RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS AND SETTLEMENT IN INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES


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ARTICLES

SPECIAL SECTION

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS
AND SETTLEMENT IN INTERNATIONAL ARBITRATION:
CORPORATE ATTITUDES AND PRACTICES

Loukas Mistelis & Crina Baltag*

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I. INTRODUCTION: THE CONTEXT OF THE 2008 SURVEY

It has been increasingly accepted, and also empirically proven, in the last ten years that corporations trust and use international arbitration and other alternative dispute resolution processes. While the recognition and establishment of arbitration as a leading method of the settlement of disputes is undisputed, what has been debated in recent years is the efficient use of the system of arbitration. The growth of arbitration has been driven by flaws in the national legal systems and the distrust and suspicion associated with litigation in a foreign country, as well as by the desire to minimize costs and delays in the resolution of a dispute. More importantly, arbitration is a neutral system particularly suitable for cross-border and cross-cultural disputes. However, the shift to arbitration and alternative dispute resolution (“ADR”) mechanisms was not only determined by legal or efficiency factors, but also by such factors as the desire to preserve a working business relationship with the other party and to avoid the negative publicity and aura emanating from court proceedings.

In 2006, the School of International Arbitration at Queen Mary University of London conducted ground-breaking research on major corporations and their perceptions and views towards international arbitration.¹ This was the first survey of its kind and on such a scale targeting major corporations, as the end-users of international arbitration; it has opened the door for further research into the practices of corporations in international dispute resolution processes.² The 2006


² There are also a number of surveys conducted by or on behalf of law firms. See, e.g., the 2008 Lovells Survey: The Shrinking World, available at http://www.lovells.com/NR/rdonlyres/DA3B6810-910E-43D2-B8E9-4E4230C99871/0/LovellsTheShrinkingWorldDRReportSpring2008.pdf (last visited Aug 28, 2009). However, this study surveyed only European corporations. See also the 2008 Litigation Trends Survey of Fulbright & Jaworski
Study\(^3\) was also the first and largest global, independently conducted, empirical survey on international arbitration, involving 143 corporations, through their corporate counsel (general counsel or head of legal department), from various industries and regions of the world. The Study was directed towards general attitudes and practices of corporations in international commercial arbitration and did not discuss in detail arbitration procedure or the recognition and enforcement proceedings in international arbitration.

The key messages of the 2006 Survey point toward a preference on the part of large corporations for international arbitration and institutional arbitration, in particular. The aim of the 2006 Survey was to reveal the real preference, perceptions and experience of major corporations in international arbitration, by testing the anecdotal evidence present in the arbitration field. Back in 2006, corporate counsel appreciated the advantages of the arbitration procedure (procedural flexibility, enforceability of awards, privacy of the process and selection of arbitrators), but also criticized the disadvantages of the arbitration proceedings (delays and increased costs). Ninety-five percent of the participating corporations in the 2006 Survey indicated at that time that they would continue to use international arbitration, as the advantages of this procedure clearly outweigh any disadvantages.

Following the success of the 2006 Survey, the School of International Arbitration conducted a second survey into the attitudes and practices of corporations in international arbitration. The 2008 Survey on “International Arbitration: Corporate Attitudes and Practices on Recognition and Enforcement of Arbitral Awards” reiterates several of the issues raised by the 2006 Survey, but focuses on two main topics: settlement in international arbitration and the recognition and enforcement of arbitral awards. There are important messages coming from the 2008 Survey for all those involved in international trade and investment. For the arbitration community, the overall message is that confidence in international trade and investment depends on the reliability of trans-national dispute resolution. This is the reason why the international arbitration process and, in particular, the recognition and enforcement proceedings must be seen to be effective.\(^4\)

\(^3\) The terms “Study” and “Survey” are used interchangeably.

II. THE 2008 SURVEY: ATTITUDES AND PRACTICES

The 2006 Survey revealed that one of the main advantages of international arbitration is the world-wide recognition and enforcement of arbitral awards. The recognition and enforcement of arbitral awards is indeed a last resort and it is always desirable that only a minority of successful parties should have to experience enforcement proceedings before national courts. Nevertheless, the existence of an effective enforcement mechanism has motivated the choice by corporations of international arbitration as their preferred dispute resolution mechanism for international disputes. It is often argued that the success in enforcing arbitral awards derives from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.5

The 2008 Survey looks at the attitudes and practices of major corporations, most of which operate globally, towards the outcomes in international arbitrations, focusing particularly on settlements and the recognition and enforcement of awards. The findings of the 2008 Study indicate that international arbitration remains the preferred dispute resolution mechanism for transnational disputes. The 2008 Study reinforces the results of the 2006 Survey, as it demonstrates that international arbitration is effective in practice. In the majority of cases, the parties settle their disputes, either before or after the arbitral award, and, if a settlement is not reached, there is a high degree of voluntary compliance with arbitral awards. Only a minority of cases proceed through to enforcement, but when they do, the process usually works effectively. The conclusion is that most transnational disputes are resolved satisfactorily at some stage within the existing processes. The 2008 Survey also confirmed that exceptions do exist. However, problems

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with enforcement are more often due to the circumstances of an award-debtor than the international arbitration or enforcement processes.

The 2008 Study was conducted during a six-month period and summarizes data from 82 questionnaires and 47 interviews. The findings of the 2008 Survey will first be subject to an overall examination, in the Executive Summary section. The next two sections will deal with an overview of international arbitration, followed by a discussion on the outcomes of the arbitration process. Sections D and E will focus on settlement and voluntary compliance with arbitral awards, while Section F – the substantive part of the 2008 Survey – will analyze the recognition and enforcement proceedings in international arbitration. Sections G and H summarize the findings on arbitrations involving states and the views of the arbitration institutions respectively.

A. Executive Summary

The 2008 Survey underpins the findings of the first Survey, reasserting that international arbitration remains the preferred dispute resolution mechanism for the resolution of cross-border disputes. Moreover, international arbitration proves to be an effective mechanism, with only few cases proceeding to enforcement.

Overview of International Arbitration

1. There is significant support for arbitration, and for other forms of ADR. Eighty-eight percent of the participating corporations have used arbitration in recent years. Certain industries such as construction; energy, oil & gas; and shipping use international arbitration as a default resolution mechanism.

2. Corporate counsel are satisfied with international arbitration. Eighty-six percent of corporate counsel said they are satisfied with international arbitration. The enforceability of arbitral awards, the flexibility of the procedure and the depth of expertise of arbitrators are the major advantages of arbitration. On the other hand, the length of time and the costs of international arbitration remain major disadvantages.

The Outcome of International Arbitration

3. The overwhelming majority of arbitration cases are successfully resolved. Twenty-seven percent of cases are settled before an arbitral award is rendered and 7% are settled after an award is rendered. Forty-seven percent of cases end in voluntary compliance with an arbitral award, while only 11% of cases proceed to recognition and enforcement procedures. Overall, 92% of arbitration disputes are successfully resolved at some stage through the arbitration proceedings.

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6 A requirement for participation in the second survey was that the respondents had participated in arbitration in the last ten years. Accordingly, a number of questionnaires were disqualified.
Settlement in International Arbitration

a. Settlement before an arbitral award

4. Settlement most frequently occurs before the first hearing. Forty-three percent of settlements involving the participating corporations were reached before the first (usually procedural) hearing in the arbitration proceedings.

5. Strong desire to preserve business relationships. Several reasons justify settlement of arbitration cases. In 27% of cases, corporations settled disputes in order to preserve their business relationships. Other factors influencing settlement were a weak position in the case and a desire not to spend excessive time and incur costs before the dispute was resolved.

b. Settlement after receiving an arbitral award

6. Corporations often achieve settlement after an arbitral award is rendered. Forty percent of corporations negotiated a settlement after the arbitral award was rendered; this usually entailed a discount in return for prompt payment. Almost one in five of the interviewed corporations realized value from the claim or award by selling or assigning it.

7. Corporations settle after the award to save time and costs. Fifty-six percent of those corporate counsel who had negotiated a settlement after an award indicated that they did so in order to avoid the time and costs involved in embarking on recognition, enforcement and execution proceedings in a foreign jurisdiction. For 19% of the participating corporations, maintaining a relationship with the non-prevailing party was an important driver of a settlement.

8. Corporations receive at least half the value of an award. Nineteen percent of the participating corporations were content to settle their claims for between 50% and 75% of the amount awarded by a tribunal, while 35% of respondents achieved settlements of more than 76% of the value of the award.

Compliance with Arbitral Awards

9. There is a high degree of compliance with arbitral awards. Eighty-four percent of corporate counsel indicated that, in most (i.e. more than 76%) of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award. According to the interviews, voluntary compliance reaches more than 90%, even 100%, especially in re-insurance, pharmaceuticals, shipping, aeronautics and oil and gas industries.

Recognition and Enforcement of Arbitral Awards

10. Most corporations are able to enforce arbitral awards within one year and usually recover more than 75% of the value of the award. Fifty-seven percent of the participating corporations who had experienced recognition and
enforcement proceedings said that it took less than one year for arbitral awards to be recognized and enforced. Forty-four percent of those corporations had recovered the full value of the award from enforcement and execution proceedings, and 84% of those corporations had received more than 75% of the value of an award following the enforcement and execution proceedings.

11. **Lack of assets is the most common problem.** Most participating corporations revealed no major difficulties when seeking recognition and enforcement of their arbitral awards. When difficulties were encountered, they usually related to the circumstances of an award debtor, typically a lack of assets or the inability to identify relevant assets. The place of enforcement and its domestic procedures may also represent problems. Seventeen percent of the corporations indicated that they have experienced various degrees of hostility from a country where enforcement of a foreign arbitral award was sought; such hostility did not always result in non-enforcement.

12. **Corporations choose the place of enforcement based on the availability of assets of the award debtor.** Not surprisingly, the most commonly cited reason for choosing the place of enforcement was that it was where the non-prevailing party had sufficient assets. Other major factors taken into consideration when deciding upon the place of enforcement included the local recognition and enforcement mechanism and the applicability of the 1958 New York Convention.

