Does the dispute resolution regime in Europe really serve MSMEs?

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Abstract: Micro, small and medium-sized enterprises ("MSMEs") dominate economies worldwide. Countries are dependent on businesses, particularly MSMEs, participating in international trade for their economic growth. Unfortunately, MSMEs are not living up to their potential. The default of international commercial litigation has too many pitfalls to provide effective access to justice. Therefore, this chapter treats international dispute resolution as a barrier to international trade and considers whether there is an alternative form of default dispute resolution that would encourage MSMEs to trade cross-border. The chapter concludes that a bilateral arbitration treaty ("BAT") would be a preferable approach to default international commercial dispute resolution. A BAT would provide certainty for MSMEs and mitigate the fear of the unknown.

Key words: dispute resolution, MSMEs, international trade, arbitration, access to justice, trade barriers, Bilateral Arbitration Treaty
A. Introduction

Micro, small and medium-sized enterprises (“MSMEs”) dominate the global economy. What defines MSMEs varies across states: in Europe, it is a firm with fewer than 250 employees, in Japan fewer than 300, in the US fewer than 500 and in New Zealand fewer than 100. The common feature is that MSMEs comprise the majority of businesses in any given country. In Europe, 99 per cent of businesses are classified MSMEs. It is therefore recognised that MSMEs are vital for economic growth: MSMEs are the “lifeblood” of all economies. In emerging economies, MSMEs account for 40 per cent of

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GDP, which shows the potential contribution MSMEs can make to an economy. However, in the European Union (“EU”) only 25 per cent of MSMEs export within the EU and fewer export beyond the EU.  

Accordingly, governments need to understand what drives MSMEs and how their contribution to growth (i.e. gross domestic product or “GDP”) can be increased. And economic growth is dependent on increased international trade. The European Commission considers MSMEs as ‘key to ensuring economic growth, innovation, job creation, and social integration in the EU’. Therefore, MSMEs need to participate in international trade for the wellbeing of the economy.

This chapter looks at the challenges MSMEs face when engaging in international trade, in particular their lack of access to effective international commercial justice. It asks whether the current default regime for international commercial dispute resolution is adequate as part of the package to encourage MSMEs to trade cross-border. Part B. looks at the barriers to trade, while Part C. looks at international commercial dispute resolution. Part D. looks at international commercial dispute resolution in the EU, while Part E. discusses whether the academic analysis lines up with empirical research. Finally, Part F. considers what the default regime for international commercial dispute resolution could be changed to.

**B. Barriers to Trade**

Regardless of the definition used, MSMEs face the same challenges. Increasing the trade participation of MSMEs is not easy. While there are numerous barriers to international trade that affect all businesses, MSMEs are particularly vulnerable. The barriers to trade

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9 Papadopoulos et al., above n 3.

10 OECD, above n 2, para 15.

11 For example, E Helpman & M Melitz & S Yeaple ‘Export versus FDI with Heterogeneous Firms’ (2004) 94 American Economic Review 300; Thierry Mayer & Gianmarco Ottaviano, The Happy Few: The
are a common area of research and analysis by economists, financial analysts and lawyers alike.\textsuperscript{12} While many MSMEs are involved in trade, larger enterprises dominate.\textsuperscript{13} The OECD determined in 2012 that large businesses are responsible for more than 50 per cent of total exports and that number is unlikely to have changed significantly.\textsuperscript{14}

The primary barrier to international trade is access to finance.\textsuperscript{15} Another key barrier to trade for all businesses is access to information: about opportunities, practical requirements, and about legal rights and obligations. An OECD study found limited resources, contacts and lack of managerial knowledge constrain MSMEs wanting to engage in international trade.\textsuperscript{16} A business is not likely to automatically know the border requirements in any given country, let alone the necessary documentation.\textsuperscript{17} According to one study by the New Zealand Ministry of Business, Innovation and Employment, the ‘most cited barriers [to international trade] revolve around the unfamiliarity of operating in a different country’.\textsuperscript{18}


\textsuperscript{13} Freund et al, above n 12, 1.


\textsuperscript{15} OECD, ‘Top Barriers and Drivers to MSME Internationalisation’, above n 12, 10.

\textsuperscript{16} OECD, ‘Top Barriers and Drivers to MSME Internationalisation’, above n 12, 28.

\textsuperscript{17} Freund et al., above n 12, 3. See further the qualitative findings of Hanneke van Oeveren, “‘It hurts my head to think about it’ – MSMEs and the Legal Framework for International Commercial Contracts’, (LLB(Hons) thesis, Victoria University Faculty of Law, Wellington, 2016).

Part of this information barrier is the uncertainty businesses face regarding international dispute resolution. Businesses are not confident in receiving effective access to justice should a dispute with an international business arise.\textsuperscript{19} The barriers are not unique to MSMEs or large businesses but they do hurt smaller businesses more as they do not have the same ease of access to resources to solve problems.\textsuperscript{20} Large businesses are not as affected by this barrier as they have the resources to overcome the information barrier—they can hire lawyers to solve their regulatory issues and their disputes. The barriers to trade mean MSMEs are not realising their full potential.\textsuperscript{21}

\textbf{C. International Commercial Dispute Resolution}

There are numerous free trade agreements, both bi and multilateral, to encourage trade between countries. The recent Economic Partnership Agreement between the European Union and Japan ("JEFTA")\textsuperscript{22} and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")\textsuperscript{23} include chapters dedicated to small and medium sized enterprises (i.e., MSMEs).\textsuperscript{24} JEFTA and the CPTPP do not contain any specific agreement on international commercial dispute resolution. However, Article 28.23 of the CPTPP states that each Party must ‘... encourage and facilitate the use of arbitration and other means of alternative dispute resolution ("ADR") for the settlement of international commercial disputes between private parties’. It is clear governments are recognising the importance of access to justice and the international dispute resolution regime, as part of enticing MSMEs to trade. More can be done. While dispute resolution may not be the


\textsuperscript{20} Freund et al., above n 12, 6.

