

GLOBAL CENTER SURVEY OF LEADING PRACTITIONERS: PRACTICES AND TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION

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Introduction

The field of international commercial arbitration can be seen as a product of the 20th century's expansion of global commerce and the rise of the modern state. International commercial arbitration involves the resolution of international commercial disputes through arbitration rather than litigation. Accordingly, the field has the potential to advance the expansion of world trade by decreasing costs and risks of conducting business in the global economy. There has been tremendous growth in this form of commercial dispute resolution just in the past 10 years, and continued growth is projected in the 21st century. Although the precise shape, size, and development of the global dispute resolution sector has yet to be fully quantified, it is substantial.

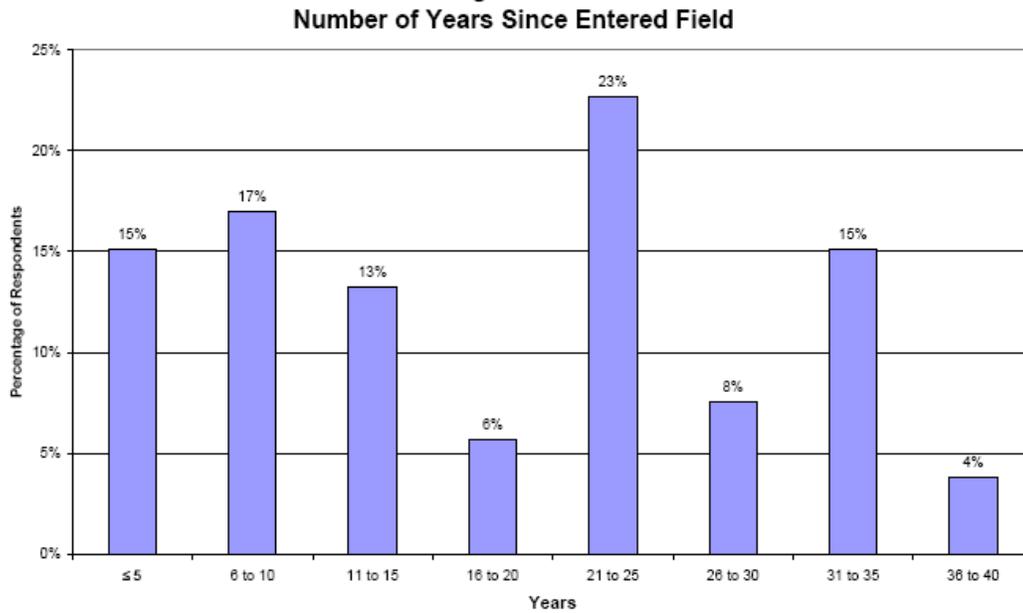
Now, more than ever, there is a serious need for reliable, empirical data available to all participants in the field that will provide the basis for deep insights into the structure, growth, and best practices of international commercial arbitration. These insights will, in turn, provide guidance in the planning and execution of international commercial arbitrations as they arise in the ever-changing and multi-varied global economy and in the structuring of the adjustments, alterations, modifications and other changes certain to be required and made in the future.

During the fall of 2004, the Global Center for Dispute Resolution Research conducted a quantitative study of practitioners in the field of international commercial arbitration to obtain an empirical basis to advance understanding of the scope and role of international commercial arbitration in the global economy. The Global Center was formed with seed funding by the American Arbitration Association to serve the needs of the entire field by providing data, analysis, insights and guidance on the practice and growth of international dispute resolution methods, focused in the area of cross-border business conflicts. Mathematica Policy Research, Inc, Princeton, New Jersey, a policy research firm with over 35 years of experience in research and data collection, was engaged to assist in the data collection and analysis, interviewing a sample of 53 advocates and arbitrators from around the world. A detailed report of this study was presented as the centerpiece of the Global Center's Annual Research Conference in May 2005 in New York City and examined in depth during the conference's individual sessions.

