terms of suitability) than in other sectors. Nevertheless, a majority of companies from this sector (69%) responded "Agree" or "Strongly Agree" to this question. Few respondents (8%) disagreed. Many participants in this sector had no opinion (23%) and no corporation strongly disagreed. So, while arbitration is viewed as less well suited to the type of international disputes encountered in the Financial Services sector, there is no strong objection to it.

In your view, arbitration is well-suited for the sort of international disputes encountered in your industry sector?



Respondents who stated that arbitration was not well suited to disputes in their sector had an opportunity to say why and were asked whether they agreed or disagreed with a number of potential limitations of arbitration.

The present survey (like previous ones) showed that, across all sectors, costs were a very important issue, as arbitration is often considered to be more costly than other available alternatives. The second most frequently cited factor was "delay" (arbitration takes longer than other dispute resolution mechanisms). Next, a perceived lack of clear-cut decisions, followed by a shortage of arbitrators with the requisite expertise. The absence of specialist institutions or rules does not seem to rank highly as a factor, whatever the industry.

Our interviews did not reveal any industry-specific disadvantages of arbitration. When asked about the disadvantages of arbitration, most interviewees, regardless of industry, pointed to universally applicable issues (such as cost and delay) rather than any industry-specific factor.

Previous surveys had highlighted some corporations' concerns with the lack of choice of suitable arbitrators. However, across most industries, a perceived lack of arbitrators with requisite expertise was not cited often as affecting the suitability of arbitration. There is a slight inconsistency here with the perception that corporations in the Financial Services sector use arbitration less frequently because of a lack of suitably qualified arbitrators. The reasons for the lower use of arbitration in Financial Services and whether arbitration could evolve to make itself more suitable to complex and technical Financial Services disputes are areas in which it would be interesting to conduct further empirical research.

In your view, if arbitration is not very well suited for your industry sector, is it because:

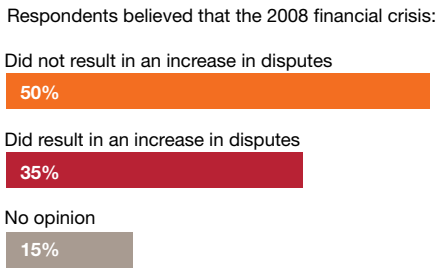
Outlook for arbitration: the impact of the 2008 financial crisis and the 2012 eurozone crisis

The impact of the 2008 financial crisis

Did the 2008 global financial crisis result in an increase in arbitration activity?

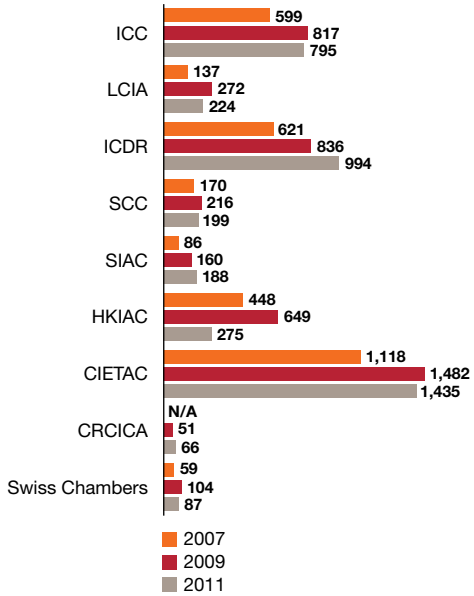
Overall, more respondents (50%) believe that the 2008 financial crisis did not result in an increase of international disputes than those that believe it did (35%); 15% have expressed no view.

2008 financial crisis.



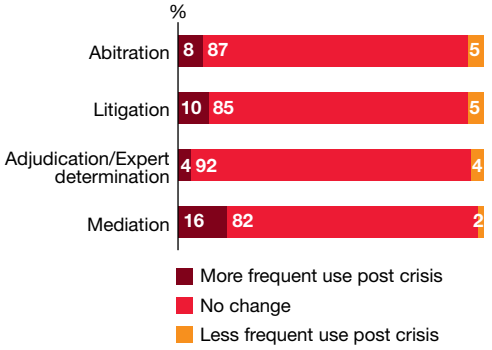
This is in contrast to the statistics of the major arbitral institutions pre- and post-crisis, which show a clear increase in case referrals (especially from 2007 to 2009, though with a relative decline between 2009 and 2011).[3]

Reported case-load – biennial trend.



When asked whether the 2008 financial crisis had changed their choice of dispute resolution mechanisms, the most frequently mentioned change was an increase in the use of mediation post crisis. Interviewees indicated this was due to increased pressure on litigation budgets.

Did the financial crisis of 2008 result in changes in your organisation's choices of dispute resolution mechanisms, and if so, what are these changes?



The geographic scope of corporations' operations at the time of the crisis had an impact on the incidence of disputes. Interviewees whose organisations' activities were mostly in high-growth regions, such Asia or Africa, said that the crisis had had a minimal impact.

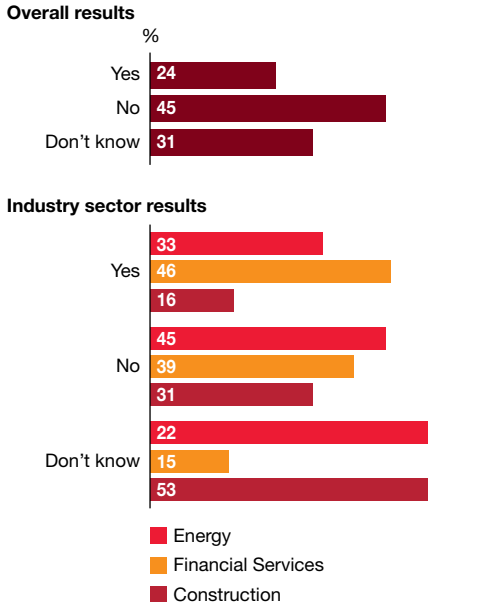
The impact of the 2012 eurozone crisis

At the time of the survey, there was significant uncertainty amongst respondents as to whether the eurozone crisis would result in an increase in international disputes faced by their organisation: 31% of respondents did not know. However, nearly twice as many corporations expect no increase in disputes than corporations that expect an increase (45% vs. 24%).

3 Statistics made available by Institutions on their websites. Statistics for international and domestic cases. It should be noted that the proportion of international cases varies greatly from institution to institution.

Participants from the Financial Services sector were most likely to foresee a rise in disputes as a result of the 2012 turmoil; this is unsurprising given the intricate links between the eurozone crisis and the banking system in Europe and globally.

