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A New Look at International Commercial Arbitration

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SURVEY

A New Look at International Commercial Arbitration

*by Robert Coulson**

I. INTRODUCTION

In the world marketplace, international arbitration is coming into its own. Businessmen distrust courts in general; in particular they distrust foreign courts. Instead, they have sought a non-judicial process that will resolve their commercial disputes efficiently and sensibly. The growing demand for international commercial arbitration has resulted in a need for executives and their attorneys to become familiar with the process. As they study the various arbitration options, they soon discover that international arbitration requires contracting parties to make choices. Basic questions arise concerning where to arbitrate, which procedures to utilize and how to enforce a resultant arbitration award.

During the summer of 1981, the American Arbitration Association (AAA) mailed questionnaires to 150 major U.S. law firms and to 100 multinational corporations; there were 67 responses. The survey is tabulated in the Appendix. This report, based upon the results of that survey, contains new information about the current attitudes of U.S. lawyers toward international business arbitration. Also included in this report are the opinions of several practitioners in the field, lawyers and business executives, who discussed their personal experiences with international commercial arbitration. The interviews were carried out by Amy Brown, a Cornell University student who was working as a summer intern with the AAA.

The identity of the arbitrator is the most important factor in arbitration. With a carefully selected arbitrator, the arbitration award is likely to be satisfactory. The arbitration procedure, while important, is of secondary significance.

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II. Arbitrator Selection

Forty-seven respondents indicated that language ability was a "very important" criterion for selecting an international arbitrator. According to this survey, language ability was deemed to be the most important factor, followed closely by knowledge of the applicable law.

The language in which the arbitration is to be conducted can be determined only after the nationalities of the parties, counsel, and witnesses are identified. Sometimes, all of the participants demonstrate fluency in one of the major international commercial languages: English, French, or Spanish. In other cases, the arbitrator must be conversant in two or more languages. Language facility can be crucial to an understanding of the case.

Arbitrators must be familiar with the applicable law on both procedural and substantive issues. While arbitrators need not be lawyers, they do require a working understanding of the relevant legal concepts. Forty-four respondents listed knowledge of the relevant law as "very important." Knowledge of the industry was listed as second in importance, with 36 selecting it as "very important."

Some respondents noted that integrity, a factor not included in the survey, was probably the most important consideration in selecting an arbitrator. Integrity, while vital, is not easy to measure. By obtaining opinions regarding the prospective arbitrator's reputation, parties can protect themselves to some degree. Other respondents indicated that they tried to understand the candidate's character in order to anticipate how that individual might rule in a particular case.

One attorney stressed the importance of the arbitrator being able to understand the business problems raised by the case. Arbitrators need to be familiar with industry jargon. However, if they are drawn from the relevant industry, their involvement may raise problems of potential bias.

Some respondents expressed concern about the partiality of arbitrators, particularly in industries where people tend to know each other. Panels in specialized areas may be comprised of a relatively small number of arbitrators. One respondent noted the comparative difficulty of obtaining a truly neutral panel when arbitrators and parties are engaged in business relationships. He suggested, for example, that the American Arbitration Association's grain panel be expanded in order to offer the parties a broader selection of potential arbitrators.

By their very nature, many industries foster business or social relationships which, by bringing people together, may create an appearance of partiality, and industry arbitrators are not excluded from such relationships. The Code of Ethics for Arbitrators in Commercial Disputes, prepared by a joint AAA-ABA Special Committee in 1977, encourages ar-

bitrators to disclose the existence of such relationships.[1] But the burden of detailed disclosure should not be so great that it is impractical for persons in the business world to be arbitrators. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the U.S. Supreme Court stated that arbitrators "should err on the side of disclosure."[2] In recent years, the courts have adopted a pragmatic standard toward using arbitrators who know either party. In *Int'l Produce v. A/S Rosshavet*, the Second Circuit indicated that the proof of collusion must amount to more than mere speculation.

> It is not unusual for those who are selected as arbitrators in maritime arbitrations [to] have had numerous prior dealings with one or more of the parties or their counsel. . . . Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results.[3]

Furthermore, Judge Robert Ward recently sustained a maritime award, pointing out that "it would not be in the interests of an industry such as the maritime industry . . . to require that arbitrators abstain from giving any consideration to the effect their decision might have on the industry generally."[4]

Another survey respondent noted that most members of the AAA's textile panel are New York textile executives. This inbreeding may put a foreigner at a disadvantage. The respondent recommended that the panel be expanded to include more foreign textile and apparel arbitrators.

