SINGAPORE INTERNATIONAL DISPUTE RESOLUTION ACADEMY

SMU
SINGAPORE MANAGEMENT UNIVERSITY

SIDRA International Dispute Resolution Survey:

2022 Final Report

SCHOOL OF LAW

The Singapore International Dispute Resolution Academy (SIDRA) is a platform for thought leadership in international dispute resolution theory, practice and policy. A research centre at the Singapore Management University Yong Pung How School of Law, SIDRA leads the way through projects, publications and events that promote dynamic and inclusive conversations on how to constructively engage with and resolve differences and disputes at global, regional and national levels. In particular, SIDRA differentiates itself through its focus on applied research that has a practical impact on industry. SIDRA is mandated with three research programs:

- The International Dispute Resolution (IDR) Survey research program;
- The Singapore Convention on Mediation (SCM) research program; and
- The Belt & Road Initiative (BRI) research program.

International Dispute Resolution Survey: 2022 Final Report

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CAM	Court-Annexed Mediation
CPR	International Institute for Conflict Prevention & Resolution
DIFC	Dubai International Financial Centre
FIPA	Foreign Investment Promotion and Protection Agreement
HKIAC	Hong Kong international Arbitration Centre
HKMAAL	Hong Kong Mediation Accreditation Association Limited
HKMC	Hong Kong Mediation Centre
ICC	International Court of Arbitration of the International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IDRC	International Dispute Resolution Centre
IMI	International Mediation Institute
ISDS	Investor-State Dispute Settlement
JIMC	Japan International Mediation Center
LCC	London Commercial Court
LCIA	London Court of International Arbitration
NYIAC	New York International Arbitration Centre
PCA	Permanent Court of Arbitration
PD	Practice Direction
SIAC	Singapore international Arbitration Centre
SICC	Singapore International Commercial Court
SIMC	Singapore International Mediation Centre
SIMI	Singapore International Mediation Institute
SMC	Singapore Mediation Centre
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

Foreword

In recent years Singapore has developed a unique reputation as a practical laboratory for research and development in the management of international commercial disputes, not just in Asia but worldwide. This role is facilitated by the deliberate and thoughtful interaction and cooperation of the Singapore Ministry of Law, the Singapore International Arbitration Centre (**"SIAC"**), the Singapore International Mediation Centre (**"SIMC"**), the Singapore International Commercial Court (**"SICC"**), and the academic sector, most notably represented by the Singapore International Dispute Resolution Academy (**"SIDRA"**) of Singapore Management University. This SIDRA International Dispute Resolution Survey: 2022 Final Report, a follow-up to its groundbreaking 2020 report, is another important step along the way.

The Survey, like its predecessor, aggregates and analyses the perspectives and practices of the primary stakeholders in dispute resolution — the parties who mediate, arbitrate, or litigate in the course of resolving commercial and investor-state disputes, and the lawyers who counsel them or who negotiate or advocate on their behalf. Surveys of this kind are a critical contributor to our understanding of the priorities and expectations business clients and counsel bring to dispute resolution and the factors that promote satisfactory processes and outcomes. Professor Alexander and her team have produced a study that reinforces some aspects of our current understanding but also breaks new ground, laying a foundation for future exploration of developing topics including mediator competence, neutral diversity, and the use of technology and complex mixed-mode approaches.

The result is a high-level picture that captures the views of a wide range of clients and counsel in the international marketplace of commercial and investor-state dispute resolution. The respondents represent a cross-section of legal systems, with particularly strong representation from parts of Asia among surveyed businesses. The results are especially meaningful because the survey team limited their canvas to focus on the expectations of *active* users, and their actual experiences.

Among the top-line results of the global survey, the most striking is the preeminence of mediation both in terms of perceptions regarding its relative benefits to users and reported high levels of user satisfaction with mediation. On average, sixty-seven percent of respondents reported satisfaction with various aspects of the mediation experience, as compared to fifty-five percent for arbitration and only forty-two percent for litigation. Mediation stands out most vividly when it comes to relatively high degree of satisfaction regarding the management of costs, relative speed, the preservation of business relationships, and the level of indirect costs experienced by clients, all of which tend to be important priorities of commercial parties and counsel. High levels of approval were also associated with the efficiency of mediation under the rubric of mediation institutions and the attributes of mediators (including dispute resolution experience, ethical values, cultural familiarity, and language skills). Contractual provisions requiring parties to mediate disputes are now a leading factor in use of the process, and in many other cases outside counsel recommend its use. These trends should accelerate as more countries adopt the Singapore Convention (United Nations Convention on International Settlement Agreements Resulting from Mediation), placing more importance on the development of even better guidance for developing and selecting effective mediators in the international sphere.

Although the results are generally less notable than those for mediation, arbitration and arbitrators are viewed as performing reasonably well in a number of respects. Most respondents were satisfied with how arbitration served important priorities such as the confidentiality of proceedings, procedural flexibility (including flexibility in choice of institutions, venues, and arbitrators), the impartiality of arbitrators, and the direct enforceability of awards. On the other hand, although efficiency is a high priority for business clients, most were dissatisfied with arbitrators' performance in this regard. Similarly, although nearly two-thirds of business users rated cost management as an important consideration, only thirty-one percent expressed some degree of satisfaction with costs in arbitration. In fact, when it comes to comparing the costs of arbitration, the speed of resolution, and the preservation of business relationships, expectations of arbitration appear to be no higher than litigation under court auspices. Indeed, among members of this respondent group, it may even be that many are now *omitting* cost savings as a potential benefit of arbitration.

Regarding litigation, the Survey findings show that local courts are still used more than international commercial courts. It is notable that respondents identified a narrower set of important expectations for court-based procedures than for either mediation or arbitration — finality, direct enforceability, impartiality, clarity and transparency of rules and procedures, speed, and cost. While over half of respondents expressed dissatisfaction with their experience respecting speed of resolution and related costs, it is conceivable that the rise of international commercial courts will try to address these issues.

Given the relative lack of versatility of litigation (and, to some extent, arbitration) in addressing the potentially broad range of priorities of business parties, it is of particular significance that the SIDRA Survey gave special attention to "mixed mode" approaches in which parties employ settlement-oriented processes (most often, mediation) against the backdrop of adjudication (either arbitration or litigation). Today, tiered dispute resolution provisions calling for mediation of disputes, followed if necessary by resort to arbitration, are becoming more common in international commercial contracts. It is worth noting that in addition to addressing the issues in the SIDRA Survey, Singapore has taken affirmative steps in the form of a joint SIAC/SIMC initiative to administer a form of "Arb-Med-Arb," in which a mediated settlement may be incorporated as a consent arbitration award. More recently, the Singapore Rules of Court have been amended to require parties in litigation to make an "offer of amicable resolution" (either an offer of settlement or to employ another process such as mediation); the Rules also empower courts to direct resolution by amicable resolution.

Foreword

The Survey's coverage of three other trending issues — the diversity of neutrals, the use and impact of technology, and the growth of third-party funding in dispute resolution — raises questions of the kind that will proliferate in the future. The most salient insights relate to the use of technology, a sector represented by fully one-sixth of the business representatives responding to the Survey. In addition to capturing the extraordinary uptick in the use of virtual/online proceedings, largely due to the global pandemic, the Survey depicts widespread use of cloud-based information storage systems and e-discovery in arbitration, and automated tools and analytics focused on case analysis, probable damages, and anticipated ranges for settlement.

The Survey indicates that despite widespread awareness of the prospect of third-party funding of parties in dispute resolution, its use in the commercial arbitration arena has been limited. Nevertheless, because third-party funding raises critical questions about fairness and due process, Singapore, like Hong Kong, has already taken affirmative steps to regulate the process.

The SIDRA International Dispute Resolution Survey: 2022 Final Report is important for a number of reasons, not least of which its value as a contribution to our growing appreciation of the spectrum of choices for managing commercial conflict globally. For Singapore and for other conscientious hubs of dispute resolution, moreover, it may also provide a further stimulus for evolution at the cutting-edge.

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Executive Summary

The International Dispute Resolution Survey: 2022 Final Report sets out the findings of the second iteration of the SIDRA Survey, which was conducted over the course of 2021. The Survey was conducted to better understand user experience and satisfaction with international commercial arbitration, international commercial mediation, international commercial litigation, mixed mode (hybrid) dispute resolution and investor-state dispute resolution mechanisms. The Survey continued to solicit data regarding user experience and satisfaction with technology in international dispute resolution. User understanding and use of third-party funding were explored in this Survey for the first time.

This Report presents the findings of the Survey, emerging trends and areas that can be improved. The data gathered from the Report is summarised below:

Respondents' Perspectives on Factor Importance in Choice of, and Satisfaction with Dispute Resolution Mechanisms: Arbitration, Mediation and Litigation

- Speed and impartiality were the two factors users considered 'absolutely crucial' or 'important' across arbitration, mediation and litigation.
- A larger proportion of respondents were satisfied with speed and costs in mediation, as compared to arbitration and litigation.
- More respondents ranked preservation of business relationships and indirect costs to client business as 'absolutely crucial' or 'important' in mediation, as compared to arbitration and litigation.

International Commercial Arbitration

- Direct enforceability, confidentiality and procedural flexibility continued to be the most 'important' or 'absolutely crucial' factors for the majority of the respondents in choosing to use arbitration as a dispute resolution mechanism.
- The majority of the respondents were least satisfied with the preservation of business relationships, indirect costs to client business and costs associated with arbitration.
- The top factors respondents considered when deciding to use a wholly online platform for arbitration were travel restrictions, lower costs, low dispute value and low complexity of issues.
- The majority of the respondents understood third-party funding, its implications and how it works but have not used it. Unsurprisingly, more Client Users had less experience with using third-party funding compared to External Counsels.

International Commercial Mediation

- The majority of the respondents identified preservation of business relationship, confidentiality and speed as the top three 'important' or 'absolutely crucial' factors for opting to use international commercial mediation to resolve disputes.
- The majority of the respondents were most satisfied with the ethical standards, language skills and dispute resolution experience of their chosen mediators.
- The majority of the respondents indicated that technology was most useful for conducting virtual/online mediation. Interestingly, Client Users found different technological tools, such as e-discovery/due diligence, automated negotiation tools and analytics for mediator appointment more useful than External Counsels.
- Gender, nationality and ethnic diversity in the pool of mediators were areas which the majority of the respondents thought should be improved.

Executive Summary

International Commercial Litigation

- The majority of the respondents indicated that finality was the most important factor influencing their decision to choose international commercial litigation as a dispute resolution mechanism. Other important factors include impartiality and direct enforceability.
- The majority of the respondents were satisfied with the clarity and transparency in rules and procedures, impartiality and direct enforceability and somewhat less satisfied with the procedural flexibility, preservation of business relationships, flexibility in the choice of institutions, venues and judges in international commercial litigation.
- Local courts were still more frequently used compared to international commercial courts such as the London Commercial Court ("**LCC**") and the Singapore International Commercial Court ("**SICC**").
- The majority of the respondents identified platforms for conducting virtual/online hearings, e-discovery/due diligence and cloud-based storage systems as 'extremely useful' or 'useful' technologies in international commercial litigation.

Mixed Mode (Hybrid) Dispute Resolution

- Mixed mode mechanisms have the potential to reduce the perceived disadvantages of standalone arbitration and mediation.
- The majority of the respondents indicated contractual obligation as the main reason for selecting a mixed mode dispute resolution mechanism.
- Where preservation of parties' business relationships, cost and speed were important factors, the majority of the respondents chose mixed mode mechanisms as opposed to standalone arbitration.
- The majority of the respondents indicated that the preservation of business relationships and the relative procedural flexibility offered by mixed mode mechanisms were the important factors that they considered in choosing mixed mode mechanisms over standalone mediation.