13. **Local enforcement and execution proceedings are the reasons corporations encounter complications.** Fifty-six percent of those respondents who experienced problems at the place of enforcement had problems with the actual logistics of enforcement or execution proceedings. Many corporate counsel cited countries in Africa and Central America, as well as China, India and Russia, as states that they perceived as hostile to enforcement of foreign arbitral awards. However, those perceptions were not matched by actual experiences of hostility. There is concern about this perceived hostility, as some of the countries cited are fast-growing economies that are expected to experience significant growth and attract large amounts of inward investment in the coming years.

**States, State Enterprises and Recognition and Enforcement of Arbitral Awards**

14. **Corporations are the main users of international arbitration.** Seventy-four percent of the arbitration proceedings involved private corporations only; twenty-one percent of the disputes involved a state enterprise; only 5% of the disputes were against states. The conclusion is that arbitration against states and state enterprises still accounts for only a small proportion of the total arbitration market.

15. **Less than one quarter of enforcement proceeding relate to arbitral awards rendered against states or state entities.** Nineteen percent of the respondents indicated that they had sought recognition and enforcement of arbitral awards against states and state enterprises. Over half of those respondents had experienced no significant difficulties in enforcing awards against states or state enterprises. Of the minority of participating corporations that had experienced
difficulties in enforcing awards against states or state enterprises, the main problems had been in identifying or obtaining access to relevant assets. In particular, there had been difficulties in linking assets to a particular state enterprise or to the state itself.

The Arbitration Institutions

16. Corporations prefer institutional arbitration as opposed to ad hoc arbitration. Eighty-six percent of the awards were rendered by arbitration institutions rather than through ad hoc arbitrations. Sixty-seven percent of the arbitrations involving states or state-owned enterprises were conducted through institutional arbitration rather than through ad hoc arbitration. The ICC, AAA-ICDR and LCIA are the institutions most used by corporations; the popularity of regional arbitration centers is increasing.

17. Arbitration institutions do not have a system of monitoring arbitral awards. Only 29% of arbitration institutions keep track of their arbitral awards. While most arbitration institutions interviewed expressed views on the enforcement of awards, most of the comments were based on anecdotal evidence.

B. An Overview of International Arbitration

The 2008 Study confirms the support for international arbitration and other forms of ADR, as an alternative to transnational litigation. We asked corporate counsel several general questions regarding dispute resolution mechanisms used in the last ten years, with the focus on the arbitration process. Alongside the views of corporate counsel, we are presenting the views of the arbitration institutions participating in this Survey.

There is significant support for arbitration and other forms of ADR, as opposed to litigation.

Corporate counsel indicated that inclusion of arbitration clauses in their contracts depends on various factors: the complexity and the international nature of the transaction, the counter-party, the likely place of enforcement of an eventual award, the applicable law, etc. However, a significant number of corporations prefer arbitration because it is a private and independent system, largely free from external interference.

Eighty-eight percent of corporate counsel have used arbitration at least once in the last ten years. When asked what type of dispute resolution mechanisms they had used to resolve their international disputes, 44% of the participating corporations indicated they mostly (but not exclusively) used international

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The 2006 and 2008 Surveys considered arbitration as separate from ADR. ADR refers to other alternative dispute resolution methods, such as conciliation, mediation, expert determination, etc.
arbitration, while 41% mostly (but not exclusively) used transnational litigation. Fifteen percent of counsel said they used mediation or other ADR mechanisms (for example, conciliation or dispute resolution boards) as the main method. (See Figure 1.) These percentages show a strong preference for arbitration, with a slightly higher percentage opting for transnational litigation, compared to the findings of the 2006 Survey. Several corporate counsel indicated during the interviews that they frequently include multi-tired dispute resolution clauses in their contracts. Often, these clauses provide for the resolution of disputes by mediation and, in the event this mechanism fails, by arbitration.

![Figure 1. Dispute resolution mechanisms used by corporations](image)

In fact 88% of the participating corporations have used arbitration in recent years. (See Figure 2.) As revealed during the interviews, in certain industries, for example, construction; shipping; and energy, oil and gas, international arbitration is the default dispute resolution mechanism. A corporate counsel disclosed during the interview that his company usually employs arbitration for disputes exceeding a certain value (usually over U.S. $3 million).
A significant number of corporations based in Japan, the U.K. and the U.S. favor mediation and other ADR procedures: more than 30% of the U.K. and U.S.-based corporations said they used ADR. Over 10% of the South American corporations employed ADR mechanisms, which indicates that alternatives to traditional court proceedings are being used in countries where such mechanisms are relatively new.

Forty-nine percent of the construction companies participating in the Survey have mostly used arbitration, while 13% have used another form of ADR. In the industrial manufacturing sector, the percentage for ADR is slightly higher, as 19% of the corporations have mostly used alternative methods for resolving their disputes. Forty-four percent of industrial manufacturing corporations have used arbitration in most of their disputes. In the energy, gas and oil industry, 50% of the participating corporations have used arbitration for most of their disputes, while 15% have employed ADR. The retail and insurance industries tend to favor alternative dispute resolution methods, with 28% and 33% using them respectively. The retail industry is the largest user of international arbitration, as 69% of its corporations have employed arbitration for settling most of their disputes.

The participating corporations are satisfied with international arbitration

If in 2006 we asked corporations about the perceived advantages and disadvantages of arbitration, in this second Study we asked them about their experience: Whether they are satisfied or not with international arbitration as a dispute resolution mechanism. Sixty-eight percent of the respondents indicated
that they are fairly satisfied, while 18% are very satisfied with international arbitration, making a solid satisfaction rate of 86%. Only 5% of corporate counsel are fairly or very disappointed with arbitration. (See Figure 3.) During the interviews it was revealed that dissatisfaction is generated by the increased costs of arbitration and delay of proceedings. However, the majority of disappointed counsel continue to use arbitration, alone or in conjunction with other ADR mechanisms, as it provides major benefits that compensate for most of the problems of costs and time. One of these major benefits was indicated as being the enforceability of arbitral awards (the second major advantage of arbitration, as identified by the first Study), along with the flexibility of the procedure and the ability to select experienced arbitrators. There had been two corporate counsel who disclosed during the interviews that they often use arbitration because it represents a better solution in contrast with the local courts, but not because the arbitration mechanism in itself is efficient. One corporate counsel indicated that the fact that arbitrators, unlike judges who deal with several disputes every day, are dedicated to the case is one of the major advantages of arbitration. At the interview stage, a European corporate counsel revealed his profound dissatisfaction with the arbitration process in general. In his opinion, arbitration is a dispute resolution mechanism that favors only the major corporations, because small companies do not have access to information about international arbitration procedure and the arbitrators. The same corporate counsel indicated that he sees arbitration as an opaque process, although his corporation is a regular user of arbitration.

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**Figure 3. Degree of satisfaction with international arbitration**

Eighty-six percent of the construction companies participating in the 2008 Survey are very or fairly satisfied with arbitration. In the industrial manufacturing sector, the percentage is slightly lower, with only 67% of very or fairly satisfied
respondents. However, none of the industrial manufacturing corporations reported dissatisfaction with the arbitration process, but rather an uncertainty as to whether the process is satisfactory or not (33%). Eighty-seven percent of the energy, oil and gas companies are very or fairly satisfied with international arbitration, while in the retail and insurance industries, the satisfaction rate is 100%.

Institutional Response:

Seventy-six percent of the arbitration institutions participating in the Study indicated that corporations are very or fairly satisfied with arbitration. A strong indication for this degree of satisfaction is the large number of cases submitted with their institution every year, as will be shown below. Nevertheless, this percentage is lower than the level of satisfaction reflected by the corporations themselves.

International arbitration cases arise most frequently from commercial transactions

Most of the disputes involving participating corporations arose from commercial transactions (38%), followed by construction disputes (14%), shipping disputes (11%), joint venture agreement disputes (9%), intellectual property disputes (6%) and insurance disputes (5%). (See Figure 4.) While these results reflect, in part, the profile of the participants, commercial agreements are clearly the main source of disputes in international arbitration.

![Figure 4. The nature of the disputes involving the participating corporations](image-url)
Institutional Response:

This result is consistent with the statistics of the interviewed arbitration institutions: the majority of institutional arbitration cases deal with commercial transactions disputes, followed by construction, intellectual property and joint venture agreements disputes.

Conclusions

Global corporations have a significant number of international disputes which are usually resolved by international arbitration. Often, corporations employ other dispute resolution mechanisms, such as transnational litigation or alternative dispute resolution. This preference is determined by various factors, but the most important seem to be the nature of the business relationship with the counter-party and the place where the dispute is to be resolved. Corporations are generally reluctant when it comes to litigating in countries where the court system is less developed or the political situation is not stable. As revealed by this Study, the majority of the disputes arise out of commercial transactions, construction and shipping contracts.

C. The Outcome of International Arbitration

Although an arbitration process can lead to an enforced arbitral award, the 2008 Study reveals that voluntary compliance with an award and settlement are common outcomes of arbitration proceedings.

In the study of the attitude of corporations towards the recognition and enforcement of arbitral awards, the participating corporations were asked about the outcome of the arbitration proceedings they had been involved in.

Forty-seven percent of the corporate counsel indicated that the arbitration proceedings they were involved in ended with an arbitral award rendered by the tribunal followed by voluntary compliance with the award by the opposing party. However, many disputes were settled during the proceedings. Twenty-seven percent of counsel reported achieving a settlement before receiving an arbitral award, while a further 7% reported settlements followed by arbitral awards by consent. Only 11% of the participating corporations had to seek recognition and enforcement of their awards. (See Figure 5.)

The data suggest that 92% of arbitration disputes are successfully resolved at some stage through the arbitration proceedings, while 81% of the disputes are effectively resolved through arbitration, without the intervention of national courts.