Do you expect that the current (2012) financial turmoil will result in an increase in your organisation's international disputes?



Choice and role of outside counsel and experts

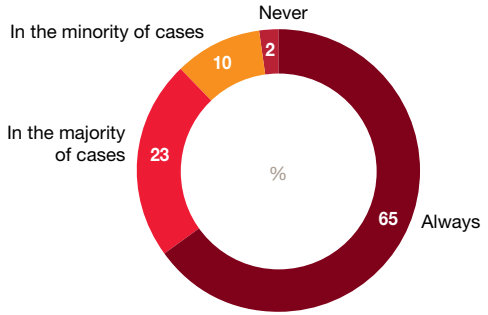
Introduction

How often are outside counsel used in international arbitration? How are they selected?

How often are outside counsel retained?

The vast majority of participating corporations instruct outside counsel when they are involved in arbitration.

When your organisation is involved in an international arbitration, how often do you instruct an outside counsel?



The picture is similar across all industries; almost all corporations instruct outside counsel for arbitration proceedings.

Our interviews provided some interesting colour on the scope of outside counsel's involvement and the interaction between in-house and outside counsel. Whilst most corporations retain outside counsel, a number of interviewees now seek to do part of the legal work in-house, sometimes drafting submissions and sharing case preparation work, such as the document production process, with outside counsel. Many corporations reported having recently employed dispute resolution lawyers to enhance their in-house capabilities for arbitration cases so as to reduce their expenditure on external firms. One interviewee explained that the level of the in-house team's involvement was something that the business would negotiate in detail prior to retaining an external firm in a case.

Use of panels of preferred law firms

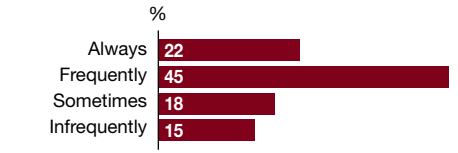
When it comes to using panels of pre-approved law firms, practices of companies varied.

We asked respondents whether they had a panel of pre-approved or preferred law firms and, if so, how often they retained panel firms for arbitration. Overall, 67% of participating corporations indicated that they had a panel of preferred law firms; this was significantly higher in the Financial Services sector than in either Energy or Construction.

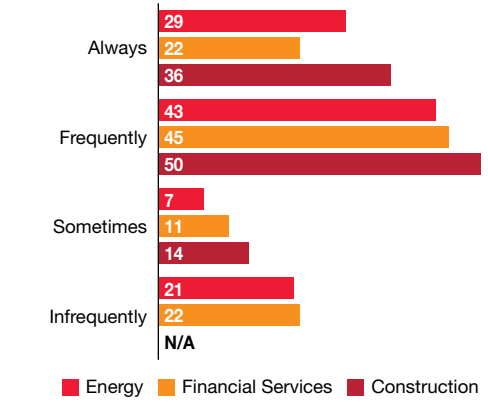
However, even when they have a panel, participating corporations do not always retain law firms from that panel. Around one-third of the respondents said they retained law firms from their panel only "sometimes" or "infrequently" for arbitrations.

If your organisation has a panel of pre-approved or preferred law firms, how often does your organisation retain law firms from that panel for its arbitrations?

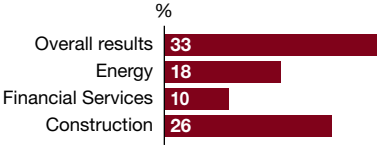
Overall results



Industry sector results



My organisation has no panel of pre-approved or preferred law firms



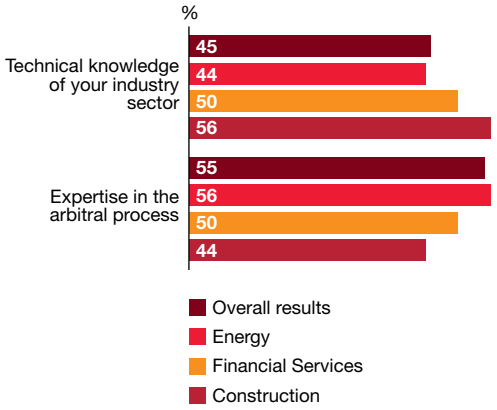
How are outside counsel and experts selected?

In recent years, many law firms have set up dedicated international arbitration teams. Other firms continue to provide their services through arbitration lawyers practising in a wider litigation department or in industry-specific practice group (such as Energy, or Commodities).

When faced with arbitration proceedings, we asked respondents which they regarded as most important for outside counsel in an international arbitration – (1) technical knowledge of the industry sector, or (2) expertise in the arbitral process.

Overall, the majority of respondents preferred expertise in the arbitral process (55%), against the 45% that favour industry specialism. There are some variations between industry sectors. In particular, a majority of respondents from the Construction sector reported that for an outside counsel in international arbitration in their sector, technical industry knowledge was more important than expertise in the arbitral process.

In your own opinion, between the following two attributes, which is the most important for an outside counsel in an international arbitration?



The interviews shed a nuanced light on this question. Interviews confirmed that a majority of corporations prefer their outside counsel to be arbitration experts rather than industry or technical experts. However, interviewees often distinguished between technical expertise,[4] and a commercial understanding of the industry sector, with the latter being more important. Several interviewees said that a good understanding of the "commercial reality" of the matters in dispute was indispensable.

Another interesting perspective came from an interviewee from the Insurance sector who suggested that an arbitration specialist counsel may appear more persuasive to a tribunal composed of arbitration specialists rather than industry specialists.

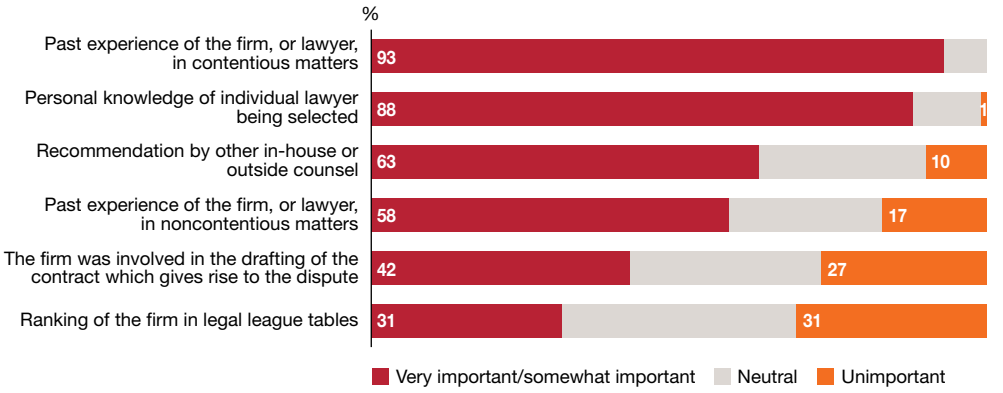
Overall, expertise in the arbitration process and commercial understanding of the relevant sector both appear to be essential (and more important than technical expertise) in the choice of outside counsel.