Investor-State Dispute Settlement

- International arbitration remained the dispute settlement mechanism of choice of most of the respondents in resolving investor-state disputes, with majority of the respondents choosing institutional or *ad hoc* arbitration.
- Direct enforceability and political sensitivity were still the top considerations in choosing a dispute resolution mechanism for investor-state dispute settlement.
- More respondents were using institutional mediation to resolve investor-state disputes than international commercial or domestic litigation.
- The majority of the respondents indicated that they were satisfied with the speed, confidentiality, ability to preserve business relationships, impartiality and political sensitivity that mediation offers.

Section 1: Introduction

The SIDRA International Dispute Resolution Survey: 2022 Final Report contains the findings of the second iteration of the SIDRA Survey, a cross-border, international survey that examined how and why businesses and lawyers make decisions about resolving cross-border disputes. The Report sheds light on user experiences with arbitration, litigation, mediation, mixed mode (hybrid) dispute resolution and investor-state dispute settlement mechanisms. The SIDRA Survey is commissioned by the Singapore Ministry of Law.

It begins with an overview of the approach and design of the Survey questionnaire followed by the respondent profile according to user type, geographical region and legal system. The findings are structured into five substantive sections, namely: (1) international commercial arbitration, (2) international commercial mediation, (3) international commercial litigation, (4) mixed mode (hybrid) dispute resolution and (5) investor-state dispute settlement.

There are five aspects of the SIDRA Survey that make it unique.

First, it is 100% user-centric. All respondents are users and they are identified either as Client Users (corporate executives and in-house counsel) or External Counsels (dispute resolution lawyers and corporate lawyers) who engage in cross-border commercial dispute resolution. Views of neutrals, academics, institutional providers and other non-user stakeholders are not represented in this Survey.

Second, the views are based on user experiences and not just preferences. Respondents were directed to the particular dispute resolution process they have experience with and were then asked to respond to a series of specific questions in relation to that mechanism.

Third, the Survey focuses on dispute resolution mechanisms for cross-border disputes only and not for domestic disputes. International dispute resolution involves different considerations compared to domestic settings and we did not want to confuse the two.

Fourth, the Survey has been distributed internationally in all six official UN languages: Arabic, Chinese, English, French, Spanish and Russian. Thus, a more diverse selection of users compared to those who primarily work in English was reached.

Finally, no single dispute resolution mechanism was examined in isolation. Dispute resolution developments are increasingly interconnected as the emergence of hybrid dispute resolution mechanisms and international court referrals to mediation show.

The Report features the birch tree, which shows its beauty in every season. Birch trees symbolise growth, adaptability and the promise of what is to come. With the publication of the findings of the second SIDRA Survey, we share data gathered from hundreds of lawyers and corporate decision-makers and report on the growth of cross-border litigation, arbitration and mediation practice, the adaptability of mixed mode dispute resolution and offer some insights on future trends. We are grateful for their continued contribution in helping us produce an up-to-date evidence-based report on the international dispute resolution landscape.

Section 2: Approach and Design

Client Users (corporate executives and in-house counsel) or External Counsels (dispute resolution lawyers and corporate lawyers) who engaged in cross-border commercial dispute resolution between 2019 and 2020 were asked to respond to the SIDRA Survey.

The Survey was segmented into five distinct sections: (1) international commercial arbitration, (2) international commercial mediation, (3) international commercial litigation, (4) mixed mode (hybrid) dispute resolution and (5) investor-state dispute settlement. The questions focused on Client Users' and External Counsels' actual decision-making processes in relation to the use of different international dispute resolution mechanisms.

The questionnaire was disseminated globally in the six official United Nations languages (Arabic, Chinese, English, French, Spanish and Russian) and closed on December 2021.

We have used the dataset as it stood in January 2022. The Survey was answered by a total of 139 respondents from 25 countries, with a total of 181 responses across the aforementioned five sections of the Survey.

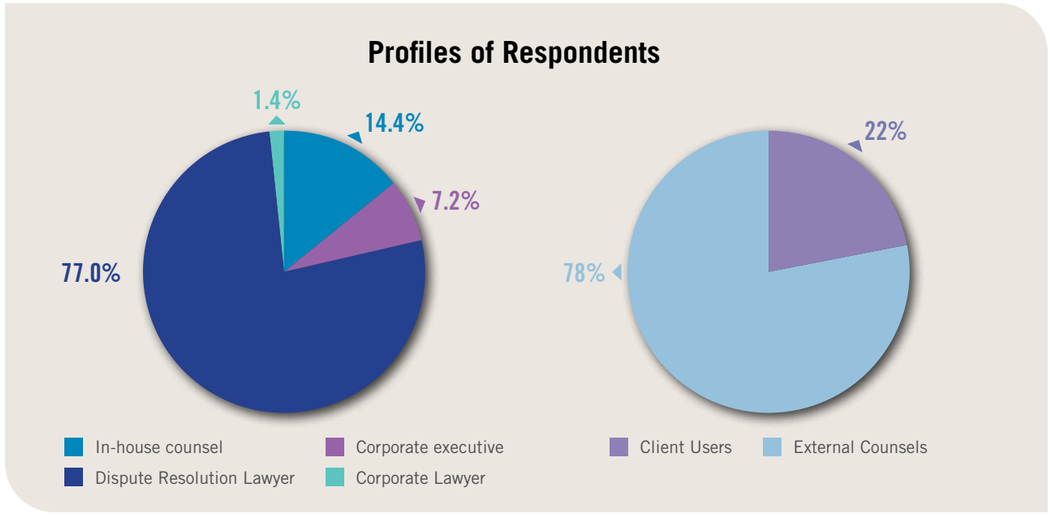
The data analysis in this Report covers summary statistics and disaggregates responses primarily in two ways:

- By user category: Client Users vs External Counsels; and
- By dispute resolution mechanism: international commercial arbitration, international commercial mediation, international commercial litigation, mixed mode (hybrid) dispute resolution mechanisms and investor-state dispute settlement.

Section 3: Respondent Profile

3.1 The Respondent profile is set out in this section.

Exhibit 3.1



3.2 Among 139 respondents, 22% were Client Users (corporate executives and in-house counsel) and 78% were External Counsels (dispute resolution lawyers and corporate lawyers).

3.3 Out of all respondents, 14.4% were in-house counsel, 7.2% were corporate executives, 77% were dispute resolution lawyers and 1.4% were corporate lawyers.

Exhibit 3.2

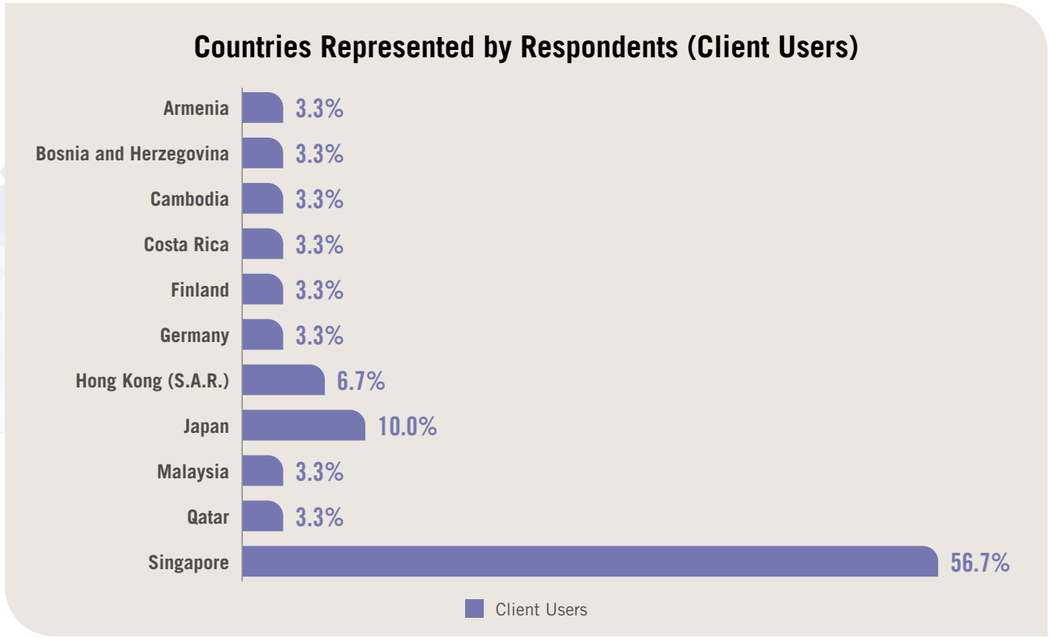
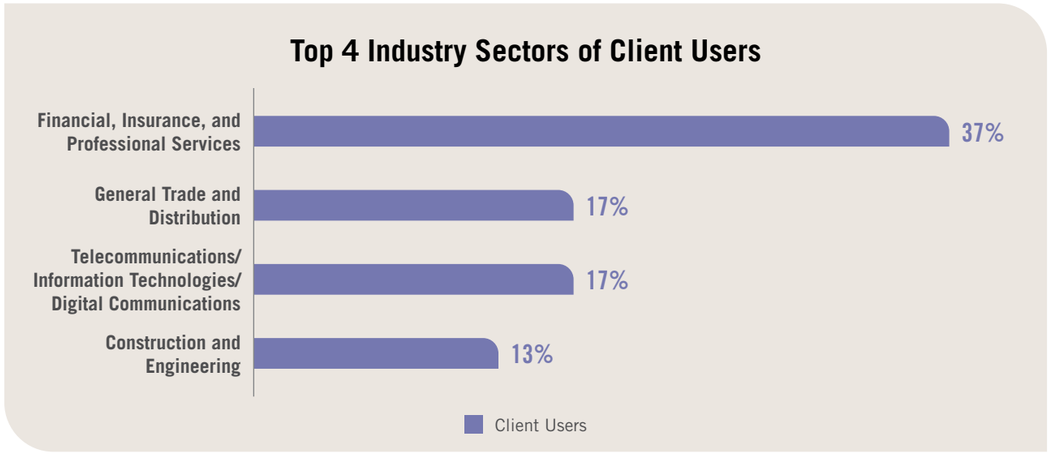
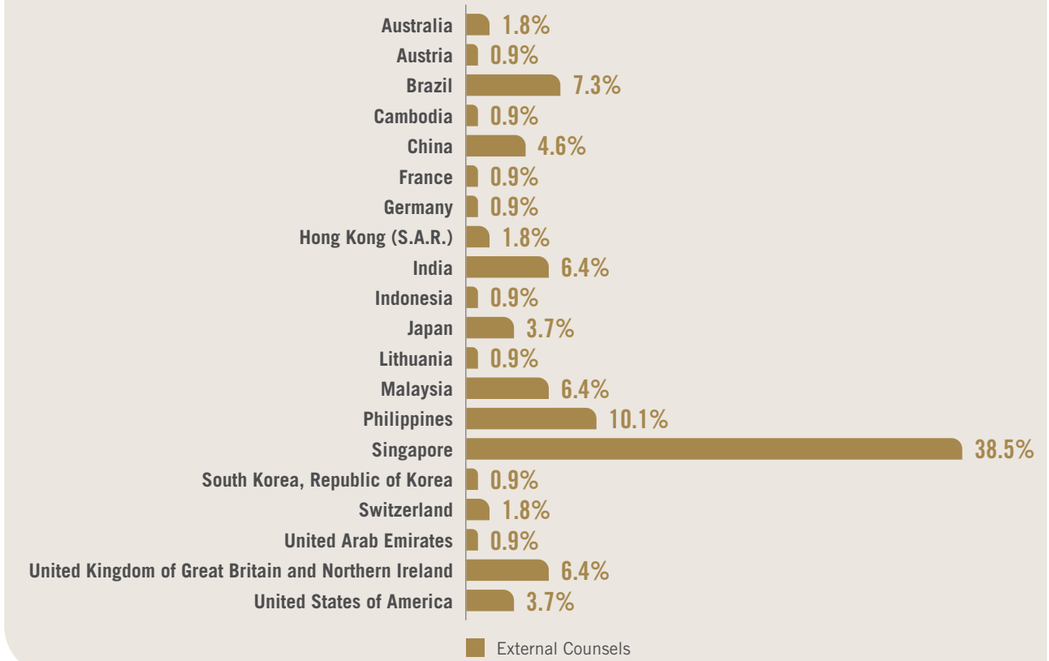


Exhibit 3.3



3.4 The Client Users operate in different regions, with the majority based in Singapore, Japan and Hong Kong. The top industry sector for Client Users is financial, insurance and professional services (37%). This is followed by general trade and distribution (17%), telecommunications, information technologies, digital communications (17%) and construction and engineering (13%).

