International arbitration: Current choices and future adaptations

International arbitration together with ADR: The winning formula

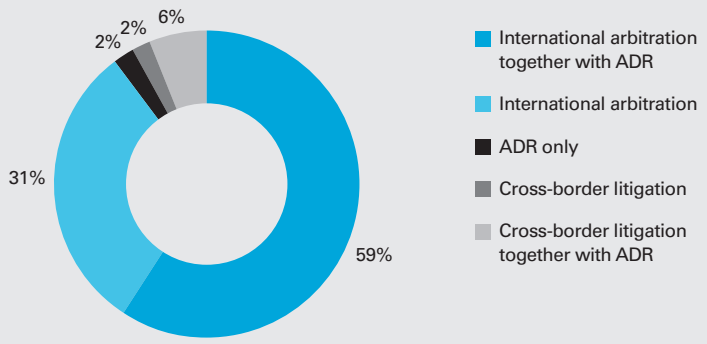
We asked respondents what their preferred method of resolving cross-border disputes would be post COVID-19. Respondents were asked to choose one of five options: 'international arbitration together with ADR', 'cross-border litigation together with ADR', 'international arbitration' as a standalone option, 'ADR only', and 'cross-border litigation' as a standalone option. We clarified that ADR would include, for example, adjudication, dispute boards, expert determination, mediation and negotiation, but exclude litigation and arbitration.

In previous surveys by Queen Mary University of London, arbitration, as either a standalone option or in conjunction with ADR, was consistently selected as the preferred dispute resolution mechanism for cross-border disputes.[1] This preference was confirmed again in this survey. In particular, an overwhelming majority of the respondent group (90%) showed a clear preference for arbitration as their preferred method of resolving cross-border disputes, either as a standalone method (31%) or in conjunction with ADR (59%). Only an aggregate of 4% is equally split between 'ADR only' and 'cross-border litigation' as standalone options, while 6% indicated a preference for 'cross-border litigation together with ADR'.

This year's findings once again reveal a noticeable increase over recent years in the overall popularity of arbitration used in conjunction with ADR: 59% of respondents expressed their preference for this combination, as opposed to 49% in 2018 and only 34% in 2015.[2]

These results reflect an ongoing trend, as confirmed in interviews. Although the question expressly referred to the post-COVID-19 landscape, interviewees explained that their answers were not influenced by the pandemic. The factors that influenced their choices remained largely the same. This is why they expected to continue to use the same dispute resolution options as they were using pre-pandemic. As an immediate

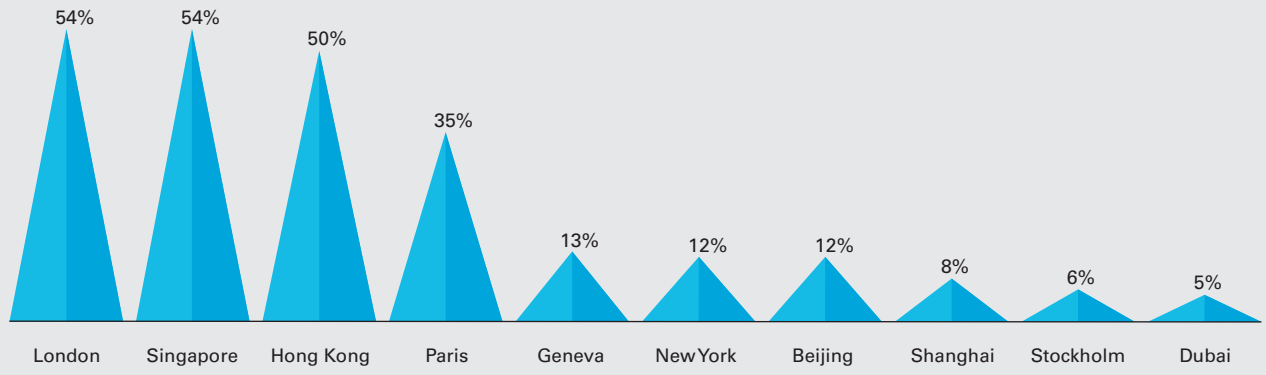
Chart 1: Post-COVID-19, what would be your preferred method of resolving cross-border disputes?



Summary

- International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, either on a stand-alone basis (31%) or in conjunction with ADR (59%).
- The five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva.
- 'Greater support for arbitration by local courts and judiciary', 'increased neutrality and impartiality of the local legal system' and 'better track record in enforcing agreements to arbitrate and arbitral awards' are the key adaptations that would make other arbitral seats more attractive.
- The UNCITRAL Arbitration Rules are the most popular regime for ad hoc arbitration.
- The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC.
- Respondents chose 'administrative/logistical support for virtual hearings' as their top choice adaptation that would make other sets of arbitration rules or arbitral institutions more attractive, followed by 'commitment to a more diverse pool of arbitrators'.
- Arbitration users would be most willing to do without 'unlimited length of written submissions', 'oral hearings on procedural issues' and 'document production', if this would make their arbitrations cheaper or faster.

Chart 2: What are your or your organisation's most preferred seats?

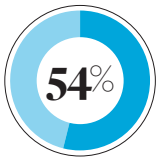


Percentage of respondents who included the seat in their answer

consequence of the pandemic, respondents referred to an initial feeling of being 'numb'—effectively, a 'procedural paralysis'. Only a few private practitioners observed that their clients were now exploring settlements more willingly than previously.