As the figures indicate, settlement is part of the arbitration process, with 34% of disputes successfully settled during the arbitration. This result might lead to the conclusion that arbitration is one of the factors favoring settlement. During the interviews, several corporate counsel suggested that they settled most of their disputes while arbitrating, and not when involved in proceedings in front of national courts.
Fifty-two percent of the construction corporations indicated that the arbitration proceedings they were involved in ended with an arbitral award followed by voluntary compliance, while 32% of their disputes resulted in a settlement before an award. Eighty-five percent of the disputes involving construction companies were successfully resolved during the arbitration process, with no intervention from national courts. Similar percentages have been indicated by the participating industrial manufacturing corporations. Fifty-four percent of these companies indicated as the outcome, arbitral awards followed by voluntary compliance with the awards. In the energy, oil and gas industry, a smaller percentage was assigned to this outcome of the arbitral proceedings. The energy, oil and gas companies revealed that in only 39% of cases did the arbitration proceedings end in an award that was honored by the opposing party. Thirty-one percent of the arbitration proceedings involving energy, oil and gas corporations ended in a settlement agreement. In the retail industry, 53% of the disputes ended in an arbitral award and voluntary compliance, while 36% ended in a settlement agreement. Ninety percent of the disputes involving retail corporations were resolved without the intervention of national courts. In the insurance sector, 67% of the disputes ended in a settlement without an arbitral award being issued by the tribunal.

D. Settlement in International Arbitration

Disputes occur between parties for various reasons: different commercial expectations, legal or cultural backgrounds and approaches, or even political situations. Some of these disputes end up adjudicated by international litigation or arbitration or, in some instances, by other forms of alternative dispute resolution procedures. However, an impressive number of disputes are resolved by negotiations between the parties: either before being submitted to an authority –
courts, arbitrators, mediators, etc. – or during or after the resolution proceedings. Apparently, various reasons motivate parties to reach settlement. Some realize they have a weak case and in the event of court or arbitration proceedings would be likely to lose the case. Others believe that making concessions and settling the dispute in a manner that would benefit both parties would help preserve the business relationship. This is usually the case when parties have been doing business together for a considerable period of time or when the market does not allow strong competition that would enable the other party to choose, for example, a different supplier. There are certain companies that have a dispute resolution policy favoring settlement rather than litigation or other dispute resolution procedures, with a view towards saving costs and time. One might add the cultural background of the parties involved in the dispute as a determinant factor in reaching settlement. Some cultures – for example the Scandinavian ones – tend to have a more conciliatory attitude. Some corporations prefer to settle a dispute to preserve their reputation and to avoid any kind of negative publicity or consequences affecting other business relationships. This is because litigation is not private and confidential, while arbitration, even though private, is not always confidential. There were corporate counsel who indicated during the interviews that settlement is also initiated when the opposing party does not have sufficient assets to cover the value of an eventual arbitral award, such that, they said, starting arbitration against these companies would only add more losses to the existing ones.

In the end, irrespective of the reasons why corporations prefer to settle, the reality is that settlement negotiations are a constant presence in international arbitration, regardless of the moment when the settlement occurs.

Although the 2008 Study mainly focuses on recognition and enforcement of arbitral awards, we asked the participating corporations to share with us their experience with settlement before, during and after the arbitral proceedings. The reason we undertook this exercise resides in the fact that settlement of disputes during arbitration proceedings may be confirmed in arbitral awards or might actually put an end to the arbitration proceedings without an arbitral award being issued. Settlement post-award might signify the absence of recognition and enforcement proceedings.

We first tested settlement before an arbitral award, and then we asked corporations whether they settled after the delivery of an award.

1. Settlement Before an Arbitral Award

The 2008 Survey revealed that settlement negotiations before the delivery of an award are quite common. We tried to ascertain who takes the initiative to settle the dispute – the parties, the lawyers, or even the arbitrators – and when this settlement is reached. We asked the corporations what triggers the settlement negotiations and also what is the position of the participating corporations in the dispute when agreeing to settle.
Settlement negotiations are typically initiated by one of the parties.

Ninety-one percent of the participating corporations indicated that in the majority of their disputes settlement negotiations are initiated by one of the parties. Only 9% of the corporations stated that in a large number of cases their counsel or their outside lawyers were the ones suggesting that the parties settle the dispute. (See Figure 6.)

Although these results are not surprising, it is interesting to observe that both in-house and outside counsel do prefer in some instances to resolve the dispute by negotiations. None of the participating corporations participating in our online questionnaire indicated any direct contribution by the arbitrators or the arbitration institution in resolving the dispute. However, during the interviews, some corporate counsel revealed that there were instances when the actual conduct of the arbitrators during the proceedings had a major influence over the settlement of the dispute, such as when there were indications of the likely outcome of the arbitration, or when the parties were encouraged to settle the dispute.

![Figure 6. The initiative to enter into settlement negotiations](image)

**Settlement most often occurs before the first hearing or before the hearing on the merits**

The Study revealed that, out of the total number of cases which settle during the arbitration proceedings, almost three-quarters of them occur before the hearing on the merits of the case. Participants reported that 43% of the disputes were settled before the first hearing in the arbitration proceedings. (See Figure 7.) The first hearing is often a procedural one, where parties and arbitrators set the framework and the agenda: timetables, rules regarding evidence, and issues in dispute to be determined by arbitrators.
A significant percentage of disputes (31%) are settled between the first hearing and the hearing on the merits. This might be influenced by the fact that parties usually exchange at least one substantial written submission after the first hearing and present their written evidence. In these instances, parties form an image of their chances to win or lose the case and this might be an essential factor in trying to find a convenient solution.

![Figure 7. The time when settlement occurs pre-award](image)

*The position of parties in the dispute is not a determinant factor in reaching settlement*

It is often believed that a party acting as respondent in the arbitration proceedings would try to settle the dispute, rather than face an arbitral award compelling damages or performance of the contract. The 2008 Survey proved that this is anecdotal evidence.

When asked about their position while settling the dispute, only 39% of corporate counsel indicated they were acting as respondents, while a significant 33% acted as claimants. Twenty-eight percent of the corporations were claimants and counter-respondents or respondents and counter-claimants. (See Figure 8.) We can conclude that the position from which parties are negotiating the settlement is not a decisive factor. The fact that a party is respondent in the proceedings does not mean that it is in a weak position which may have considerable influence on its willingness to reach a convenient agreement rather than proceed to an award.
When reaching the settlement, what was your position in the dispute?

 Desire to preserve business relationships is a strong driver for pre-award settlement.

There are several likely reasons that favor parties negotiating the settlement of their disputes. There is an anecdotal perception placing the weak or rather unsuccessful position of the parties in the dispute as the determinant factor.

The 2008 Study revealed that reaching settlement in the arbitration proceedings is mainly determined by the strong desire of the parties to preserve their business relationship. The data gathered by the online questionnaire revealed that 27% of the participating corporations reach a settlement in order to safeguard their business relationship. The incentive to settle in order to preserve business relationships was particularly evident where parties had been doing business together for a considerable period of time or where the market did not offer a wide range of alternative solutions.

Two other major reasons have motivated corporations to reach a settlement during the arbitration proceedings: avoiding unnecessary costs (23%) and delay (17%). The weak position of the parties in a dispute is indeed one of the factors triggering the settlement, but it is not the decisive one (21%). (See Figure 9.) Concerns over the likely place of enforcement or the lack of assets of the opposing party were not cited as a major influence on the decision to settle.
Brazilian corporations (33%) consider that time is the most important reason why parties reach an agreement before the award is made and, in conjunction with this, avoiding unnecessary costs in dispute resolution comes out in second place (25% of the participating corporations). The majority of the participating Japanese and U.S. corporations indicated settlement as being more cost effective, while most of the Swiss corporations prefer to settle to preserve business relationships. U.K. corporations (23%) tend to settle when they are placed in a weak position.

In the construction industry, 27% of the participating corporations indicated that the weak position of the party in the dispute is the main reason for reaching a settlement agreement. Thirty percent of the industrial manufacturing corporations revealed that preserving a working relationship is the principal reason for settling a dispute. In the energy, oil and gas sectors, the participating corporations indicated the weak position of the party (24%), avoiding unnecessary costs (24%) and preservation of the current business relationship (23%) as the top reasons for settlement pre-award. Similar percentages have been revealed by corporations in the retail industry. In the insurance sector, 46% of the corporations placed at the top of the list the preservation of the business relationship, while the avoidance of costs and delay came second, with 27% each.
Institutional Response:

The arbitration institutions believe that the main factors influencing parties to settle are the savings of time and costs and safeguarding of business relationships. This broadly tallies with the responses given by corporations in this study.

Corporations consider a pre-award settlement to be a satisfactory alternative to an arbitral award

Eighty-nine percent of the participating corporations found the settlement agreements reached before an award had been made to be very or fairly satisfactory. Only 5% of corporate counsel felt disappointed by the outcome of the settlement pre-award. (See Figure 10.) During the interviews, some corporate counsel explained that this satisfaction derives directly from the advantages of an early settlement, as indicated in the above sections. Some of the counsel acknowledged that the satisfaction also stems from the unpredictable outcome of the arbitration proceedings and that it is always better to have something tangible rather than only expectations.

![Figure 10. Settlement as a satisfactory option](image)

Conclusions

In a significant number of cases, corporations prefer to settle before the first hearing in the arbitration proceedings. Usually one of the disputing parties takes the initiative to begin negotiations. This occurs for various reasons, including the time and costs associated with an eventual arbitration procedure or the weak
position of the party who started the negotiations. However, the most important reason seems to be the need of the parties to preserve their business relationship.

2. Settlement after Receiving an Arbitral Award

Settlement post-arbitral award is referred to here as an agreement reached by the parties, after the award has been rendered by the arbitral tribunal, that alters the award by changing the terms of its performance (for example by stipulating a different time frame, agreeing payment in installments or agreeing to a reduced payment, often in exchange for prompt payment). In many situations this kind of settlement is convenient for both parties. For the non-prevailing party it might be more suitable to substitute damages for specific performance or to pay a substantial amount over a period of time. For the winning party, renegotiating the arbitral award might be more profitable than spending time and money in enforcing it.

The 2008 Survey gathered data on whether the participating corporations usually employ settlement post-awards in their international disputes, the reasons for doing so and the value of the settlement.