Exhibit 3.4



3.5 The External Counsels practice in different parts of the world. They come from 20 countries, with 38.5% based in Singapore. This is followed by the Philippines (10.1%) and Brazil (7.3%).

3.6 The diversity of the legal systems of the respondent countries is illustrated in the table below.

Exhibit 3.5

Country	Legal System	Country	Legal System
Armenia	Civil Law	Indonesia	Civil Law
Australia	Common Law	Japan	Civil Law
Austria	Civil Law	Lithuania	Civil Law
Bosnia and Herzegovina	Civil Law	Malaysia	Hybrid
Brazil	Civil Law	Philippines	Hybrid
Cambodia	Civil Law	Qatar	Hybrid
Costa Rica	Civil Law	Singapore	Common Law
China	Civil Law	South Korea, Republic of Korea	Civil Law
Finland	Civil Law	Switzerland	Civil Law
France	Civil Law	United Arab Emirates	Hybrid
Germany	Civil Law	United Kingdom	Common Law
Hong Kong	Common Law	United States of America	Common Law
India	Common Law		

3.7 The respondents come from 25 countries and are distributed among common law, civil law and hybrid legal systems. A majority of the respondents from Asia are from Singapore.[1]

1 42.4% of all respondents come from Singapore.

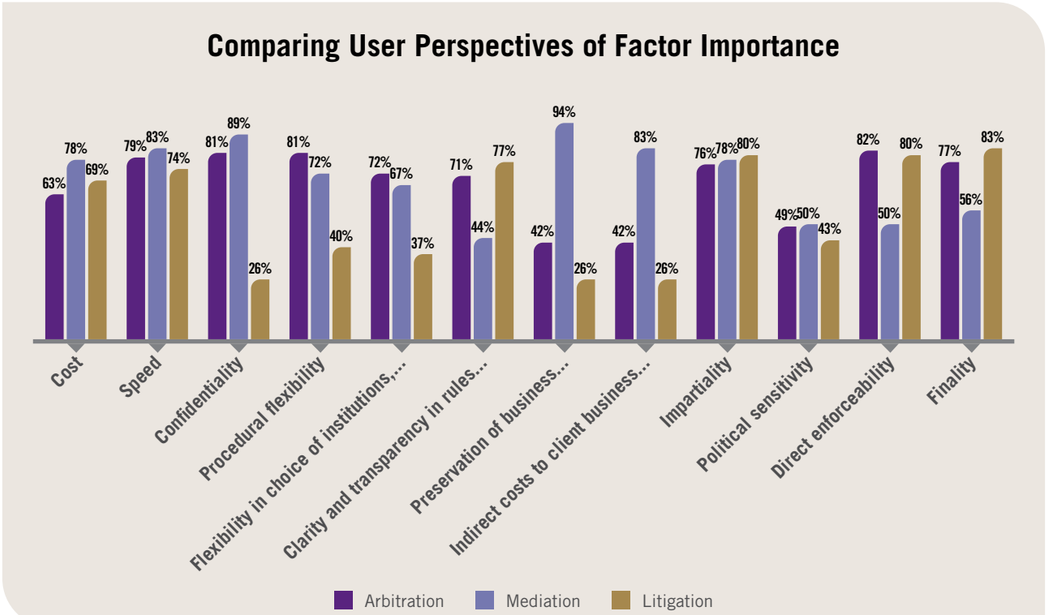
Section 4: Respondents' Perspectives on Factor Importance in Choice of, and Satisfaction with Dispute Resolution Mechanisms: Arbitration, Mediation and Litigation

At A Glance:

- Speed and impartiality were the two factors users considered 'absolutely crucial' or 'important' across arbitration, mediation and litigation.
- A larger proportion of respondents were satisfied with speed and costs in mediation, as compared to arbitration and litigation.
- More respondents ranked preservation of business relationships and indirect costs to client business as 'absolutely crucial' or 'important' in mediation, as compared to arbitration and litigation.

Comparing Respondents' Perspectives of Factor Importance in Choice of Dispute Resolution Mechanism

Exhibit 4.1



4.1 Respondents were asked to indicate which factors they considered as 'absolutely crucial' or 'important' in deciding whether to settle a dispute through arbitration, mediation or litigation.

4.2 Speed and impartiality were the two factors users considered 'absolutely crucial' or 'important' across arbitration, mediation and litigation. There were some notable differences in the importance of other factors.

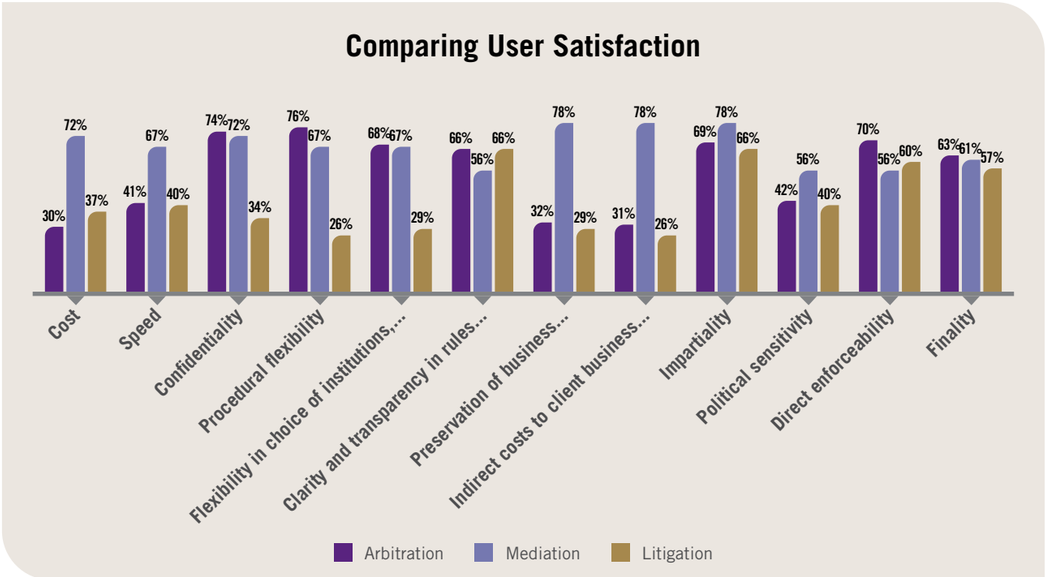
4.3 For example, fewer respondents found direct enforceability as an 'absolutely crucial' or 'important' factor in mediation (50%) compared to arbitration (82%) and litigation (80%). This is consistent with the data presented in the SIDRA Survey Final Report 2020. This seems to reflect mediation users' thinking that there is an enforcement mechanism gap in mediation. The Singapore Convention on Mediation (the **"Singapore Convention"**) seeks to change this. The Singapore Convention to mediated settlement agreements is what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **"New York Convention"**) is to arbitral awards; both focus on the enforcement of the outcome of the proceedings. At the time of writing, the Singapore Convention, with 55 signatories and ten ratifications to date, is still relatively young and has not gained as much traction as the New York Convention with 24 signatories and 170 state parties.

4.4 Interestingly, more respondents ranked preservation of business relationship and indirect costs to client business as 'absolutely crucial' or 'important' when selecting mediation (preservation of business relationship 94%; indirect costs to client business 83%) compared to arbitration (42% for both factors) and litigation (26% for both factors). In other words, where users sought a dispute resolution mechanism that would support their clients to preserve relationships and minimise direct and indirect costs, they were more likely to select mediation over other dispute resolution mechanisms.

4.5 Fewer respondents found confidentiality 'absolutely crucial' or 'important' in litigation (26%) compared to arbitration (81%) and mediation (89%). This is consistent with the fact that litigation is a generally more public process compared to arbitration and mediation, and users selecting litigation would generally be less concerned about a confidential dispute resolution forum.

Comparing Respondents' Satisfaction

Exhibit 4.2



4.6 Satisfaction levels for the different factors identified varied across all three dispute resolution mechanisms.

4.7 More than 50% of all respondents were satisfied with the direct enforceability and finality in arbitration, mediation and litigation. This is similar to what was reported in the SIDRA Survey Final Report 2020. More than 50% of all respondents were also satisfied with the clarity and transparency in rules and procedures and impartiality in arbitration, mediation and litigation.

4.8 With respect to cost and speed, there are some stark differences. More respondents were satisfied with those factors in mediation (72% of respondents were satisfied with the cost of mediation and 67% with its speed) as compared to arbitration (cost 30%; speed 41%) and litigation (cost 37%; speed 40%).

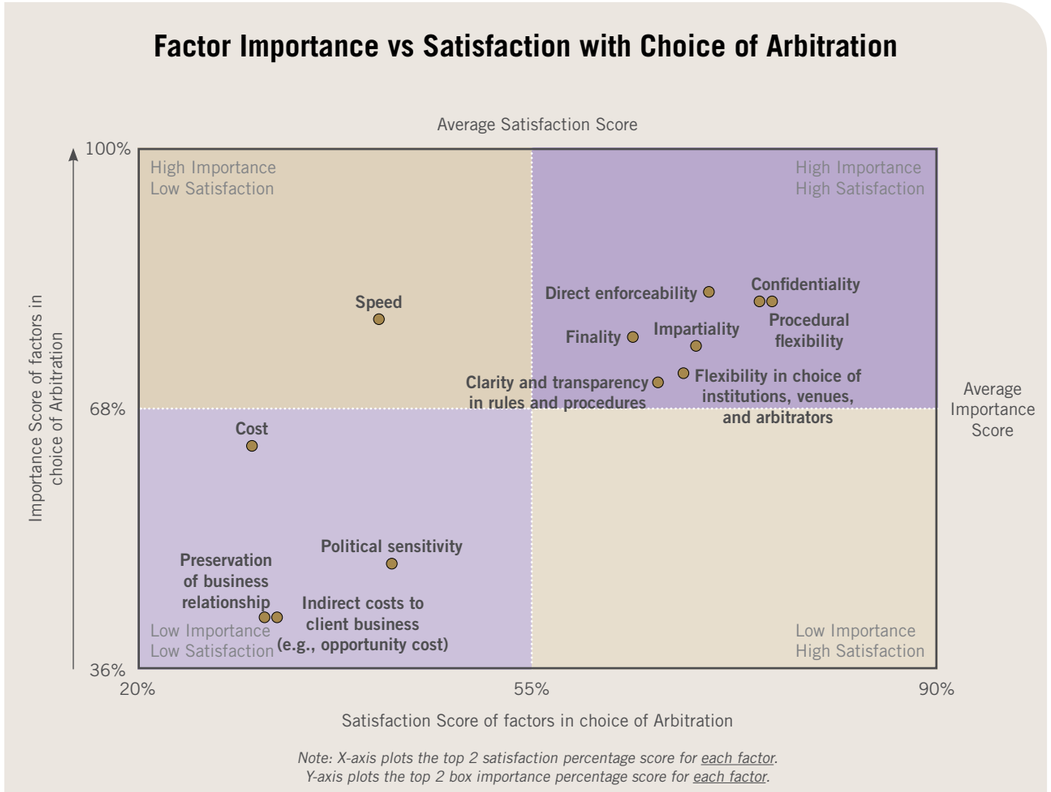
4.9 Respondents' expectations and experiences for procedural flexibility and flexibility in choice of institutions, venues and arbitrators or mediators in arbitration and mediation were generally aligned. For litigation, only 40% of respondents ranked procedural flexibility as 'absolutely crucial' or 'important', and only 26% of respondents were satisfied with the same. For flexibility in choice of institutions, venues and judges, only 37% of respondents found this factor 'absolutely crucial' or 'important', and only 29% were satisfied. This shows that there are low expectations and low satisfaction for these two factors in litigation.