Criteria used to choose outside counsel

What criteria are applied by corporations when choosing outside counsel? We asked respondents to rate the importance of different criteria.

Overall, the two most important factors were (1) past experience of the firm or lawyer in contentious matters and (2) personal knowledge of the individual lawyer being selected. Ranking of the law firm in league tables appeared as the least important factor.

How important are the following factors when you or your organisation select an outside counsel?

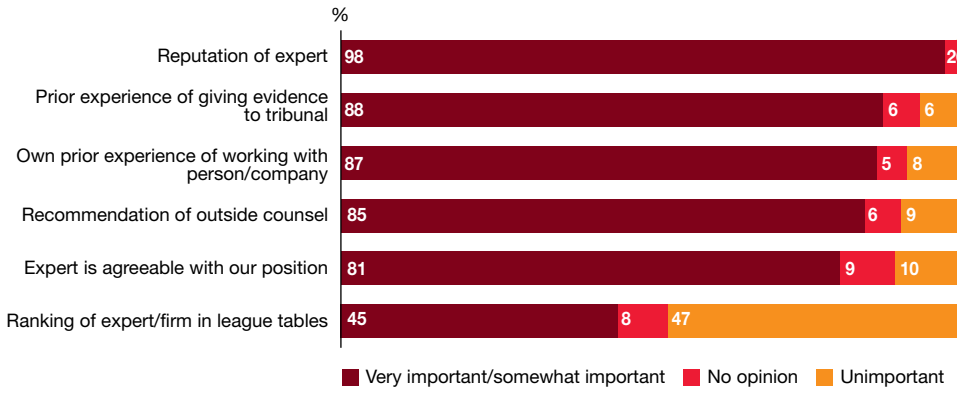


4 For example, expertise in the engineering aspects of a construction or energy project, or an ability to understand actuarial calculations in the insurance industry.

Likewise, the involvement of the firm in drafting the contract that has given rise to the dispute is seldom considered to be significant. Companies that tend to conduct their business on the basis of standard-form contracts (such as commodities trading) are unlikely to benefit from using the firm involved in the drafting of the contract. On the other hand, for activities that require more bespoke contractual arrangements (such as Construction or Energy sector matters), one would expect outside counsel's involvement in drafting the original contract to provide a level of benefit.

When choosing experts, the two most important criteria were reported to be the reputation of the expert, followed by prior experience of working with either the expert or his/her firm. As with choosing external counsel, ranking in league tables was not an important consideration.

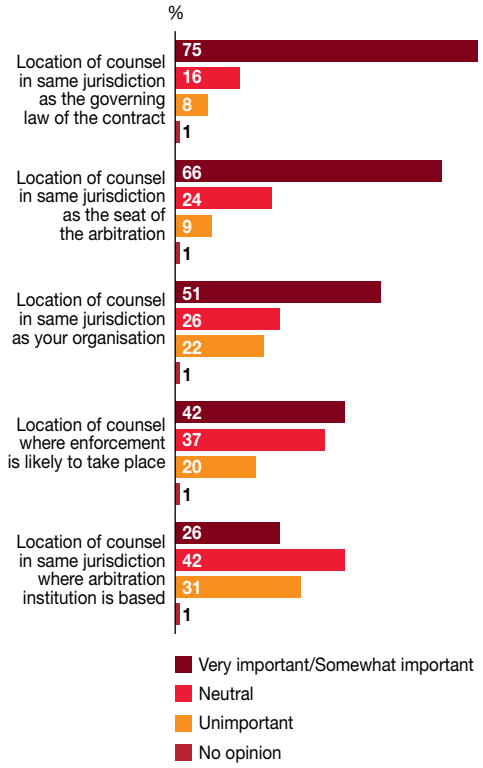
In your industry how important are the following factors in choosing an expert?



Importance of geographic location of counsel

In light of the increasing globalisation of the legal services market, the survey questioned the importance of location in selecting counsel for international arbitrations. Various propositions were put to the respondents, who were asked to assess their respective importance.

What is the importance of the location of your outside counsel?



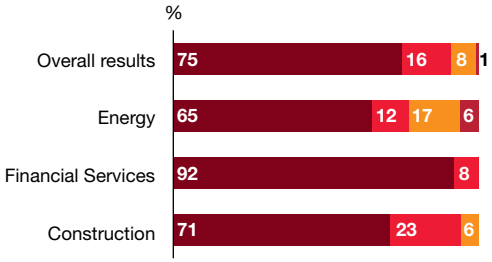
As expected, the most relevant factor is the location of outside counsel in the same jurisdiction as the law governing the relevant contract. The importance of counsel being located in the same jurisdiction as the seat of arbitration was ranked the second most significant factor. This comes before the location of counsel in the same jurisdiction as the participating corporation (which for reasons of practicality alone might have been expected to rank higher). This would seem to indicate that some users of arbitration attach a certain importance to the notion of "seat of the arbitration".

The location of counsel where enforcement is likely to take place is mostly seen as "neutral" or "unimportant"; overall, parties are not particularly concerned with their counsel having good knowledge of the law of the likely place of enforcement.

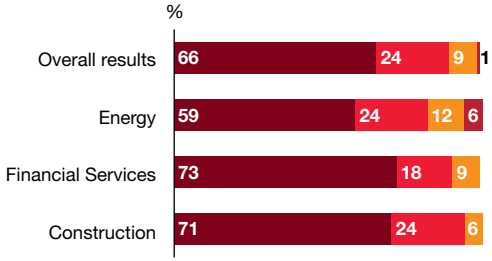
When broken down by sector, the results highlight some differences. Respondents in the Energy sector seem less concerned with the location of counsel than those in other sectors. In contrast many Financial Services companies attach considerable importance to the location of their outside counsel – notably in terms of their being in the same jurisdiction as the contract's governing law. Interviewees in Financial Services sector companies said they are more concerned with arbitrators "getting the law right".

What is the importance of the location of your outside counsel?