Generally, interviewees noted that recourse to ADR was in the hope that a swifter and more cost-efficient resolution could be found before resorting to arbitration. In many cases, there is a contractual mandate to use ADR, typically through multi-tiered escalation clauses. Even when there is no contractual requirement to do so, interviewees confirmed a willingness to explore suitable alternatives to resolve disputes. This explains opting for 'arbitration together with ADR' for the purposes of this question as opposed to arbitration as a stand-alone option.

In addition, in certain types of disputes, there are established practices of recourse to other means of dispute resolution; for instance, interviewees with experience in disputes in the construction industry reported positively on the use of disputes boards in that sector. They explained that dispute adjudication and dispute review boards are commonly used in construction projects. In some cases, the contract provides for dispute boards in the form of standing bodies assigned to monitor the projects. Several interviewees noted that, in many instances, they have found dispute boards to be a good, efficient and often cheaper dispute resolution option that helped their clients avoid lengthy and time-consuming arbitrations. Standing dispute boards were also reported to be a useful means of dispute prevention. However, the main concern noted was that the decisions of dispute boards are not generally enforceable. This means that if a decision is not mutually accepted, the parties 'will be back to square one', facing potentially duplicative and costly arbitration proceedings for the same dispute.



London and, for the first time, Singapore, were the **most preferred seats** with scores of 54%

Which seats are most preferred?

Choice of arbitral seat is a key issue for users of international arbitration. We sought to identify the seats that are most preferred by respondents or their organisations, allowing them to list up to five seats in free-text boxes. Reflecting the global nature of international arbitration, respondents cited more than 90 different seats from a range of jurisdictions around the world.

Notwithstanding the number of choices available to international arbitration users, the top-five preferred seats should not come as a surprise when looking at the results from our previous surveys.[3] There has, however, been interesting movement within the top-five rankings. While London once again stands at the top of the charts, for the first time it shares this position with Singapore—each was included in the top-five picks of 54% of the respondents. The rise in popularity of key Asian arbitral hubs demonstrated by Singapore's success is mirrored by Hong Kong, which takes third place (50%). Paris comes in fourth (chosen by 35% of respondents) followed by Geneva in fifth place (13% of respondents).[4]

Reviewing the findings of our 2015, 2018 and current surveys, it seems that these cities have cemented a dominant position as seats of choice. This is perhaps to be expected given that each of them has a longstanding and recognised reputation as a 'safe seat' for international arbitration.[5] Indeed, based on the previous surveys, it was expected that they would continue to be popular. This has been borne out in these latest findings.

London's continued presence at the top of the table suggests that, as was predicted by the majority of the respondents in our 2018 survey,[6] its popularity as a seat has not been significantly impacted (at least so far) by the UK's withdrawal from the European Union. London retains its reputation amongst users as a reliable seat of choice.

What is more striking, however, is the significant percentage gains made by Singapore (54%) and Hong Kong (50%), as compared to our previous surveys. Singapore was the third most frequently chosen seat in 2018, selected by 39% of respondents, and it came in fourth in 2015, chosen by 19% of respondents. Hong Kong took fourth place in 2018, chosen

by 28% of respondents, and it was third in 2015, as a seat of choice for 22% of respondents. Interviewees confirmed that these seats are considered safe, obvious choices of established quality. Interestingly, some interviewees mentioned the presence of well-established arbitration institutions, such as SIAC in Singapore, as an additional factor they consider when choosing the seat.[7] The growth in popularity of seats in this region year-on-year[8] may reflect an increasing willingness by parties with commercial interests linked to that locale to also resolve disputes 'locally'. It will be interesting to see whether large-scale commercial projects, such as the Belt and Road Initiative, will continue to impact this in the future.

The increases enjoyed by these seats may also correlate with a relative reduction in the percentage of respondents who included traditionally dominant European seats, such as London, Paris and Geneva, in their answers. London was selected by 64% of respondents in 2018, making it the most selected that year, but it dropped to 54% in this edition of the survey. Paris fell even further, from its second place showing in 2018, with 53% of respondents including it in their selections, to fourth place this year, as a seat of choice for 35% of respondents. Geneva also retained its position in previous surveys as the fifth most popular seat, but with a dip in the percentage of respondents who included it in their answers—from 26% in 2018 to 13% now.

Similarly, while the other seats rounding out the top seven in both 2015 and 2018 continue to be seen as safe choices by respondents—namely, New York and Stockholm—seats in other regions have gained in popularity. Beijing joins New York as joint sixth most popular seat, with each chosen by 12% of respondents. Shanghai comes in eighth (8%), with Stockholm dropping from the seventh place it held in previous surveys to ninth place (6%). The top ten is rounded out by Dubai, chosen by 5% of respondents.

Other cities that were each listed by 4% to 2% of respondents included: Zurich; Vienna; Washington, DC; Miami; Shenzhen; São Paolo; Frankfurt; and The Hague.

The regional picture

We analysed the results for respondents practising or operating in various regions,[9] which revealed a number of fluctuations. London, for example, topped the charts for all regions in our 2018 survey; although it continues to enjoy first place for most regions this time, it was not selected as the most preferred seat for respondents in Asia-Pacific and did not feature at all in the top picks for the Caribbean/Latin America. In Asia-Pacific, both Singapore and Hong Kong surpassed London by a significant margin (more than 20%).

