

P.R.I.M.E. Finance

Panel of **Recognized International Market Experts in Finance**

ATTITUDES OF FINANCIAL INSTITUTIONS TOWARDS ARBITRATION AND ADR



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OUTLINE

- Historical and current attitudes of financial institutions towards arbitration and ADR
 - History
 - Empirical data
 - The emergence of investment arbitration
- Would emergency arbitrators and other fast-track options change the attitudes?
 - Relevance
 - Alternatives



The Background of the Talk: Roberto Calasso's The Marriage of Cadmus and Harmony



A bestseller book on Greek mythology looking inter alia of a unique event when Greek gods appeared as humans at the wedding of Cadmus and Harmony.

Banks, the modern temples, bankers and finance experts come at P.R.I.M.E. Finance conferences and talk to arbitrators and other dispute resolution experts.

It is to be wished that this is not a single occurrence but something that happens more often



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HISTORICAL AND CURRENT ATTITUDES I

- History
 - Affinity of financial institutions towards specific national courts, mostly in common law jurisdictions
 - Reluctance to use any arbitration or ADR
 - Theoretical and practical objections towards arbitration and ADR or rather justification for the use of certain common law courts
 - Change of tide in civil law countries and CIS countries
 - Gradual increase in number of cases



HISTORICAL AND CURRENT ATTITUDES – EMPIRICAL DATA I

- Empirical data and other developments from across the world
 - Cologne / DIS / ISDA Conference
 - Queen Mary (SIA) Surveys 2013 and 2018
 - CFA work
 - ICC Task Force
 - ISDA Model Agreement
 - In 2016, the ICC saw cases arising from the finance and insurance sector grow to match the number of cases relating to the construction and engineering sector, which sector has historically led to the highest percentage of ICC cases. (but this is perhaps a unique occurrence)



HISTORICAL AND CURRENT ATTITUDES – EMPIRICAL DATA II (2013)

Which is the most preferred dispute resolution mechanism in your industry

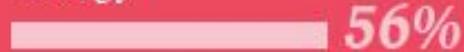
% of respondents that prefer (most preferred) international arbitration as a choice of resolving cross border disputes with a built in comparison between the

Overall results



and those by industry –

Energy



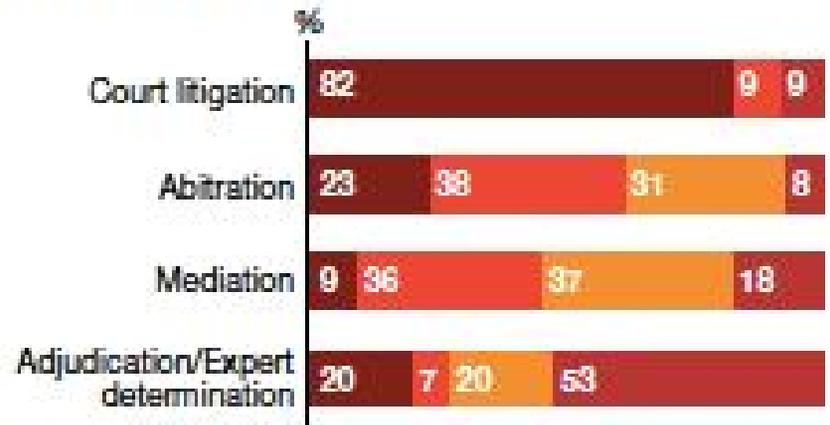
Construction



Financial Services



Financial Services



1 (Most preferred) 2 3 4 (Least preferred)



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HISTORICAL AND CURRENT ATTITUDES – EMPIRICAL DATA III (2018)

Chart 7: What are the three most valuable characteristics of international arbitration?