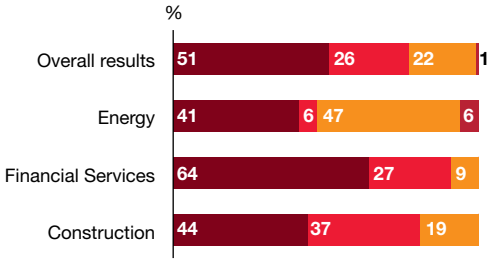
Location of counsel in same jurisdiction as the governing law of the contract



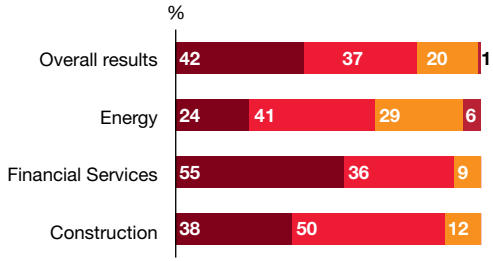
Location of counsel in same jurisdiction as the seat of arbitration



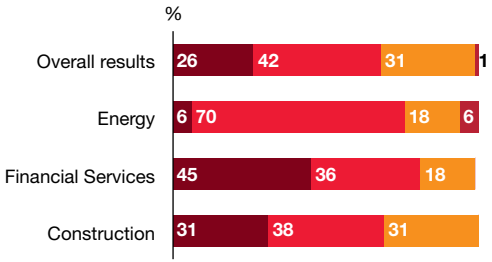
Location of counsel in same jurisdiction as your organisation

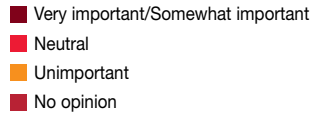


Location of counsel where enforcement is likely to take place



Location of counsel in same jurisdiction where arbitration institution is based



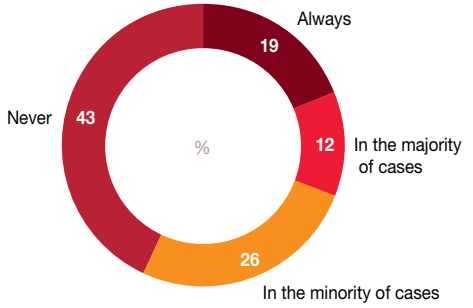


Who decides which firm to retain?

The survey results reveal that company executives (board-level directors, CEOs or senior business executives) tend to be the ultimate decision makers in deciding whether or not to initiate arbitration in a majority of cases. However, the question of which firm to retain for a particular arbitration falls more often within the remit of in-house corporate counsel. When asked how often the Board of Directors, the CEO or a senior business executive was involved in the choice of outside counsel, 69% of respondents answered "never" or "in the minority of cases", 19% responded "always" and 12% responded "in the majority of cases".

The survey results show little difference across industry sectors.

In your organisation, how often is the Board of Directors, the CEO or a senior business executive materially involved in the choice of outside counsel in a particular arbitration?

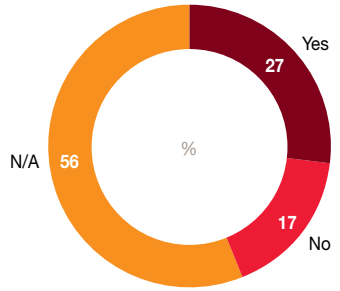


Retaining an outside counsel after a defeat?

We asked respondents whether they had rehired a particular counsel after they represented the corporation in an unsuccessful arbitration.

Overall and across each of our key sectors, a majority of respondents who had been presented with the opportunity did so.

In the past 5 years, has your organisation rehired a particular counsel for an arbitration after they represented your organisation in an unsuccessful arbitration?



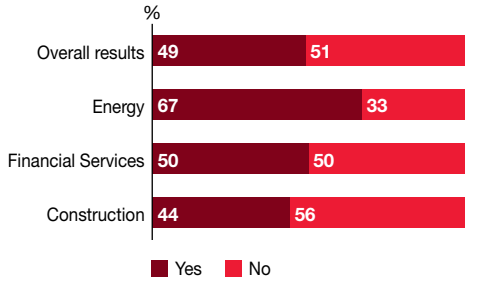
Anatomy of an arbitration user: internal decision-making in an arbitration

Introduction

Principal questions explored in this section include: What proportion of corporations have a dedicated in-house disputes team? What factors influence the decision to initiate arbitration proceedings? Who makes the ultimate decision? To what extent are technical experts involved in shaping the legal strategy of a case? Do practices vary from one industry to another?

Most participating corporations (90%) have a dedicated legal department. There is little variation from one industry to another (i.e. across Energy, Financial Services, and Construction). However, across all sectors, of those corporations that have a legal department only half (49%) have a dedicated in-house disputes team. The corporations with the most in-house disputes team are in the Energy sector (67%).

Does your organisation's legal department have a dedicated disputes team or department?

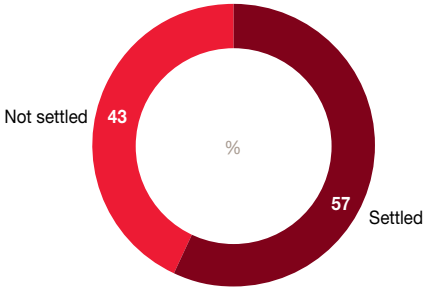


This is in line with the fact that, on average, respondents in the Energy sector had dealt with more disputes in the past five years than respondents in other sectors.

How often do users opt to litigate or arbitrate?

We first asked respondents what proportion of international disputes they had managed to settle amicably (that is to say through direct negotiation or mediation) before litigation, arbitration, or other formal proceedings were initiated.

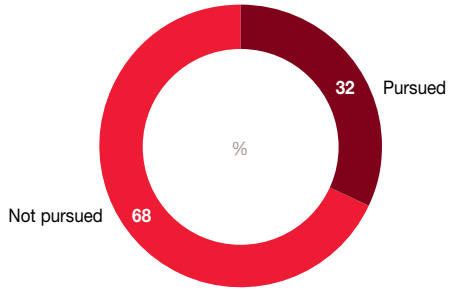
Over the past 5 years, what is the approximate proportion of international disputes that your organisation has managed to settle amicably (i.e. through direct negotiation or mediation) before litigation, arbitration, or other formal proceedings were initiated?



On average, participants said that they managed to settle 57% of their disputes through direct negotiation or mediation.

We also asked our respondents what proportion of the disputes that could not be settled were referred to litigation or arbitration. The results indicate that, overall, when participating corporations have been unable to settle their disputes, they initiate litigation or arbitration proceedings in the minority of the cases (32%).

Over the past 5 years, of the international disputes that your organisation was not able to settle amicably, what is the approximate proportion of disputes that your organisation has actually pursued?



The interviews indicated that the need to maintain ongoing business relationships is an important consideration in deciding whether to commence legal proceedings. Interviewees explained that, where there are a limited number of players in a particular market, or where one has to deal with a state-owned entity, initiating proceedings might mean losing future business opportunities. Interviewees also confirmed that the local culture has an impact on willingness to refer disputes to formal dispute resolution mechanisms such as arbitration.