> **While the 'global powerhouse' seats continue to be popular, there are many regional seats which are growing in reputation and popularity**

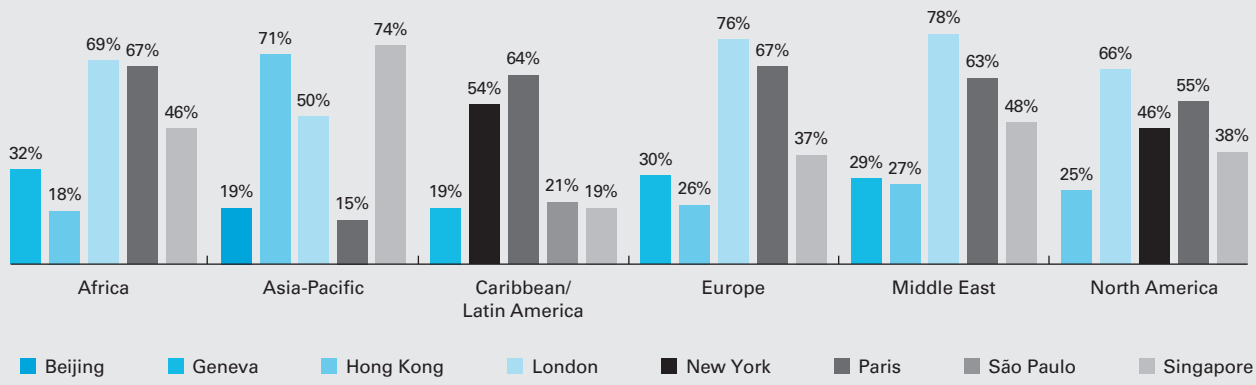
Hong Kong, Paris and Singapore were amongst the top-five preferred seats **in all regions**

Hong Kong, Paris and Singapore were all ranked in the top-five most preferred seats in all regions.

A number of other popular seats reached the top five in several regional subgroups; for example, Geneva was the fourth most preferred seat in Europe, Africa and the Middle East, and fifth in the Caribbean/Latin America.

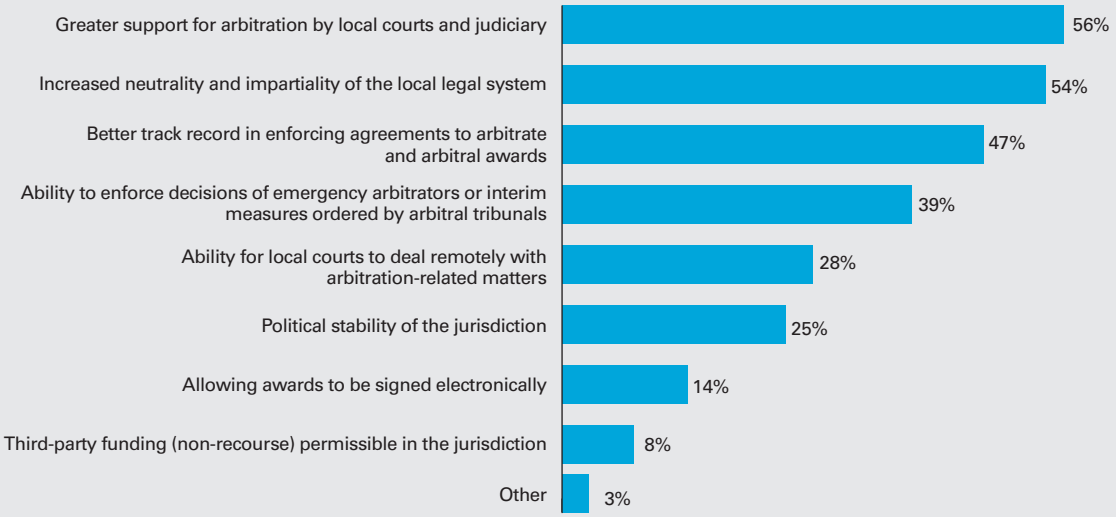
Several seats outside the global top ten did make it to the top ten in the regions in which they are located. In Africa, this was the case with Cairo (12%) and Nairobi (6%); in Asia-Pacific, Shenzhen (4%); in the Caribbean/Latin America, São Paolo (21%), Miami (15%) and Lima (6%). Madrid (5%) also made the top ten for the Caribbean/Latin America. Although it seems that the 'global powerhouse' seats will continue to be popular, there are many regional seats which are growing in reputation and popularity.

Chart 3: Top-five most preferred seats by region



Percentage of respondents who included the seat in their answer

Chart 4: What adaptations would make other seats more attractive to users?



Respondents were able to select up to three options

What adaptations would make other seats more attractive?
More than 90 different seats were mentioned in response to the previous question on seat preference. This shows that although the most popular seats enjoyed the lion's share of the votes, there is still significant scope for seats outside the top ranks to attract users. We asked respondents to indicate what adaptations would make seats more attractive other than those they say they preferred. Respondents could choose up to three options from a list of suggestions, with a free-text 'other' option.