4.10 With respect to confidentiality, respondents' expectations and experiences in arbitration (81% found it 'absolutely crucial' or 'important' and 74% were satisfied) and mediation (89% found it 'absolutely crucial' or 'important' and 72% were satisfied) were also aligned. Interestingly, while only 26% of respondents found confidentiality 'absolutely crucial' or 'important' in litigation, more respondents were satisfied with the same (34%).

Factor Importance vs Satisfaction in Choice of Arbitration, Litigation and Mediation

4.11 The exhibits below illustrate the difference between factor importance (respondents' rating of importance of a specific factor) and respondents' satisfaction (respondents' rating of satisfaction of a specific factor) with respect to their choice of arbitration, mediation or litigation.

Exhibit 4.3



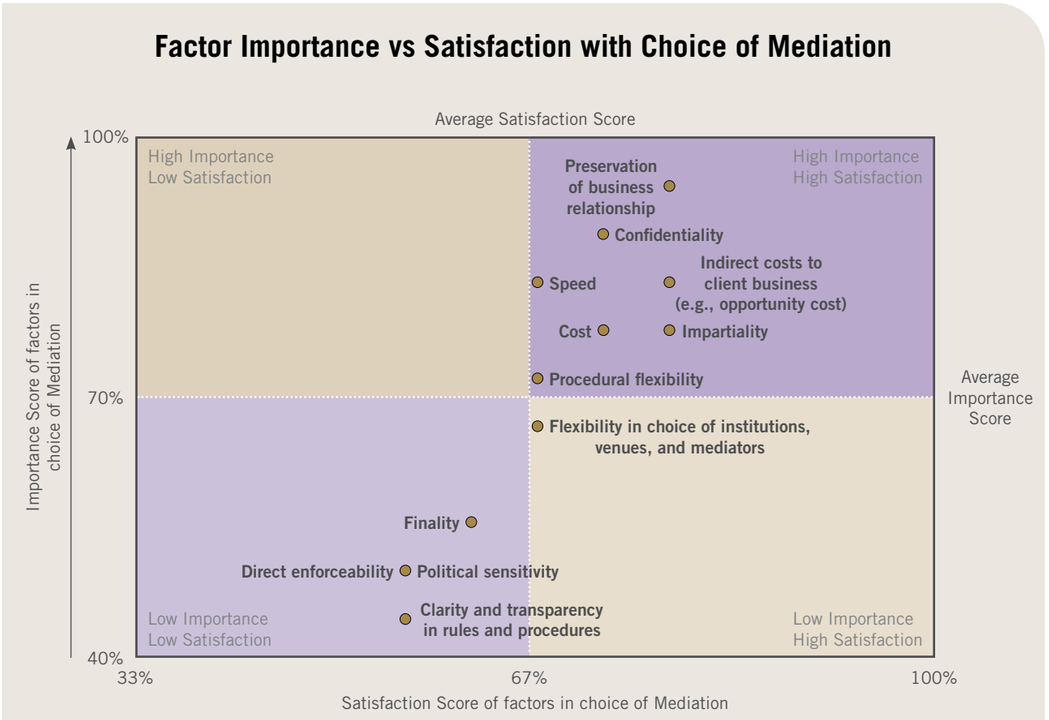
Note: X-axis plots the top 2 satisfaction percentage score for each factor.
Y-axis plots the top 2 box importance percentage score for each factor.

Note: Importance Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated the considerations behind the selection of arbitration were "Absolutely Crucial" and "Important". Satisfaction Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated they were "Very satisfied" and "Somewhat satisfied" with factors used in the selection of arbitration. The average Importance Percentage Score across all factors for arbitration is 68%; The average Satisfaction Percentage Score across all factors for arbitration is 55%.

4.12 In their choice of arbitration, respondents rated direct enforceability, confidentiality, procedural flexibility, finality, impartiality, flexibility in choice of institutions, venues, and arbitrators and clarity and transparency in rules and procedures as high in importance (rated above 68% in importance scores) and high in satisfaction (rated above 55% in satisfaction scores).

4.13 Respondents rated speed as high in importance (rated above 68% in importance scores) but low in satisfaction (rated below 55% in satisfaction scores). Respondents found cost to be low in importance (rated below 68% in importance scores) and low in satisfaction (rated below 55% in satisfaction scores). In the SIDRA Survey Final Report 2020, speed and cost were both rated as low in importance and low in satisfaction. The discrepancy in importance and satisfaction scores for speed and cost is wide and suggests that the respondents' expectations and experiences are not aligned.

Exhibit 4.4



Note: X-axis plots the top 2 satisfaction percentage score for each factor.
Y-axis plots the top 2 box importance percentage score for each factor.

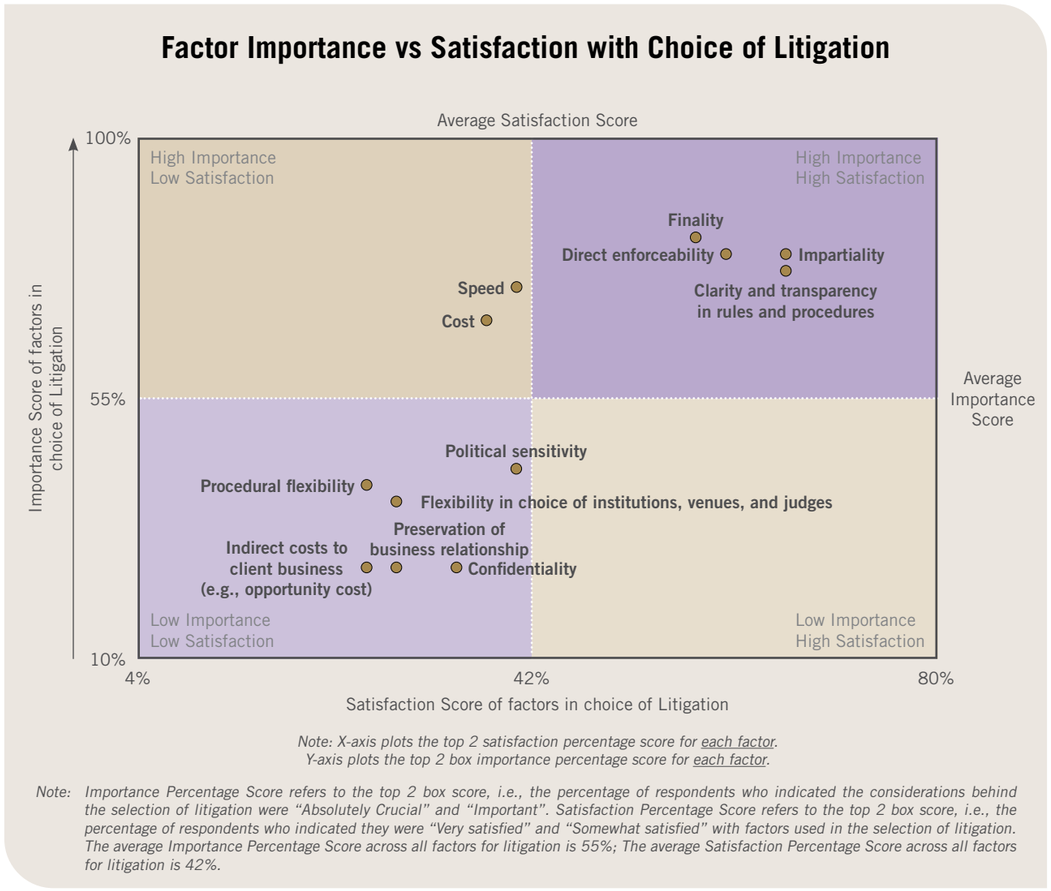
Note: Importance Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated the considerations behind the selection of mediation were "Absolutely Crucial" and "Important". Satisfaction Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated they were "Very satisfied" and "Somewhat satisfied" with factors used in the selection of mediation. The average Importance Percentage Score across all factors for mediation is 70%; The average Satisfaction Percentage Score across all factors for mediation is 67%.

4.14 In their choice of mediation, respondents rated preservation of business relationship, confidentiality, indirect costs to client businesses, speed, impartiality, cost and procedural flexibility as high in importance (rated above 70% in importance scores) and high in satisfaction (rated above 67% in satisfaction scores). Impartiality, confidentiality and procedural flexibility were also ranked by more than 70% of respondents as high in importance and high in satisfaction in the SIDRA Survey Final Report 2020.

4.15 Respondents ranked preservation of business relationship as high in importance (94%) and high in satisfaction (78%). Despite the location of preservation of business relationship in the 'high/high' quadrant, there exists a discrepancy which suggests that respondents' expectations and experiences in this area are not entirely aligned.

4.16 Fewer than 70% of respondents ranked finality, direct enforceability, political sensitivity and clarity and transparency in rules and procedures as important. It should be noted that there is a discrepancy between importance (44%) and satisfaction (56%) percentage scores for clarity and transparency in rules and procedures. This suggests that while respondents placed lesser importance on clarity and transparency in rules and procedures, their actual experiences went over and above their expectations.

Exhibit 4.5



Note: X-axis plots the top 2 satisfaction percentage score for each factor.
Y-axis plots the top 2 box importance percentage score for each factor.

Note: Importance Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated the considerations behind the selection of litigation were "Absolutely Crucial" and "Important". Satisfaction Percentage Score refers to the top 2 box score, i.e., the percentage of respondents who indicated they were "Very satisfied" and "Somewhat satisfied" with factors used in the selection of litigation. The average Importance Percentage Score across all factors for litigation is 55%; The average Satisfaction Percentage Score across all factors for litigation is 42%.

4.17 In their choice of litigation, respondents rated finality, impartiality, direct enforceability and clarity and transparency in rules and procedures as high in importance (rated above 55% in importance scores) and high in satisfaction (rated above 42% in satisfaction scores). Respondents indicated finality (83%), impartiality (80%), direct enforceability (80%) and clarity and transparency in rules and procedures (77%) as 'absolutely crucial' or 'important' and that they were 'very satisfied' or 'somewhat satisfied' with the same (57%, 66%, 60% and 66% respectively).

4.18 There are significant discrepancies in the percentage amounts between the respondents' importance and satisfaction scores for cost and speed. Both cost and speed are rated as high in importance (rated above 55% in importance scores) and low in satisfaction (rated below 42% in satisfaction scores). 74% of respondents indicated that speed was 'absolutely crucial' or 'important'. 69% of respondents thought cost was 'absolutely crucial' or 'important'. Only 40% of respondents were 'very satisfied' or 'somewhat satisfied' with speed and only 37% were 'very satisfied' or 'somewhat satisfied' with cost.