How companies decide whether to initiate formal proceedings

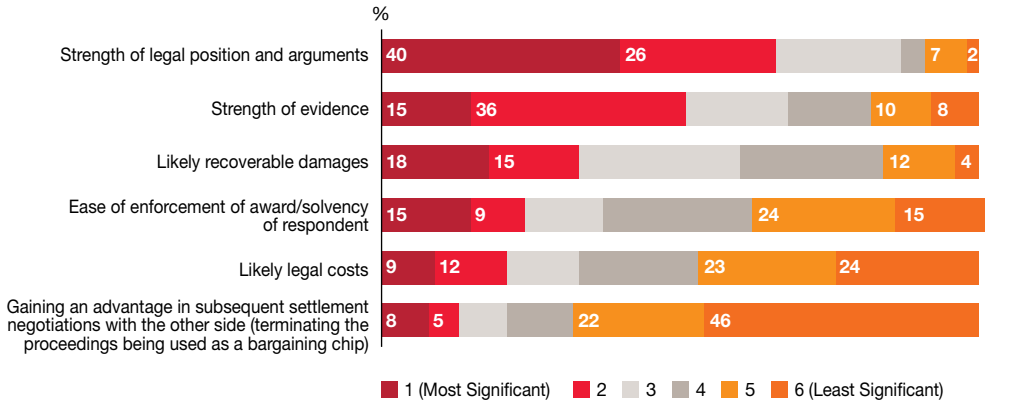
Factors influencing the decision to initiate arbitration proceedings

We asked respondents which factors were most influential in deciding whether to commence arbitration. Respondents were presented with a list of proposed factors and asked to rank them in order of significance.

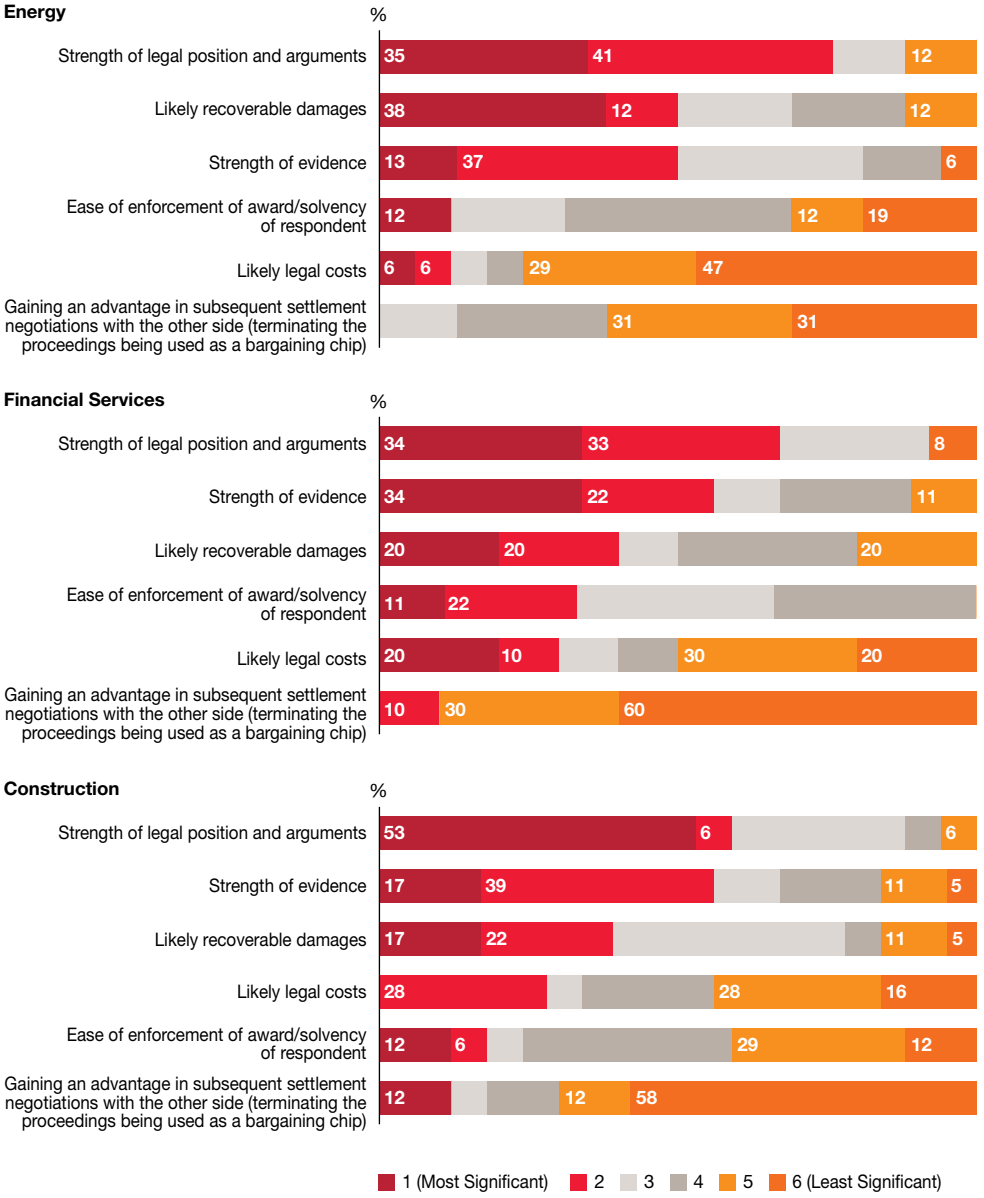
Across all sectors, the most important factor in deciding to initiate arbitration proceedings is the strength of the corporation's legal position followed by the strength of evidence. The value of recoverable damages is ranked third. As discussed elsewhere, legal costs are the second least significant factor (after gaining a tactical advantage for settlement negotiations).

Our sector by sector analysis shows that respondents from the Financial Services sector are more conscious of costs at the start of proceedings than corporations in other sectors. Energy-sector corporations seem to be the least concerned.

In deciding whether or not to initiate arbitration proceedings, rank the following in order of significance.

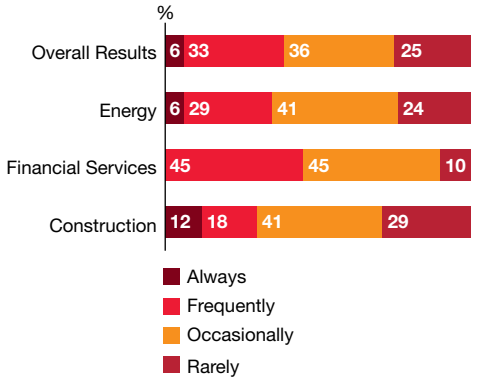


By industry sector.