During the interviews, we attempted to ascertain whether an arbitral award has a market value, in the sense that it might be considered a credit title and sold to third parties. Some corporations revealed that there are situations when they decide to “sell” their winning awards to specialized corporations or funds, where it appears impossible for them to succeed in recovering the damages awarded by arbitral tribunals. These cases prove to be isolated and most of them involve states. Some interviewed counsel revealed that the award was sold together with the whole business. These findings confirm the interesting debate in the arbitration community – especially in investment arbitration disputes against states – on whether the winning party should sell its award to a third party (a company, law firm or fund), specialized in recovery of debts. There were some examples of awards being factored to a third party at a discount of 50% to 75% of the award’s stated value.

Settlements are frequently negotiated after an arbitral award has been made

Forty percent of the corporate counsel confirmed that they had negotiated a settlement with the opposing party after the arbitral award had been delivered. Thirty percent of the respondents indicated that they never negotiated a settlement after the award had been delivered. (See Figure 11.)
South American, Japanese and U.K. corporations rarely reached settlement after the arbitral award had been delivered, while Swiss, Mexican and U.S. companies consented to a settlement agreement after the award. These statistics do not necessarily reflect cultural factors. For example, from a cultural perspective, it can be argued that Japanese corporations would try to maintain their business relations and negotiate an advantageous outcome for the parties involved in a dispute, irrespective of when this might occur.

Forty-two percent of the construction companies revealed that they agreed to settle after the delivery of an arbitral award. In the industrial manufacturing, the energy, oil and gas, and insurance industries, the percentage is somewhat higher (56%, 50% and 67%, respectively). Only 33% of the corporations in the retail business agreed to settle after an award had been issued. In this last case, 50% of the corporate counsel indicated that they never agreed on a settlement post-award.

Corporations choose to renegotiate arbitral awards to save money and time

Respondents’ main reasons for negotiating a settlement after an arbitral award were to avoid costs and save the time that would be incurred in enforcement (56%). The participating corporations were also motivated by preservation of a working relationship with the other party (19%), while only 9% of the corporate counsel reached a settlement because of concerns about the place of enforcement of the award. (See Figure 12.) Some of the interviewed corporate counsel revealed that they would prefer to receive less money rather than commencing enforcement proceedings in countries with a corrupt or bureaucratic court system.

It is not surprising that the factors influencing settlement after the delivery of an arbitral award are similar to the factors influencing pre-award settlement, albeit with a slightly different emphasis, given the certainty resulting from the award.

During the interviews, one corporate counsel disclosed that after several years of futile efforts and almost half of the value of the award spent in recognizing and enforcing an arbitral award, the corporation decided to reach an agreement with
the award debtor. The attorney indicated that this kind of experience, as rare as it may be, motivated the company to consider carefully the circumstances affecting an enforcement procedure and to decide accordingly for settlement or enforcement. Another attorney from the banking and finance industry indicated that his corporation never settles after the delivery of an award. In his opinion, this would affect the reputation of the company, with direct consequences on other business relationships. Counsel for an industrial manufacturing corporation revealed that it usually tries to reach an agreement after an award has been rendered if the award-debtor would go bankrupt by paying the award or when it is more advantageous to replace the payment of damages with specific performance.

![IF THE SETTLEMENT WAS REACHED POST- AWARD, WHAT WAS THE REASON FOR SETTLING?](image)

*Figure 12. Reasons for post-award settlement*

When it comes to industries, the corporations in the construction and the energy, oil and gas industries prefer to settle even after an award has been issued in order to avoid the costs that would be incurred with the enforcement proceedings (49% and 46%, respectively). Forty percent of the corporations in the industrial manufacturing sector reach a post-award settlement agreement as they prefer a prompt receipt of the amount awarded by the tribunal in exchange for a discount, rather than spending money and time for enforcement proceedings. This might be an indication of the fact that claimants in arbitration proceedings tend to overestimate the amounts claimed in the proceedings, which makes settlement post-award at a discounted amount a good deal for them. In the insurance industry, 49% of the corporate counsel indicated that they mainly settle after the
delivery of an award in order to maintain the working relationship with the opposing party.

_The position of partners in the dispute is not determinative in post-award settlement_

The position of the party in the arbitration proceedings is not conclusive as to what drives settlement. It seems that claimants and respondents address settlement in the same way. (See Figure 13.)

![Figure 13. The position of the parties in the original dispute, when a settlement post-award is agreed](image)

More than half of post-arbitral award settlement cases are settled for over 50% of the award

The quantitative data gathered by the online questionnaire revealed that following the post-award settlement, 54% of the participating corporations negotiated a settlement amounting to over 50% of the award, and 35% of the corporations settled for an amount in excess of 75% of the award. (See Figure 14.) Several interviewed counsel were of the opinion that this percentage is more than fair, if they consider the time and money spent during enforcement proceedings, including attorneys’ fees.
Conclusions

Settlement post-arbitral award is a common practice adopted by the corporations involved in international arbitration. At the post-award stage, settlement is triggered by various factors, including time and cost efficiencies and maintaining a working relationship with the other party.

E. Compliance with Arbitral Awards

Corporations usually comply with the awards rendered in international arbitration proceedings.

The 2008 Survey is the first empirical survey to reveal a high level of compliance with the awards rendered in international arbitration. Eighty-four percent of respondents indicated that the opposing party had honored the award in full in more than 76% of the cases. Only 3% reported that an award-debtor had failed to comply with the award. (See Figure 15.) During the interviews, corporate counsel often mentioned that more than 90%, typically 99%, of the awards had been honored by the non-prevailing party.
The interviewed corporations revealed that the main reason for compliance with the arbitral awards was to preserve a business relationship. In sensitive industries, such as insurance and re-insurance, pharmaceuticals, shipping, aeronautics and oil and gas, the percentage is significantly higher, as the number of major players in these sophisticated markets is much lower than in other industries (86% in the construction industry, 73% in the energy, oil and gas and 100% in the insurance and re-insurance). For this reason, probably the highest rate of compliance with arbitral awards is encountered in the re-insurance sector. The counsel of shipping companies revealed during the interviews that their corporations use the so-called “Rule B attachment” by asking banks to support them in recovering the value of the award: banks block the accounts of the non-prevailing party. The counsel indicated that it is more efficient to “intercept” the award than to enforce it.

Institutional Response:

The majority of the participating arbitration institutions do not keep records of the arbitral awards after the proceedings are over. However, almost half of the institutions believe that the non-prevailing party complies voluntarily with the award in more than 76% of the cases.

F. Recognition and Enforcement of Arbitral Awards

The first Study placed among the major advantages of arbitration the enforceability of arbitral awards. In 2008 we celebrated the 50th anniversary of the New York Convention, which is considered one of the main reasons for the success of arbitration and the implementation of arbitral awards. More than 140 countries are party to the New York Convention.8

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8 The Convention is in force in 144 countries as of July 2009: www.uncitral.org.
On the recognition and enforcement of arbitral awards, the 2008 Study tested whether corporations experienced difficulties in enforcing arbitral awards, the significance of the place of enforcement of arbitral awards and the time and amounts recovered in the recognition and enforcement proceedings.

1. Difficulties in Recognizing and Enforcing Arbitral Awards

Most corporations have not encountered major difficulties in seeking recognition and enforcement of arbitral awards

In only 11% of cases did participants need to proceed to enforce an award. The majority of the participating corporations that had enforced awards reported that they had not encountered major difficulties in doing so.

These findings of the 2008 Survey refute the anecdotal evidence that corporations encounter major difficulties when resorting to recognition and enforcement of arbitral awards. This theory rested on the fact that recognition and enforcement proceedings are outside the arbitral tribunal’s powers and national legal systems and local courts are involved in the proceedings. However, the Study reveals that only a very small proportion of the participating corporations faced problems when seeking recognition and enforcement of foreign arbitral awards.

Out of the 11%, only 19% of the corporations had encountered difficulties when seeking to have recognized and enforced foreign arbitral awards. Most of the difficulties arose from attempts to enforce damages awards, although some problems were also encountered when enforcing declaratory and specific performance awards. (See Figure 16.)

<table>
<thead>
<tr>
<th>Has your organization experienced difficulties in recognizing and enforcing foreign arbitral awards? What were the remedies covered by the arbitral awards?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Damages awards</td>
</tr>
<tr>
<td>Declaratory awards</td>
</tr>
<tr>
<td>Specific performance awards</td>
</tr>
<tr>
<td>Contract adaptation awards</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

Figure 16. Enforcing arbitral awards
Most of the problems encountered when seeking enforcement of arbitral awards relate to problems regarding the identification or lack of assets of the non-prevailing party

Corporate counsel reported that their difficulties in enforcing an award often arose because of the circumstances of the award-debtor rather than deficiencies in the arbitral or court proceedings. Seventy percent of the problems related to the debtor’s lack of assets or an inability to identify the debtor’s assets. Only 6% of the respondents encountered difficulties because the country of enforcement was not a signatory to the New York Convention. The small percentage in this last case is related to the large number of countries party to the New York Convention. Seventeen percent of the corporate counsel referenced the hostility of the place of enforcement, which is understood as comprising, among others, an unstable and bureaucratic political and legal system with all the consequences deriving therefrom, including intimidation and threats or corruption. (See Figure 17.)

During the interviews, several corporate counsel indicated that they encountered difficulties when seeking enforcement of interim measures ordered by an arbitral tribunal, especially when such enforcement takes place in a country different from the place of arbitration. This was blamed on the fact that the New York Convention deals only with arbitral awards and not with orders of arbitral tribunals, which do not have the finality of an award.

<table>
<thead>
<tr>
<th>In recognizing and enforcing arbitral awards, how often have you encountered the following difficulties?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unable to identify or access the assets of the debtor</td>
</tr>
<tr>
<td>The lack of assets of the award debtor</td>
</tr>
<tr>
<td>The place of recognition and enforcement was hostile to foreign awards</td>
</tr>
<tr>
<td>Local law allows enforcement in certain time limits</td>
</tr>
<tr>
<td>The inapplicability of the New York Convention</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

**Figure 17. Difficulties in enforcing arbitral awards**

Thirty-seven percent of the corporations in the construction industry indicated the lack of and the inability to identify or access the debtor’s assets as the main difficulties in enforcing their arbitral awards. In the industrial manufacturing sector, besides the circumstances of the award-debtor, 22% of the corporations
indicated the hostility of the place of enforcement as one of the main sources of
difficulty in enforcing arbitral awards. Eighty-seven percent of the corporations in
the energy, oil and gas industry revealed that the main problems stem from a lack
of or the impossibility of accessing or identifying the assets of the non-prevailing
party. Sixty-six percent of the corporations in the retail business indicated the lack
of assets of the award-debtor as the principal source of difficulties.