\textsuperscript{21} See Butler and Herbert, above n 19, 188.


\textsuperscript{23} Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) ("CPTPP").

\textsuperscript{24} Chapter 20 of JEFTA and Chapter 24 of the CPTPP.
highest-ranking barrier to international trade, it is still important. Any reduction in trade barriers will help MSMEs and growth.

This topic has only recently begun to receive academic and political attention.\(^{25}\) Research from multiple jurisdictions confirms that international litigation does not provide access to justice for many MSMEs.\(^{26}\) A European Commission study found that one third of respondents felt cross-border conflicts and resolution of these conflicts stifled international trade.\(^{27}\) The 2012 World Bank and the International Finance Corporation study found that efficiency and transparency in dispute resolution is crucial in encouraging international trade.\(^{28}\)

Dispute resolution is not something parties necessarily turn their mind to in forming an international business relationship. However, ‘without a neutral, efficient, and fair dispute resolution process that is legally enforceable, many businesses would not contract abroad for fear of foreign litigation’.\(^{29}\) Therefore, how MSMEs are able to deal with legal issues may be critical to growth.\(^{30}\)

Parties are free to negotiate dispute resolution clauses and incorporate them into agreements. However, if parties fail to undertake such a negotiation or are unable to come to an agreement when a dispute arises, litigation applies as a default to international commercial disputes. MSMEs do not have the resources, compared to large established businesses, to incorporate a complete and effective dispute resolution clause in their contracts.\(^{31}\) Two studies in New Zealand have confirmed anecdotal evidence of the lack

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\(^{25}\) To list a few examples, see Papadopoulos et al., above n 3; and European Commission, above n 19; World Bank and the International Finance Corporation, ‘Doing Business 2012’ (2012),<http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-FullReport.pdf>.

\(^{26}\) European Commission, above n 19; World Bank, above n 25; and van Oeveren, above n 17.


\(^{28}\) World Bank, above n 25, 4–5.


\(^{30}\) Pleasence and Balmer, above n 5, at i–ii and at 2.

\(^{31}\) Butler and Herbert, above n 19, 188.
of “sophistication” in international contracting by MSMEs; but also found that the extent and magnitude of the issue is underestimated and/or ignored by businesses and policy makers alike.\textsuperscript{32} The study was continued in Austria which supported the findings in New Zealand that MSMEs avoid recourse to the law and lawyers.\textsuperscript{33}

The uncertainty MSMEs face leads them to protect themselves in other ways, by restricting trade and thereby restricting their growth. The alternative is for MSMEs to expose themselves to the risks of international litigation where a dispute arises.

International litigation faces the same and greater weaknesses as domestic litigation. The oft-repeated weaknesses are time and cost. In the United Kingdom, civil justice reforms were implemented following a 1996 report by Lord Woolf in which he concluded that the system was ‘too slow in bringing cases to a conclusion’.\textsuperscript{34} In 2005, a follow up report stated that ‘the case managed court based dispute resolution system is delivering quality at a much improved pace, but probably at a higher cost’.\textsuperscript{35} Other weaknesses are the uncertainty of jurisdiction, uncertainty of judicial procedure (for example, a company in a civil law jurisdiction facing a common law court), and difficulty of enforcing any judgment. There are language barriers. There is a fear that a foreign jurisdiction will favour the home party (i.e. a lack of neutrality). This may be valid where there are allegations of corruption. Importantly, there is a risk of parallel proceedings: in the place of performance, the home jurisdiction of the contracting parties or where they have assets.\textsuperscript{36} These difficulties add to the costs that businesses face and the time it takes to resolve the dispute, particularly where local and foreign legal counsel are involved or the local legal system is backlogged and appeals are lodged.\textsuperscript{37} Judges may not have the

\textsuperscript{32} van Oeveren, above n 17. The qualitative study in 2018 was undertaken by the authors.

\textsuperscript{33} For a more direct comparison, see Petra Butler and Christina Geissler, ‘Contractual Realities of SMEs – Access to Commercial Justice’ in 2020 Austrian Yearbook on International Arbitration (forthcoming).


\textsuperscript{35} Department for Constitutional Affairs, ‘The management of civil cases: the courts and post-Woolf landscape’, (DCA Research Series 9/05, 2005) at iii.


\textsuperscript{37} Gary Born ‘BITs, BATs and Buts – Reflections on International Arbitration’ (University of Pennsylvania Law School, Pennsylvania, 28 April 2014); Fiske, above n 29, 457; Gary Born and Petra
expertise required for a particular commercial dispute, whether it is because of the subject matter of the dispute or the application of foreign law. And, finally, it is often difficult to enforce foreign judgments as there is no global standard that has been adopted as of yet.\textsuperscript{38} Even where enforcement is possible, it may be delayed.\textsuperscript{39}

There are a number of sources that neatly articulate the deficiencies of international commercial litigation.\textsuperscript{40} The weaknesses of international litigation introduce uncertainty and unpredictability into international trade which may have a chilling effect on business participation.\textsuperscript{41} This constrains MSMEs and depresses growth. MSMEs cannot rely on relationships over formal contractual arrangements forever.\textsuperscript{42}

\textbf{D. International Dispute Resolution in the European Union}

The right to access the courts is protected by Art 6(1) of the European Convention on Human Rights.\textsuperscript{43} It has been held that the right ‘secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal’.\textsuperscript{44} International litigation in the EU is made easier by integration, for example through regulations such as the Brussels I Regulation.\textsuperscript{45} The EU has ratified the Hague Choice of Court Convention.\textsuperscript{46} There are also increasing numbers of international commercial

\textit{Butler, ‘Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution’, in UNICTRAL 50 years university celebrations (UNCITRAL, Vienna, 2017), 314–326, [7(c)]; Butler and Herbert, above n 19, 202 et seq.}


\textsuperscript{39} Born and Butler, above n 37, [7(e)].