We asked participants how often they involve technical (i.e. any non-legal) experts in formulating the case strategy. 39% said they involved experts either always or frequently in formulating the case strategy. This was most prevalent in the Financial Services sector.

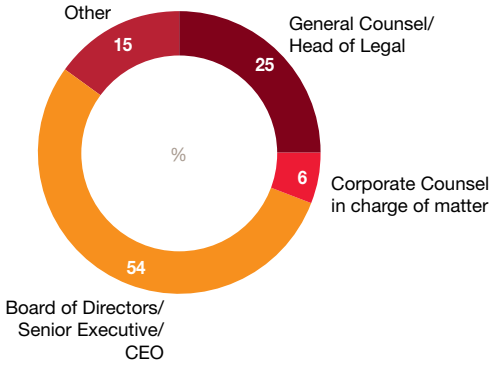
How often do you use external technical (i.e. non-legal) experts in determining the case strategy and formulation?



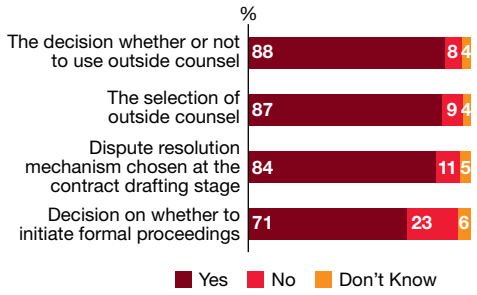
Who decides whether to initiate legal proceedings?

The Board of Directors/CEO most commonly have the ultimate say over whether or not to initiate proceedings in major cases (54%); the decision is made by General Counsel/ Head of Legal in 25% of cases. A number of interviews indicated that the decision to initiate proceedings usually involves a collaborative effort between legal and other executive management.

In your organisation, who makes the ultimate decision whether to initiate litigation or arbitration proceedings?



In your organisation, would you say that in-house corporate counsel (including General Counsel/Head of Legal) are the driving force in respect of:

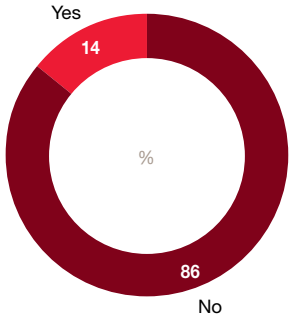


Minimum monetary threshold under which arbitration is avoided

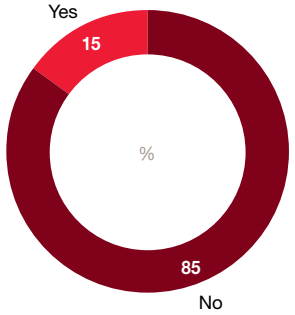
We asked whether corporations have a minimum monetary threshold under which they prefer to avoid arbitration. A majority (85%) do not have a minimum threshold below which arbitration proceedings will not be initiated (when contracts contain an arbitration clause).

We asked respondents whether they had a policy of not inserting arbitration clauses when the value of the contract is below a certain amount. A majority of respondents (86%) have no such policy.

Does your organisation have a policy of not inserting arbitration clauses in contracts, when the value of such contracts is below a certain sum (a "minimum threshold")?



For disputes arising out of contracts which already contain an arbitration clause, does your organisation have a minimum threshold under which it does not refer such disputes to arbitration?



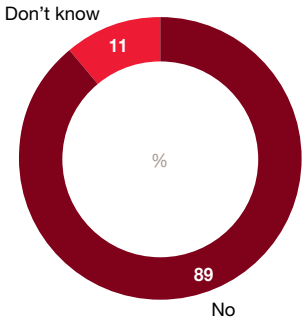
Funding arbitration proceedings

Funding in general

We explored whether financial constraints in the current economic climate had made it more difficult to fund arbitration proceedings and whether access to third party funders has had a significant impact on corporations' decisions to embark on arbitration proceedings.

We asked respondents whether, in the past five years, they had had to withdraw from an arbitration they had initiated primarily because of difficulties in funding the proceedings. For 89% of respondents the answer was "No", with no difference in responses across the Financial Services, Energy, and Construction sectors.

In the past 5 years, has your organisation had to withdraw from an arbitration it had initiated primarily because of difficulties in funding the proceedings?



Some interviewees said that increased pressure on internal legal budgets has made corporations more cautious before initiating arbitral proceedings but that, once a decision to arbitrate is made, they are unlikely to withdraw from the proceedings due to the costs.

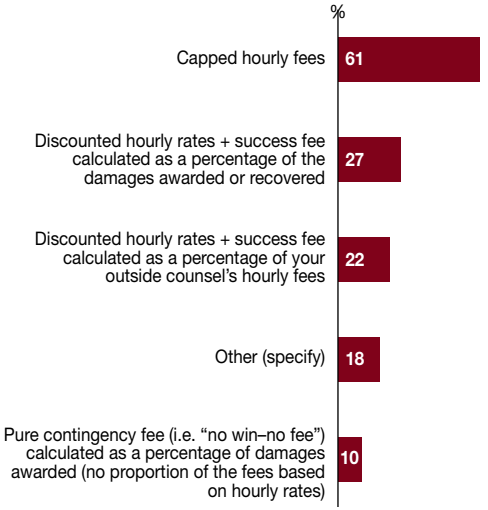
Flexible fee structures

Respondents were asked about the types of "alternative" fee structures that they had used in their arbitrations – alternative fee structures being where the fees of outside counsel are not based solely on hourly rates.

Of the various fee structures, the one most frequently used by respondents was "capped fees". Of the respondents that had experience of flexible fee structures, 61% had used capped fees. A combination of discounted hourly rates and a success fee element was also popular. 27% of respondents had used discounted hourly rates with a success fee calculated as a percentage of damages; 22% had used discounted hourly rates with a success premium calculated by reference to (i.e. as a percentage of) external counsel's hourly fees.

Pure contingency fees were infrequent. Only 10% of the respondents using flexible fee structures had used pure contingency fees in their arbitrations.

Which of the following flexible fee structures (i.e. fees not entirely based on hourly rates of individual lawyers) have you used in your arbitrations?



In the interviews, several corporations said that predictability about the likely fees was important; the uncertainties of contingency fees were not considered attractive.

In interviews we questioned who proposed alternative fee structures to see whether competition among arbitration lawyers would prompt law firms voluntarily to offer alternative fee structures. However, in-house counsel said that their corporations were much more often the driving force for alternative fee arrangements than the law firms.