'Greater support for arbitration by local courts and judiciary' was the most selected adaptation (56%), closely followed by 'increased neutrality and impartiality of the local legal system' (54%) and 'better track record in enforcing agreements to arbitrate and arbitral awards' (47%). The other choices ranked as follows: 'ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitral tribunals' (39%), 'ability for local courts to deal remotely with arbitration-related matters' (28%), 'allowing awards to be signed electronically' (14%), 'political stability of the jurisdiction' (9%) and 'third-party funding (non-recourse) permissible in the jurisdiction' (8%).

These adaptations reflect what were already identified as the systemic legal traits of a seat considered to be most important to users.[10] This follows a well-trodden path of reasons identified by the respondents in our 2018 survey as the most important when choosing arbitral seats.[11] These criteria are seen as long-term markers of quality that determine user preference. They include unhindered access to arbitration promoted by local courts, neutrality and impartiality of the local judiciary, and an enforcement track record.

90+

More than 90 **different seats** were mentioned in response to the question on seat preference

Once those features are identified in given seats, there may be other factors taken into account by respondents which influence their choice of one seat over another. In particular, there seems to be a growing wish for seats to also have the judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness (for example, local courts being able to deal remotely with arbitration-related matters). The latter, coupled with the possibility of awards being signed electronically, are issues that were given relatively little attention pre-pandemic. Presumably, in light of recent experience, users are placing more importance on them now.

There is a growing wish for seats to also have the judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness

Which ad hoc procedural rules are most used?

We asked respondents which ad hoc procedural regimes they had used most frequently in the past five years. We included a list of choices and a free-text box choice ('other'), allowing respondents to select up to three options. Pre-set choices included: 'bespoke regimes agreed by the parties', 'CPR Non-Administered Arbitration Rules', 'Grain and Feed Trade Association Arbitration Rules',[12] 'London Maritime Arbitrators' Association (LMAA) Terms', 'national arbitration laws', 'The Construction Industry Model Arbitration Rules', and 'UNCITRAL Arbitration Rules'.

The UNCITRAL Arbitration Rules, chosen by three-quarters (76%) of respondents, were a clear winner. They were followed by 'national arbitration laws' (28%), 'bespoke regimes agreed by the parties' (26%) and the LMAA Terms (13%). Several interviewees credited the success of the UNCITRAL Arbitration Rules to these rules being carefully designed and widely tested. Others remarked on their prevalence and level of global recognition. This may be because the UNCITRAL Arbitration Rules are used across all sectors in both commercial and investment treaty arbitration.

> **Interviewees valued the procedural flexibility offered by ad hoc arbitration, which they felt enhanced party autonomy compared to institutional arbitration**

76%

The **UNCITRAL Arbitration Rules** were amongst the most frequently used **ad hoc regimes** by 76% of respondents

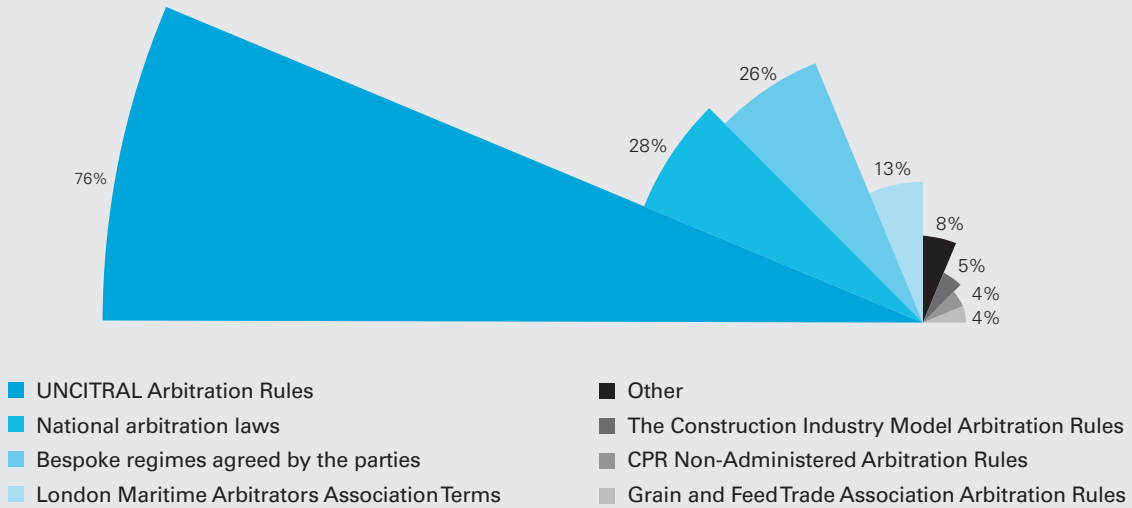
Interviewees valued the procedural flexibility offered by ad hoc arbitration, which they felt enhanced party autonomy compared to institutional arbitration. This emphasis on party autonomy throughout the arbitral process was a recurring theme in interviews. A number of interviewees also highlighted the popularity of ad hoc arbitration for resolving disputes in sectors such as the maritime industry and commodity markets. As one interviewee specialising in maritime disputes explained, parties want 'a dispute resolution mechanism that was developed by their sector, for their sector, and conducted by practitioners from their sector'.

Which arbitral institutions are most preferred?

We asked respondents to indicate their preferred arbitral institutions, allowing them to specify a maximum of five different entries (in free-text form). This generated a list of more than 50 institutions across the globe—a strong indication that while certain institutions are chosen time and again, users also appreciate a wide degree of choice.