One survey participant speculated that arbitrators from lesser developed countries might be subjected to improper political pressures. In areas where the economic process is dominated by political considerations, this coercion could become a problem.

Another respondent stressed that a neutral arbitrator, prepared to issue firm rulings on procedural issues, should be willing to control the hearing. It was also pointed out that it is sometimes difficult to obtain arbitrators who are willing to stay with a lengthy case for a long time because of the resulting sacrifice of their own business interests.

A. Neutral Arbitrator Selection

When a neutral arbitrator is to be appointed, most respondents did not want the administrative agency to select the arbitrator on its own initiative. They would rather have the agency submit a list from which

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[1] CANON 2 CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977).

[2] Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145,151 (1968).

[3] Int'l Produce v. A/S Rosshavet, 504 F.Supp. 736,740 (S.D.N.Y.) *rev'd*, 638 F.2d 548 (2nd Cir. 1981), *cert. denied*, 101 S.Ct. 3006 (1981).

[4] Sidmara Soc'y Italiana v. Holt Mairne, 515 F.Supp. 1302,1307 (S.D.N.Y. 1981).

the parties would select an arbitrator. Of the law firms responding to the questionnaire, 26 out of 30 "usually" or "always" prefer a system under which neutral arbitrators are mutually selected from such a list. Of the 24 corporate returns 11 prefer a system of joint selection. The strong preference expressed by lawyers may result from their desire to establish a closer involvement in the selection process.

Several lawyers reported that delays can result from the presentation of unsatisfactory lists. They encourage the administrative agency to be certain that only qualified persons are listed.

One respondent observed that, "Arbitrators have almost absolute authority over the determination of the dispute before them. The choice of arbitrators can be of immense tactical and strategic importance for the parties in dispute."

A majority of respondents acknowledged that in international cases, they would prefer the arbitrator to be of a nationality different from either of the parties. International parties may also feel more comfortable with an arbitrator whom they know is not identified with their adversary's country.

Rule 16 of the AAA's Commercial Rules gives either party the right to request a neutral, non-national arbitrator.[5] In the case of a neutral panel, three non-nationals may be requested.

B. Party-appointed Procedure

Cases involving large sums of money are often heard by three arbitrators. The cost of the proceeding may be increased if the parties require a three-member arbitral panel; however, a group judgment may be preferred over that of a single arbitrator.

Certain types of international contracts call for the party-appointed method of selecting a three-person panel. This sytem was devised at a time when impartial administrative agencies were not available to provide neutral arbitrators. In the United States it has largely fallen into disuse, except in admiralty cases, because it is difficult to implement.

The AAA questionnaire posed three questions which related to the "party-appointed" arbitrator system. According to the respondents in this survey, a "party-appointed" arbitrator is seldom viewed as impartial. Parties usually select someone whom they feel will be "sympathetic" to the interests of their firm.

Forty-seven out of sixty-four respondents stated that "party-appointed" arbitrators are "seldom" or "never" impartial. None of the respondents thought that "party-appointed" arbitrators are "always" impartial.

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[5] COMMERCIAL ARBITRATION RULES Rule 16 (1981).

With the exception of four respondents, all indicated that they select party-appointed arbitrators who are "sympathetic" to their views. It should be noted, however, that "sympathetic" does not necessarily mean that the arbitrator is prejudiced. Almost three-quarters of the respondents thought that it is "seldom" or "never" appropriate for a party to communicate with its "party-appointed" arbitrator during the arbitration. Three respondents, however, said that such communications are "always" appropriate.

If the other party's "party-appointed" arbitrator is expected to be prejudiced, a party may be more inclined to temper that prejudice by making an equally prejudiced selection and relying on the objectivity of the third arbitrator. If the arbitrators chosen by the parties can be expected to "vote" in favor of their party, the view of the third arbitrator becomes decisive.

One may ask why party-appointed panels are used. One respondent stated that, "it may be that the arbitrator who is selected by a party can be an effective advocate of the party's position in the otherwise mysterious deliberations of the arbitrators." This can be particularly useful in situations where the parties intend to continue communicating with their arbitrators during the arbitration.

