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# International Commercial Arbitration - An Introduction

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CLARITY MATTERS

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# Overview

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- Rise in international arbitration
- Foundations of modern international arbitration
- Getting your arbitration clause right
- Selecting a place (seat) for arbitration
- Choosing institutional or ad hoc arbitration
- Choosing the the right institution



# Rise in use of international arbitration

International Arbitration Cases																	
Institution	Country	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
ICSID	-	12	14	19	31	27	27	23	37	21	25	26	38	50	40	38	52
AAA-ICDR	USA	510	649	672	646	614	580	586	621	703	800	888	994	996	1165	1052	NA
CIETAC	China	543	562	468	422	461	427	442	429	548	560	418	470	331	375	387	437
ICC	France	541	566	593	580	561	521	593	599	663	817	793	796	759	767	791	801
LCIA	UK	87	71	88	104	87	118	133	137	215	272	246	224	265	290	296	326
SCC	Sweden	66	68	50	77	45	53	64	81	74	96	91	96	92	86	94	103
HKIAC	Hong Kong	298	307	320	287	280	281	394	448	602	429	291	275	293	263	252	NA
SIAC	Singapore	37	39	34	23	39	74	90	86	99	160	198	188	235	259	222	271
Grand Total	-	2094	2276	2244	2170	2114	2081	2325	2438	2925	3159	2951	3081	3021	3245	3132	NA



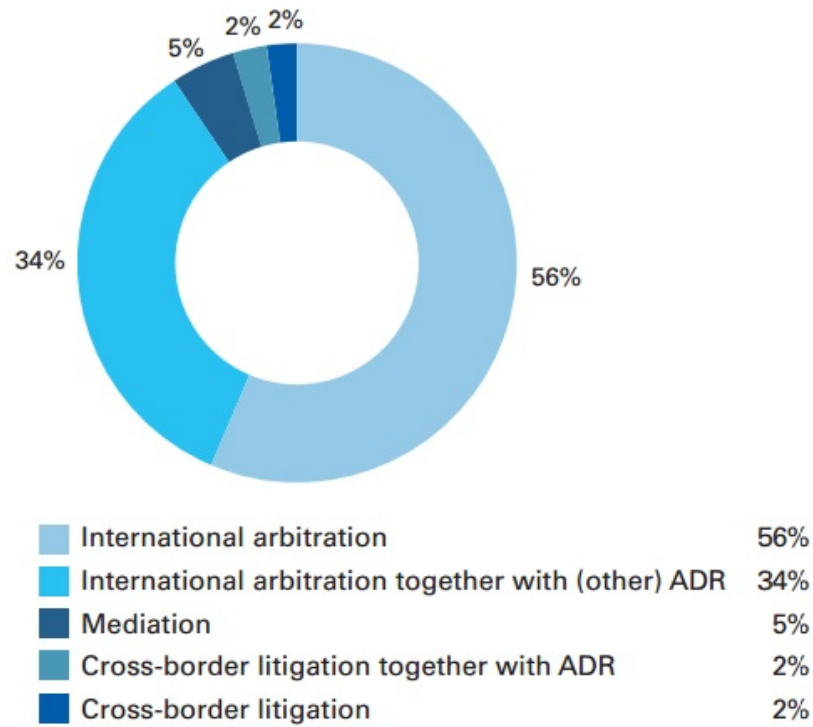
# Prevalence of Arbitration

## Preferred Mechanisms for Resolving International Disputes

Source: Queen Mary University / White & Case Survey 2015

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**Chart 1: What is your preferred method of resolving cross-border disputes?**