Third-party funding and insurance funding

94% of respondents said that they had not used third-party funding. While the sample of respondent companies who had experience of third-party funding is too small to provide any reliable evidence of trends, interviews with in-house counsel at those corporations provided some interesting findings. Some said that they had used funders because of a lack of liquidity to fund proceedings. Others chose third party funders because, whilst they had no liquidity problem, it was either more convenient or more cost-effective to sell on the claim or share the risk with a third-party funder.

One interviewee explained that he had only used third-party funding to obtain enforcement of a favourable award. The interviewee explained that the third-party funder's team was, in his opinion, better equipped than his outside counsel to secure enforcement of the award.

While the responses to this survey are not indicative of a clear change in the market for legal services, it will be interesting to observe whether, and for what reasons, third-party funders will play a bigger role in arbitration proceedings in the future, either at the early stages of proceedings or at the enforcement stage.

As expected, the use of "before the event" insurance funding to finance proceedings is more prevalent than third-party funding. 20% of respondents have used a "before the event" policy to fund proceedings in the past five years (compared to 6% who had used third-party funding).

Interviewees who had experience of third-party funding and insurance funding were asked whether they had experienced disagreements between themselves and the insurer/third-party funder over the strategy of the case, the selection of arbitrators or of outside counsel and the question of whether or not to settle. None indicated any such difficulties.

Cost, delay and the fear of judicialisation of arbitration

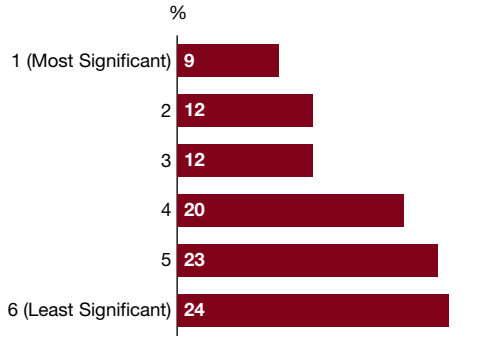
Cost and delay: frequent concerns but with limited impact

While, overall, arbitration remains the preferred dispute resolution mechanism for transnational disputes, many respondents and interviewees expressed concern over the related issues of costs and delays experienced in international arbitration proceedings.

While these concerns are not new and the arbitration community has undertaken various initiatives to address the users' concerns, we wanted to explore whether the concerns affect how corporations approach arbitration. In particular, we asked how these considerations feature at the initial planning stage when key decisions are made by a corporation about how to handle a dispute.

As noted above, respondents did not rank costs amongst the most important factors when deciding whether to initiate arbitration proceedings. Costs are a concern but on their own are not usually a deterrent to initiating arbitration proceedings.

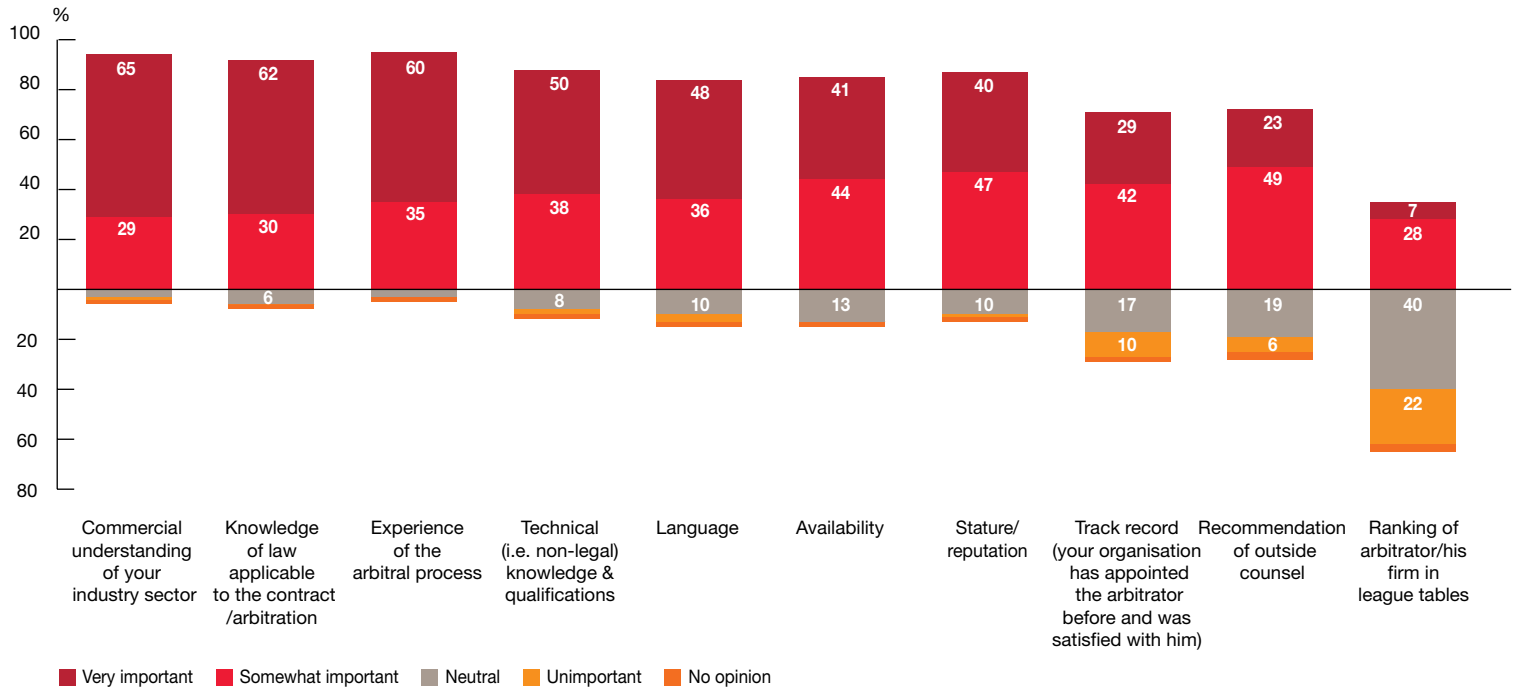
Importance of anticipated legal costs as a factor in the decision to initiate arbitration proceedings.



When asked about nominating a co-arbitrator, respondents said the most influential factors in the appointments were the individual's (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential.