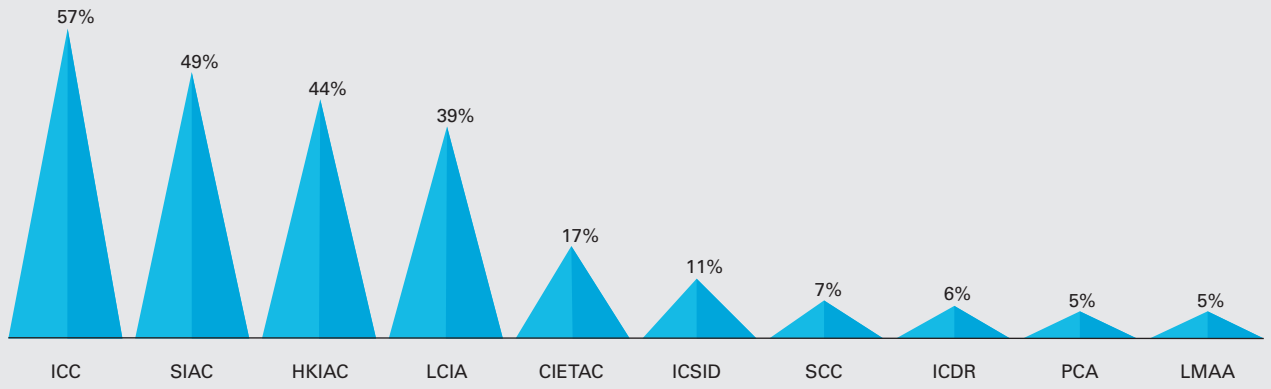
Of all the nominations, the ICC stands out as the most preferred institution (57%), followed by SIAC (49%), HKIAC (44%) and the LCIA (39%). These top-four choices have been the market leaders for well over a decade.[13] This year, CIETAC (17%) also made it to the top-five most preferred choices for the first time. The other institutions in the

Chart 5: If you or your organisation have selected ad hoc arbitration over the past five years, which of the following procedural regimes were used the most?



Respondents were able to select up to three options

Chart 6: What are your or your organisation's most preferred arbitral institutions?



Percentage of respondents who included the institution in their answer

global top ten were: ICSID (11%), SCC (7%), ICDR (6%), PCA (5%) and LMAA[14] (5%).

Our 2015 and 2018 surveys highlighted a noticeable growth in the percentage of respondents selecting SIAC.[15] This trend was clearly confirmed in this survey, with SIAC taking second place overall. There was also a significant increase in the percentage of respondents selecting HKIAC, which took third place.[16]

The increases enjoyed by SIAC and HKIAC may correlate with a relative reduction in the percentages of the LCIA and the ICC. The LCIA, although it remains amongst the most popular institutions, dropped to fourth place from second place in 2018. The ICC's overall percentage dropped considerably from 77% in 2018 to 57% today.

Interviews confirmed the principal drivers behind choice of institution include the general reputation of the institution and the respondent's previous experience of that institution.[17] However, interviewees revealed that in particular circumstances they would widen the list of institutions they might consider. For example, depending on the potential value of a given dispute, practitioners reported that they would be willing to consider less well-known institutions offering competitive fees. The depth and breadth of the pool of arbitrators that might be recommended by an institution was also a factor highlighted by interviewees, as discussed further at pp.11 – 12 below. Some interviewees also mentioned that their perception of the quality and consistency of institutional staff and counsel teams can influence their opinion when considering institutions. While none of these considerations in and of themselves displace the general factors of reputation and recognition of an institution, they suggest that there are multiple distinguishing features which influence the choice of one institution over another.

50+

More than 50 **arbitral institutions** across the globe were mentioned by respondents

The regional response

An analysis of the subgroups based on the regions where respondents principally practise or operate revealed that the top-three preferred institutions globally also rank highly across most of these regions. The ICC ranks first in all regions except for Asia-Pacific, where it is outranked by the SIAC, which in its turn is also ranked among the first-five choices in all regions. The LCIA ranks second in all regions except for Asia-Pacific.

More regionally based variations can be noticed outside the top-five ranks. ICSID and the PCA both enjoyed a consistent showing, appearing in the top-ten rankings of all subgroups. Several other institutions made it to the top ten either in all subgroups (e.g., the SCC) or in almost all subgroups (e.g., the LMAA[18]). There were also a number of institutions that did not make the top-ten list globally, but that were ranked amongst the top-ten most preferred institutions in the regions in which they were based. These include, for example, VIAC and DIS in Europe, JAMS and the AAA/ICDR in North America, DIAC in the Middle East and the Lagos Court of Arbitration in Africa.[19]

The general reputation of the institution and the respondent's previous experience of that institution are the principal drivers behind choice of arbitral institution

Administrative/logistical support for virtual hearings is the most important adaptation that would make other arbitral institutions more attractive

What adaptations would make other institutions or arbitral rules more attractive to users?
We asked respondents to indicate what adaptations would make other arbitral institutions or sets of arbitration rules more attractive. A list of indicative choices was offered, together with a free-text 'other' option, from which respondents could choose up to three options. Some of the suggested adaptations related to provisions in arbitral rules (whether used in administered or non-administered arbitrations). Other suggested adaptations concerned the service offered by arbitral institutions and appointing or administering authorities.