\textsuperscript{40} See, for example, Born and Butler, above n 37; see also Queen Mary School of Arbitration surveys which set out reasons why large enterprises choose international arbitration over cross border litigation (<http://www.arbitration.qmul.ac.uk/research/index.html>, last accessed 3 June 2019).

\textsuperscript{41} Born and Butler, above n 37, [7(f)].

\textsuperscript{42} See, for example, John McMillan and Christopher Woodruff ‘Interfirm Relationships and Informal Credit in Vietnam’ (1999) 114(4) The Quarterly Journal of Economics 1285 at 1285 and 1286.

\textsuperscript{43} European Convention on Human Rights CETS 194 / ETS 5 (entered into force 3 September 1953) (and subsequently amended).

\textsuperscript{44} Golder v United Kingdom (1975) 1 EHRR 524, 36.


\textsuperscript{46} Convention on Choice of Court Agreements (signed 30 June 2005, entered into force 1 October 2015).
courts in EU states, to provide alternatives to domestic litigation or arbitration.\textsuperscript{47} These courts share a common feature in the use of English as the language of proceedings but vary in the use of specialised procedures, costs and appearance of foreign counsel.\textsuperscript{48} It is too soon to tell whether these courts will be effective and be used by disputing international businesses. As it stands, these courts will not resolve the issues of parallel proceedings or unfamiliar civil procedure. Enforcement of judgments outside of the EU, or outside of States which have ratified the Choice of Court Convention, may still be difficult. Nonetheless, it will be an interesting space to watch develop.

A number of studies have been conducted into disputes faced by businesses in the EU. It is not the purpose of this chapter to regurgitate the findings of the studies but some of the results are interesting for our purposes. First, a 2006 study by the EIM Business & Policy Research found that approximately 28 per cent of European MSMEs surveyed were involved in commercial disputes during the last three years.\textsuperscript{49} The majority of disputes were about payment (71 per cent) and of these disputes, 91 per cent were domestic while 9 per cent were international for small businesses, and medium-sized businesses faced more international disputes at 19 per cent.\textsuperscript{50} The study found that ADR was used in a minority of cases and MSMEs are not familiar with ADR processes.\textsuperscript{51} MSMEs noted that the most important requirement for dispute resolution is speed, followed by low cost.\textsuperscript{52}

A 2012 European Commission study found that only 11 per cent of EU companies had used ADR.\textsuperscript{53} However, companies were more satisfied with ADR than court procedures.\textsuperscript{54} Courts were seen to be expensive, time-consuming and there was a ‘fear


\textsuperscript{48} Knoll-Tudor, above n 47.

\textsuperscript{49} Rob van der Horst, Renate de Vree and Paul van der Zeijden ‘SME access to Alternative Dispute Resolution systems’, (EIM Business & Policy Research, 28 February 2006), 17.

\textsuperscript{50} As above, 25.

\textsuperscript{51} As above, 28 and 70.

\textsuperscript{52} As above, 65.

\textsuperscript{53} European Commission, ‘Business-to-business Alternative Dispute Resolution in the EU’ (November 2012) at 7.

\textsuperscript{54} As above, 7, 27 and 61.
that nothing would come of it’. The study found that the ‘main reason for not using ADR is a lack of awareness’. For an international dispute, it took courts 15.2 months to resolve it, while arbitration took 8 months and mediation 5.8 months. The study found interesting differences in the knowledge of small versus larger businesses, and goes on to highlight the importance of relationships to businesses, as well as time and money.

Businesses in the European Commission study estimated that the value of a domestic dispute was €28,300 compared to €44,300 for an international dispute. These businesses were then asked how much they spent on dispute resolution. For a domestic issue, courts cost €11,500, arbitration cost €5,500 and mediation cost €6,100. While for an international dispute, courts cost €13,000, arbitration cost €21,300 and mediation cost €3,000. It is important to remember that there will be variations in the severity of the dispute, leading to variations in the required expenditure. Larger companies were more willing to use arbitration in the future (66 per cent versus 54 per cent), while the larger the MSME, the more likely they were to consider using binding ADR in future (medium 65 per cent, small 57 per cent, and micro 52 per cent).

International commercial dispute resolution in the EU benefits from integration. However, this does not solve all the problems identified in Part C. While some of the concerns are mitigated, through recognition of jurisdiction and judgments, not all are. Legal systems, even in Europe, are not mirror images of each other. The standardisation introduced by EU arrangements and regulations ensuring consistency across Member States do not mean that access to justice is the same in each country. There are still delays faced by those hoping for their day in court. Delays in the court system are not unique

55 As above, 7 and 37.
56 As above, 7 and 37.
57 As above, 7.
58 As above, 36.
59 As above, 37.
60 As above, 40.
61 As above, 43.
62 As above, 55.
to any particular jurisdiction. The cost of having that day in court also varies between countries. Parties still need to travel and may need to hire foreign counsel, particularly where there is a language barrier. Importantly, civil procedure is not the same across jurisdictions. The Brussels Regulation may clearly state which court has jurisdiction but it does not help a party understand the applicable civil procedure, which may vary greatly from the party’s home state. The rules of evidence, documents, experts, witness preparation, discovery and the burden of proof can all vary in different ways in every country. All of this information is vitally important in preparing and strategizing a case. Therefore, while some of the concerns about international commercial litigation are minimised, they are not completely resolved.

