



## Is Arbitration Still Worth it?

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Arbitration, rather than litigation, has long been the preferred method of dispute resolution in the aerospace and defence industries.<sup>[2]</sup> Stemming from arbitration clauses in the applicable contracts, arbitration offers several advantages over traditional litigation that may be particularly attractive to actors in the defence industry. Arbitration is often speedier, less intrusive (less discovery), more flexible, and less expensive than litigation—compelling benefits in the fast-paced aerospace and defence fields.<sup>[3]</sup> Further, arbitration proceedings are often confidential (or can be made confidential), and at the very least offer the parties the opportunity to avoid filing their claims on publicly accessible dockets.<sup>[4]</sup> Confidentiality is a valuable feature for industry participants seeking to avoid disclosure of intellectual property or classified information, or hoping to avoid publicising an accident or safety concern to risk-averse customers.<sup>[5]</sup> Of course, arbitration comes with its own set of risks—speed, efficiency, and flexibility may mean unpredictability of procedure or shallow depth of analysis, and ill-reasoned arbitration awards are notoriously difficult to overturn.<sup>[6]</sup>

Recently, in the broader commercial context, arbitration has come under increasing criticism. The perceived unfairness arising from mandatory arbitration agreements, lack of diversity among arbitration neutrals, and the expense and delays of the arbitration process are leading companies in many industries to rethink whether arbitration is appropriate. For the defence and aerospace industry, however, arbitration of commercial disputes—conducted under a thoughtful arbitration provision—remains a sound choice. Arbitration is well suited to the increasing internationalisation of commercial contracts in the defence industry, and offers access to neutrals with the specialised knowledge and experience that can be necessary to rendering efficient, quality decisions.

### *The International Advantage*

The defence and aerospace industry, once a United States-centric industry with a relatively small set of actors, has become increasingly international in the past 10 to 20 years.<sup>[7]</sup> Driven in part by economic realities since the 2008 recession, including decreasing defence budgets, US companies are increasingly taking their business abroad—and this trend is likely to continue.<sup>[8]</sup> Whereas historically, defence disputes were resolved either internally or through domestic arbitration, the growing numbers of cross-border disputes have increased the incidence of international arbitrations.<sup>[9]</sup> International arbitrations allow the parties to avoid either side getting a home-court advantage in its own legal system, as well as obtain a final award that can be enforced internationally.<sup>[10]</sup>

International arbitration is an increasingly common choice for resolving defence-industry commercial disputes, and arbitral institutions are responding to today's popular criticisms. While precise data is difficult to find, the recent statistics released by the International Chamber of Commerce ("ICC") are informative. In 2018, the ICC set new records in the number of cases registered (842) and draft awards approved (599). [11] The vast majority of the parties in those cases were commercial entities, and many of the disputes arbitrated were in the areas of defense and security, and specialised technology.[12] The average duration of proceedings in cases that went to a final award in 2018 was two years and four months, and the median duration was two years.[13] By way of comparison, the median time in months to trial for the US District Court for the Northern District of California over approximately the same period was 21.4 months.[14] To promote efficiency, expedited arbitration procedures that yield a final award within six months of the case-management conference are available for cases where the total amount in dispute does not exceed US\$ 2 million, or where parties expressly opt in. Finally, the ICC has made progress on gender diversity—the number of women arbitrators sitting in ICC tribunals was at 18.8% in 2018, and the ICC launched the "ICC Gender Balance Pledge" in late 2018 to commit to increase gender diversity across its platform.[15] The ICC is just one international association, but as a global arbitration leader, these recent statistics likely reflect broader trends.