Noticeably, but perhaps unsurprisingly given the pandemic, the top-ranked choice (38%) was 'administrative/logistical support for virtual hearings'. It was followed by 'commitment to a more diverse pool of arbitrators' (32%) and 'transparency of administrative processes and decisions, such as selection of and challenges to arbitrators' (29%). Other options chosen by 25% to 20% of respondents included: 'provision of expedited procedures', 'more tailored procedures for complex and multi-party arbitrations', 'provision for arbitrators to order both virtual and in-person hearings', 'cost sanctions for delay by arbitrators', 'rules giving extensive case management powers to arbitrators including robust sanctions in relation to the behaviour of parties and counsel', and 'provision of secure electronic filing and document-sharing platforms'.

In our 2018 survey, when we asked respondents to indicate the four most important reasons why they prefer given institutions, the results showcased a tendency for users to adopt a 'macro-perspective'.

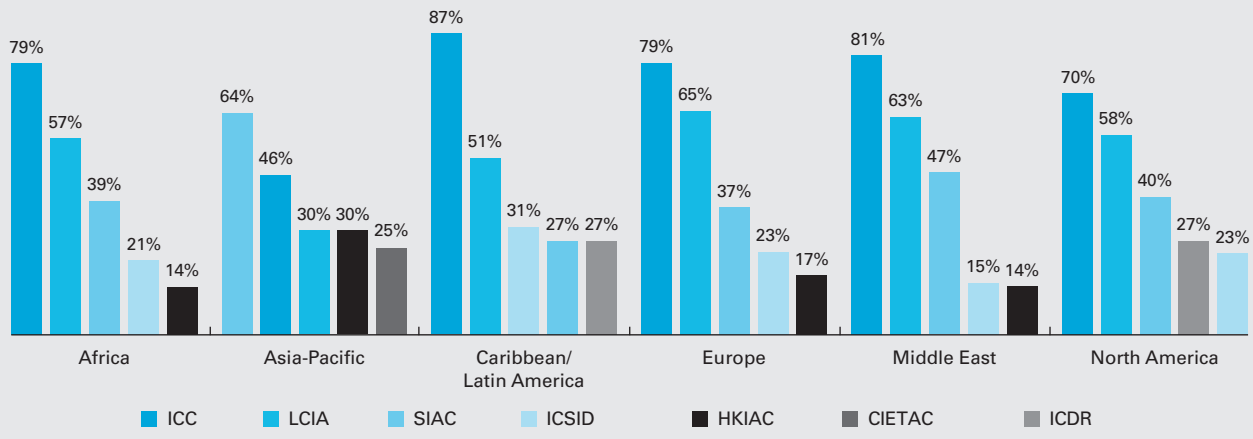
38%
of in-house counsel would like **administrative/ logistical support for virtual hearings**

This macro-perspective reflects the main factors that respondents to our 2018 survey identified as the ones that most determine their preference for one institution over another, namely the 'general reputation and recognition' of the institution, its 'high level of administration' and users' 'previous experience of the institution'.[20] These factors were more important to users than specific aspects of either the administration of cases by the institutions or their respective rules. The first choice for our current survey ('administrative/logistical support for virtual hearings') is clearly an indication of an emerging need of users due to the pandemic. The need for adaptation in response to changing circumstances is further underlined by the fact that there was also a demand for rules to include a 'provision for arbitrators to order both virtual and in-person hearings' (23%).[21]

'Commitment to a more diverse pool of arbitrators' (32%) ranked second across the whole respondent pool, but was the joint highest ranked choice of the in-house counsel subgroup. This shows the importance of institutions or appointing authorities in providing a more diverse pool of proficient arbitrators.[22]

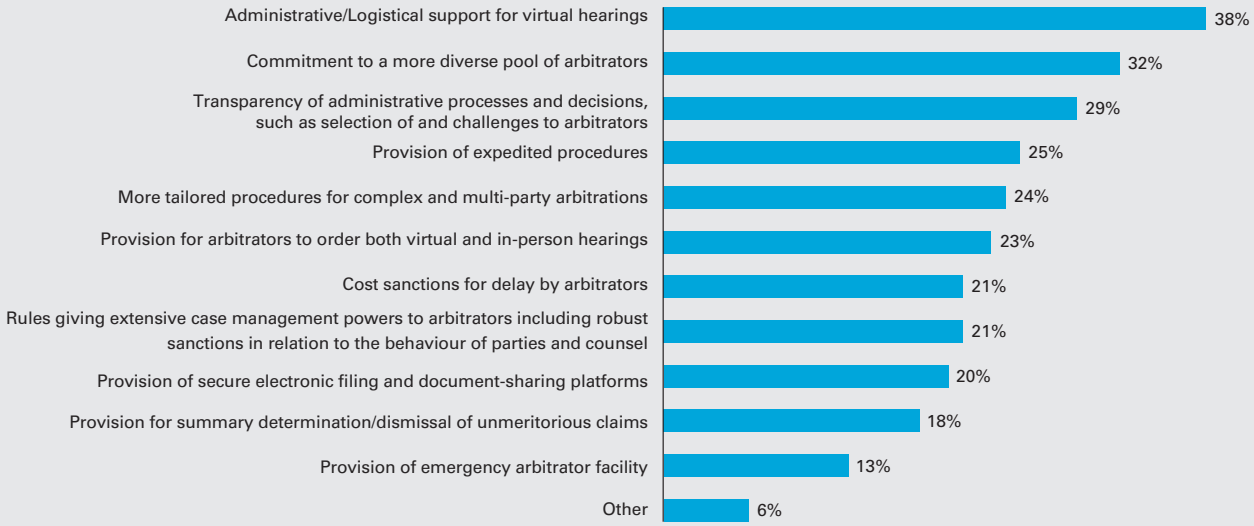
Interestingly, several interviewees highlighted that, depending on the nature and the value of the dispute, they might be

Chart 7: Top-five most preferred arbitral institutions by region



Percentage of respondents who included the institution in their answer

Chart 8: What adaptations would make other institutions or rules more attractive to users?