E. Empirical Research

This research is supported by research recently undertaken in New Zealand and Singapore by the authors and a further study conducted in Austria. The study found that many MSMEs often do not have one single contractual document that governs the entirety of a trading relationship. Arrangements are made in a piecemeal fashion frequently through a mixture of emails, phone calls, and even social media chats. For MSMEs in New Zealand, the emphasis is on relationships. However, the more complex the product, for example if the product contains intellectual property rights or involves distribution agreements, the more likely it is that a single contractual document exists.

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64 See Rachel Laing, Saskia Righarts and Mark Henaghan, ‘A Preliminary Study on Civil Case Progression Times in New Zealand’, (A report by the University of Otago Legal Issues Centre, Faculty of Law, 15 April 2011).


66 The same research is being conducted in Spain, the United Kingdom, Belgium, Hong Kong, and Canada.

67 Only twelve MSMEs out of the 48 interviewed in New Zealand (25 per cent) stated with an unqualified “yes” that they used a single written contract. Six qualified their answer by making it dependent on the circumstances: i.e., on the country they were dealing with, whether it was the service or production side of the business, or the length of the contractual relationship. Only two of the Singaporean MSMEs stated that they use a single written contract.

68 van Oeveren, above n 17; and, for example, 2018 study: NZ Business 8 (retail) uses WeChat when importing from China. Other businesses mentioned the use of WhatsApp.

69 Study 2018: NZ Business 3 (agriculture exports to 23 countries), NZ Business 7 (consumer electronics), NZ Business 24 (marine sector), NZ Business 25 (educational technology), NZ Business 26 stated:
Whether MSMEs perceive a need for a formal contractual document may depend on in which country the contractual partner is located.70 The MSMEs who participated in the research tend to let their perceptions or business judgments, rather than legal knowledge, drive the decision as to how seriously documented a trade relationship needs to be.

There was a recurring theme of a mistrust of contractual documents and some reluctance to require counterparts to sign legalistic-looking documents. Contracts were perceived as using verbose clauses to contemplate everything that has the potential to go wrong with a particular transaction. Businesses prefer to rely on the relationship developed between the parties to overcome difficulties.

When asked whether they thought customers read the terms and conditions one participant stated:71

No . . . and I hope that they [the other party] don’t because it can only be damaging for the relationship.

Another participant noted that whether they had a written contract differed based on their counterpart:72

Some we do, and some we don’t . . . It just depends on who we’re dealing with – history and those sorts of things. When you’ve been paid upfront, it’s not always as effectual and it also depends on the specifications and things which are involved in the transaction. Most of it there is a contract but there are some people we’ve been dealing with for a long time where there’s no actual contract as such, there’s just an email back and forth, what they want and we sort it out from there.

It is not just MSMEs who find contractual documents determinative of a relationship. One large business also revealed that the contractual documents (which contained both a

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70 The United States was identified by multiple participants as a country that is hard to business with. Study 2018: NZ Business 22 (agriculture) noted: ‘everything you do with them [US, Canada] is very contractual and it’s all very organised as well’; NZ Business 12 (retail) exporting to the Pacific Islands stated ‘I deal with brutal reality. There is reality to business. The reality is you do the work and you get paid. So, you have to get paid, and you have to get paid however you can. But dreaming about having contracts . . .’.

71 van Oeveren, above n 17, 27 fn 105.

72 NZ Business 29 of the 2018 study.
choice of law and dispute resolution clause) were merely springboards for negotiations, and not actually relied upon by the parties. This response, from a New Zealand perspective, makes sense: you cannot bury your head in legalese and writing. You need to focus on the person across from you and compromise instead.

Comparatively, Austrian businesses surveyed valued having their negotiations summarised in one written document more than New Zealand MSMEs and noted that they generally have a written contract.

The New Zealand study showed MSMEs are not aware of the unique legal issues that international business relationships may give rise to—13 of the 33 MSMEs surveyed sought legal advice for their domestic contracts but only 11 had done the same for international business. The Austrian businesses behave the same: eight MSMEs out of the 15 have never contacted a lawyer regarding their domestic contracts and seven had never sought legal advice for their international transactions.

Rather than depend on (or use) written contracts, businesses in New Zealand, Austria and Singapore frequently rely on front-end measures to prevent problems in their trading relationship. As part of this, MSMEs spend time getting to know and researching their potential business partner before engaging in trade. This can include traveling to meet the other business and asking other businesses in the industry about the potential partner.

As one participant explained:

There’s a number of things we do. We start a dialogue with people. We talk to others who they know in that market about them. We may use [New Zealand Trade & Enterprise] to look and see whether they’re legitimate or not.

This was echoed by a Singaporean MSME.

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73 Study 2018: Business 35 (importer, over 500 employees).
74 Austrian Study 2018/2019: out of 15 MSMEs interviewed, 11 use a single written contract, 1 sometimes, 1 uses a single document but none of the modifications are recorded in writing or added to the written contract, 1 was unclear, and only 1 MSME (viticulture, 2 employees) did not, saying ‘No, not really. These are simply orders online, or according to the classic old hand slapping method’.
75 For example, study 2018: NZ Business 17 (film industry).
77 Study 2018: Singaporean Business C. Note also Singaporean Business D (manufacturing of technical instruments/machinery): ‘Our customers are very close with us so we visit them quite often, by emails, telephones and visits. So, we know the customers’ staff very well. So, we when we visit we actually
We do the checks on buyers. We visit them at least once and know them well. [Or we know them through another company]. And then you can also check market information, how are their payments and [for information about the customer]. Even banks, when you put the documents through the banks, the import/export documents, they also conduct a credit report on the buyer and once they get a satisfactory credit report from the other bank, then the transaction takes place.