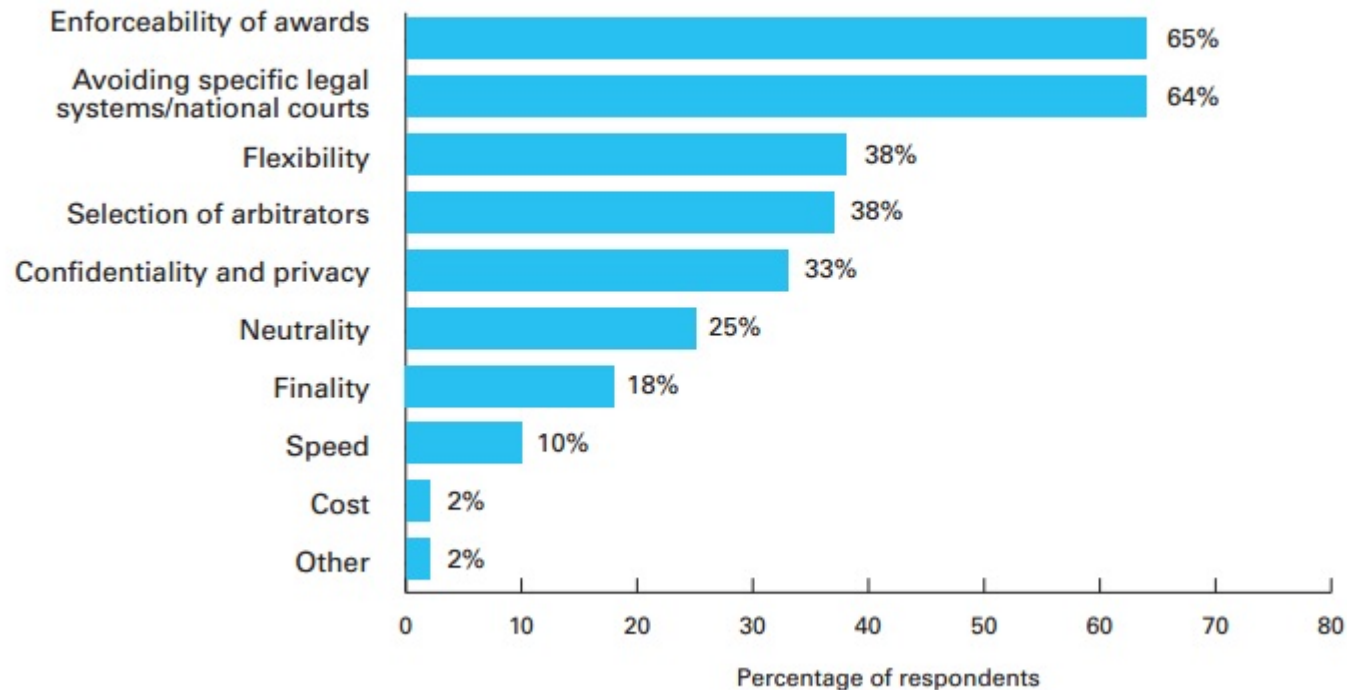
# Prevalence of Arbitration

## Preferred Mechanisms for Resolving International Disputes

Source: Queen Mary University / White & Case Survey 2015

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**Chart 2: What are the three most valuable characteristics of international arbitration?**