One issue that is often cited as a cause of delays in arbitration is the availability of arbitrators. We asked whether corporations consider this when making an appointment. Arbitrators' availability did not rank highly as a factor. It was cited as "very important" less often than any of these other factors. This does not mean that corporations were unconcerned about lack of availability and busy diaries but that, on balance, in-house counsel felt that it is more important to appoint the arbitrator best suited to the case rather than an arbitrator who could potentially complete the mandate faster. This finding differs from that in previous surveys and suggests that, while not satisfied with delays, corporations may accept that a larger pool of experience arbitrators will take time to evolve.

How important are the following factors in influencing your organisation's choice for the nomination of a co-arbitrator?



"Judicialisation": the danger facing arbitration

A recurrent theme in interviews with respondents from various sectors was the risk of "judicialisation" of arbitration. Interviewees expressed concern about their perception that the process of arbitration has become more sophisticated and more "regulated", with "control" over the process moving towards law firms – and away from the actual users of this process. Several interviewees linked concerns over increases in the costs of arbitration with this encroaching judicialisation.

Overall, however, both the survey and our interviews showed a continued support for arbitration, and an expectation that respondents will keep using this mechanism in the future.

Appendices

Methodology **24**

School of International Arbitration, Queen Mary, University of London **26**

PwC's International Arbitration network **27**

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Methodology

The research for this study was conducted between 1 March 2012 and 31 December 2012 by Rémy Gerbay (Attorney New York, Solicitor England & Wales), LLB (Hons, Lyon), MA (Graduate Institute, University of Geneva), LL.M (Georgetown), PwC Research Fellow in International Arbitration, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London, together with Professor Dr. Loukas Mistelis, LLB (Hons, Athens), MLE (Magna cum Laude), Dr Iuris (summa cum laude) (Hanover), MCIArb, Advocate, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration; and Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London.

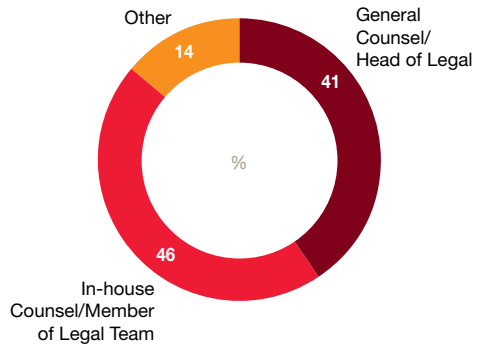
An external focus group comprising senior corporate counsel, arbitration practitioners and arbitrators provided comments on the draft questionnaire.

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

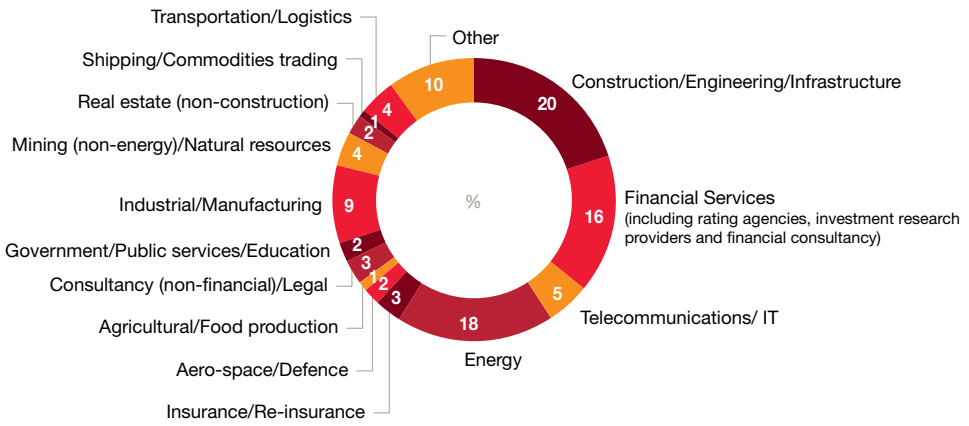
- **Phase 1:** an online questionnaire of 82 questions was completed by 101 respondents between 13 June 2012 and 18 December 2012. Respondents were general counsel, heads of legal departments or counsel, on the authority of the general counsel.
- **Phase 2:** Over 30 interviews with corporate counsel were conducted from October to December 2012. Interviews were based on a set of guideline questions and ranged from 20 to 90 minutes. All interviewees had completed the questionnaire prior to the interview. The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, contextualise the findings and cast further light on particular issues raised by the survey. Information taken solely from this group is referred to as from 'interviewees' or 'interviews' throughout this report.

The following charts illustrate the composition of respondents by: position, company turnover, number of disputes, industry sector, and geographic scope of operations.

Primary role of respondents.



Respondents by industry sector.

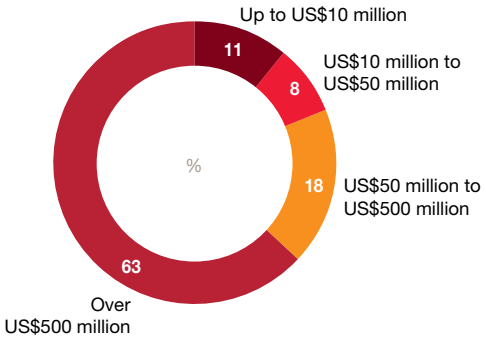


We took care, as much as possible, to maintain a balance in terms of regions, industries and company sizes represented.

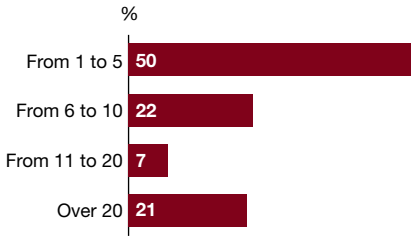
For the 2013 survey we sought to expand the range of corporations that had participated in previous years and also improve the geographical spread of the participants. The survey questionnaire was sent to thousands of in-house counsel worldwide, both by mail and email. For the first time, we made extensive use of web-based professional and social networks, including LinkedIn and Facebook.

Information about the questionnaire was also distributed through a number of more traditional channels including several trade journals (such as Global Arbitration Review) and websites, such as PracticalLaw. We also benefited from the kind support of professional organisations and/or groups such as the International Swaps and Derivatives Association (ISDA) and the Association for International Arbitration (AIA).

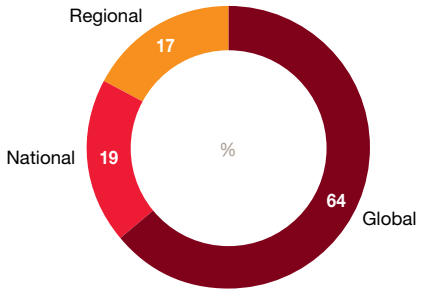
Annual turnover of respondent corporations.



Number of international disputes in the past five years at respondent organisations.



Geographic scope of respondents organisations.



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