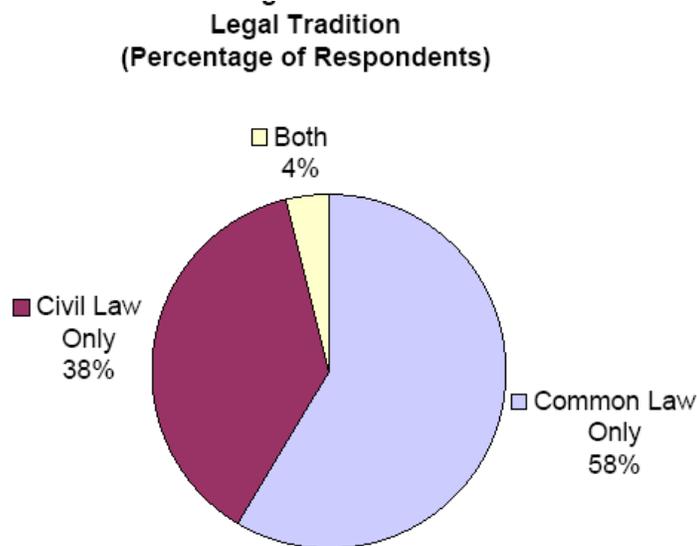
Respondent Background

The practitioners interviewed in the study tended to have extensive experience in the field of international commercial arbitration. Collectively, this group of practitioners had career experience in more than 3,100 international commercial arbitrations and participated in approximately 1,000 cases in just the past five years. That experience tended to be in the role of advocate, specifically, as outside counsel. Naturally, those working part-time reported fewer

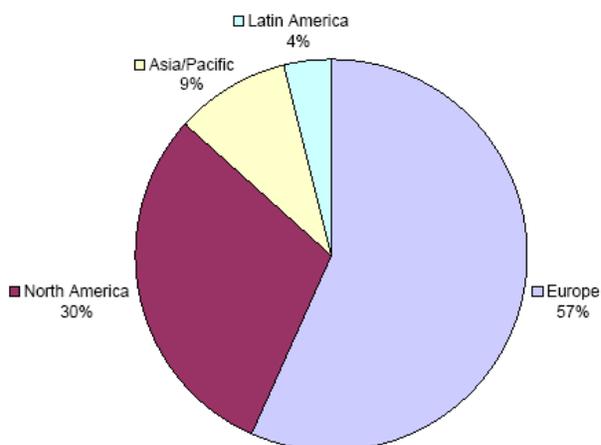
cases since entering the field than those working full-time. The median number of cases for part-timers was 10, for full-timers 60. See the graph below.



More striking was the difference based on regional base of operation. Practitioners based in Europe reported a higher number of cases since entering the field (median = 51) compared with those based elsewhere (median = 11). European practitioners, however, were not noticeably more likely to work full-time in the field. The breakdown of the legal traditions and the bases of operations of the respondents are shown below.



**Primary Base of Operations
(Percentage of Respondents)**



Focusing on the past five years, respondents reported involvement in between 2 and 80 individual cases, with the median number of 18 cases. Collectively, respondents reported involvement in approximately 1,000 international commercial arbitration proceedings in the past five years. Again, those working part-time reported fewer cases in the last five years than those working full-time. Similarly, regional differences were again apparent, with part-time practitioners based in Europe having a median of 20 cases during the period and those based elsewhere 10.