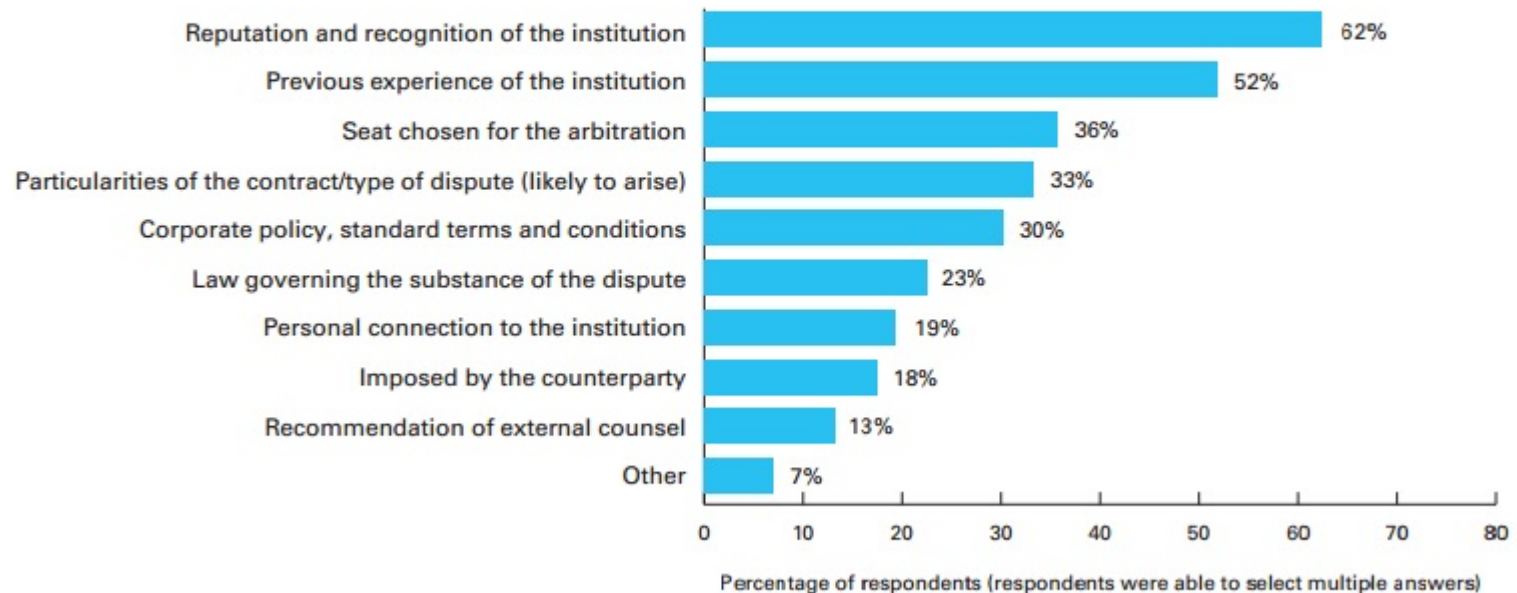


# Prevalence of Arbitration Preferred Mechanisms for Resolving International Disputes

Source: Queen Mary University / White & Case Survey 2015

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**Chart 15: Why are certain institutions selected the most?**



# Why arbitrate international disputes?

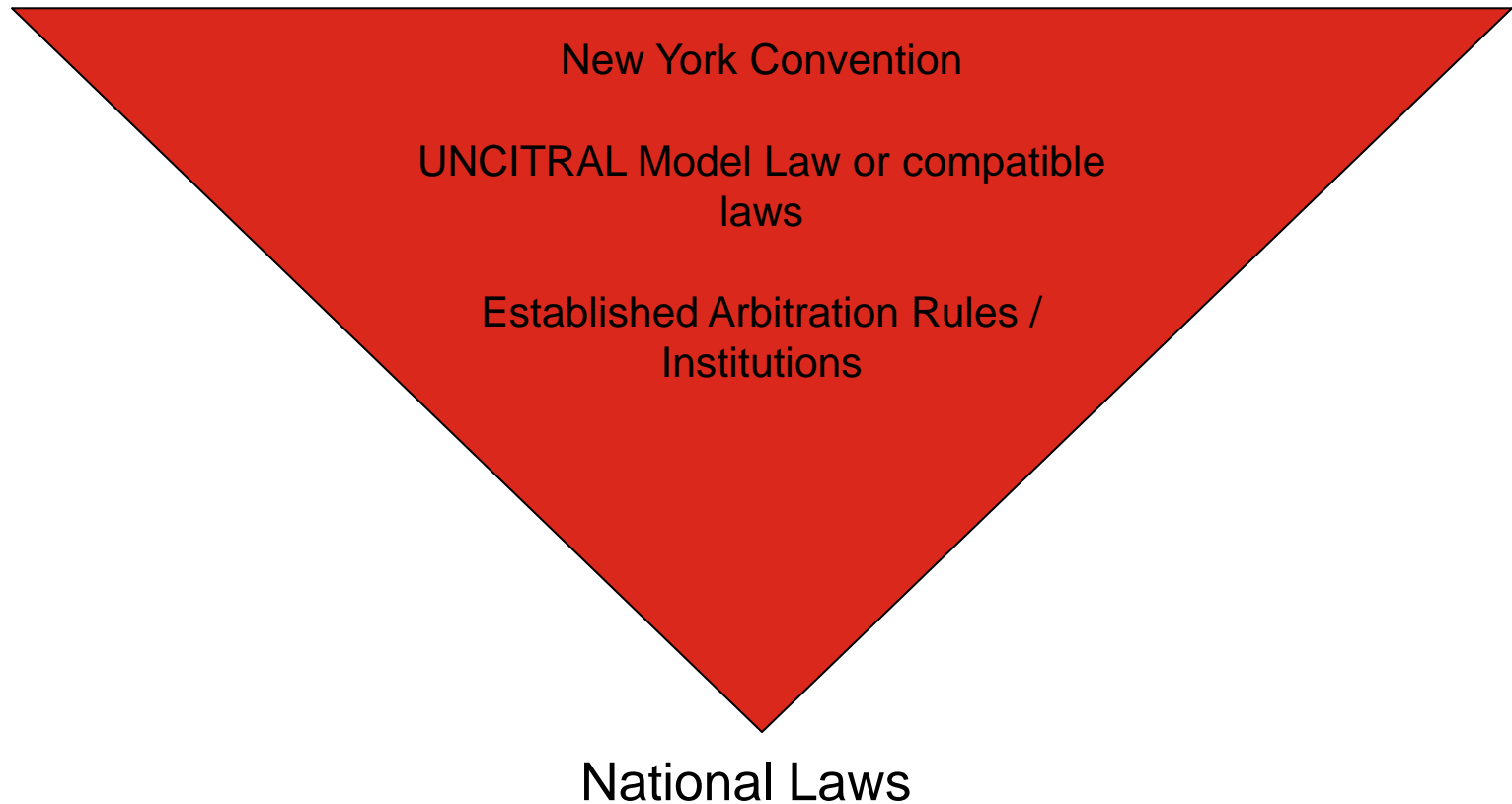
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- International neutrality
- International enforcement: New York Convention
- Flexibility / party autonomy
- Expert arbitrators
- Privacy / Confidentiality
- Finality of decisions