Institutional Response:

The participating institutions reported that parties to arbitration proceedings
administered by them experienced a range of difficulties when attempting to
enforce arbitral awards, including damages awards, declaratory awards and
specific performance awards. In their view, the two main difficulties are the lack
of assets of the award-debtor and the hostility towards foreign arbitral awards in
the place of enforcement.

2. The Place of Enforcement

The State where the non-prevailing party has most of its assets is the major
tfactor in choosing the place of enforcement of arbitral awards

Unlike the place of arbitration, the place of enforcement of arbitral awards is
usually chosen carefully as this has a critical impact on the execution of the
award. There are several factors influencing this decision, from the country where
the assets of the award-debtor are located to the recognition and enforcement
mechanism at the place of enforcement.

When invited to identify the main factors affecting their decision regarding
the place of enforcement, 27% of the corporations considered first the country
where the non-prevailing party had sufficient assets, while 22% put weight on the
recognition and enforcement mechanisms in the country of enforcement. Twenty
percent of the participants took into consideration the applicability of the New
York Convention. (See Figure 18.) One corporate attorney in the industrial
manufacturing sector indicated that his firm usually checks whether the New York
Convention is applicable and gathers information on the local court system and
the efficiency of the national legal system in general. The attorney added that in
one of these surveys on the local court system they discovered that the courts at
the potential place of enforcement had a tendency to favor foreign investors.
A variety of difficulties have been encountered at the place of enforcement

When asked what kind of difficulties they had experienced at the place of enforcement, 56% of counsel indicated the recognition and enforcement or the execution proceedings. The majority of counsel linked both these problems with the attitude of the local bureaucrats and courts. Ten percent of respondents cited difficulties arising from corruption at local courts. (See Figure 19.)

If you have encountered recognition and enforcement difficulties related to the place of enforcement, what were the particular problems?

Figure 18. Factors considered when choosing the place of enforcement

Figure 19. Difficulties encountered at the place of enforcement
When it comes to the difficulties encountered at the place of enforcement, 50% of the construction companies indicated that they had problems with the recognition and enforcement proceedings, while in the industrial manufacturing industry, the local execution procedure and delays in the enforcement and execution proceedings were placed first (29% each). Twenty-seven percent of the corporations in the energy, oil and gas industry complained about perceived corruption of the judges and the administrative personnel of the local courts.

*Several countries are perceived as hostile to enforcement*

We tested the experience and perception of corporate counsel regarding potential countries or regions where difficulties are likely to appear in enforcement or execution proceedings. Only a few respondents had actually experienced difficulties due to the hostility of the country of enforcement (17%). Brazil, China, India and South Korea were each cited more than once as countries hostile to the enforcement of foreign arbitral awards. On the perception side, China (31%), Russia (14%) and India (10%) were viewed as countries hostile to the enforcement of foreign awards. (See Figure 20.) The actual experience of corporations seems to match their perceptions, although there is much misconception in this attitude. The three most cited regions perceived as hostile were Central America, South America and Africa.

The interviewed corporate counsel acknowledged that this perception may be associated with unstable political regimes or closed markets in the countries and regions mentioned above. In countries such as China, for example, entering into business relationships with local companies may be a challenge for Western firms, as many local firms are integrated with the Chinese government at different levels. Additionally, in our example, Chinese law does not allow parties to pursue *ad hoc* arbitration.9 One corporate counsel disclosed that after litigating and arbitrating his company’s disputes in China, he retained the impression that arbitrators and judges are biased.

Another factor contributing to the perception that a country or region is hostile is a lack of familiarity with its legal and cultural system. It is interesting that counsel from civil-law jurisdictions believe that problems might arise in common-law jurisdictions (for example, the U.S. or the U.K.) because of their unfamiliarity with the legal system. However, in this case, the problems are not directly linked with the place of enforcement, but with the legal experience of the interviewed attorneys. A significant number of corporate counsel consider that problems are likely to occur in countries that are not signatories to the New York Convention or where there is no reciprocity for recognizing and enforcing arbitral awards.

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In which countries do you consider that your corporation might encounter problems in enforcing foreign arbitral awards?

![Bar chart of countries perceived as hostile to the enforcement of foreign arbitral awards]

Figure 20. Countries perceived as hostile to the enforcement of foreign arbitral awards

**Institutional Response:**

Arbitration institutions were asked to name the countries where the parties in arbitration proceedings administered by their institution encountered significant difficulties in enforcing awards. The most cited countries were China, Turkey and Taiwan.

3. **Time and Recovery Rate in the Enforcement Proceedings**

The average time to recognize, enforce and execute arbitral awards is less than one year

The 2008 Study discovered that recognition, enforcement and execution proceedings in international arbitration took less than one year in the majority of cases.
Fifty-seven percent of the participants had taken less than one year to obtain enforcement and execution of their arbitral awards. Fourteen percent were successful in less than six months. However, in 5% of cases, the proceedings took between two and four years. (See Figure 21.) Most counsel pointed to the New York Convention as the main reason for relatively short proceedings. Lengthy proceedings were usually blamed on local bureaucracy.

Forty percent of the corporations in the construction industry indicated that it took between one and two years to recognize, enforce and execute their arbitral awards, while 40% of the industrial manufacturing corporations spent between six months and one year in the proceedings. Forty-five percent of the energy, oil and gas companies spent less than one year in the enforcement and execution proceedings. In the retail sector, this percentage is almost double, with 83% of corporate counsel spending an average of less than one year in enforcement and execution proceedings.

Recovery through recognizing, enforcing and executing arbitral awards is high

Forty-four percent of the participants reported that they usually recovered 100% of the arbitral award when using recognition, enforcement and execution proceedings. Forty percent recovered over 75% of the amount awarded. (See Figure 22.) During the interviews, corporate counsel indicated that the lack of assets of the non-prevailing party is the main reason for the failure to recover the full amount of an award.
4. Resisting Recognition and Enforcement Proceedings

Less than half of the award-debtors resist recognition and enforcement proceedings

Figure 22. The average amount recovered during the enforcement and execution proceedings

Article V of the New York Convention provides several grounds upon which national courts may refuse the recognition and enforcement of foreign arbitral awards. Similar provisions may be found in national arbitration laws. In these circumstances, the opposing party may resist recognition and enforcement by asking the court to acknowledge the existence of one or more grounds for refusal of the recognition and enforcement of an arbitral award.

Although it was believed that in a large number of cases the opposing party will employ every tactic in order to delay compliance with an award, the participating corporations indicated that in only 39% of the cases did the award debtor resist enforcement proceedings. (See Figure 23.) During the interviews, several corporate counsel indicated that in rare cases the resistance of the award debtor is in fact a dilatory tactic. Nevertheless, the corporate counsel believe that these situations are rare and in exceptional circumstances an arbitral award may be refused recognition and enforcement.
Have you experienced resistance from the opposing party in enforcing the arbitral awards?

39% Yes
61% No

Figure 23. Opposition to the recognition and enforcement of arbitral awards

Among the grounds set out in by the New York Convention, the participating corporations indicated that in 35% of the cases, the opposing party relied on procedural irregularities in the arbitration proceedings. In 16% of the oppositions, the award-debtor argued that the arbitral tribunal exceeded its jurisdiction, while in 14% of the cases, the non-prevailing party argued the existence of an invalid arbitration agreement. (See Figure 24.)

IN RESISTING ENFORCEMENT, WHAT GROUNDS HAVE BEEN INVOKED BY THE NON-PREVAILING PARTY?

Invalid arbitration agreement 14%
Procedural irregularities in the arbitration proceedings 35%
Tribunal exceeded its jurisdiction 16%
Award was not binding or was suspended or set aside 10%
Subject matter of the dispute not capable of being settled by arbitration 12%
Public policy issues 13%

Figure 24. Grounds for resisting recognition and enforcement of arbitral awards

Institutional Response:

We asked arbitration institutions whether they were aware of the number of arbitral awards that were subsequently set aside. Sixty-five percent of the institutions indicated that less than 25% (more typically less than 10%) of their
awards had been challenged. Twenty-nine percent revealed that none of their awards had been challenged. However, these results must be considered in the context that 42% of the participating institutions do not keep track of their awards after dispatch.

Conclusions

Even in situations where the prevailing party has to resort to recognition and enforcement proceedings, corporate counsel reported that they seldom face major difficulties. When they encounter problems, this happens because the award-debtor does not have sufficient assets to cover the value of the award or, even if there are sufficient assets, it is difficult to identify them.

The place of enforcement of arbitral awards is important as it provides finality to the arbitration proceedings. Corporations choose the place of enforcement based on several criteria; however, the country where the non-prevailing party has the majority of its assets is the most important one. African, Central American and some Asian countries are regarded by the participating corporations as countries hostile to arbitration and to recognition and enforcement of arbitral awards, in particular.

It seems that time is not a major problem in enforcing arbitral awards, as the Survey reveals that parties spend less than one year in enforcement proceedings. As indicated during the interviews, this might be a direct consequence of the wide applicability of the New York Convention. Following enforcement and execution proceedings, 84% of the corporations tend to recover more than 76% of the value of the award.

Only in a small number of cases does the award-debtor oppose the recognition and enforcement of arbitral awards and this is usually the case when the non-prevailing party feels that one of the grounds provided for in the New York Convention or in the national laws is applicable.