Respondents were able to select up to three options

willing to use less widely known institutions (such as institutions based in jurisdictions that are emerging as arbitration hubs) or even new entrants to the market. They explained that trusting in such institutions can be an effective means of encouraging greater diversity, particularly when those institutions may be in a position to suggest a different pool of arbitrators. This could include arbitrators who may not as yet enjoy high visibility globally, but who have particular experience of a region, applicable law or industry relevant for a given dispute.

'Cost sanctions for delay by arbitrators' and 'rules giving extensive case management powers to arbitrators including robust sanctions in relation to the behaviour of parties and counsel' were each selected by 21% of respondents and reflect, as expanded on in interviews, the desire for faster arbitration proceedings and more flexibility. In relation to the ability of arbitrators to sanction parties and their counsel, several respondents felt that arbitrators are still overly cautious when it comes to 'due process paranoia'.[23] As one interviewee stressed, this 'timid' approach leaves clients with a negative perception of arbitration. Others

32%

of in-house counsel want commitment by institutions to a **more diverse pool of arbitrators**

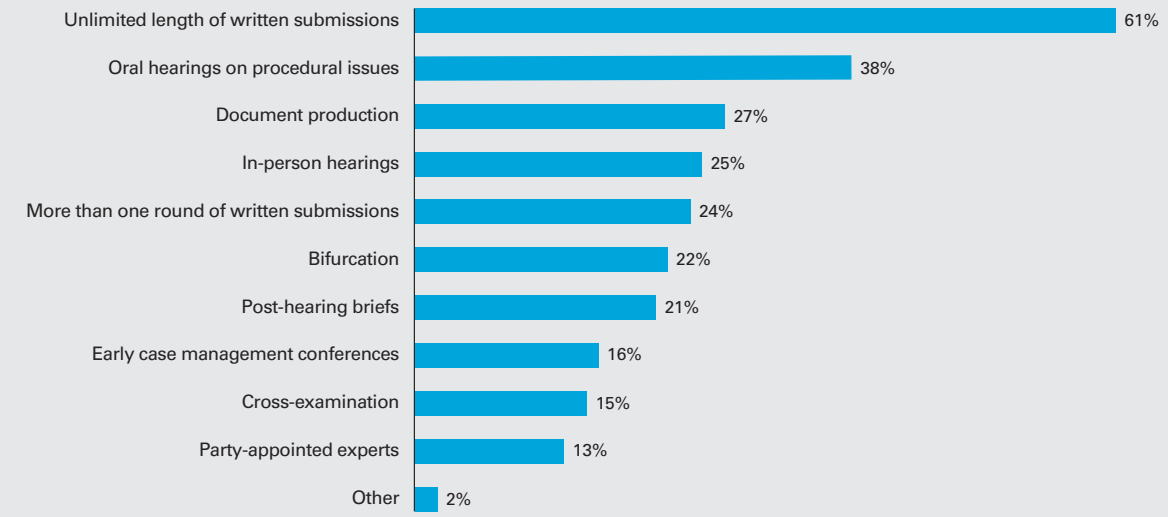
referred to instances of arbitrators failing to adequately address 'guerrilla tactics' by opposing counsel and parties. It appears from this that the real concern is not so much a lack of powers provided for in arbitral rules, but a perceived reluctance by arbitrators to exercise those powers.[24] On a related note, one interviewee emphasised the role that institutions can play in improving the quality of arbitrator performance, especially in terms of procedural delay. This can be achieved, the respondent opined, by more transparency as to arbitrators' availability and making available data such as the average time taken to render awards.

Other interesting questions concerned the nature and extent of the services that respondents would like administering entities and institutions to offer. On one hand, respondents have called for more active support in the practical conduct of arbitrations, such as 'administrative/logistical support for virtual hearings' and 'provision of secure electronic filing and document sharing platforms'. On the other hand, several interviewees, many of whom practise as full-time arbitrators, expressed their dissatisfaction with the way in which, in their view, some arbitral

The use of less widely known institutions or even new entrants to the market can be an effective means of encouraging greater diversity, particularly when those institutions can suggest a different pool of arbitrators

institutions have become 'too prescriptive'. Interviewees cited by way of example instances where they considered arbitral institutions to have adopted strong views on matters that are not clearly regulated under their rules, an approach which these respondents considered to be counterproductive to the flexibility of the arbitral proceedings.

Chart 9: If you were a party or counsel, which of the following procedural options would you be willing to do without if this would make your arbitration cheaper or faster?



Respondents were able to select up to three options

Making arbitrations cheaper and faster: Which procedural options are we really ready to forgo?