# Foundations of Modern International Arbitration

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# New York Convention

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- Dates back to 1958
- Over 140 signatory countries



# New York Convention

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- New York Convention requires national courts
  - to recognize the validity of arbitration agreements subject to specified exceptions
  - to refer parties to arbitration when they have entered into a valid agreement to arbitrate
  - to recognize and enforce foreign arbitral awards subject to a limited number of specified exceptions
- Procedure for enforcing an award varies from state to state since a state enforces awards according to its own rules but must not be contrary to the New York Convention



# Grounds for Non-Enforcement under the New York Convention

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- Incapacity of party
- Invalidity of the arbitration agreement
- Lack of notice or lack of fairness in the process
- Arbitrator acting in excess of authority
- Constitution of the tribunal or the arbitral procedure was not consistent with the agreement of the parties
- Award not yet binding
- Award has been set aside
- Subject matter of the dispute is not arbitrable
- Public policy



# UNCITRAL Model Law

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- UNCITRAL Model Law on International Commercial Arbitration
- A model law for adoption as part of domestic legislation
- States have the flexibility to depart from the text
- Model Law designed to work in conjunction with the party autonomy and the arbitration rules – “unless the parties have agreed otherwise.”
- In case of conflict between the arbitration rules and the Model Law, generally the chosen arbitration rules will prevail
- Over 60 countries have arbitration legislation based on the UNCITRAL Model Law



# Arbitration Rules

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- One of the significant ways parties exercise their autonomy is through the inclusion, in their commercial contracts, of arbitration agreements incorporating institutional or *ad hoc* arbitration rules
- E.g. UNCITRAL Arbitration Rules, SIAC Rules, ICC Rules, HKIAC Rules
- Arbitration rules can usually be varied by party autonomy



# Role of national laws in international arbitration

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- Law governing the parties' capacity to enter into an arbitration agreement
- Law governing the arbitration agreement and the validity of that agreement
- Law governing the procedure of the arbitration (i.e. *lex arbitri*, usually the law of the seat of the arbitration or the legal place of the arbitration)
- Law, or the relevant legal rules, governing the substantive issues in dispute (i.e. applicable law, governing law or substantive law)
- Law governing recognition and enforcement of the award



# Getting Your Arbitration Clause Right

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- Issues to consider when drafting arbitration clauses:
  - Scope
  - Choice of Law (governing the dispute / arbitration agreement)
  - Place of Arbitration or seat (law governing the arbitration)
  - Ad hoc or Institutional
  - Number and Choice of Arbitrator
  - Third parties
  - Prerequisites to commencement