G. States, State Enterprises and Recognition and Enforcement of Arbitral Awards

In the last decade, arbitration against states, and in particular investment arbitration, increased significantly, along with the proliferation of Bilateral Investment Treaties (“BITs”), the increased caseload of the International Centre for Settlement of Investment Disputes (“ICSID”), and the cases under the Energy Charter Treaty (“ECT”) and the North American Free Trade Agreement (“NAFTA”). Investment arbitration disputes rely to a great extent on provisions of investment treaties concluded by states – bilateral or multilateral treaties – and are brought for adjudication to institutional or ad hoc arbitration. There are more than 2,700 BITs concluded between states and a significant number of multilateral investment treaties and regional treaties, including NAFTA and DR-CAFTA.¹

¹ Dominican Republic – Central America Free Trade Agreement, signed in 2004.
believed that there are also a significant number of disputes adjudicated by ad hoc arbitration, under the UNCITRAL Rules. If there seems to be a reporting system for institutional investment arbitration, for ad hoc investment arbitration we can only speculate on the number of adjudicated disputes. Few of the ad hoc investment arbitral awards are made public, while the majority of institutional awards are already in the public domain. According to UNCTAD, between 1987 and 2006 a total of 259 cases against states based on BITs were instituted before various forums: 161 before ICSID and 92 before other forums.\footnote{UNCTAD, IIA Monitor No. 1 (2008), available at http://www.unctad.org/en/docs/iteiia20083_en.pdf.}

In this broad category of state arbitration we also included disputes between state enterprises and private entities, irrespective of whether they relate to commercial contracts, joint venture agreements or privatization contracts. In 2006, most of the disputes involving Eastern European states were disputes against their enterprises in connection with privatization agreements. Of course, this was the natural effect of privatizations carried out after the fall of the communist regime in 1990.

It must be emphasized here that in the ICSID system, recognition and enforcement of arbitral awards is based on the provisions of the ICSID Convention. Under the ICSID Convention there is no possibility for the state to resist enforcement of awards or to exercise any other challenge available in the local law, except for those remedies provided for in the ICSID Convention. Nevertheless, the execution proceedings of ICSID awards are carried out in accordance with local law.

*Private sector entities are the predominant users of international arbitration*

Of the corporations surveyed, it appears that most of them (74%) have experience arbitrating mainly with private organizations, while 21% have also arbitrated disputes against state enterprises. Only 5% of the corporations polled had experienced with arbitration with states. (See Figure 25.) A majority of the construction companies participating in the study had faced state enterprises as opposing parties in arbitration proceedings. During the interviews, one corporate attorney disclosed that, while it is sometimes difficult to negotiate a contract with a state, states are in fact very open when it comes to agreeing on arbitration clauses and arbitration in general.
Arbitral awards against states or state enterprises are most commonly rendered in institutional arbitration.

The surveyed corporations reported that their disputes against states and state enterprises are principally brought before institutional arbitration, while only 33% of disputes are adjudicated in ad hoc proceedings. (See Figure 26.)

The 2008 Survey indicates that, aside from ad hoc arbitration, the most popular venues for adjudicating disputes against states are the ICC, AAA, LCIA.
and ICSID. (See Figure 27.) ICSID is only used in investment arbitration, where the home state of the investor and the state party to the dispute are contracting states to the ICSID Convention.\textsuperscript{12} As reported by the interviewed counsel, the AAA, ICC and LCIA are used not only for disputes against state enterprises, but also in disputes against states.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{institutional_ad_hoc_arbitration.png}
\caption{Ad hoc and institutional arbitration against states and state enterprises}
\end{figure}

\textit{States and state enterprises regularly comply voluntarily with arbitral awards or negotiate a settlement}

While the number of arbitrations involving states is increasing, these cases represent only a small proportion of the total number of arbitrations. Consequently, many of the participants have not experienced recognition and enforcement of arbitral awards against states. Only 19\% of respondents have experience in enforcing arbitral awards against states or state enterprises. (See Figure 28.) However, there are a significant number of cases involving enforcement against state enterprises. An additional factor is the high degree of voluntary compliance with arbitral awards (around 90\% of the cases, as disclosed during the interviews). Compliance often resulted in the renegotiation of contracts between corporations and the state or state enterprises, rather than the state paying damages to an investor.

\textsuperscript{12} Under the ICSID Additional Facility Rules, a dispute may be adjudicated by an ICSID tribunal if one of the states involved in the dispute (the host state or the home state) is a party to the ICSID Convention. The Additional Facility Rules are applicable only upon the consent of the parties in dispute. Since these disputes are outside the jurisdiction of ICSID, the provisions of the ICSID Convention are not applicable.
During the interviews, several corporations indicated that they did not attempt to enforce awards against states as they considered they would be unsuccessful. In these cases, corporations sometimes sold or assigned the awards to third parties or sold the underlying local business involved in the proceedings to someone prepared to take the risk of obtaining value from an arbitral award.

**Figure 28. Enforcement against states and state enterprises**

Forty-three percent of construction corporations and 33% of industrial manufacturing companies sought to obtain recognition and enforce arbitral awards against states and state enterprises. The enforcement rate in the energy, oil and gas sector appears to be slightly lower (13%). (See Figure 29.)

**Figure 29. Enforcement against states and state enterprises / Industries**
Institutional Response:

Fifty-nine percent of the participating arbitration institutions indicated that less than 25% of their awards are rendered in proceedings involving states or state enterprises. Twenty-four percent revealed that they never administrated cases involving states or state enterprises.

Corporations experienced fewer significant problems in enforcing arbitral awards against states and state enterprises than in enforcing awards against private sector entities.

Of the minority of participants that had experience in enforcing awards against states or state enterprises (i.e. 19% of the corporations who arbitrated against states and state enterprises), over half had no significant problems. (See Figure 30.) A small proportion had experienced significant difficulties and the interviews indicated that there was a correlation between countries where corporations experienced broader business issues and the countries where there were difficulties in enforcing arbitral awards. In countries like Venezuela or Ecuador, the participating corporations admitted that they were practically forced to sell their investments due to political and economic measures imposed by these states.

![Figure 30. Difficulties in enforcing awards against states and state enterprises](image)

When asked what type of difficulties they encountered in enforcing against states or state enterprises, the majority of corporate counsel (68%) indicated the impossibility of identifying the assets of the state or state enterprise. Thirteen percent of respondents experienced immunity from execution problems in enforcement proceedings against states. (See Figure 31.) We can conclude that the problems encountered when enforcing awards against states are not much different from those experienced in commercial arbitration proceedings.
As far as perceptions are concerned, a large number of corporations that did not attempt to enforce any arbitral awards against states or state enterprises (28%) believe that it is somewhat more difficult to enforce against states then against private entities. (See Figure 32.) This might flow from the belief that a state is an abstract concept and it is unlikely to identify its assets, while private companies are tangible entities with more transparent rules governing their activity and liability.
Do you consider that it is more difficult to enforce arbitral awards against states or state enterprises than against companies?

![Figure 32. Perception: enforcing arbitral awards against states and state enterprises](chart)

**Institutional Response:**

Only a few arbitration institutions were aware of problems regarding the enforcement of awards against states and state enterprises. Twenty-three percent of the institutions suggested that it is more difficult to enforce arbitral awards against states and state enterprises than against corporations. However, 59% of the institutions were unable to comment and 18% felt that there were no difficulties.

**Conclusions**

Corporations have limited experience when it comes to recognition and enforcement of arbitral awards against states. There are several explanations, but two appear to have considerable weight: compliance with or renegotiation of the arbitral awards and assignment of arbitral awards rendered against states.

Corporations that sought to enforce arbitral awards against states have not encountered significant problems. If they had problems, these appear to be similar to those they experienced when enforcing awards against corporations: they were unable to identify or access the assets of the state or state enterprise. In a few cases, corporations faced difficulties related to immunity from execution when attempting to enforce against states.
H. The Arbitration Institutions

Institutional arbitration is generally preferred to ad hoc arbitration

The 2008 Survey confirms that there is significant support for institutional arbitration. Eighty-six percent of the awards had been rendered under the rules of an arbitration institution, while 14% under ad hoc arbitration. (See Figure 33.) These results are consistent with the 2006 Survey. The corporations indicated that the main reason for using institutional arbitration was the reputation of the institutions and the convenience of having the case administrated by a third party.

One European corporate counsel disclosed during the interview that his company mainly uses institutional arbitration because of the fear that they “would get wrong the ad hoc arbitration clause.” For this reason, the attorney indicated that they often import the standard arbitration clauses recommended by the arbitration institutions. Another corporate counsel revealed that the corporation only uses institutional arbitration because in that particular country arbitrators do not have experience with ad hoc arbitration proceedings.

![Figure 33. The use of ad hoc and institutional arbitration](image)

More than 95% of the participating corporations from South America have used institutional arbitration. Interviewed counsel of South American corporations believe that this preference is mainly determined by the supervisory role of the institutions.

Ninety-three percent of the construction companies have used institutional arbitration, while 45% of the companies in the insurance sector have employed ad hoc arbitration procedures to resolve their disputes. In the other sectors, an average of 85% of the corporations have used the services of an arbitration institution for their disputes.
The ICC, followed by AAA-ICDR and LCIA remain the most popular arbitration institutions

In the first Study we asked corporate counsel to choose their preferred institutions from a list of ten well-known arbitration institutions. Back then we tested the preference of the corporations and not the actual number of cases submitted with those institutions.

Arbitration institutions regularly report the number of cases administered under the institution’s rules. Notwithstanding the reported statistics, this year we asked corporations to identify the institutions used in the arbitration proceedings, in order to determine whether their responses matched the number of cases reported by arbitration institutions. Forty-five percent of the participating corporations preferred to submit their disputes to the ICC, followed by the AAA-ICDR (16%) and the LCIA (11%). (See Figure 34.)

In line with the findings of the 2006 Survey, the participants reported an increased preference for regional arbitration institutions, with several of corporations using CAM, NAI, FIESPI and KCAB as viable alternatives to the international institutions.

It is interesting to observe the solid popularity of ICSID. Although in a significant number of cases parties might be compelled to arbitrate under the auspices of ICSID, there are instances where corporations may choose whether to submit the dispute to ICSID or to another designated institution (most often to the SCC or ICC).

![Figure 34. Arbitration institutions and international arbitration](image-url)
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 the ICC, CIETAC, SIAC or LCIA, while U.S. corporations prefer the AAA-ICDR, ICC and HKIAC. These statistics can be easily explained by various factors, including the geographic position of the corporations and the nationality of their business partners. However, the geographical factor is not the decisive one. For example, although it is believed that Swiss corporations might prefer to arbitrate with Swiss Chambers, the Study showed that they would rather submit their disputes to the ICC or AAA-ICDR.