III. PROCEDURE

Once the arbitral panel has been appointed, the procedures to be followed assume greater significance. Presumably, the parties have already attempted to settle their dispute. Therefore, a further attempt to conciliate the matter may be appropriate.

A. Conciliation

Two-thirds of the respondents (41) said that they would be willing to engage in conciliation before arbitration. Some felt that conciliation might encourage the parties to review the issues in an open forum in an effort to reach a possible settlement. A neutral mediator might help the parties bring the issues into sharper focus. Several agencies, including the AAA, have been encouraging such an approach. As long as the parties believe that conciliation will not impede arbitration, they may be willing to conciliate.

Seventeen respondents said that they would not be willing to conciliate. A number described conciliation as a waste of time; having already attempted to settle the case, the attorneys are familiar with the facts, and consider themselves best suited to engage in voluntary settlement activities.

B. The Arbitration Clause

Some of the difficulties that parties face in arbitration can be alleviated by drafting the arbitration clause carefully. Several questions arise relating to the inclusion of such provisions.

Contrasting societal attitudes with cultural and legal variations are present in international trade. These differences may be reflected in arbitration.

At the time of negotiation, the specifics of the arbitration clause may not seem important. Though when a dispute arises, this response may change. Parties should not underestimate the importance of the arbitration clause. In order to provide in advance for an efficient system of arbitration, it may be necessary to negotiate the details of the clause. All too frequently such matters are not dealt with in the original agreement.

One example of an arbitration provision to be included in the contract is a "language" designation or a "locale" clause which may avoid arguments as to forum and procedure when a dispute arises. The fewer procedural decisions which the parties must make after the dispute has arisen, the easier it may be to arbitrate.

The parties to an international agreement may have differing expectations as to the procedure to be followed when arbitrating their case. As a result, choice of law clauses are usually included in such contracts. All but one of the respondents "always" (31) or "usually" (31) insert such a clause in their contracts. The selection of the applicable law may relate to the site of the arbitration, which in turn may determine the choice of the arbitrator. Occasionally, the applicable law provision will designate a country other than that in which the hearing is held. For example, parties may conclude that well developed laws such as those of New York or London may be advantageous, even though the case is to be heard elsewhere. On the other hand, parties from less developed countries may insist that the arbitration be conducted in accordance with their local law, which may not be well defined. If the parties do not stipulate to the procedural law to be followed, or if the stipulated law is ambiguous, there is a chance that confusion will result in the enforcement of the arbitration clause or in the judicial review of the award.

C. Language

No consensus has evolved as to whether parties should stipulate the language to be used during the arbitration. It may not always be possible for the parties to agree. Many of the 65 respondents indicated that they "Always" (17) or "usually" (17) specified a language; others "seldom" (23) or "never" (8) did so. It is interesting to note that 47 respondents indicated that "language ability" is a "very" important factor in the choice of an arbitrator. Eleven found it "somewhat" important; eight "not"

important.

D. Discovery

Most respondents do not include specific discovery procedures in their international arbitration agreements. This is the subject of some debate. A few respondents indicated that discovery could help clarify the parties' positions and expedite the dispute settlement process. Less than half of the respondents prefer discovery procedures in international arbitration. Nevertheless, four "always" and nine "usually" include such arrangements in their contracts. Fifty-one "seldom" or "never" include discovery provisions.

An exchange of documents prior to the hearing may help parties prepare for the hearing by narrowing the issues. Discovery procedures extend beyond that. Some respondents noted that full-blown discovery could be an oppressive weapon, used tactically to obtain a delay. With strict adherence to the Federal Rules of Civil Procedure, discovery is likely to be quite expensive. According to one respondent:

> Whether arbitration is in other respects more or less costly than court adjudication may well depend in part upon the extent to which, in a particular case, the arbitral tribunal permits discovery procedures comparable to those which have made American litigation so costly and which have been the subject of much critical comment.

Discovery typical to U.S. practice does not exist in most other countries. Consequently, foreigners litigating in the United States may be distressed with what may appear to be an unfamiliar and burdensome procedure. American lawyers may be more favorably disposed.