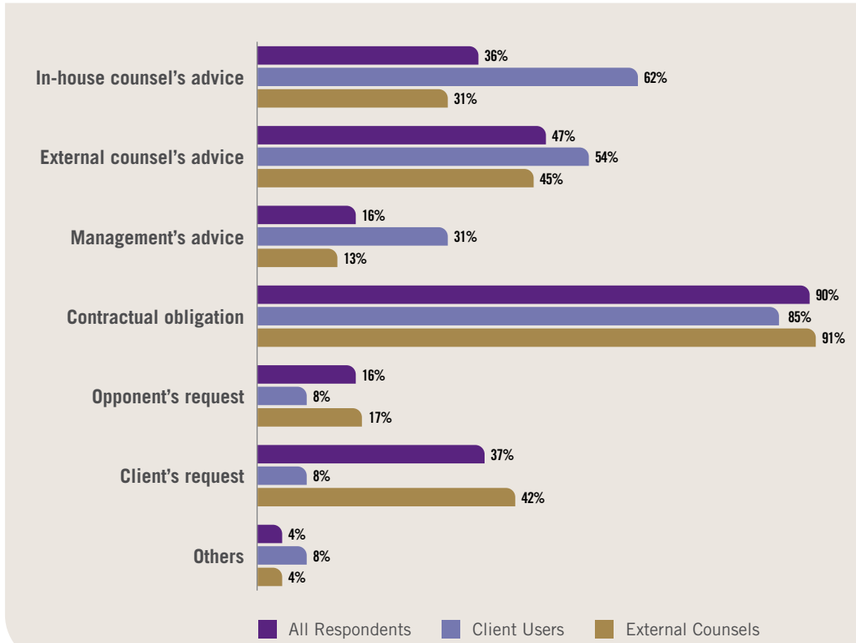
Section 5: International Commercial Arbitration

At A Glance:

- Direct enforceability, confidentiality and procedural flexibility continued to be the most 'important' or 'absolutely crucial' factors for the majority of the respondents in choosing to use arbitration as a dispute resolution mechanism.
- The majority of the respondents were least satisfied with the preservation of business relationships, indirect costs to client business and costs associated with arbitration.
- The top factors respondents considered when deciding whether to use a wholly online platform for arbitration were travel restrictions, lower costs, low dispute value and low complexity of issues.
- The majority of the respondents understood third-party funding, its implications and how it works but have not used it. Unsurprisingly, Client Users had less experience with using third-party funding compared to External Counsels.

Factors that Contributed to Respondents' Choice to Use International Commercial Arbitration

Exhibit 5.1



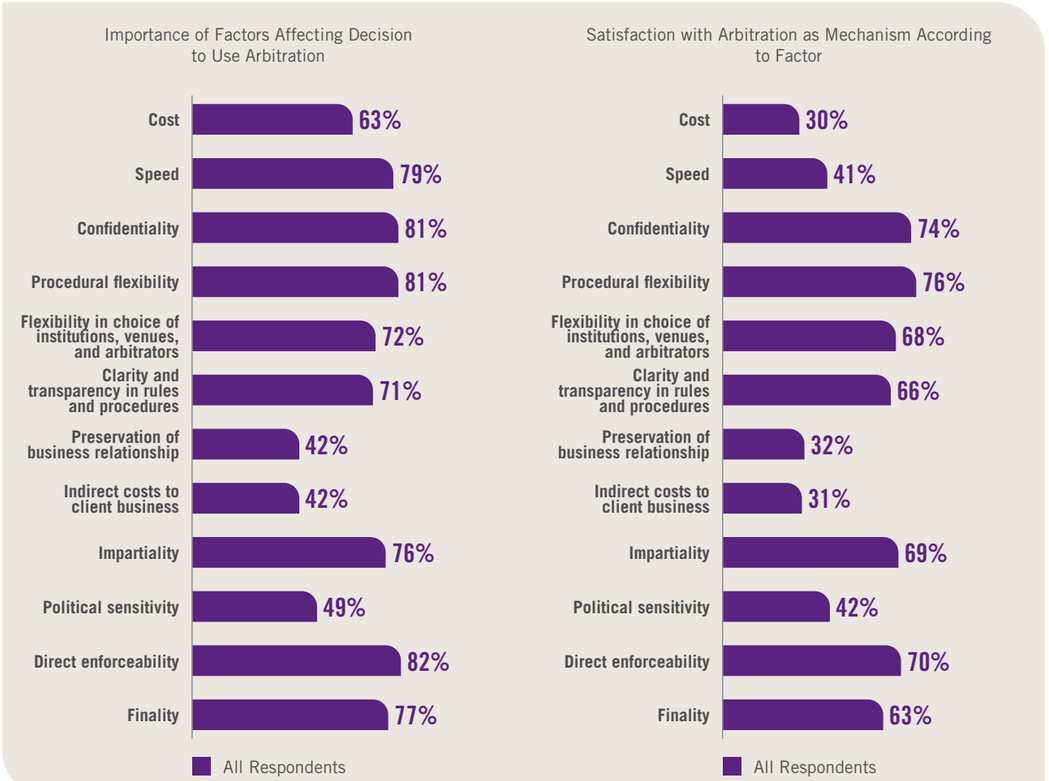
5.1 The top three influences on respondents' choice to use international commercial arbitration were contractual obligation (90%), external counsel's advice (47%) and client's request (37%).

5.2 This comes as no surprise as most international commercial arbitration cases arise out of contractual obligation, with parties complying with the arbitration clauses found within their agreements.[2]

2 *Gary Born, International Commercial Arbitration (2nd ed), Kluwer Law International (2014) at 73.*

Factors Affecting Respondents' Decision to Use Arbitration and Respondents' Satisfaction With Arbitration as a Mechanism

Exhibit 5.2



5.3 In choosing international commercial arbitration, 82% of respondents ranked direct enforceability as 'important' or 'absolutely crucial'. Respondents indicated confidentiality and procedural flexibility, both at 81%, as 'important' or 'absolutely crucial' characteristics towards the decision to use arbitration. In the SIDRA Survey Final Report 2020, 87% of respondents found enforceability as 'absolutely crucial' or 'important'. This reinforces the impact the New York Convention has had regarding the enforceability of arbitral awards across different jurisdictions.

5.4 Speed (79%), finality (77%) and impartiality (76%) are the other characteristics that respondents found to be 'important' or 'absolutely crucial'.

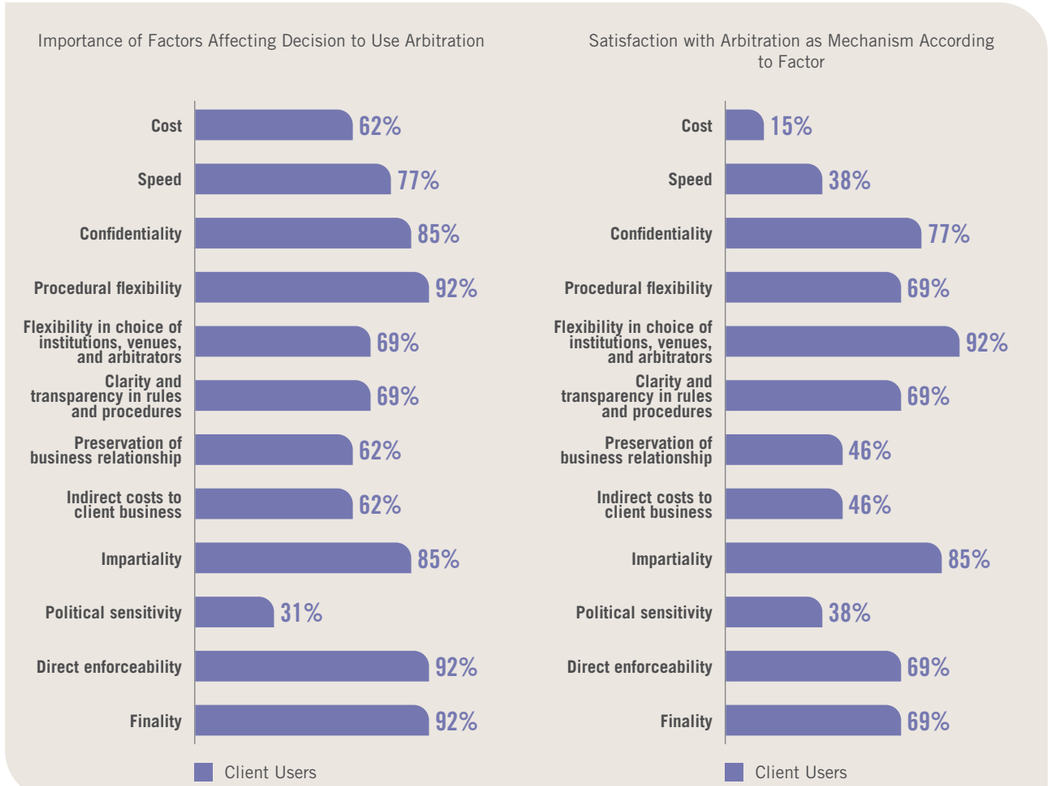
5.5 The majority of the respondents were 'very satisfied' or 'somewhat satisfied' by the procedural flexibility (76%), confidentiality (74%) and direct enforceability (70%) that arbitration facilitates. This is similar to what was reported in the SIDRA Survey Final Report 2020.[3]

5.6 Preservation of business relationship (32%), indirect costs to client business (31%) and cost (30%) were ranked lower in terms of user satisfaction. This is perhaps due to the transformation of arbitration into a process that "mimics litigation"[4] and ultimately affects business relationships and increases costs.

3 In the SIDRA Survey Final Report 2020, respondents were 'very satisfied' or 'somewhat satisfied' with confidentiality (69%), enforceability (65%) and flexibility of processes (63%).

4 V. K. Rajah, SC, W(h)ither adversarial commercial dispute resolution?, Arbitration International, Volume 33, Issue 1, March 2017, available at https://doi.org/10.1093/arbint/aiv075

Exhibit 5.3



5.7 For Client Users, direct enforceability (92%), finality (92%) and procedural flexibility (92%) were 'important' or 'absolutely crucial' in deciding whether to use arbitration. Interestingly, cost, preservation of business relationship and indirect costs to client business all came in at 62%.

5.8 In terms of satisfaction, Client Users were 'very satisfied' or 'somewhat satisfied' with flexibility in the choice of institutions, venues, and arbitrators (92%), impartiality (85%) and confidentiality (77%). In the SIDRA Survey Final Report 2020, satisfaction in the flexibility in choice of institutions, venues, and arbitrators ranked lower than impartiality and finality. Client Users were least satisfied with preservation of business relationship (46%), indirect costs to client businesses (46%), political sensitivity (38%), speed (38%) and cost (15%). Speed and cost were also ranked last in terms of Client User satisfaction in the SIDRA Survey Final Report 2020.