The corporations in the construction industry submitted their disputes to the ICC (73%), followed by the LCIA (11%). In the industrial manufacturing sector, corporate counsel indicated that they used the ICC (37%), followed by the AAA-ICDR (20%) and regional arbitration institutions (15%). Energy, oil and gas corporations resorted to the ICC (60%), followed by the AAA-ICDR (12%) and the LCIA (9%) to resolve their disputes.

Reported statistics from the institutions show that the AAA-ICDR is the most frequently used institution, closely followed by the ICC.

The information gathered from corporations is supported by the number of international cases reported by the arbitration institutions participating in this second Study. The AAA-ICDR administered 621 international disputes in 2007, while the ICC and CIETAC registered 599 and 429, respectively.

### Institutional Arbitration: Arbitration cases between 2003 and 2007

<table>
<thead>
<tr>
<th>Institution</th>
<th>Type</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC</td>
<td>International</td>
<td>580</td>
<td>561</td>
<td>521</td>
<td>593</td>
<td>599</td>
<td>2,854</td>
</tr>
<tr>
<td>AAA/ICDR</td>
<td>International</td>
<td>646</td>
<td>614</td>
<td>580</td>
<td>586</td>
<td>621</td>
<td>3,047</td>
</tr>
<tr>
<td>LCIA</td>
<td>International</td>
<td>99</td>
<td>83</td>
<td>110</td>
<td>130</td>
<td>127</td>
<td>549</td>
</tr>
<tr>
<td>SCC</td>
<td>International and Domestic</td>
<td>169</td>
<td>123</td>
<td>100</td>
<td>141</td>
<td>170</td>
<td>703</td>
</tr>
</tbody>
</table>

13 For 2008, the following statistics are publicly available as of February 2009: The ICC received 663 referrals (a 10.7% increase), the LCIA received 221 new cases (a 60% increase), the Swiss chambers received 68 cases, the Milan Chamber received 118 new cases and the SCC received 176 cases.


15 International Center for Dispute Resolution, American Arbitration Association, at www.adr.org/international.


<table>
<thead>
<tr>
<th>Institution</th>
<th>Type</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>TOTAL</th>
</tr>
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<tr>
<td>Swiss Chambers</td>
<td>International</td>
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<td>52</td>
<td>54</td>
<td>50</td>
<td>58</td>
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<tr>
<td>HKIAC</td>
<td>International</td>
<td>287</td>
<td>280</td>
<td>281</td>
<td>394</td>
<td>448</td>
<td>1,690</td>
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<tr>
<td>SIAC</td>
<td>International</td>
<td>35</td>
<td>48</td>
<td>45</td>
<td>65</td>
<td>70</td>
<td>263</td>
</tr>
<tr>
<td>CIETAC</td>
<td>International</td>
<td>422</td>
<td>462</td>
<td>427</td>
<td>442</td>
<td>429</td>
<td>2,182</td>
</tr>
<tr>
<td>DIS</td>
<td>International and Domestic</td>
<td>81</td>
<td>87</td>
<td>72</td>
<td>75</td>
<td>100</td>
<td>415</td>
</tr>
<tr>
<td>ICAC (Ukraine)</td>
<td>International and Domestic</td>
<td>389</td>
<td>262</td>
<td>366</td>
<td>323</td>
<td>319</td>
<td>1,659</td>
</tr>
<tr>
<td>CICA</td>
<td>International</td>
<td>70</td>
<td>77</td>
<td>72</td>
<td>62</td>
<td>54</td>
<td>335</td>
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<tr>
<td>KCAB</td>
<td>International</td>
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<td>46</td>
<td>53</td>
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<td>International</td>
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<td>33</td>
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<td>24</td>
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<td>WIPO Arbitration and Mediation Centre</td>
<td>International</td>
<td>8</td>
<td>9</td>
<td>22</td>
<td>23</td>
<td>32</td>
<td>94</td>
</tr>
<tr>
<td>CAM - Milan</td>
<td>International</td>
<td>15</td>
<td>11</td>
<td>18</td>
<td>20</td>
<td>23</td>
<td>87</td>
</tr>
<tr>
<td>Mongolian National Arbitration Court</td>
<td>International</td>
<td>11</td>
<td>13</td>
<td>11</td>
<td>22</td>
<td>12</td>
<td>69</td>
</tr>
<tr>
<td>JCAA</td>
<td>International</td>
<td>14</td>
<td>17</td>
<td>10</td>
<td>11</td>
<td>14</td>
<td>66</td>
</tr>
</tbody>
</table>

19 Hong Kong International Arbitration Centre, at http://www.hkiac.org/HKIAC/HKIAC_English/main.html.
22 German Arbitration Institution, at http://www.dis-arb.de.
29 Japan Commercial Arbitration Association, at http://www.jcaa.or.jp/e/index-e.html.
Arbitration institutions were asked whether they keep track of arbitral awards after they have been rendered. We were interested in whether arbitration institutions consider that their task is over as soon as the tribunal renders the award (and the fees have been paid) or whether they continue to monitor the awards and their enforcement or voluntary compliance, in order to measure the efficiency of their management. While it is true that compliance with arbitral awards or their enforcement is not directly linked to the arbitration institutions, this is a factor that has to be considered.

Forty-two percent of the arbitration institutions participating in this Study reported that they had no system to monitor awards after they had been dispatched, while 29% confirmed that they did perform some form of regular monitoring. Twenty-nine percent of the institutions keep track of arbitral awards only in certain cases. (See Figure 35.) In this last situation, the institutions indicated that they monitor awards that are challenged in setting-aside proceedings or by resisting recognition and enforcement. This is because the parties usually request from the institutions various documents in connection with the arbitration proceedings or the arbitral award. Institutions assist on some occasions with enforcement by supplying supporting documents or letters addressed to enforcing courts. However, in most cases, institutions do not keep track of the awards rendered under their auspices.

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*Including cases submitted under ICSID Additional Facility Rules.

<table>
<thead>
<tr>
<th>Institution</th>
<th>Type</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>PCA</td>
<td>International</td>
<td>5</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>9</td>
<td>30</td>
</tr>
<tr>
<td>ACICA</td>
<td>International</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>3,023</td>
<td>2,916</td>
<td>2,910</td>
<td>3,120</td>
<td>3,280</td>
<td>15,249</td>
</tr>
</tbody>
</table>

A simple system for monitoring arbitral awards – for example, a questionnaire sent to the parties one year after the completion of the proceedings – might improve the institutions’ awareness of how parties fared, which might also assist in the institutions’ management of cases and the efficiency of their proceedings.

III. THE 2008 SURVEY: METHODOLOGY

The research for the 2008 Study was conducted between November 15, 2007 and April 15, 2008 by Crina Baltag, with the assistance of Loukas Mistelis and Stavros Brekoulakis, all from the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London.

A. Limitations

The aim of the 2006 and 2008 Surveys was to test the effectiveness of international arbitration. The purpose of both Surveys was not only to contribute to the debate on whether international arbitration is an efficient dispute resolution mechanism, but also to reveal the areas where further actions should be taken in order to improve the process. As with any other publication, surveys are undertaken in a particular time and geographical framework.

The 2008 Survey constitutes a study of the experiences and perceptions of the end users of international arbitration. We have only interviewed and asked for the opinions of corporate counsel and arbitration institutions and we have not interviewed lawyers in private practice, arbitrators or academics.

The research analysis was limited to settlement and recognition and enforcement proceedings in international arbitration, and, in connection with this, general attitudes towards international arbitration. We have not asked specific questions relating to arbitration procedure or the arbitral tribunal. Our intention was to establish general trends for the corporations involved in international arbitration. Where necessary, we revealed the trends of a specific industry or
region. One additional limitation was that the participating corporations all had experienced arbitration in the recent past, typically five years, to ensure that there was adequate “institutional memory” or records.

B. Methodology

The research was divided into two major streams:

- The experiences and attitudes of corporations towards settlement, recognition and enforcement in international arbitration;
- The experiences and attitudes of arbitration institutions towards settlement, recognition and enforcement in international arbitration.

The research involving corporations comprised two phases: a quantitative and a qualitative phase. This was the practice since different data can come out when using quantitative and qualitative techniques. Second, at the qualitative stage, respondents could easily explain their views and further questions could be asked.

Phase 1: An online questionnaire completed by 82 respondents between November 15, 2007 and February 28, 2008. Almost all interviewed corporations also produced written responses to the questionnaires but the quantitative data was counted only once. Respondents were general counsel, heads of legal departments or counsel, on the authority of the general counsel.

Respondents answered a total of 37 substantive questions, as follows: five questions on the arbitration framework, nine questions regarding settlement pre- and post-arbitral award, 17 questions on recognition and enforcement of arbitral awards and six questions as to recognition and enforcement against states and state enterprises. The questions had single or multiple answers. Some questions required respondents to rank possible answers/options.

The questionnaire was drafted by Loukas Mistelis and Crina Baltag, following a thorough review of issues relating to settlement, recognition and enforcement in international arbitration. The first draft had been submitted for review to a Focus Group comprising 14 lawyers and specialists in the international arbitration field from the U.K., France, the U.S. and Sweden.

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33 Actually more than 82 corporations produced questionnaires; five questionnaires were disqualified, largely because the corporations had not experienced arbitration in the recent past.

34 The focus groups consisted of John Fellas (Hughes Hubbard and Reed LLP), Paul Friedland (White and Case LLP), Matthew Gearing (Allen Overy LLP), Paula Hodges (Herbert Smith LLP), Ed Kehoe (Kind and Spalding LLP), Daniel Kalderimis (Freshfields Bruckhaus Deringer LLP), Karl Mackie (CEDR), Simon Nesbitt (Lovells LLP), Robin Oldenstam (Mannheimer Swartling), Guy Pendell (CMS Cameron McKenna LLP), Philippe Pinsolle (Shearman and Sterling LLP), Javier Rubinstein (PwC), Franz Schwarz (Wilmer Cutler Pickering Hale and Dorr LLP), Audley Sheppard (Clifford Chance LLP), and Joseph Tirado (Norton Rose LLP).
Phase 2: Forty-seven face-to-face or telephone interviews with corporate counsel conducted between February 1, 2008 and April 15, 2008. Interviews departed from a set of guideline questions and varied from 30 minutes for telephone interviews to two hours for face-to-face interviews. Face-to-face interviews were conducted in the U.K., the U.S., Sweden, Switzerland, Greece, Japan, Mexico and Brazil.