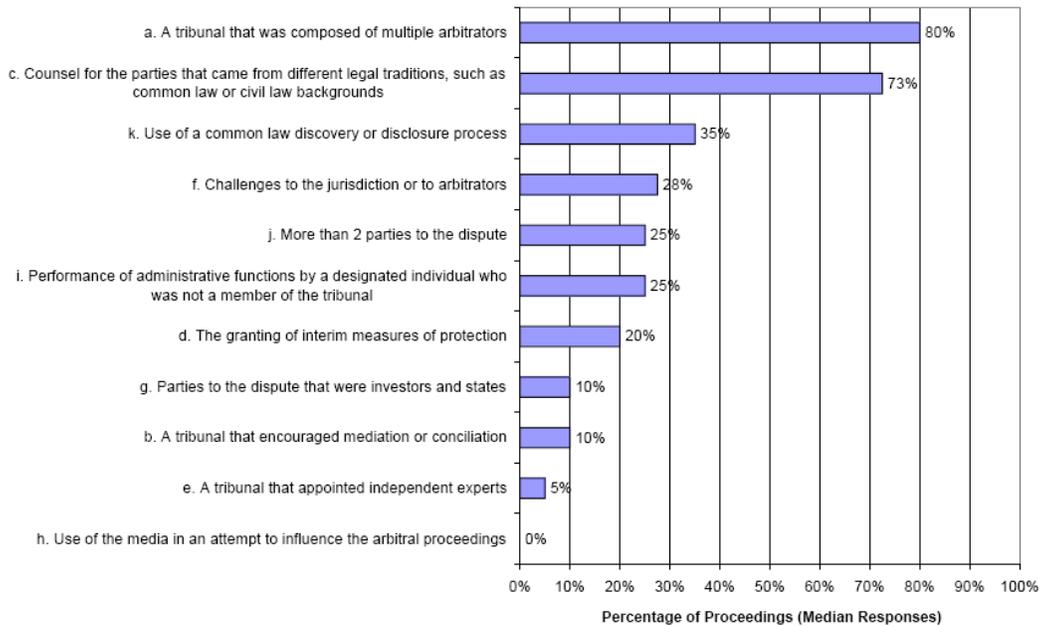
In the past five years, the median percentage of time spent in the field by respondents was almost two-thirds (65 percent), and primarily as advocates rather than arbitrators. Not only did respondents tend to be advocates, they also tended to report experience as outside counsel only. The regional composition of the respondents showed greater geographical dispersion, with a slight emphasis on Europe as both the base of operation and the headquarters of the respondent's organization. Common law was cited as the legal background by a majority of respondents, while over one-third were trained in civil law.

The Survey and Findings

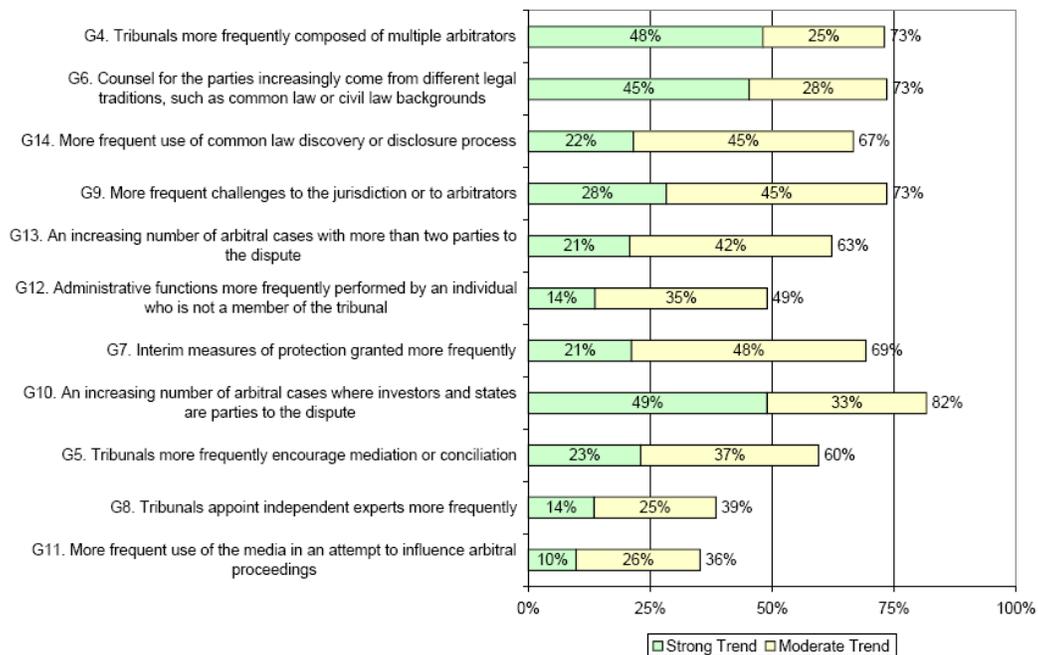
The survey collected a wealth of data on practitioner characteristics (highlighted above), ad hoc and institutional arbitrations, and several key features in the arbitral process. Respondents were asked to provide information on their past experiences as well as their projections for the future. By comparing recent experience to future projections, areas of continuity and discontinuity were identified. These findings can inform discussion, future research, and strategy development among practitioners, businesses, academics, and policy makers involved in international commercial arbitration.