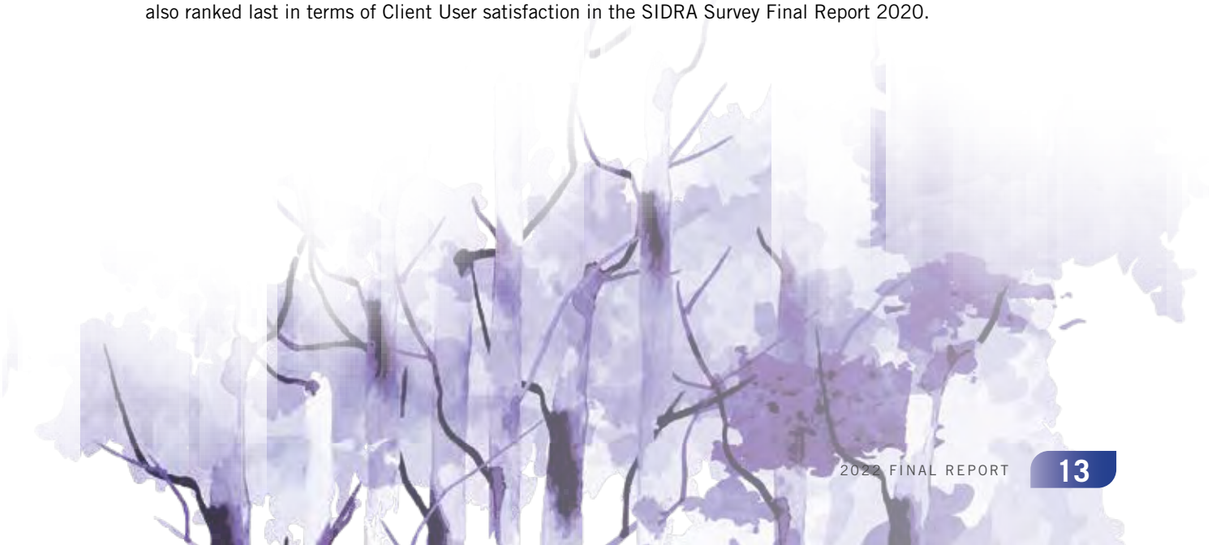
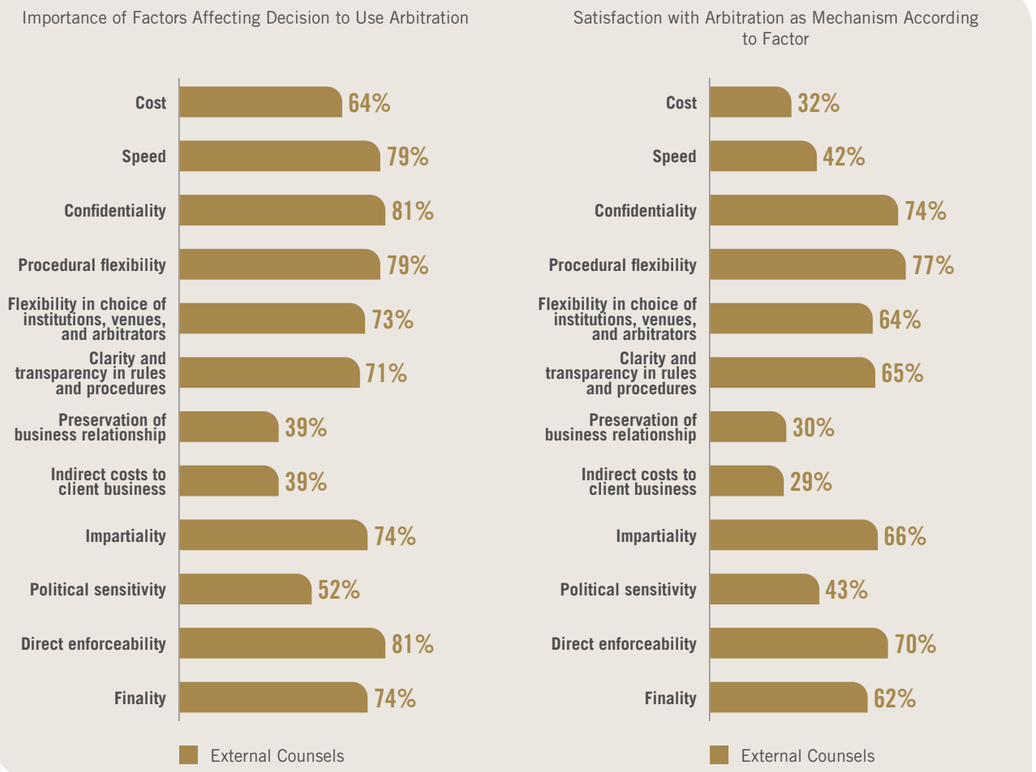


Exhibit 5.4

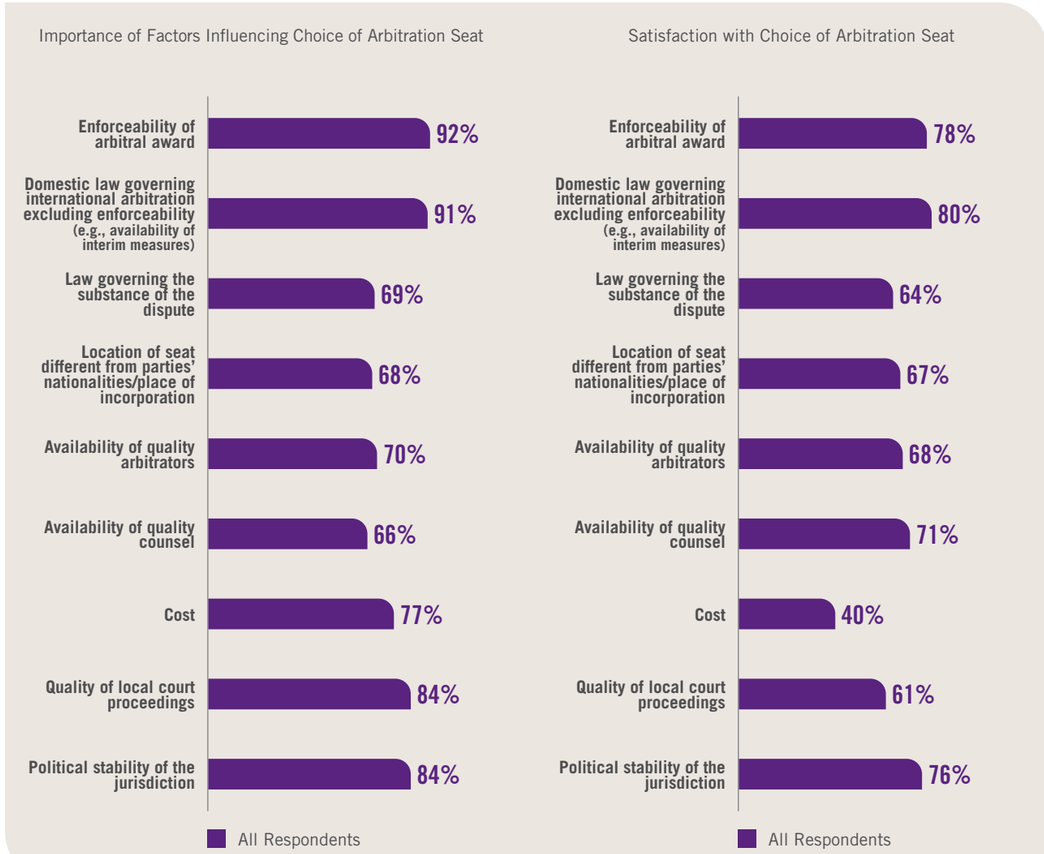


5.9 For External Counsels, direct enforceability (81%), confidentiality (81%), procedural flexibility (79%) and speed (79%) were 'important' or 'absolutely crucial' in deciding whether to use arbitration. External Counsels found political sensitivity (52%), preservation of business relationship (39%) and indirect costs to client business (39%) to be the least important.

5.10 External Counsels were 'very satisfied' or 'somewhat satisfied' with procedural flexibility (77%), confidentiality (74%) and direct enforceability (70%). External Counsels were least satisfied with cost (32%), preservation of business relationship (30%) and indirect costs to client business (29%).

Factors Affecting Choice of Seat of Arbitration and Respondents' Satisfaction with Seat of Arbitration

Exhibit 5.5



5.11 In choosing the seat of arbitration, both Client Users and External Counsels found enforceability of the arbitral award (92%) as 'important' or 'absolutely crucial'. Enforceability of arbitral awards was also the top factor influencing the choice of arbitration seat in the SIDRA Survey Final Report 2020. This reinforces the importance of the seat of arbitration, which determines the domestic legal framework applicable to an arbitration process, as well as procedures for enforcement and annulment of arbitral awards. The other top considerations were domestic law governing international arbitration excluding enforceability (e.g., availability of interim measures) (91%), quality of local court proceedings (84%) and political stability of the jurisdiction (84%).

5.12 In terms of satisfaction with the choice of seat of arbitration, 80% of the respondents were 'very satisfied' or 'somewhat satisfied' with the domestic law governing international arbitration excluding enforceability. Respondents were also 'very satisfied' or 'somewhat satisfied' with the enforceability of arbitral award (78%) and political stability of the jurisdiction (76%). This ties in with the characteristics that all the respondents ranked as 'important' and 'absolutely crucial' in choosing a seat of arbitration. The data on the importance of specific characteristics and satisfaction with respect to the seat of arbitration is consistent with the findings in the SIDRA Survey Final Report 2020.

Most Commonly Used International Commercial Arbitration Seats

Exhibit 5.6

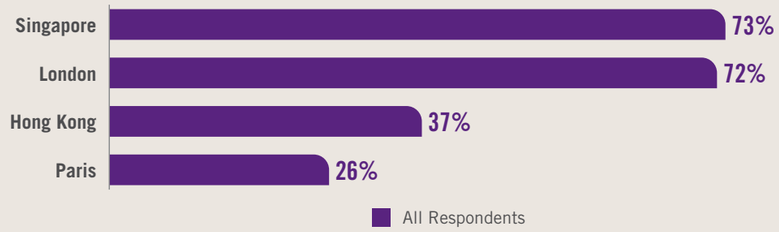


Exhibit 5.7

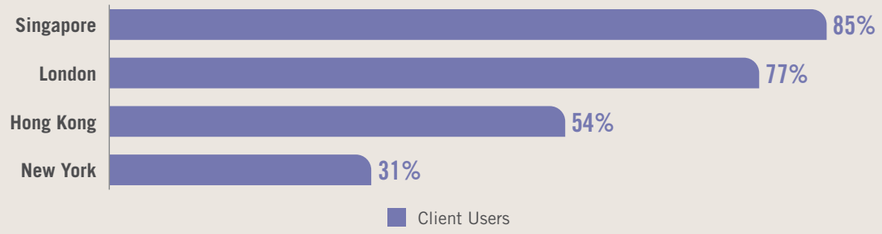
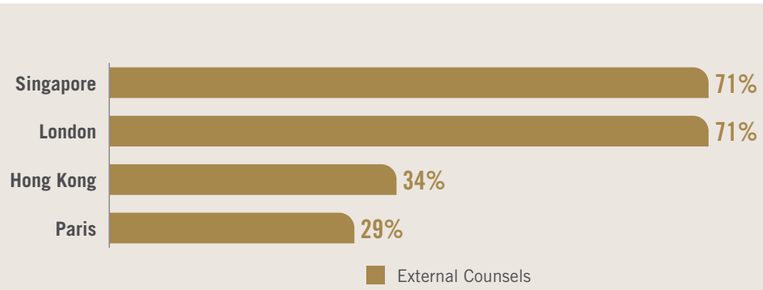


Exhibit 5.8



5.13 Singapore (73%), London (72%) and Hong Kong (37%) were selected by the respondents as the most commonly used international commercial arbitration seats. For Client Users, Singapore (85%) is the most used international commercial arbitration seat. On the other hand, External Counsels' most used international commercial seats are London (71%) and Singapore (71%). This also reinforces the standing of Singapore, London and Hong Kong as arbitration-friendly jurisdictions that have comprehensive domestic laws governing international arbitration and put a premium on procedural flexibility, confidentiality and direct enforceability. It must be noted that these charts also reflect the geographic profiles of the respondents who were mainly from Asia.