### ***Experienced Neutrals***

Defence disputes frequently require industry familiarity or technological expertise, such that many generalist arbitrators may experience a high "learning curve," resulting in increased inefficiencies, costs, and potential for error. For these reasons, specialised arbitral institutions and procedures have been organised in an effort to meet the demand for defence and aerospace expertise in dispute resolution, with varied degrees of success. For example, a set of industry-specific arbitration rules pertaining to outer-space disputes was adopted by the Permanent Court of Arbitration ("PCA") in 2011, based in large part on the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules of 2010.[16] The modified rules include an explicit waiver of sovereign immunity and added confidentiality safeguards.[17] Additionally, the rules require the PCA to maintain a list of arbitrators with aerospace experience, as well as lists of technical experts available to serve as expert witnesses.[18] More recently, the American Arbitration Association ("AAA") and its international counterpart, the International Centre for Dispute Resolution ("ICDR"), created a specialised panel of arbitrators and mediators in 2016.[19] Known as the Aerospace, Aviation, and National Security Panel, the featured neutrals purportedly have the requisite industry expertise to handle "complex, high-value aerospace, aviation, defence, cyber, and security-related disputes both domestically and internationally." [20] Parties can request that a case administrator select a chair or panel of arbitrators from this specialised roster, and parties themselves can consider these diverse, vetted professionals in making a party appointment. The goal is for the parties to the dispute to have confidence that the arbitrators they select or appoint will have appropriate experience.

Notwithstanding today's criticisms, arbitration remains a valid option for resolving commercial disputes in the defence industry. To maximise its advantages and meet today's arbitration criticisms, companies would be well served by crafting their arbitration provisions to ensure that an appropriate arbitral institution has been identified, considering or opting-in to expedited procedures if appropriate, and examining neutrals on specialised rosters when making a party-appointment or selecting an arbitration panel.

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[2] See Carson W. Bennett, *Houston, We Have an Arbitration: International Arbitration's Role in Resolving Commercial Aerospace Disputes*, 19 Pepp. Disp. Resol. L.J. 61, 69 (2019).

[3] *Id.*; see also Stephen E. Smith & Lester W. Shiefelbein, Jr., *Arbitration Disputes of the Aerospace Industry*, College of Commercial Arbitrators, at 2, <https://www.ccaarbitration.org/wp-content/uploads/Disputes-in-the-Aerospace-Industry.pdf> (2017).

[4] Bennett, *supra* note 2, at 69.

[5] *Id.*

[6] For example, under the United States Federal Arbitration Act, an arbitration award may be vacated only where "the award was procured by corruption, fraud, or undue means," "there was evident partiality or corruption in the arbitrators," the arbitrators acted such that "the rights of any party have been prejudiced," or "the arbitrators exceeded their powers." 9 U.S.C. § 10(a).

[7] Caroline Simson, *Why Aerospace Cos. Are Forgoing Courts for Int'l Arbitration*, Law360, <https://www.law360.com/articles/859940/print?section=aerospace> (Nov. 9, 2016, 3:29 PM EST).

[8] *Id.*

[9] *Id.*

[10] *Id.*; Smith & Schiefelbein, *supra* note 3, at 2.

[11] ICC Dispute Resolution 2018 Statistics, Int'l Chamber of Commerce, [www.iccwbo.org/dr-stat2018](http://www.iccwbo.org/dr-stat2018), at 4 (2019).

[12] *See id.* at 13.

[13] *Id.* at 15.

[14] Robert Tata, *'Rocket Docket' Justifies Its Name for 11th Straight Year*, Law360, <https://www.law360.com/articles/1167066> (June 10, 2019, 4:45 EDT).

[15] ICC Dispute Resolution 2018 Statistics, *supra* note 12, at 5.

[16] *Id.* at 5; Bennett, *supra* note 2 at 73.

[17] Bennett, *supra* note 2 at 73.

[18] *Id.*

[19] Caroline Simson, *AAA Creates New Panel for Aerospace, Security Disputes*, Law360, <https://www.law360.com/articles/857522/print?section=aerospace> (Oct. 31, 2016, 6:30 PM EDT).

[20] *Aerospace, Aviation, and National Security Panel*, Am. Arb. Ass'n, <http://go.adr.org/aans-panel.html> (last accessed Aug. 9, 2019).

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