The study collected data on several key features of arbitral proceedings, as well as the respondents' recent experience and future projections for each feature. Respondents were also asked whether each feature was a positive or negative aspect of the arbitral process. Key findings follow.

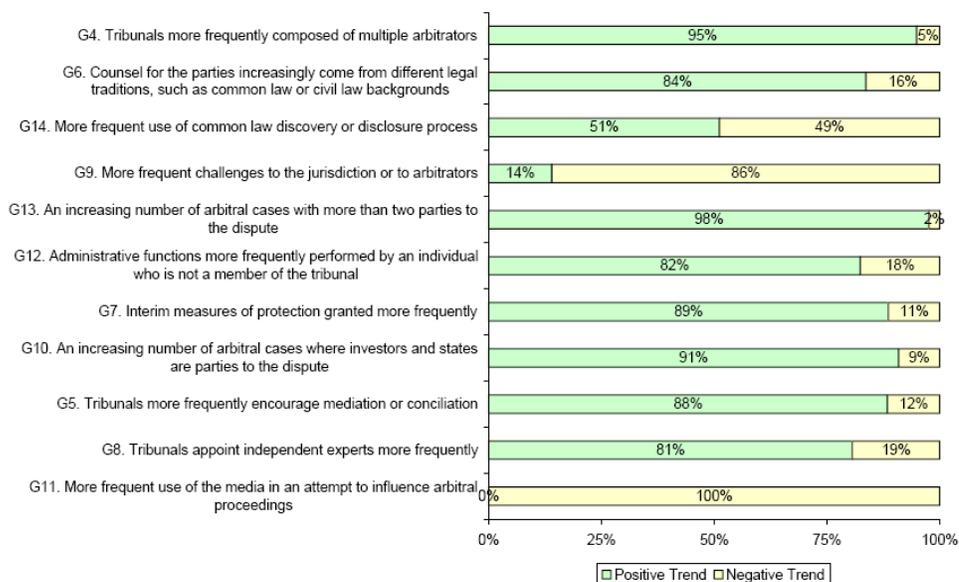
**Characteristics of Proceedings Over the Past Five Years
(Ranked by Median)**



**Strength of Trends Over the Next Five Years
(Percentage of Respondents)**



Opinions on Trends Over the Next Five Years
(Percentage of Respondents Who Rated Each a Trend)



(Note: The letters and numbers preceding the categories graphed refer to the specific Survey questions.)

- The most common features of the arbitral process, of those studied, are tribunals with multiple arbitrators and counsel for the parties representing different legal traditions. Both are expected to continue as prominent features of the arbitral process over the next five years and are widely viewed as positive. In addition, multi-member tribunals tend toward collegiality, and discord is rare.
- Investor/state disputes were uncommon in the recent experience of the respondents, but were identified as having the strongest growth trend over the next five years. This ties in with the “explosive” characterization by some of the recent growth in Bilateral Investment Treaties. This trend was viewed as a positive aspect of the international commercial arbitration process.
- Comparatively common characteristics are generally expected to remain common. These include disputes with more than two parties, the granting of interim measures of protection, and having a non-tribunal member handle administrative functions. All three were viewed as positive features of the arbitral process.
- Challenges to the jurisdiction or to the arbitrators and use of a common law discovery/disclosure process were also common and are expected to remain so. The respondents, however, did not view these features as positively as they did others, which suggests a lingering controversy over what has been described as an “Americanization” of the arbitral process.

- Tribunal encouragement of mediation or conciliation was also uncommon, but is predicted to be a relatively strong, positive trend in the next five years -- even though respondents were divided on the appropriateness of this practice. Further, in the respondents' experience, there is no pattern as to when a tribunal encourages mediation or conciliation, and it is uncommon for this practice to lead to settlement.
- Use of the media to influence proceedings is a rare occurrence in the respondents' experience and is expected to remain so. Marketing by arbitral institutions appears to be a strong and growing trend, and is viewed positively by respondents. Marketing by individuals is being conducted on a somewhat lower level, but it is still a strong and growing trend -- although respondents are split on whether this is a positive practice.