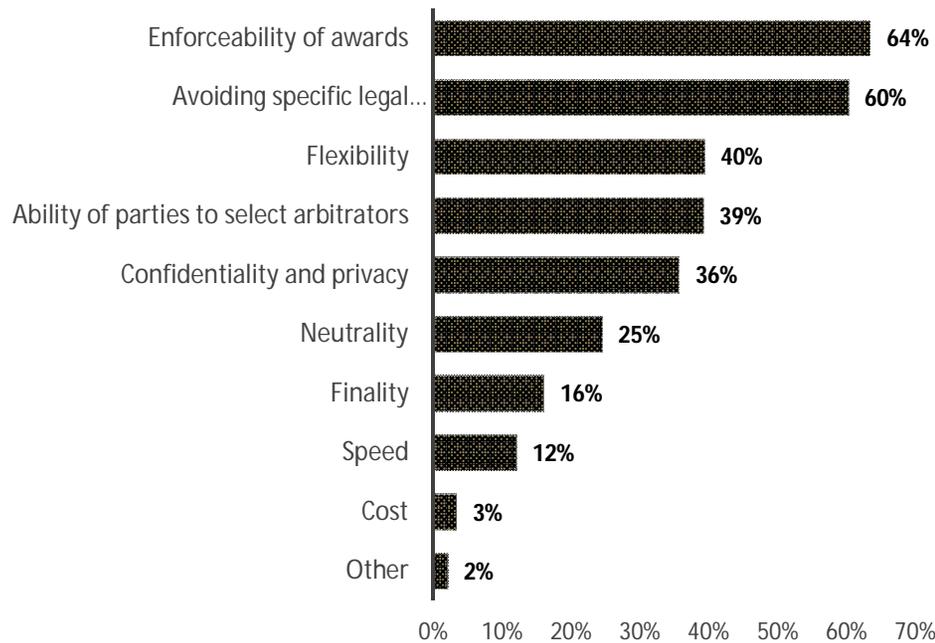
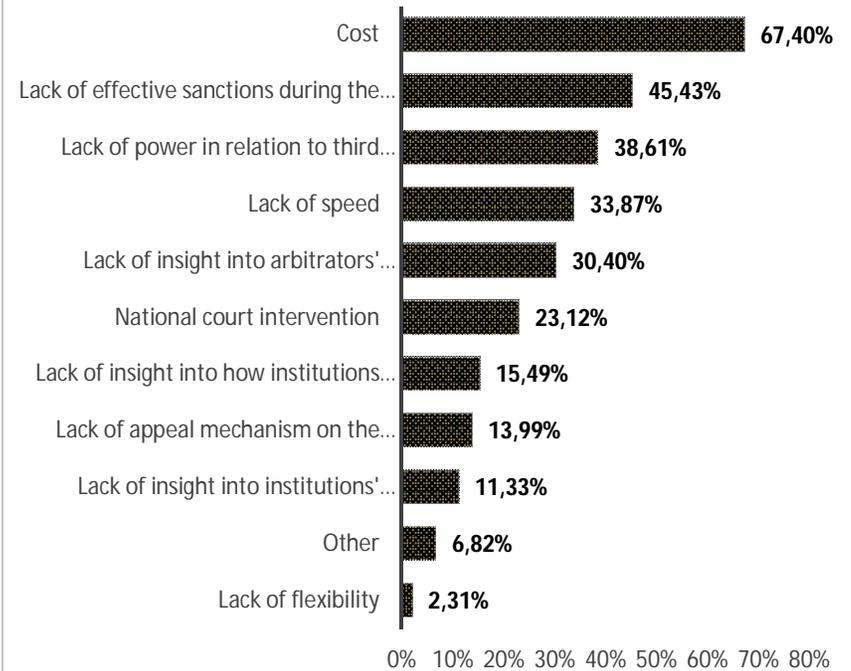
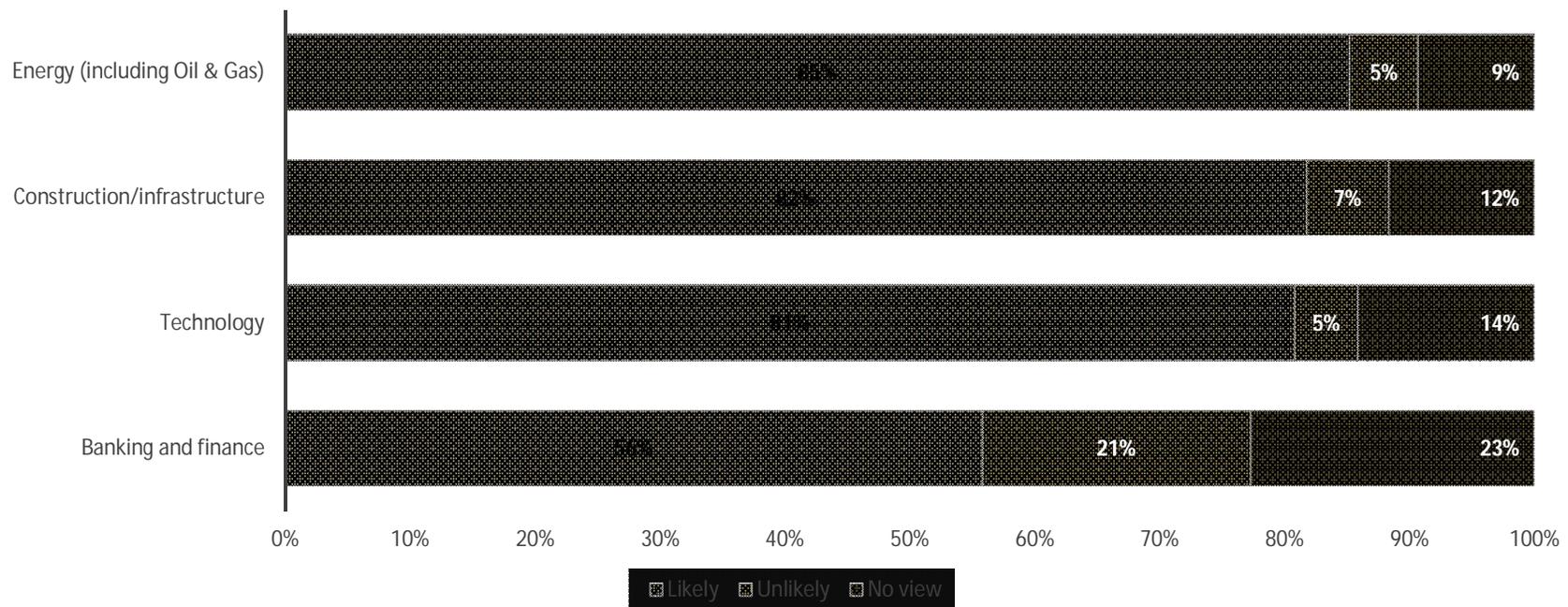