Three-quarters of the respondents (46) indicated that the arbitrator should be authorized to order "discovery." An even larger number (55) would authorize the administrative agency to require parties to exchange documents to facilitate the arbitration proceeding. This procedure could be expected to expedite the settlement since parties would then possess relevant information and documents.

These responses seem to indicate that U.S. parties want the arbitrator as well as the administrative agency to encourage fair disclosure of the evidence in advance of the hearing. The arbitrator should function as an active case manager with the agency facilitating the process.

Under the rules of the International Chamber of Commerce (ICC), the Court of Arbitration is required to approve a statement of the issues before the case is submitted to an arbitrator. This document is called the Terms of Reference. A majority of the respondents (32 against 26) preferred not to have such a procedure. Their response may reflect U.S. bias. Some respondents explained that in their view, an agency should not be involved in the substance of the arbitration. Instead, the agency should

concentrate upon facilitating and servicing the process. Several respondents indicated that the issues should be formulated by the parties, without agency involvement.

Most respondents (58) would prefer to have briefs or relevant documents presented to the arbitrator before the first hearing. This would help to narrow the issues, and would differ from the traditional U.S. practice in which arbitrators often appear at the first hearing with no prior knowledge of the case.

E. Prehearing Conference

An almost universal preference was expressed for having the agency arrange a prehearing conference to assist the parties in scheduling the order of proceedings and the exchange of documents; sixty-one in favor, with only one in dissent. Respondents expect an agency: to facilitate arbitration, to accept papers, to open lines of communication, to make administrative arrangements such as designating how the parties will be kept informed, and to provide arbitration facilities. They do not want the agency involved in defining the issues; this is perceived as being within the ambit of the arbitrators. It should be noted that this latter point is totally consistent with AAA policies.

F. Arbitrability

Parties prefer that arbitrability issues be decided either by the arbitrator after a hearing (28) or by the courts (21). In the United States, an arbitrator often decides questions of arbitrability at an initial hearing. Using this procedure, the courts are not involved in the proceeding, and the arbitrator has the final say on the issues to be decided. Parties who desire the arbitrator to handle arbitration issues generally prefer that the decision be made after a hearing rather than through correspondence. Only a few respondents were willing to trust the administrative agency to make such decisions.

The AAA does not feel authorized or qualified to decide arbitrability issues. Seven of the respondents said that they would prefer an agency to decide questions of arbitrability through correspondence. One respondent noted that the ICC would render such decision based on correspondence. Six respondents would prefer the agency to reach a decision only after a hearing. But most respondents would like to have such matters decided by the arbitrator: most (28) after a hearing, some (5) through correspondence. Litigation over arbitrability can be expensive and time consuming; frustrating some of the purposes of arbitration. In general, the AAA has encouraged parties to allow the arbitrator to decide such issues at the first hearing. A majority of U.S. international lawyers would seem to agree with that approach.

G. Locale

When deciding the place of arbitration, communication facilities (52), the personal security of the participants (51), and applicable arbitration law (50) are considered most important by respondents. The presence of an administrative agency and availability of office conveniences are considered least important. Among other "very important" considerations are the absence of travel restrictions (46), language (42), court supervision and enforcement (39), costs (35), and availability of competent trial counsel (31). Outside lawyers indicate more concern about costs than corporate counsel.

H. Improper Communications with the Arbitrator

Where an inappropriate communication occurs between one of the parties and the arbitrator, 55 of the respondents thought the agency should be authorized to replace the arbitrator. Since only two respondents said that an agency should not be authorized to replace an arbitrator in such a situation, a strong consensus appears to exist on that issue.

I. Hearing Procedure

Slightly less than half of the respondents believe that direct testimony (35), cross-examination (30) or prehearing briefs (27) should be required. A few noted that prehearing briefs help to direct the arguments to the issues in a logical fashion. It is usually up to the arbitrator to request such briefs if they would be helpful. While prehearing briefs may serve a useful function, they constitute a trade off in time and money, since the arbitration will be delayed if the parties prepare briefs. Where the demand for arbitration is vaguely worded, the issues to be arbitrated may be in dispute. In complex cases, the arbitrator may be required to waste time at the hearing helping to organize the parties' presentations. In these kinds of situations, the advance preparation of a case book or of briefs may contribute to an effective presentation, forcing the advocates to focus on their case in advance of the hearing.