The studies show that MSMEs can demonstrate a lack of awareness about the legal implications of their business relationships. Their lack of resources, although discussed in research papers, is perhaps even still underestimated. MSMEs do not have the capacity to identify potential legal issues, let alone seek information about the problem or help from an independent source. This applies to both simple and complex legal issues. MSMEs do not have the means, time or money, to dedicate to drafting contracts. Instead, MSMEs need to rely on background research and talking to their international counterpart to develop a relationship of trust and comradery. Time spent on legalese is time taken away from the core of the business.

MSMEs acknowledged that international trade was riskier, but also offered greater potential reward. The physical distance feeds into this risk, which may of course not be as large an issue with intra-EU trade but for an Austrian business trading with a New Zealand company the same issue arises. Geopolitics can also feed into risk. Non-payment was perceived to be a bigger risk internationally than domestically.

MSMEs were blasé about the threat of disputes—noting that they had not been involved in any serious legal dispute and that this was unlikely to occur. The biggest burden for
an MSME experiencing a dispute with a trading partner is the impact on trust in the relationship. However, in a specialised industry, the impact may be more severe in the face of reputational risk.\footnote{Butler and Geissler, above n 33.}

These results align with a United Kingdom study into small businesses. The smaller the business, the more likely they were to deal with problems by ignoring it or act on their own, rather than seeking independent help.\footnote{Pleasence and Balmer, above n 5, 67.} This UK survey found, naturally, that the profitability of the business and the severity of the problem were the key determinants of whether a business pursued resolution of problems.\footnote{As above, 70.}

A further 2016 study focusing on small businesses in the United Kingdom supports the above findings.\footnote{Richard Hyde, ‘Tied Up: Unravelling the Dispute Resolution Process for Small Firms’ (Federation of Small Businesses, November 2016).} The Federation of Small Businesses found that small businesses have limited resources to “deal optimally” with disputes. The study found that small businesses ‘are unlikely to have access to the required knowledge, adequate spare labour, time and finance’ to pursue the most appropriate dispute resolution method.\footnote{As above, 9.} These resource constraints expose small businesses to a weaker bargaining position: larger firms have the knowledge, experience and the upper hand in the relationship.\footnote{As above, 9.} Again, this study found that payment issues are the most frequent.\footnote{As above, 11. This is supported by the New Zealand and Singapore study.} Despite the drawbacks of international litigation (including cost and inconsistent service),\footnote{As above, 31.} small businesses do not capitalise on the existence of alternative forms of dispute resolution.\footnote{As above, 23.} The study found that this is because of a knowledge gap—which exists due to the aforementioned resource constraints.\footnote{As above, 24–25.} Disputes hurt economically efficient transactions and prevent small businesses contributing to the market.\footnote{As above, 14.} Accordingly, the study estimates that commercial

\footnotetext[84]{Butler and Geissler, above n 33.} 
\footnotetext[85]{Pleasence and Balmer, above n 5, 67.} 
\footnotetext[86]{As above, 70.} 
\footnotetext[87]{Richard Hyde, ‘Tied Up: Unravelling the Dispute Resolution Process for Small Firms’ (Federation of Small Businesses, November 2016).} 
\footnotetext[88]{As above, 9.} 
\footnotetext[89]{As above, 9.} 
\footnotetext[90]{As above, 11. This is supported by the New Zealand and Singapore study.} 
\footnotetext[91]{As above, 31.} 
\footnotetext[92]{As above, 23.} 
\footnotetext[93]{As above, 24–25.} 
\footnotetext[94]{As above, 14.}
disputes generate approximately £24 billion of economic inefficiency in England and Wales a year.  

MSMEs who participated in the New Zealand, Singapore and Austria studies (and, evidently, the United Kingdom studies) have been highly successful in their international business endeavours, despite their apparent lack of concern about potential disputes. Their lack of focus on the legal solutions does not mean that they are unsuccessful or face a debilitating problem. It means they have developed different skills to mitigate business risk. The current conditions arguably meet commercial needs. MSMEs may not know about the default international commercial dispute resolution regime, let alone about the existence of alternatives. Accordingly, businesses have not and are not likely to demand a change in the legal landscape. This does not mean there is no room for change—it is just one piece to the puzzle for encouraging MSMEs to do business overseas. Free trade agreements represent a change to the legal landscape and these still, despite the plethora of such arrangements, encourage increased trade—more so than the existence of pre-existing measures such as the New York Convention (“the NYC”).

F. Alternative Dispute Resolution

Briggs LJ noted that ‘[t]he single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals’. Whilst this was said in the context of domestic United Kingdom disputes, it is perhaps even more apposite to international commercial litigation. The purpose of this chapter is not to say that changing the international commercial dispute resolution regime will encourage all MSMEs to trade internationally. Neither is the chapter saying that changing the regime will help all MSMEs. The intention is to show that this change will help risk-averse MSMEs who are tempted to trade internationally but who fear the unknown. And it will help keep businesses trading where there is an adversarial dispute that cannot be solved by negotiation and was not accounted for when

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95 As above, 15.


the relationship was first formed. The asymmetry between MSMEs and large businesses can be reduced.

Focusing on dispute resolution is not an attempt to be wilfully narrow-minded and assume that this is the only risk that MSMEs face in international trade. It is to say that there are extreme circumstances where businesses find themselves in trouble in an international commercial business relationship and realise that, back when they were negotiating the agreement, they did not turn their minds to the possibility of dispute resolution, they avoided talking about it for fear of ruining a burgeoning relationship, or the clause they negotiated is unsuitable or imperfect. A written agreement does not ensure no problems when it comes to disputes. If MSMEs are left with litigation being the only option for formal dispute resolution, this can cause access to justice problems. International litigation is not realistic or appropriate for many international commercial disputes, as the problems discussed in Part C. highlight.