Factors Affecting Choice of Arbitration Institutions and Respondents' Satisfaction with Choice of Arbitration Institution

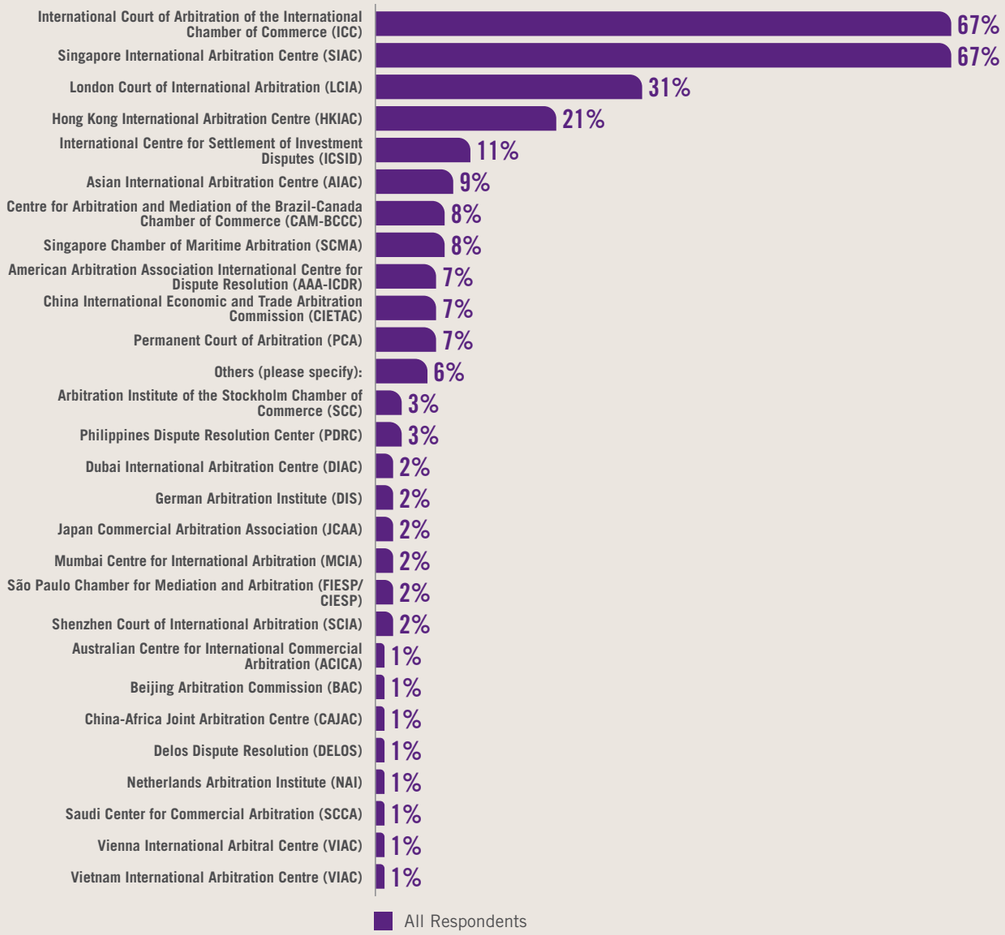
Exhibit 5.9

5.14 In choosing an arbitral institution, efficiency (91%), institutional rules (e.g., emergency arbitrator, expedited procedure, consolidation, joinder, etc.) (91%) and cost (78%) were the top three 'important' or 'absolutely crucial' characteristics.

5.15 The respondents were 'very satisfied' or 'somewhat satisfied' with the institutional rules (e.g., emergency arbitrator, expedited procedure, consolidation, joinder etc.) (78%), efficiency (68%) and size and expertise of panel of arbitrators (64%) at their choice of arbitration institution. The data with respect to importance and respondent satisfaction highlights efficiency as the main factor in deciding on an arbitral institution.

Choice of Arbitration Institution

Exhibit 5.10



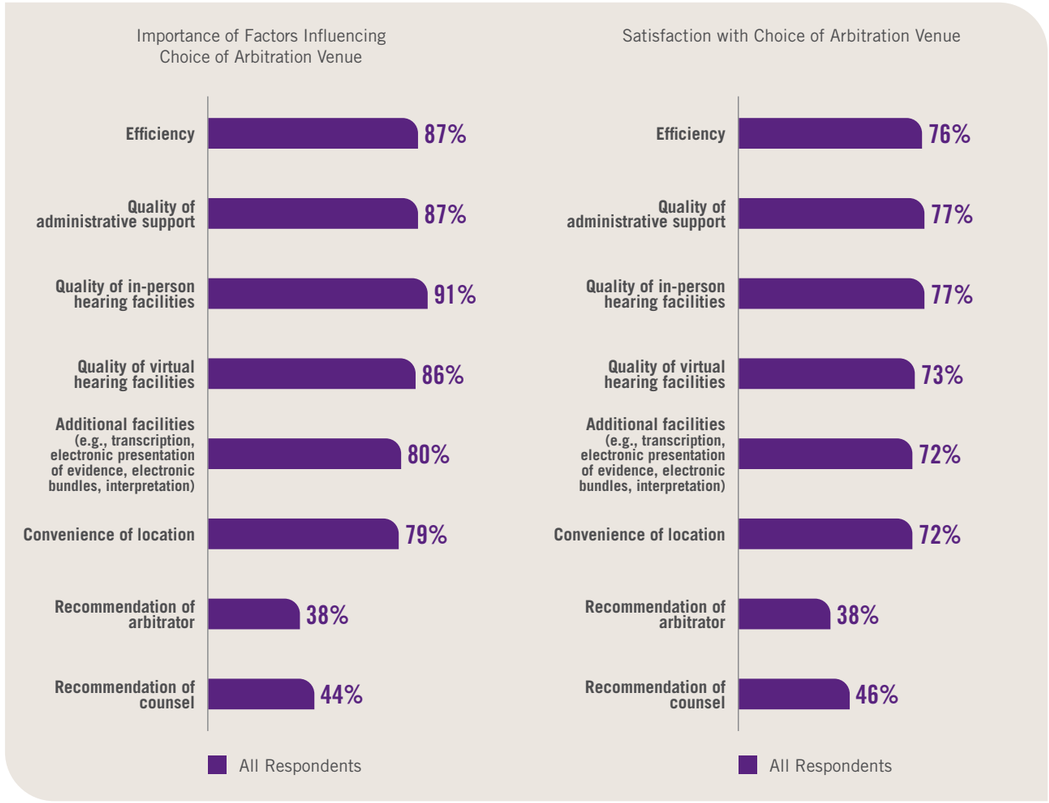
5.16 The top three commonly used international commercial arbitration institutions are the International Court of Arbitration of the International Chamber of Commerce (**"ICC"**) (67%), the Singapore International Arbitration Centre (**"SIAC"**) (67%) and the London Court of International Arbitration (**"LCIA"**) (31%). These are the same most commonly used institutions in the SIDRA Survey Final Report 2020. These institutions are known for their progressive institutional rules, diverse panel of arbitrators and flexible cost structures.

Point of Interest

The new ICC Rules of Arbitration took effect on 1 January 2021. The new rules are aimed at making ICC arbitrations more flexible, efficient and transparent. One of the notable changes in the 2021 ICC Arbitration Rules is found in the new Appendix IV on Case Management Techniques. It provides that arbitral tribunals should encourage parties to enter into a settlement agreement through negotiation or other forms of dispute settlement, including mediation under the ICC Mediation Rules.

Factors Affecting Choice of Arbitration Venue and Respondents' Satisfaction with Choice of Arbitration Venue

Exhibit 5.11



5.17 In choosing an arbitration venue, respondents found the quality of in-person hearing facilities (91%), efficiency (87%) and the quality of administrative support (87%) 'important' or 'absolutely crucial'. Other notable characteristics include the quality of virtual hearing facilities (86%) and the availability of additional facilities such as transcription, electronic presentation of evidence, electronic bundles and interpretation (80%). Interestingly, the quality of in-person hearing facilities did not rank as high in the SIDRA Survey Final Report 2020. With pandemic-related travel restrictions being lifted across the world, more hearings are again held in person, highlighting the need for quality in-person hearing facilities.

5.18 Both Client Users and External Counsels were 'very satisfied' or 'somewhat satisfied' with the quality of administrative support (77%), quality of in-person hearing facilities (77%) and efficiency (76%) of their chosen arbitration venue.

Most Commonly Used International Commercial Arbitration Venues and Hearing Centres

Exhibit 5.12

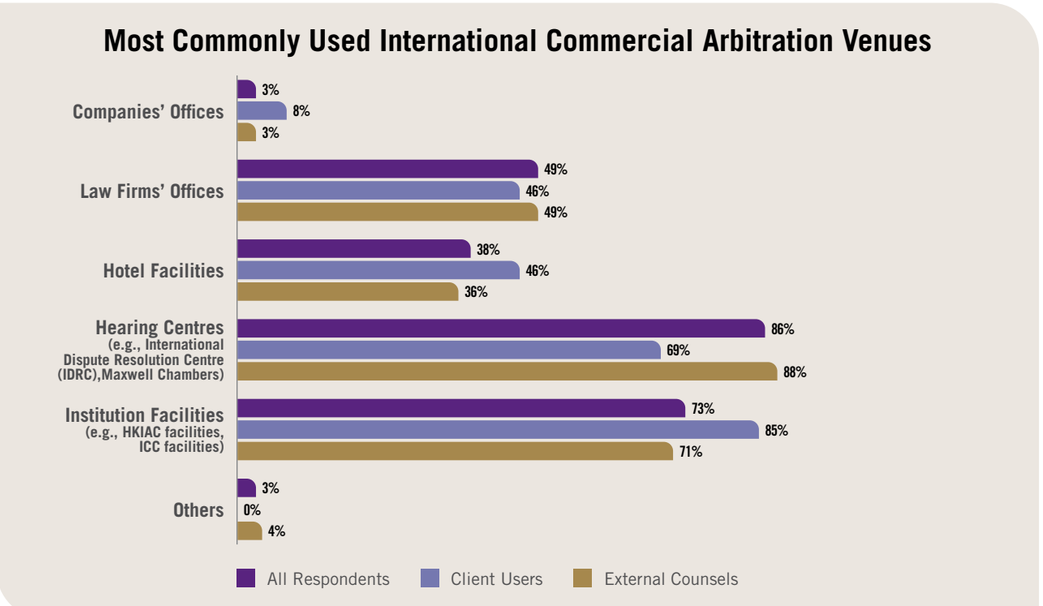
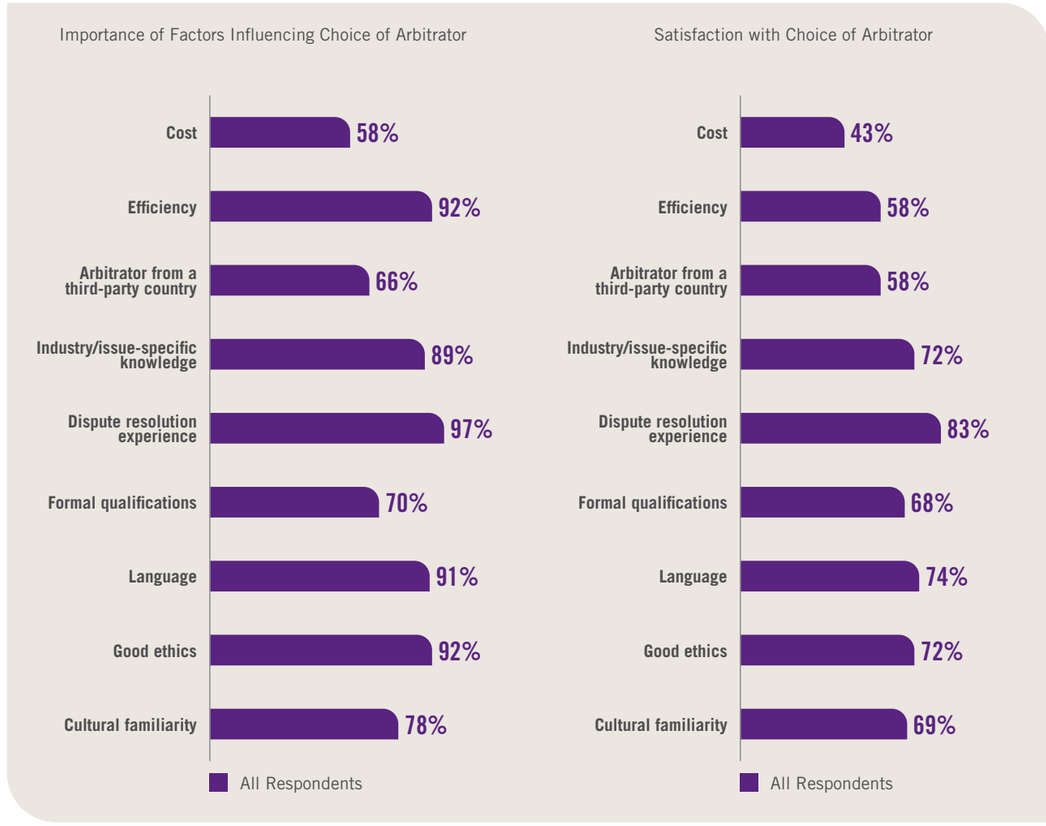