J. Transcripts

Whether or not a transcript will be made, should be decided by the parties themselves. Three-quarters of the respondents would permit but not require them. A transcript can be useful in cases where an appeal is likely or in complicated, lengthy cases. Transcripts are expensive; this factor should be considered when deciding on their necessity.

K. Consecutive Hearings

Most respondents (52) felt that hearings should continue on consecutive days. Because of the travel expense likely to be incurred, foreign parties also are likely to prefer that hearings continue on consecutive days. A stipulation to this effect should be obtained in advance of the first hearing.

L. Privacy

Ninety percent of the respondents (55) felt that outside persons should not be permitted to attend hearings. Arbitration is a private proceeding; this may be particularly important in international commercial cases. Nine out of ten respondents felt that communications between one of the parties and an artibrator during the pendency of the case should be forbidden. This response reinforces one described earlier that would authorize an agency to replace any arbitrator who indulges in such a communication.

M. Enforcement

A slight majority of the respondents (34 out of 64) indicated that in international contracts they specify the courts in which an award may be confirmed. Arbitration clauses frequently contain general enforcement provisions which state that "any court having competent jurisdiction" may enter enforcement of the award. That clause is recommended in the AAA's Commercial Arbitration Rules and is intended to alleviate jurisdictional enforcement problems once the award is rendered.[6] Such clauses are not customary abroad; therefore, when parties consider such a clause, they should review the applicable law. In some jurisdictions, an enforcement clause may not be appropriate. Since parties select arbitration in order to avoid foreign courts, they may wish to obtain the most favorable arbitration law for enforcement.

N. Reasoned Award

A majority of the respondents (28 out of 41) indicated that including the arbitrator's reasons for arriving at the award does not increase the likelihood of enforcing the award. Fifteen had no opinion. Some commented that a reasoned award might give the award more moral force, persuading the losing party to abide by its terms. In jurisdictions, such as the United States, where arbitrators are not required to state their reasons, the offer of a reasoned award may suggest grounds for a motion to

[6] Id. at Rule 47(c).

vacate. An award without an opinion may therefore be easier to enforce. A losing party may have a better chance to vacate a reasoned award. One attorney described that problem: "If enforcing an award entails extensive litigation, then arbitration has accomplished very little towards settling the dispute involved."

Reasoned awards are common in other countries. Before the recent change in British law, the "stated case" and the judicial review procedures permitted parties to attack arbitrator's decisions. The AAA Commercial Arbitration Rules do not require reasoned awards, although reasons are customary in international cases. One respondent expressed a need for a digest of written opinions by commercial arbitrators: "Without such opinions, precedents are not available."

There was a cleanly divided opinion (27 as against 26) as to whether parties should be required to file awards in court, as is the case in some European countries.

Most respondents did not specify the currency in which arbitration awards must be calculated (42 out of 61). Some noted, however, that such a stipulation might expedite the enforcement process, and eliminate a possible ground for subsequent delays in payment.

O. Compensation

Less than half of the respondents reported a specific dollar amount of compensation for international commercial arbitrators. Of those who did, the ceiling was $1,020 per day, the average was $670 per day, and the floor was $354 per day. In general, it would appear that parties not only expect to pay international arbitrators but also to pay them at a rate somewhat higher than has been customary for U.S. commercial arbitrators.

IV. Conclusion

Several respondents commented that the questionnaire seemed slanted towards common law practice or Anglo-Saxon litigation procedures. This opinion was based on the questions pertaining to discovery, cross-examination, transcripts of testimony, and specific contract clauses concerning the arbitration format. At any rate, it is apparent that it is not always possible for U.S. lawyers to obtain their favored arbitration provisions. U.S. lawyers might prefer to draft complete arbitration clauses which would provide for the English language, an agreed-upon applicable law, judicial enforcement procedures and mutual selection of the arbitrators. In practice, it may be difficult to obtain the agreement of the foreign business partner on such issues. The arbitration clause is seldom a top negotiating priority. Furthermore, lawyers may be unable to persuade their U.S. clients that a preferred clause will save time and money when

arbitration occurs. International commercial arbitration is widely used because business people distrust foreign courts and foreign law. In some situations, European practices may be unavoidable because the foreign party will not accept common law rules of procedure. In cases involving Eastern European countries and the United States or Western Europe, the negotiators may be willing to expend the time and effort to negotiate an arbitration clause which includes detailed rules of procedures. In other situations, the foreign party will refuse to negotiate until it obtains an arbitration system with which it is familiar.