Helping those MSMEs, and larger businesses, at the fringes can assuage the fear of the unknown. At least, if all goes wrong, businesses know the dispute resolution method they can rely on. This is why the authors support a change to the default method for international commercial dispute resolution by bi or multilateral agreements signed between States. Any change to the default method of dispute resolution must balance efficiency (reduced cost and time) with ensuring due process. However, ‘fairness also requires a certain level of efficiency, since justice too long delayed becomes justice denied’. The key learning from the empirical research is that businesses do not have faith in courts to resolve international commercial disputes or cannot access the courts. But, businesses do not know what the alternatives are. Accordingly, a change to the international commercial dispute resolution regime needs to overcome this information barrier. This is the role of governments. It is up to governments to mould the business environment in which businesses feel comfortable trading with international firms.

100 As above, 169.
Whilst they may not know it, ADR may provide the answer to issues that international litigation poses for MSMEs. Where negotiation fails, arbitration may be the next best alternative for binding and enforceable dispute resolution.\textsuperscript{101} It is a flexible process that can fit the dispute before it. Of course, it is not the right answer for all disputes but for disputes that are likely to end up in court, arbitration may be a preferred path. The deficiencies of international litigation can have an adverse effect on international trade as it feeds into the fear of risk averse businesses.

There are a number of alternatives that could be considered as replacements to litigation. For one, litigation may be improved through increased use of international commercial courts. States may provide for tribunals or compulsory mediation. There may be entities set up to solve disputes for MSMEs. Like the European Commission consumer dispute platform, we may see States and trading blocs increasing the use of online dispute resolution (\textquotedblleft ODR\textquotedblright) platforms. ODR is an alternative for smaller, less adversarial disputes. This may represent a more efficient form of dispute resolution. It would be quicker than litigation or arbitration, with fewer costs as there is no need for international travel. It may also be easier for MSMEs as the internet or online platforms are something they are familiar with. It would not require the same extent of legal fees. An internet platform offering mediation and arbitration may be an option going forward.\textsuperscript{102} The utility of ODR is currently being investigated by APEC\textsuperscript{103} and it is something that should be more seriously considered moving forward, particularly for disputes involving lower sums of money.

It should also be recognised that a number of trade associations have their own standard form contracts (or terms and conditions) that apply arbitration as the method of dispute

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\textsuperscript{101} Jack Graves ‘Court Litigation over Arbitration Agreements: is it time for a new default rule?’ (2012) 23 American Review of International Arbitration 113, 128.
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\textsuperscript{102} David Dodwell, ‘Online dispute resolution likely to become a godsend for MSMEs, with Hong Kong at its heart’ (South China Morning Post, 15 September 2017, online ed.), <https://www.scmp.com/business/companies/article/2111302/online-dispute-resolution-likely-become-godsend-smes-hong-kong>.
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resolution for industry contract disputes.\textsuperscript{104} It is one part of ensuring conformity.\textsuperscript{105} There are numerous examples of associations applying arbitration: the most famous are London’s Grain and Feed Trade Association (“GAFTA”) and the Federation of Oils, Seeds and Fats Association’s (“FOFSA”) use of arbitration.\textsuperscript{106} Standardised arbitration clauses are also common in insurance and reinsurance contracts.\textsuperscript{107} Arbitration is preferred by these associations because of its adaptability, speed, cost-efficiency and simplicity.\textsuperscript{108} The arbitral tribunal can be composed of industry experts: commercial people actually involved in the particular trade rather than independent lawyers.\textsuperscript{109} The trade association procedure may also provide for the exclusion of legal practitioners, with the focus on business experience and can cater for string arbitration (based on string contracts, similar to consolidated proceedings).\textsuperscript{110} Trade associations also provide for shorter arbitrations (similar to expedited proceedings) and multi-tier arbitrations, incorporating a right of appeal.\textsuperscript{111} There is a reputational risk if businesses fail to comply with the assigned process or the final award,\textsuperscript{112} in that the trade associations allow for

\textsuperscript{104} J. C. S. Mackie ‘Arbitration and the Commodity Trades’ (1977) 44(1) Arbitration 13–17.


\textsuperscript{110} Swangard and Pickford, above n 106, 39 and 40.

\textsuperscript{111} Swangard and Pickford, above n 106, 35 and 36.

\textsuperscript{112} Jacques Covo, ‘Commodities, Arbitrations and Equitable Considerations’ (ASA Bulletin, vol 10 issue 2, 1992) 133–151, 137.
“defaulter provisions” where market participants can be informed if a member fails to carry out or abide by an arbitral award.113 These trade associations have mastered the uncertainty of dispute resolution for industry participants to ensure stability in trade.

These individual efforts show recognition of the issue but are not in and of themselves necessarily the best solution.114 To truly overcome the deficiencies of the current default regime the response must be on a standardised, global basis.