The research involving arbitration institutions had only a quantitative phase, although in one case (the LCIA), an interview was conducted. The participating arbitration institutions completed a questionnaire containing 18 substantive questions: five questions on arbitration framework, three questions regarding settlement, seven questions on recognition and enforcement and three questions related to recognition and enforcement proceedings against states and state enterprises.

The following arbitration institutions participated in our Study: the ICC, AAA-ICDR, LCIA, PCA, JCAA, ACICA, HKIAC, the Swiss Chambers, CIETAC, VIAC, NAI, WIPO Arbitration and Mediation Centre, CICA, SAKIG, ICAC (Ukraine), the Mongolian National Arbitration Center, CEPANI,35 DIAC,36 KCAB and the Milan Chamber of Arbitration.

The online questionnaire for corporate counsel was completed by 82 respondents, via mail or e-mail. Forty-six percent of the participating counsel were heads of legal departments (usually litigation/arbitration departments) and 22% were general counsel. Twenty percent of the respondents were counsel, but they participated under the authority of general counsel. (See Figure 36.) Of the 47 interviews conducted, the majority of the interviews were with general counsel and heads of legal departments.

<table>
<thead>
<tr>
<th>What position do you hold in your organization?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Counsel</td>
</tr>
<tr>
<td>Head Legal Department</td>
</tr>
<tr>
<td>Deputy General Counsel</td>
</tr>
<tr>
<td>General Counsel</td>
</tr>
<tr>
<td>5%</td>
</tr>
<tr>
<td>20%</td>
</tr>
<tr>
<td>46%</td>
</tr>
<tr>
<td>7%</td>
</tr>
<tr>
<td>22%</td>
</tr>
</tbody>
</table>

Figure 36. The corporate counsel and their position in the organization

35 Belgian Centre for Arbitration and Mediation.
36 Dubai International Arbitration Centre.
Respondents from the following industry sectors participated in our Study:

- Industrial Manufacturing
- Financial Services and Banking
- Energy, Oil and Gas
- Engineering and Construction
- Automobile and Transportation
- Retail and Consumer
- Media and Entertainment
- Telecommunications
- Insurance
- Shipping
- Mining and Metals
- Consulting/IT/Outsourcing
- Pharmaceuticals
- Aeronautics

As demonstrated in the chart below, we covered all significant industry sectors. However, a majority of the respondents (23%) were acting in the energy, oil and gas industry. This percentage can be explained by the large number of arbitrations (including investment arbitrations) in this industry sector, as well as by the fact that we grouped three sub-sectors in this category: energy, oil and gas. Some participating corporations are active, for example, only in the gas industry. In our first Study, a significant number of respondents came from the industrial manufacturing sector.

![Respondents by industry sector](image)

*Figure 37. The surveyed industries*
As this second Study mainly deals with recognition and enforcement of foreign arbitral awards, it was natural for us to target corporations that act globally. Seventy-six percent of respondents have global structures, while only 13% operate at a national level. (See Figure 38.) However, even in the latter case, the participating corporations had participated in recognition and enforcement proceedings.

![Figure 38. The surveyed corporations and their business coverage](chart)

Although the majority of the participating corporations have operations/offices in numerous countries, they are primarily based in the U.S., Mexico, the U.K., Brazil, Switzerland, Germany, Turkey, Italy, France, Japan, Nigeria, Canada, Singapore, Australia, India, Russia, Croatia, Poland, Czech Republic, the Netherlands, Belgium, Austria, Greece, Romania, Venezuela, Argentine Republic and Egypt. It was difficult to reach corporations from Africa and South-East Asia.
As to the financial profile of the participating corporations, more than 68% had an average yearly turnover of more than U.S. $5 billion. (See Figure 40.)

Figure 39. The geographic location of the participating corporations

Figure 40. The average yearly turnover of the participating corporations
IV. INTERNATIONAL ARBITRATION AND THE IMPORTANCE OF EMPIRICAL SURVEYS

The 2008 Survey revealed that 88% of the participating corporations have used arbitration at least once in the last ten years, while 44% have used arbitration in over 75% of their disputes. Although there were several counsel who felt disappointed by the arbitration process, most indicated that they will continue to use arbitration, as it provides major advantages over litigation. Corporate counsel are seeking other forms of alternative dispute resolution when arbitration and litigation prove to be inefficient. This is a general trend revealed by the Survey, with 15% of the disputes generally being resolved through mediation, conciliation, expert determination or dispute boards. One of the interviewed corporate counsel felt very disappointed with international arbitration and indicated that his corporation is now trying to implement an ADR policy for dispute settlement, although a large number of their disputes are still being adjudicated in arbitration proceedings.

The participating corporations expressed the view that when the right conditions are in place, they prefer to settle their disputes, even after an arbitral award had been issued, rather than engage in a bureaucratic, expensive, time-consuming or unknown procedure. Corporations indicated that they also prefer to settle a dispute in order to avoid negative publicity or to preserve a working business relationship with the opposing party. Several corporate counsel revealed that they prefer to settle, before, during or after an award is made, if the opposing party lacks sufficient assets to cover the claim.

Only a small percentage of the participating corporations had to resort to recognition and enforcement proceedings in international arbitration. A clear trend appears to be towards voluntary compliance with arbitral awards. The 2008 Survey indicates that when recognition and enforcement of arbitral awards is employed, this is effective in practice, with a small number of corporate counsel pointing at difficulties encountered during these proceedings. When problems appear, these are usually blamed on the lack of, or impossibility of identifying, the assets of the non-prevailing party. Problems are also encountered in countries with alleged corrupt legal and political systems or with centralized economies. The interviews indicated that the efficiency of the recognition and enforcement mechanism is ensured by the worldwide application of the New York Convention.

So how is the future of international arbitration? While international arbitration is an efficient and popular dispute resolution mechanism, it does not mean that it is perfect.

We embarked on the two Surveys with a genuine academic interest and without any agenda. We anticipated that we would identify issues and might not be able to offer solutions. For this very reason, we decided not to collect data from arbitrators or outside counsel, but to focus on corporations and in-house lawyers as users of the arbitration process. But identifying issues was a good enough exercise: there was so little data available that any topic one could survey would bring new insights, stimulate interest and form the basis of future research.
The 2008 and the 2006 Surveys have reignited interest in empirical research in international arbitration. Christopher Drahozal and Richard Naimark were right when, in 2005, they stated that more empirical research would make arbitration a science (rather than merely an art).37 Hopefully, researchers will use and analyze the data with a view toward providing further insights into international arbitration and making it a more efficient and user-friendly process.

Arbitration institutions, law firms and corporate counsel assessed the findings and decided to take action in respect of critical conclusions. To name a few examples:

- The ICC Arbitration Commission established a task force on Techniques for Controlling Time and Costs in Arbitration, the most striking concern of arbitration users according to the first survey.38 Similar working groups have operated in other arbitration institutions, such as the International Institute for Conflict Prevention and Resolution (“CPR”);
- The Centre for Effective Dispute Resolution (“CEDR”)39 formed a commission to explore settlement in international arbitration.40 The work was to some extent inspired by the 2006 Survey and was also informed by the findings of the 2008 Survey, which specifically looked at the issue of settlement;
- Many law firms have organized internal training seminars as well as client seminars to assess and discuss the findings of the two surveys.

Most importantly, the two surveys have empowered and given voice to corporate counsel. In-house lawyers are now invited to most major arbitration events; arbitration institutions have acknowledged the importance of corporations and their in-house lawyers, not only for the promotion of arbitration as a procedure, but also for the assessment and improvement of the process. More specifically, in late 2006, the Corporate Counsel International Arbitration Group (“CCIAG”)41 was created.42 An official platform now exists for corporations that

37 TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher Drahozal & Richard Naimark eds., 2005).
39 Centre for Effective Dispute Resolution, at http://www.cedr.co.uk.
40 See http://www.cedr.com/about_us/arbitration_commission. The work is ongoing.
41 See http://www.cciag.com/index.html. Corporate counsel representing 23 multinational corporations met in Paris on November 3, 2006, to explore the foundation of a group to represent corporate users’ views in international commercial arbitration. According to http://www.cciag.com/About%20Us%20Mission%20Statement.html, the CCIAG aims to be the premier forum to represent the interests and views of corporations in relation to the conduct, practice and scope of international arbitration and other forms of early and alternative dispute resolution as a means of dispute resolution. The CCIAG shall also be a forum within which the members may share knowledge and best practices, network with their peers with respect to matters of general interest,
are active and interested in arbitration. The shift of the focus of arbitration back on the users represents a most welcome consequence of the two surveys.

The three main themes and the specific findings of this Survey are also discussed in several separate articles in this issue. A further survey will be conducted in 2009 and 2010 and will be presented in late 2010.

obtain education and training, and participate in other joint initiatives and activities; subject in all cases to any legal constraints on such activities. The initiatives and activities of the CCIAG shall have as their common purpose the promotion of higher standards in international commercial arbitration.

Two presentations were made, by Chris Lemar of PricewaterhouseCoopers and Professor Loukas Mistelis; they detailed the findings of the 2006 Survey and prompted lively discussion with the participants.

Crina Baltag discusses Enforcement Against States, (infra at 391), Stavros Brekoulakis explores Enforcement of Awards and the Commercial Limitations of the Current System and the Gradual Development of Private Means of Enforcement, (infra at 415), Loukas Mistelis analyzes Settlement as Enforcement (infra at 377), Paul Friedland provides Comments on the Survey (infra at 447) and Gerry Lagerberg discusses the Business Rationale (infra at 455).

For any comments and suggestions please contact Professor Loukas Mistelis at L.Mistelis@qmul.ac.uk.