Time and cost are perennially acknowledged as the biggest concerns for arbitration users.[25] We asked respondents to assume the role of a party or counsel and consider, in that context, which of a list of different procedural options they would be willing to forgo if this would make their arbitration cheaper or faster. Respondents could select up to three options from the list, in no order of preference.

With a clear margin of more than 20% over other options, the first choice was 'unlimited length of written submissions' (61%). Interviewees agreed that this was the option that they would feel most comfortable foregoing, as they saw it as a 'safe' choice regardless of the type or profile of the dispute at stake. Interviewees further explained that, in their experience, it has become common practice for parties to submit unnecessarily long briefs. Imposition of page limits was thought most appropriate for certain types of submissions, predominantly post-hearing briefs (as discussed further below). Interestingly, some interviewees felt it is not only the parties who should curb their tendencies in this regard, suggesting that page limits should also be set for arbitral awards, particularly in the context of investor-state disputes.

In a related vein, 21% of the respondents would be willing to do without 'post-hearing briefs'. Interviewees revealed a more nuanced view of post-hearing briefs: some explained that they do find post-hearing briefs useful, especially when an oral closing has not taken place during a hearing, but that they work best where the tribunal provides some guidance as to content and imposes page limits. Indeed, imposing page limits on post-hearing briefs was almost unanimously deemed by interviewees as a means to save time and costs. As several respondents noted, counsel should resist the temptation to restate their entire case again when preparing their post-hearing briefs. It was suggested that post-hearing briefs should not simply function as an executive summary of the party's previous submissions, but should instead contain reflections on what has come out of a hearing and offer a roadmap to the tribunal for writing the award. On a similar theme of streamlining written arguments, respondents also indicated a willingness to relinquish 'more than one round of written submissions' (24%).

60% of arbitrators and **51%** of in-house counsel favour **limiting the length of written submissions**

31% of in-house counsel are willing to exclude **document production**

'Oral hearings on procedural issues' (38%) was the second most popular option that respondents would be willing to forgo. Respondents pointed out that, as procedural issues can arise frequently throughout an arbitration, parties and tribunals should prudently seek to avoid the additional expense and time commitment that oral hearings on procedural issues entail. Fewer respondents would be willing to forgo 'early case management conferences' (16%). Interviewees explained that, in many instances, early case management conferences are useful for resolving procedural issues early on.

'Document production' (27%) was also a popular option to sacrifice. Many interviewees emphasised that document production can be a very costly and time-consuming process. The time and cost involved is often disproportionate to the benefits that a party might hope to derive from the exercise. Others pointed out that although document production makes sense in some cases, in others, it can be tactically misused. Several interviewees also underlined the different expectations that parties from different legal traditions have when it comes to document production. While it might be expected that counsel from civil law

Respondents stressed the importance of flexibility as a means to aid efficiency and reduce costs

traditions would be more inclined to do without document production, it is interesting that many interviewees from common law backgrounds also expressed a willingness to limit document production.

A quarter of respondents (25%) included 'in-person hearings' as a feature they would be prepared to forgo. This seems to reflect, to some extent, the increased level of comfort users have acquired with remote hearings in recent times, and particularly as a result of logistical difficulties for in-person hearings resulting from the COVID-19 pandemic.[26] However, interviews revealed that respondents were more likely to elect this option for hearings on procedural issues, rather than substantive hearings.[27]

A slightly less frequently chosen option was 'bifurcation', which less than a quarter of respondents (22%) would elect to eliminate. Interviewees felt that whether bifurcation is a means to enhance efficiency or, conversely, whether it leads to more costs and delays depends significantly on the specific circumstances of the case. As such, they were less inclined to agree to exclude the possibility of bifurcation from the outset.

Only a relatively small percentage of respondents (15%) indicated that they would be willing to do without 'cross-examination'. In interviews, respondents expressed a preference for a more nuanced approach to this—for example, they would be more amenable to forgo cross-examination in cases with less complex factual backgrounds and in relation to 'non-key' witnesses. Some respondents thought that a user's legal culture may influence their view, suggesting that civil lawyers might be more willing to forgo cross-examination in certain circumstances.

40%

of arbitrators would forgo **oral hearings on procedural issues**

'Party-appointed experts' was also chosen by a small percentage (13%). There was a split amongst interviewees performing different roles. Some arbitrators took the view that party-appointed experts are sometimes used as 'hired guns' by parties, which is undesirable. On the other hand, several counsel mentioned the also undesirable risk of a tribunal-appointed expert becoming a de facto fourth arbitrator.

A recurring theme in interviews was the sense that arbitration is becoming increasingly over-formalistic, at the expense of efficiency. Interestingly, this view was articulated by arbitrators themselves; as one arbitrator put it, they have seen the development over the years of what they referred to as 'a kind of arbitration-formality' which, taken too far, can amount to 'depriving the parties of the efficiencies they hoped for when they signed the arbitration clause'. One example of this 'arbitration-formality' that several respondents warned against is an excessive tendency to 'mimic court processes'. Respondents stressed the importance of flexibility as a means to aid efficiency and reduce costs by tailoring procedures to the needs of the dispute in question, rather than adopting rigid or excessively formalistic procedures. As one respondent pithily noted, arbitration should stop 'taking itself so seriously'! Closer monitoring of costs may also encourage greater efficiency—one respondent suggested that institutions should introduce costs budgeting rules to help parties and their funders monitor and plan for their potential costs exposure.