These fears of international litigation may be overcome by States signing bi or multilateral arbitration treaties (a BAT or MAT, referred to as a BAT for simplicity).115 A BAT could also form part of a free trade agreement, similar to investor-State dispute resolution chapters. This would ensure a uniform and transparent international commercial dispute resolution process in a defined area.116 Where MSMEs have not provided for dispute resolution in their contract, and the default applies, this treaty would state that commercial arbitration is to be the applicable form of dispute resolution for businesses in the signatory States, instead of national courts. A BAT could clarify the rules and reduce the power imbalance in default international commercial dispute resolution. It would provide some much-needed certainty and clarity for contracting parties. International litigation raises procedural and jurisdictional issues, perhaps through parallel proceedings, adding to the costs that parties face. Arbitration does not face the same jurisdictional hurdles. Instead, arbitration will ensure small businesses trading internationally can still have access to justice.117

113 Swangard and Pickford, above n 106, 43.
114 Although it may be best for trade associations with longstanding standard dispute resolution clauses to continue with their own approach, as discussed further below.
115 (Draft) Model Bilateral Arbitration Treaty 2012; and Jack Graves ‘ICA and the Writing Requirement: Following Modern Trends towards Liberalization or Are We Stuck in 1958?’ (2009) 3 Belgrade L. Rev. 36 where he first proposed arbitration as a default in a convention for international commercial disputes; and Graves, above n 101.
116 Gary Born ‘BITs, BATS and Buts’ (paper presented to Kiev Arbitration Days, Kiev, 15 November 2012), 7.
117 For a discussion of the advantages and potential counter-arguments, see Born, above n 117, 12. For a discussion of the argument that a BAT would violate Article 6 of the European Convention on Human Rights compare Butler and Herbert, above n 19, 195 et seq. (discussing in the context of the New Zealand Bill of Rights Act 1990, s 27).
This would not be the first time that efforts have been made to make international commercial dispute resolution accessible for all parties.\textsuperscript{118} For example, the NYC has greatly contributed to making arbitration a preferred method of international dispute resolution.\textsuperscript{119} What these previous developments rely on, however, is the presumption that businesses include dispute resolution clauses in their contracts. We know that this is not necessarily the case. The parties may not even have a written agreement. Accordingly, international litigation still applies as a default. A BAT is an ‘innovative way of mitigating these deficiencies and the unique risks of international trade and investment’.\textsuperscript{120} A BAT would change the default from international litigation to arbitration for international business to business (commercial) disputes. The idea is that it would ‘provide a more expert, efficient, and enforceable means of dispute resolution’.\textsuperscript{121}

A BAT would increase access to justice for all businesses trading internationally and hopefully play a part in facilitating more international trade.\textsuperscript{122} This is not a new concept and has generated considerable interest from States, and legal and business communities.\textsuperscript{123}

The benefits of arbitration are well-traversed in many places. Once more, it is not the purpose of this chapter to repeat these. However, it is important to note that the core benefits for smaller businesses of having access to arbitration as a default will be the certainty it provides, the reduced costs compared to extensive litigation (in multiple courts) and guaranteed independence and expertise of the decision-makers. The NYC would still apply such that arbitral awards could be reviewable on due process or public

\textsuperscript{118} For, example the CISG; United Nations Convention on Contracts for the International Sale of Goods [1995] NZTS 22 (signed 11 April 1980, entered into force 1 January 1988). It is not the first example of a law to arbitrate international commercial disputes – Guatemala enacted law making it compulsory to arbitrate cross-border disputes but it was struck down by the Constitutional Court because it took the choice from parties away (there was no opt out option). See Luis Bermejo ‘Mandatory ICC Provision in Guatemala’s Arbitration Law is Declared Unconstitutional by the Constitutional Court of Guatemala’ (2011) 14(5) International Arbitration Law Review.


\textsuperscript{120} Born and Butler, above n 37, [10].

\textsuperscript{121} Born and Butler, above n 37, [12].

\textsuperscript{122} Born and Butler, above n 37, [2].

\textsuperscript{123} Born and Butler, above n 37, [2].
policy concerns, so to say that there would be no right of appeal is inaccurate.\(^{124}\) The NYC serves to prevent frivolous appeals. BATs capitalise on the advantages of commercial arbitration, namely: ‘neutrality, efficiency, expertise, finality, and enforceability’\(^\text{125}\). The asymmetry between MSMEs and large businesses, where large businesses are able to negotiate dispute resolution clauses and pay to resolve a dispute, would be tipped towards balance.

Party autonomy is not overcome by a BAT. Parties can opt out. This could take the form of a different dispute resolution choice, prescribing a different arbitration procedure or agreeing that the BAT would not apply. Trade associations may have specific requirements that could not be accounted for in a single integrated system like a BAT (for example, requiring arbitrators with experience in the particular industry).\(^{126}\) Therefore, these associations could also opt out of arbitration, and sectors with their own pre-existing regimes (as described above) may be better served in that way.

To clarify, a BAT would prescribe the procedural rules for the arbitration. It would state the disputes that it covers, for example disputes that states want oversight over could be excluded.\(^{127}\) It would strictly apply to commercial disputes between businesses trading cross-border.\(^{128}\) States could agree that the agreement only applies to disputes over a certain value.\(^{129}\) A BAT would further state the rules according to which the arbitration is to be conducted, the number of arbitrators and the appointing mechanism. As an example, Gary Born suggests the UNCITRAL Rules of Arbitration and the Permanent Court of Arbitration as the appointing authority.\(^{130}\) States could adapt these to suit their needs and ensure neutrality and efficiency. Should a party try to ignore the stipulations of the BAT and seek recourse before the courts, the courts in both States would decline jurisdiction,

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\(^{124}\) Graves, above n 101, 133.

\(^{125}\) 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (Queen Mary University, 2015), 5; Born and Butler, above n 37, [19].

\(^{126}\) Mackie, above n 109, 92.

\(^{127}\) For example, competition and employment matters.

\(^{128}\) See Draft BAT, art 1.

\(^{129}\) Born, above n 116, 5.