# Place of Arbitration

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- Where do you arbitrate?
- Usually neutral country
- Is it a contracting state to the New York Convention?
- CIArb London Centenary “Safe Seat” Principles
  - A clear effective, modern international arbitration law – law recognizes, assists but does not interfere e.g. – interim relief / setting aside
  - Availability of court access and an independent competent judiciary with expertise in international arbitration and respectful of the parties’ choice of arbitration as their method of settlement of disputes
  - Availability of legal expertise and good counsel and no restrictions on appointment of arbitrators or counsel





# Place of Arbitration

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- Accessibility and safety – easy access free from unreasonable constraints on entry, work and exit for parties, witnesses, counsel and arbitrators.
- Facilities – availability of infrastructure for arbitration – hearing rooms, hotels, transcription services
- Ease of communication
- Education – commitment to education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of international arbitration and to the further development of learning in the field of arbitration



# Place of Arbitration

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- Ethics – professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel e.g. – IBA guidelines on Conflicts of Interest / on Third Party Representation
- Enforceability – adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries
- Immunity – a clear right of arbitrator immunity for civil liability or anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator



# Place of Arbitration

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- Location of evidence and witness
- Costs – of travel, facilities, arbitrators and counsel
- If no seat chosen, usually arbitral tribunal (or in under some rules the institutions) will decide on seat



# ***Ad Hoc or Institutional***

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- ***Ad Hoc Arbitration***

- No arbitral institution administers or supervises the arbitration
- Usually parties select preexisting set of procedural rules designed to govern ad hoc arbitrations (e.g. UNCITRAL Arbitration Rules)
- Sometimes an appointing authority is designated (e.g. arbitral institutions, courts, individuals)



# *Ad Hoc or Institutional*

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- **Institutional Arbitration**

- Proceedings are administered by an organization (e.g. SIAC, HKIAC, ICC)
- Usually in accordance with its own rules of arbitration



# ***Ad Hoc* or Institutional**

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## **Example of *Ad Hoc* – UNCITRAL**

- Promulgated by UNCITRAL in 1976
- UNCITRAL does not act as an administrator or charge fees
- Designed for use in *ad hoc* international arbitrations
- Provides a tried and tested procedural framework
- Rules of many arbitral institutions are based on these rules



# Ad hoc or Institutional

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- If institutional, ensure institution is correctly named and rules are incorporated – use model clause where there is one
- No excuse for pathological clauses
- Consider the rules that go with choice of institution
- If *ad hoc*, consider if clause should include detailed provisions for conduct of arbitration e.g. appointment of arbitrators, default provisions, discovery, interim relief



# Number and choice of arbitrators

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- Usually one or three
- Rules usually have default provisions
- Provide for how arbitrators will be chosen
  - Appointing authority
  - Based on list
- Also consider appointment of presiding arbitrator (if there is one)





# Advantages to institutional arbitration?

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- Cost
- Speed
- Support and Guidance
- Arbitrator Selection
- Financial Management
- Enforceability



# Advantages to institutional arbitration?

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- Use of model clauses – avoidance of pathological clauses
- Incorporation of best practices through continual rules review and development
- Availability of emergency / expedited procedures
- Third parties and joinder procedures
- Challenges to arbitrators
- Availability of commentary on rules, procedure and practice
- Publication of awards



# Choosing the Right Arbitral Institution

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## Which arbitration institution should you choose?

- Internationally recognised institution
- Well developed rules incorporating latest best practices
- Internationally experienced supervisory board or institutional court
- Experienced and sophisticated case management team



# Thank You

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If you have any questions, please do not hesitate to contact:

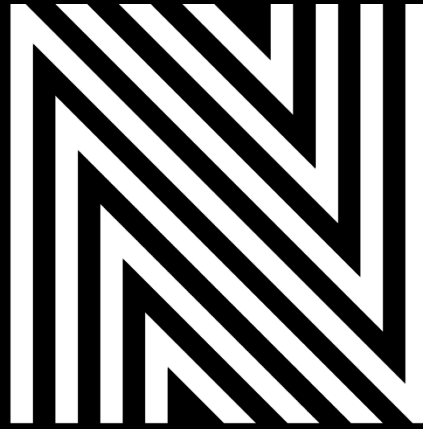
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