The study also identified areas for future research, stemming from both the survey findings and the respondents' own suggestions. Respondents requested further research in the areas of enforcement of awards, arbitrator experience and expertise, arbitral procedures and costs, and customer satisfaction, to name a few. The respondent-practitioners had a keen interest in empirical research in many areas of international commercial arbitration.

The Study in Context

There is widespread agreement among scholars and practitioners that quantifiable, empirical data are needed to better understand the field of international commercial arbitration, a field that is both growing as a method of dispute resolution and cohering as a profession. Such data collection has been relatively sparse, the result of a web of factors militating against easy aggregation of case information and practitioner views. Nevertheless, some illuminating studies have been conducted that informed the Global Center's study. One explanation for the dearth of empirical analyses of international commercial arbitration arises from the nature of the subject matter. Arbitration is an alternative to a much more codified, standardized, rule-driven means of dispute resolution: litigation. Arbitration can be far more flexible, less rule-driven, and adaptable to the preferences of the disputing parties, their counsel, and the arbitrators.

The very fact that arbitral procedures vary widely across individual cases -- even within cases handled by the same arbitral institutions -- makes them difficult to study and poses intriguing questions of what constitutes common practice. Christian Buhring-Uhle, author of one of the most comprehensive empirical studies in the field to date, points to the legal and cultural diversity represented in the field as a key reason that "common practice" is a seemingly elusive concept in international commercial arbitration.

The process brings together lawyers and business people from the most diverse legal and cultural backgrounds and inevitably results in a distinctive combination of procedural elements from different origins. Therefore, any statistical analysis, and indeed any form of generalized statement about the practice of international commercial arbitration, has to be made and understood with great caution.¹

¹ Buhring-Uhle, Christian. *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*, The Hague: Kluwer International, 1996, p. 133.

The confidentiality of arbitral proceedings also poses an obstacle to their study. It is not a simple matter of observing actual cases. Nor is there a central clearinghouse of information on case proceedings. The straightforward question of how often a discovery or disclosure process is invoked, for instance, is not easily answered, since there is no central case file to consult. Any estimates are likely to be complicated by case selection effects.

The 2004 Euromoney Guide to the World's Leading Experts in Commercial Arbitration identified 389 specialists from around the world in 29 different jurisdictions. In 2003, Christian Buhring-Uhle estimated that there were between 100 and 200 practitioners "with significant repeat experience in international commercial arbitration,"² and later increased the number to between 500 and 1,000.³ The Parker School compiled their "list of thousand" arbitrators in 1990, and then doubled it upon release of the second edition in 1992.⁴ Actual growth in the field no doubt accounts for part of these increases, but it remains difficult to identify precisely how many people are engaged in international commercial arbitration at any given time. Moreover, there does not seem to be an agreed-upon "definition" of the practitioner universe. Some may count only those, as Buhring-Uhle does, with "significant repeat experience." Others may count those with *any* experience in the field. Still others look only for those most prominent in the field.

—The inherent nature and characteristics of the field notwithstanding, the studies do shed significant light on important features of the arbitral process. The advantages of arbitration over litigation have begun to be clarified, cost dynamics have been fleshed out, and the role of settlement in the arbitral process has been delineated. Preferences on many procedural matters have been revealed, and the frequency of compromise awards and the granting of interim measures of relief have been estimated.

The present study contributes to this growing body of survey-based literature, and it is also informed by the broader legal literature and discussion in legal and academic circles on specific practices in the field. For instance, the Global Center study gauges the frequency with which various features of the arbitral process occur, rather than measuring preferences for those features as other studies have done. Thus, the Global Center data provide a rough sketch of those aspects of arbitral proceedings that are quite common and those that are less common. The features tested in the Global Center study include the frequency of multi-member tribunals, use of a discovery or disclosure process, and the prevalence of cases involving states and investors as parties. The merits of some of these features -- for example, the use of discovery -- have been hotly debated in the field. This study provides tangible information to inform such debate.

² Buhring-Uhle, Christian, Gabriele Scherer, and Lars Kirchoff, "The Arbitrator as Mediator: Some Recent Empirical Insights." *Journal of International Arbitration*, vol. 20, February 2003, p. 81.