Lawyers should remind their clients of the importance of the arbitration clause in contracts, and of the need for a thoughtful dispute settlement arrangement. The solution may be aided by the selection of a responsible administrative agency to facilitate arbitration, process the case efficiently, provide hearing rooms, and open lines of communication. Most U.S. lawyers expressed satisfaction with the AAA's current Commercial Arbitration Rules. The procedure is flexible. Many experienced lawyers already encourage the AAA to arrange prehearing conferences to assist in the scheduling of proceedings and the exchange of documents. However, U.S. respondents seemed generally content with the current system.

The survey results yielded some suggestions toward the improvement of international arbitrations:

1. The parties should be encouraged to select from a list of qualified international experts.
2. Arbitrators should be fluent in the language of the arbitration.
3. Third nationality arbitrators should be available and included on the list.
4. All arbitrators should be neutral rather than party-appointed, unless the parties agree otherwise.
5. Conciliation should be available as a preliminary or alternative procedure.
6. The arbitrator should be authorized to order appropriate "discovery."
7. The agency should encourage the parties to exchange relevant documents for submission to the arbitrator in advance of the hearing.
8. Wherever possible, a stipulation as to consecutive hearings should be obtained.
9. The agency or the arbitrator should schedule a prehearing conference.
10. Arbitrators should not indulge in unilateral communications with a party during the arbitration; the agency should be authorized to replace an arbitrator when such a communication occurs.
11. Parties should have the right to request a reasoned award.
12. International arbitrators should be compensated fairly for their service.

While the above conclusions will not satisfy every respondent, they do seem to reflect a consensus regarding necessary and useful improve-

ments in the international sphere. If the AAA decides to issue new supplementary procedures for international cases, it should consider the points mentioned above. Clearly, a difference exists between the expectations of international commercial counsel and those of U.S. attorneys involved primarily in local practice. It is hoped that this report will encourage further discussion of the need for international arbitration procedures and the most effective form which they should take.

APPENDIX

International Commercial Arbitration Survey

conducted by

The American Arbitration Association

I. Arbitrator Selection Process

Before the advent of administered arbitration, the usual way to obtain a neutral arbitrator was for each party to select a party-appointed arbitrator to help select a neutral. This system is still found in some international contracts.

1. Do you believe that a party-appointed arbitrator is impartial?
   Always (0) Usually (17) Seldom (39) Never (8)

2. In appointing a party-appointed arbitrator, do you select someone who is sympathetic to your views?
   Always (27) Usually (33) Seldom (4) Never (0)

3. Do you think that it is appropriate for a party to communicate with its party-appointed arbitrator during the arbitration?
   Always (3) Usually (16) Seldom (23) Never (21)

4. Do you prefer a system under which the members of the panel of arbitrators are mutually selected from a list provided by an impartial agency?
   Always (17) Usually (27) Seldom (14) Never (4)

Under some systems of international arbitration, the neutral arbitrator is appointed directly by an administrative agency; in others, the parties participate in selecting the arbitrator. The next few questions deal with that appointment process.

5. When a neutral arbitrator is to be appointed, do you prefer to have an agency select the arbitrator on its own initiative?
   Yes (14) No (51) No opinion (1)

6. When a neutral arbitrator is to be appointed, do you prefer an opportunity to select that person from a list submitted to the parties by an agency?
   Yes (53) No (9) No opinion (3)

7. Do you prefer that the neutral arbitrator be of a nationality different than that of either of the parties?
   Yes (29) No (10) No opinion (16)

8. How important are the following factors, as they relate to your choice of arbitrator?

	Very	Somewhat	Not
knowledge of applicable law	(44)	(21)	(1)
knowledge of the particular industry	(36)	(28)	(1)
recognized international arbitrator	(13)	(28)	(24)
language ability	(47)	(11)	(8)
membership in arbitration societies	(6)	(14)	(44)
nationality	(12)	(36)	(17)

II. Prehearing Arrangements

The following questions concern preliminary procedural decisions.