\(^{130}\) Draft BAT, art 4(1)(a) and Draft BAT, art 4(1)(b).
By prescribing the default, a BAT means parties avoid the costs in trying to familiarise themselves with litigation in multiple countries. MSMEs would not need to dedicate resources to negotiating a dispute resolution clause in their agreements. Selecting a set of neutral rules overcomes the concerns about bias. Further, parties would not need to hire foreign counsel. Businesses can trust the process and, accordingly, the outcome.

Coincidentally, a BAT may also relieve over-burdened national courts. To conclude, ‘[a] BAT would – by directing the resolution of disputes to arbitration – serve to give [MSMEs] greater access to justice in the international space than is available under the status quo’. A further option to consider is a time delay clause in the BAT, such that arbitration may only be pursued after a period of time in which the parties, in good faith, have attempted negotiation to resolve the dispute.

Arbitration and the BAT are not perfect. There are concerns about whether commercial parties can be said to have consented to the arbitration. However, if States have ensured businesses have access to the information, then by not opting out parties can be said to have consented. Arbitration can still be costly and time-consuming but this can be mitigated by excluding lower value disputes and allowing for expedited proceedings. While the Brussels I Regulation ensures that parties in the European Union have access to


133 Graves, above n 101, 135.

134 Butler and Herbert, above n 19, 189.

135 See Draft BAT, art 2(a), which contains a requirement to negotiate in good faith. This is in line with the emphasis by MSMEs on negotiation that was found in the New Zealand and Singapore studies.


137 Graves, above n 101, 130–131; and Emanuel, above n 136.
justice and can enforce judgments,\textsuperscript{138} this does not solve the problems with different national courts.\textsuperscript{139} There is still room for a BAT or MAT in the European Union.

Contrary to the argument we have put forward above, one could argue that BATs deny access to justice. This right is often treated as synonymous with the right to access a court—to have your day in court. However, there is a difference between access to courts and access to justice.\textsuperscript{140} As we have demonstrated, they are not the same. For international commercial dispute resolution, a BAT provides better access to effective justice than international litigation.\textsuperscript{141} In \textit{Bellet v France}, the European Court of Human Rights stated that ‘For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights’.\textsuperscript{142} The shortcomings of international litigation, as previously espoused, means that it is not providing access to justice for commercial parties, particularly MSMEs. A BAT, providing for neutral, efficient and expert arbitration, could provide access to effective justice.\textsuperscript{143}

A final concern could in itself be the fear of the unknown.\textsuperscript{144} However, the research cited above shows that this fear exists regardless of the applicable default regime. If States sign BATs and change the default we would expect to see information produced for businesses to access and understand their legal rights. This concern is easily overcome and should not hinder progress.

A BAT could provide effective access to justice for MSMEs in international commercial disputes. This could encourage more MSMEs to engage in cross-border trade: a BAT ‘would illustrate a commitment on the part of [the nations to a BAT] to international trade, and to the fair and effective resolution of disputes’.\textsuperscript{145} International commercial

\textsuperscript{138} Born, above n 116, 13.
\textsuperscript{139} See Part C. and D. above.
\textsuperscript{140} Born and Butler, above n 37, [57].
\textsuperscript{141} See Butler and Herbert, above n 19, 195 \textit{et seq.} for an analysis of New Zealand law.
\textsuperscript{142} ECtHR, \textit{Bellet v France}, Application no. 23805/94, 4 December 1995, at para. 36; see also \textit{Äärelä and Näkkäläjärvi v Finland} (24 Oct 2001) CommNo 779/1997 (Human Rights Committee) in regards to Article 2 of the ICCPR.
\textsuperscript{143} Born and Butler, above n 37, [58].
\textsuperscript{144} Born, above n 116, 13
\textsuperscript{145} Butler and Herbert, above n 19, 206; citing Wenliang Zhang ‘Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the “Due Service Requirement” and the
arbiration may not be perfect but it is better than international litigation as a default for resolving international business to business disputes.  

G. Conclusion

Policy makers should turn their minds to the importance of dispute resolution as a pillar of the information barrier to international trade. People, particularly MSMEs, do not know what their rights are or what is available to them and the importance of relationships means that it is often not considered. Justice that is only available for a select few (large companies) does not embody access to justice. To encourage MSMEs to engage in international trade requires certainty. Part of this certainty is knowing what will happen if a serious dispute occurs. The current system represents uncertainty with a fragmented approach. A united approach, perhaps in the form of a BAT or MAT, may reduce the uncertainty that businesses face in international commercial dispute resolution. It would provide confidence in the international commercial system and thereby encourage international trade, rather than hinder it. It will also be interesting to watch the developments with online dispute resolution and the proliferation international commercial courts across jurisdictions, as well as whether there is further uptake of the Choice of Court Convention.

The quantitative and qualitative research referred to in this chapter shows that MSMEs do not know about the rights and options available to them in international commercial dispute resolution and courts are not the best method to provide justice. The resource constraints that MSMEs face hurt them in understanding their options and in resolving disputes. However, this research also shows that MSMEs have found ways to mitigate their risk when it comes to disputes. A safeguard, a default mechanism, would nonetheless help them and provide more certainty—without the need to add to negotiation costs at the start of a new business relationship. The research in New Zealand and Singapore shows that businesses do not often think of the implications of a dispute if they have not already turned their mind to it. It is not a problem at the forefront of their business plan. This may suggest that there is no need for a change. However, this simply


146 Born, above n 116, 8.

shows that there is a lack of knowledge, exacerbated by resource constraints. A BAT with a supportive government could overcome this hurdle.

Default international commercial litigation does not provide access to effective justice. A BAT is a possible solution.\textsuperscript{148} A BAT would reduce the fear of the unknown and support the contribution of MSMEs to trade and economic growth.

\textsuperscript{148} Born and Butler, above n 37, [65].