³ Buhring-Uhle, Christian. "A Survey on Arbitration and Settlement in International Business Disputes." In *Towards a Science of International Arbitration: Collected Empirical Research*, edited by Christopher R. Drahozal and Richard W. Naimark. The Hague: Kluwer Law International, 2005, p. 26.

⁴ Parker School of Foreign and Comparative Law, Columbia University. *Guide to International Arbitration and Arbitrators*. 2d ed. Ardsley-on-Hudson, NY: Transnational Juris Publications, 1992 cited in Yves Dezalay and Bryant G. Garth. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University of Chicago Press, 1996, p. 6. fn 3.

The Global Center study also explored perceived differences in ad hoc and institutional arbitration. Ad hoc proceedings are notoriously difficult to study, since they occur outside the structure of arbitral institutions and are arranged by the parties and the arbitrators themselves. By asking the sample of practitioners what percentage of their caseload is ad hoc versus institutional, the Global Center study can get a sense of the relative frequency of each type of proceeding. Respondents were also asked to compare both types of proceedings across a range of factors, providing insight into the strengths and weaknesses of each. To our knowledge, this represents a first attempt to provide quantifiable information on *perceptions* of ad hoc and institutional arbitration.

To date, information on emerging trends in the field has tended to come from the views of seasoned practitioners asked to comment on such matters. Indeed, the Global Center has sponsored lively and informative panels devoted to emerging trends.⁵ The current study sought to identify growing trends in the field by asking respondents to rate each of a list of potential trends in terms of its strength, in addition to providing a positive or a negative assessment. The result is a rich set of data on emergent trends in the industry -- some rated as highly likely and positive, others judged less likely but soundly negative, and so forth. Emergent trends represent an important object of inquiry because they can have broad ramifications on the market for arbitral services, case management, and specific strategies employed by advocates and arbitrators.

The Global Center study results provide empirical data that can be used to advance an understanding of the growing field of international commercial arbitration. They add meaningful information to a growing body of literature on the field of international commercial arbitration and have broad implications for its participants. By exploring past practice and future possibilities, this study provides a view of the field -- from the vantage point of practitioners -- both now and in the future.

Specific Aspects of the Arbitral Process: Areas of Continuity and Discontinuity

1. Growth; institutional and ad hoc arbitration Practitioners in the study clearly consider themselves part of a growing industry. A nearly unanimous 94 percent of respondents anticipated an increase in demand for international commercial arbitration; the remaining 6 percent predicted that demand would remain stable. Market projections were somewhat higher for institutional than ad hoc arbitration, although demand for both was widely expected to increase.

Ninety-three percent of respondents predicted growth for institutional arbitration, compared with 76 percent who anticipated growth in ad hoc administration. None of the respondents anticipated a drop in demand for institutional arbitration, although 6 percent felt that demand for ad hoc arbitration would decrease. Institutional arbitration was widely considered to

⁵ Session II: International Commercial Arbitration: Trends/Future Possibilities, First Annual Global Center for Dispute Resolution Research Conference, The Hague, April 23, 2004. See also "The Challenges Ahead." In *Bulletin for Dispute Resolution Research*. New York: Global Center for Dispute Resolution Research, vol. 1, no. 1, autumn 2004, pp., 3-4.

be more efficient in administrative terms, while ad hoc proceedings were considered more flexible procedurally.

These projections may reflect the respondents' experience. Half of the respondents reported that 80 percent of their cases or more were institutionally arbitrated, while only 4 percent had no experience with institutional cases. Conversely, 15 percent of respondents reported no experience with ad hoc cases in the past 5 years, while half of the respondents noted that 20 percent or fewer of their cases utilized ad hoc arbitration. Projections for the next five years reveal that respondents see little change in the mix of case in their portfolios over the next five years.

2. Investor-state disputes The strongest future trend, by far, identified by the respondents was that there will be an increasing number of arbitral cases involving states and investors as parties to disputes. Eighty-two percent note that this is a major trend (and one that is viewed as positive), although it had been rare in terms of the respondents' past five years experience. Clearly, this will have enormous implications for both case dynamics and procedural norms.