9. Do you include a clause designating the applicable law in international commercial contracts?

Always (31) Usually (31) Seldom (1) Never (0)

10. In your international commercial contracts, do you specify the language in which the arbitration will be held?

Always (17) Usually (17) Seldom (23) Never (8)

11. In international commercial arbitration, do you prefer to have the kinds of discovery procedures that are generally available in American courts?

Always (7) Usually (21) Seldom (25) Never (11)

12. In international commercial contracts, do you include specific arrangements for such discovery?

Always (4) Usually (9) Seldom (22) Never (29)

13. Do you think the arbitrator should be authorized to order discovery in international commercial cases?

Yes (46) No (15) No opinion (4)

14. Should the agency be authorized to require parties to exchange documents in aid of arbitration in advance of the hearing?

Yes (55) No (8) No opinion (3)

15. Under some systems of international commercial arbitration, the agency must approve a statement of the issues. Do you prefer having such a step in the procedure?

Yes (26) No (32) No opinion (8)

16. Under some systems of international commercial arbitration, the agency arranges a pre-arbitration conference to assist the parties in scheduling the order of proceedings and an exchange of documents. Do you prefer this procedure?

Yes (61) No (1) No opinion (4)

17. Would you be willing to engage in conciliation before arbitration in international commercial arbitration cases?
Yes (41) No (17) No opinion (8)

18. In international commercial arbitration, questions as to arbitrability may arise. How would you prefer that issue to be decided?
(7) by the administrative agency through correspondence
(6) by the agency after a hearing
(5) by the arbitrator through correspondence
(28) by the arbitrator after a hearing
(21) by the courts

19. How important are the following considerations in selecting the place of arbitration for an international commercial case?

	Very	Somewhat	Not
absence of travel restrictions	(46)	(16)	(3)
applicable arbitration law	(50)	(15)	(1)
availability of competent trial counsel	(31)	(24)	(11)
communication facilities	(52)	(13)	(1)
costs	(35)	(27)	(4)
court supervision and enforcement	(39)	(21)	(3)
language	(42)	(23)	(1)
office conveniences and hearing rooms	(24)	(42)	(0)
personal security of participants	(51)	(13)	(2)
presence of administrative agency	(13)	(31)	(20)
transportation	(30)	(35)	(1)

20. Should the arbitrator be given briefs or relevant documents in advance of the hearing?
Yes (58) No (3) No opinion (3)

21. If it is disclosed that an inappropriate communication took place between one of the parties and the arbitrator, should the agency be authorized to replace that arbitrator?
Yes (55) No (2) No opinion (8)

III. Hearing Procedure

22. Please indicate whether you feel that the following procedures should be permitted or required in international commercial arbitration:

	Permitted	Required
prehearing briefs	(38)	(27)
direct testimony of witnesses	(42)	(22)

cross-examination	(33)	(30)
affidavits of witnesses unable to attend	(54)	(8)
transcripts	(49)	(15)
post-hearing briefs	(47)	(13)
interim awards by the arbitrator	(57)	(2)

23. Once hearings have begun, do you prefer to have them continue on consecutive days?
Yes (52) No (3) No opinion (10)

24. Should international commercial cases be arbitrated in private, with no outside persons permitted to attend the hearing?
Yes (55) No (4) No opinion (7)

25. Should unilateral communications between one of the parties and the arbitrator during the pendency of the case be forbidden?
Yes (56) No (5) No opinion (8)

IV. Enforcement of the Arbitration Award

In international commercial arbitration, an important concern is whether the arbitration award can be enforced.

26. Do you specify in your arbitration clauses in international commercial contracts the courts in which an award may be confirmed?
Yes (35) No (29)

27. In international commercial arbitration, the award may include the arbitrator's reasons. Does that increase the likelihood of enforcing the award?
Yes (23) No (28) No opinion (15)

28. In some countries, an award must be filed in court before it can be enforced. Is this an appropriate provision?
Yes (27) No (26) No opinion (14)

29. In your international commercial contracts, do you provide for the currency in which arbitration awards must be calculated?
Yes (19) No (42)

30. What range of compensation in American dollars do you expect to pay an international commercial arbitrator per day?
High (1000) Average (650) Low (350)