Chart 8: What are the three worst characteristics of international arbitration?



HISTORICAL AND CURRENT ATTITUDES – EMPIRICAL DATA III (2018)

Chart 39: In your view, how likely is it that the use of international arbitration for resolving cross-border disputes will increase in relation to the following industries and sectors?



HISTORICAL AND CURRENT ATTITUDES – EMPIRICAL DATA III

- Further concerns of Banking and Finance World
 - Do arbitrators split the baby?
 - No such empirical evidence (Look at Naimark & Keer survey)
 - Isn't the reliance on precedent a safer option?
 - Yes but courts are also reluctant to consider innovative solutions and/or unusual remedies
 - What about enforcement over property? Doesn't it always require the assistance of national courts?
 - Yes, but arbitral awards are more easily enforceable than national court decisions



EMERGENCE OF INVESTMENT ARBITRATION

Several investment arbitration cases relate to banking and finance matters, including:

- Italian Bondholders (*Abaclat et al v Argentina*)
- *Postova Bank v Greece*
- *Deutsche Bank v Sri Lanka*
- *Fedax v Venezuela*
- *Standard Chartered v Tanzania*

As there has been a dedicated panel we will not address these cases further



WOULD EMERGENCY ARBITRATORS AND OTHER FAST-TRACK OPTIONS CHANGE ATTITUDES

- Speed and efficiency are very important
- Are arbitral institutions becoming multi-door dispute resolution centres?
- Is judicialization a consequence or a cause in respect of the change of attitudes towards urgency
 - Is the fabric of arbitration changing?
 - What about party autonomy?
- And what about national courts' responses



CONCLUSION

- The trend is clear, but the numbers are still relatively low
- Differences between common law and civil law lawyers
 - Important contribution of P.R.I.M.E. Finance
 - Important contribution of ISDA
 - Important contribution of other arbitral institutions such as PCA, ICC, LCIA, DIS, etc
- Empirical data is encouraging
- Remarkable regulatory responses by arbitral institutions.



THANK YOU

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