3. Multiple arbitrator panels; counsel from different legal traditions Continuity and change in the international arbitral landscape were revealed in practitioner responses to questions about their past practices and future predictions. Of the four strongest trends predicted to occur over the next five years, two of these trends—multiple-arbitrator tribunals and counsel from different legal traditions—were also the most common case attributes over the past five years. In the case experience of the respondents multiple arbitrator panels are characterized by cooperation rather than conflict. Unanimous decisions are frequent and dissent is rare. Adversarial behavior on the part of arbitrators and advocates is quite uncommon. Harmony is not simply the product of a shared legal background, since tribunal members often come from different legal traditions. Nevertheless, a shared legal background is believed by many to make procedural agreement more likely. Outcome agreement is less affected by a shared legal background in the opinion of the respondents.

4. Challenges to jurisdiction and to arbitrators; discovery/disclosure More frequent challenges to jurisdiction or to arbitrators were also among the top four strongest trends, and more frequent use of common law discovery or disclosure was also projected to experience a marked increase over the next five years. If these increases do come about, they will result in prolonging the arbitration process and adding to its cost. This, in turn, may present additional obstacles to address and overcome for those (parties and their advisors) considering whether or not to rely on international commercial arbitration.

5. Encouragement of mediation or conciliation Somewhat less striking, though still notable, is the projected trend for tribunal encouragement of mediation or conciliation. This tested as one of the least common case features over the last five years, but emerged as a relatively strong anticipated trend in the next five years. Practitioners based in Europe were especially likely to anticipate a strong trend toward encouragement of mediation or conciliation. More frequent overtures for mediation or conciliation could change the nature of the process by which disputes are resolved.

6. Marketing A clear difference in perceptions emerged around the issue of marketing. Marketing by arbitral institutions—a strong trend in both past and future—was viewed very positively by the respondents. Marketing by individuals, on the other hand, was viewed much less favorably. Respondents were evenly split on whether it was a positive trend in either the past or the future.

7. Additional trends Additional strong trends identified by the practitioners included more challenges to arbitral awards, increased problems with enforcement of awards, increasing cost of arbitration, clients becoming more reluctant to use arbitration because of the cost, and more arbitration coming out of Asia, China in particular.

Conclusion

Global dispute resolution is an expanding field of vital importance to world trade. Wherever entities (primarily commercial) try to grow by conducting business across borders, disputes inevitably arise that require resolution. International arbitration has grown as a response to this practical need by commercial entities to conduct business across national borders. With the intense growth in both dollar amount and volume of international trade has come a concomitant growth, and development, in international commercial arbitration.

There will be and should be change, even dramatic change perhaps, in the ways that this development takes place. As this process plays out, however, the changes need to be carefully scrutinized, evaluated, and channeled by leaders in the field. Special care must be taken to avoid adopting policies, procedures, and practices that will have the effect of eroding the value that arbitration provides to the global economy. One of the things we need to be mindful of at this juncture is the potential impact that the discontinuities (a number of which were identified and analyzed in the Global Center study) may very well have on the relevant efficiencies -- and ultimate value -- of international commercial arbitration.

We can all agree on the importance of international commercial arbitration to the future of international business, politics, and economies. It is a given that what the field has to offer can accelerate the progress of commerce and nation-building. Yet, as a field, there remains an investment to be made in the systematic and empirical understanding of our industry. Far too much of what is taken to be true about dispute resolution is based on anecdotal evidence. Our picture of the field of international commercial arbitration will be brought into sharper focus when viewed through the lens of empirical data.

We cannot continue to lead our profession without sophisticated tools and in-depth information. We need these tools to measure progress and identify elements of success. There needs to be a body of credible empirical knowledge on which to base strategies and tactics. Our field needs to consolidate its experience into a body of best practices, capturing it in such a way that it can be passed on to current and future practitioners. Only then will this industry move from anecdotal evidence to fact-based leadership.

The Global Center's study is both a serious beginning in collecting, analyzing, and disseminating meaningful data about the field, as well as a clear demonstration that such an exercise can be successfully undertaken and important results obtained to help define for advocates and arbitrators successful strategies and methods, and ways to improve the effectiveness of international commercial arbitration.