Exhibit 5.13

5.19 The top three most commonly used international commercial arbitration venues were hearing centres (86%), arbitration institution facilities (73%) and law firms' offices (49%). Maxwell Chambers, Singapore (78%) continues to be the most commonly used hearing centre for international commercial arbitration. The International Dispute Resolution Centre ("**IDRC**"), London (36%) and New York International Arbitration Centre ("**NYIAC**"), New York (16%) facilities are some of the most commonly used hearing centres. It should be noted that this once again highlights the geographic profile of the respondents to the Survey, with most coming from Asia.

Factors Affecting Choice of Arbitrator and Respondents' Satisfaction with Choice of Arbitrator

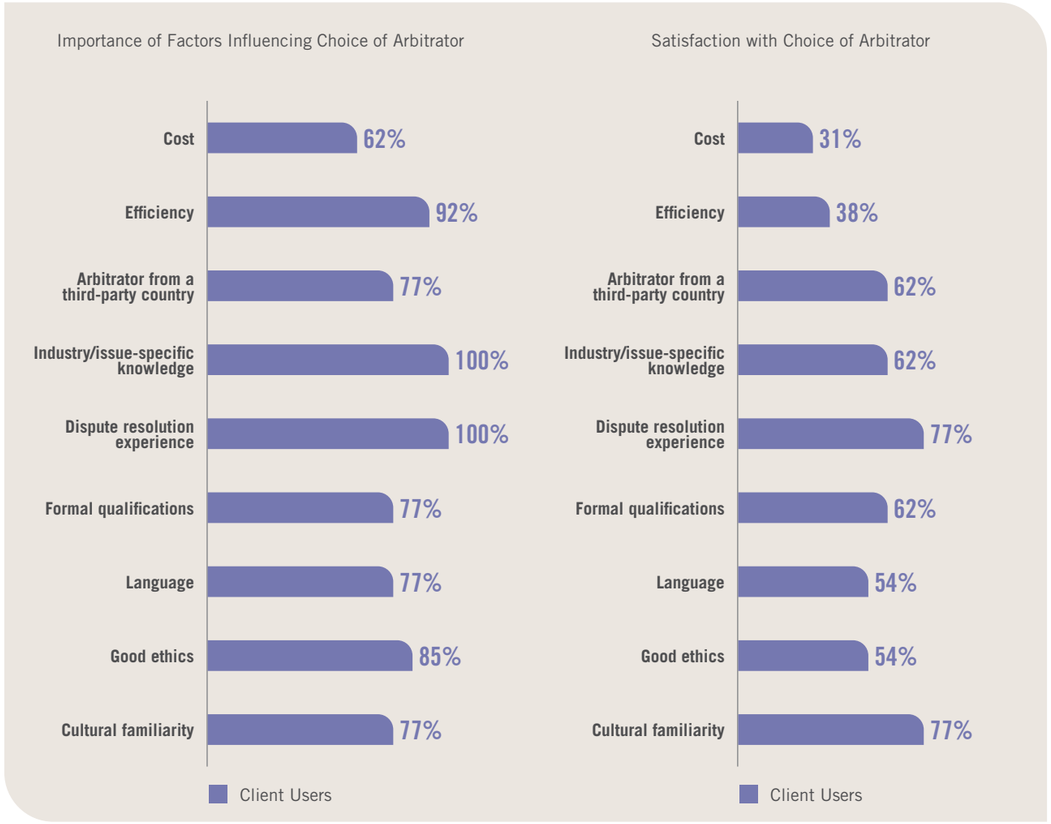
Exhibit 5.14



5.20 In choosing an arbitrator, the respondents indicated that dispute resolution experience (97%), efficiency (92%), good ethics (92%), language (91%) and industry/issue-specific knowledge (89%) were 'important' or 'absolutely crucial' factors in choosing arbitrators. Other factors include cultural familiarity (78%), formal qualifications (70%) and that the arbitrator is from a third-party country (66%). Respondents identified cost (58%) as the least important factor in choosing arbitrators.

5.21 Respondents were 'very satisfied' or 'somewhat satisfied' with the dispute resolution experience (83%), language (74%), good ethics (72%) and industry/issue-specific knowledge (72%) of their chosen arbitrators. Interestingly, respondents were least satisfied with the cost (43%) related to their chosen arbitrators. This reinforces the growing discontent by users with the costs of arbitration.

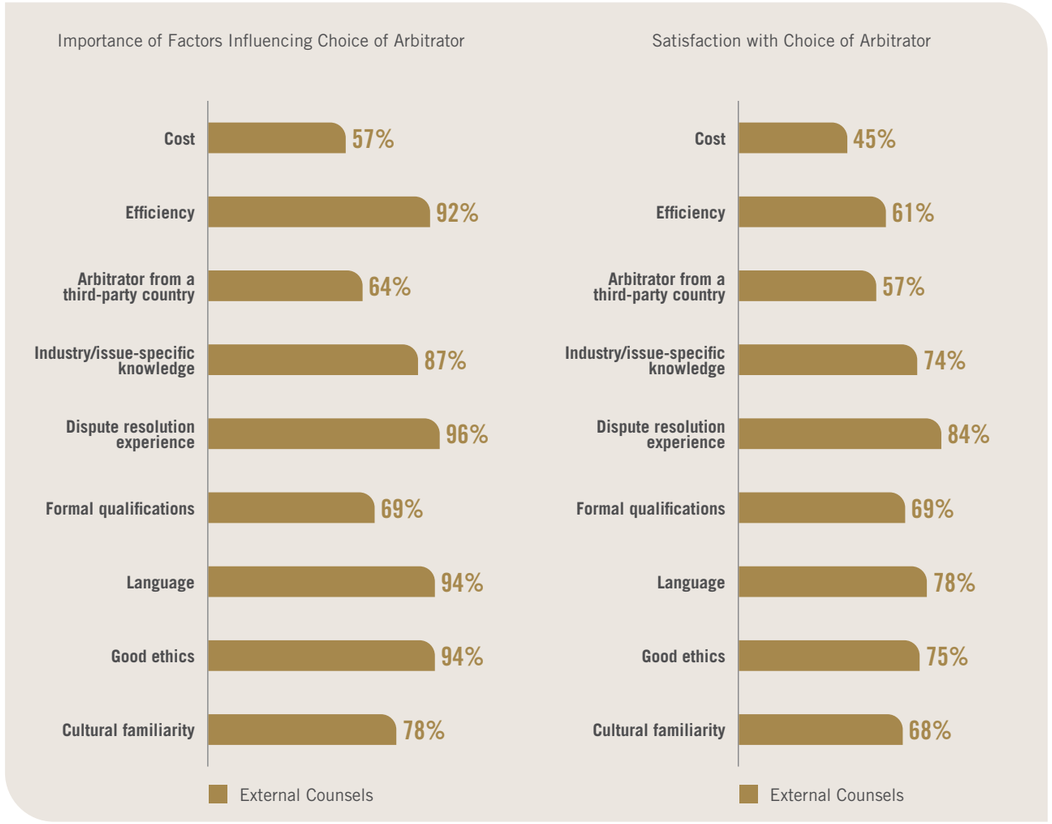
Exhibit 5.15



5.22 For Client Users, the 'important' or 'absolutely crucial' factors in choosing arbitrators were dispute resolution experience (100%), industry/issue-specific knowledge (100%), efficiency (92%) and good ethics (85%). Cost was the least important characteristic at 62%.

5.23 Client Users were 'very satisfied' or 'somewhat satisfied' with the dispute resolution experience (77%), cultural familiarity (77%), industry/issue-specific knowledge (62%) and formal qualifications (62%) of their chosen arbitrators. But it must be noted that Client Users were least satisfied with the efficiency (38%) and cost (31%) associated with their chosen arbitrators.

Exhibit 5.16



5.24 External Counsels essentially prioritise the same factors as Client Users in choosing arbitrators. Dispute resolution experience (96%) was the most 'important' or 'absolutely crucial' factor for External Counsels. Other factors include language (94%), good ethics (94%), efficiency (92%) and industry/issue-specific knowledge (87%).

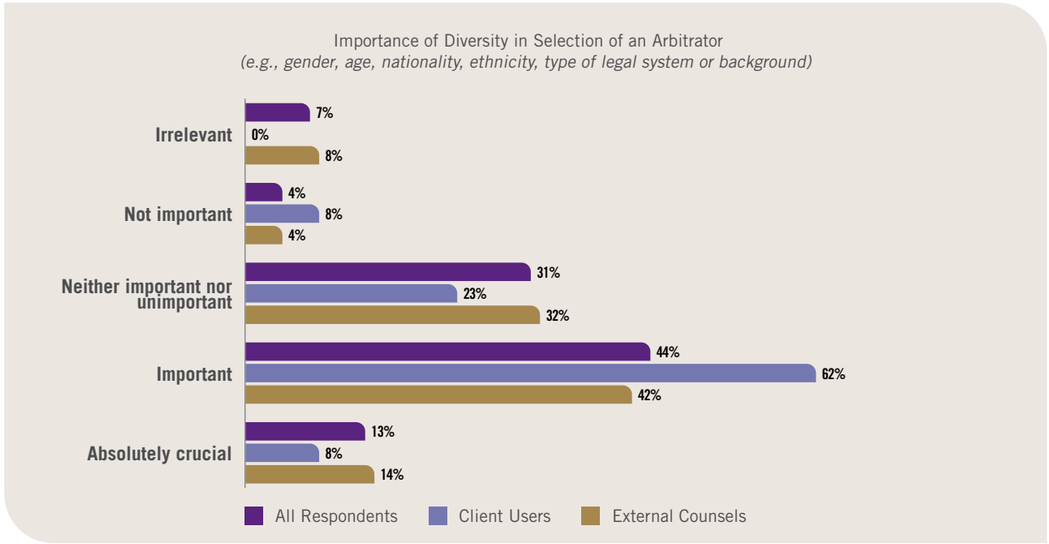
5.25 Like Client Users, External Counsels were 'very satisfied' or 'somewhat satisfied' with the dispute resolution experience of their chosen arbitrator (84%) and least satisfied with efficiency (61%) and cost (45%).

Point of Interest

To improve arbitrator efficiency and to prevent lengthy proceedings, several international arbitration institutions impose strict deadlines on arbitrators regarding the issuance of awards. For instance, Rule 32.3 of the 2016 SIAC Rules states that tribunals should submit the draft award to the Registrar 45 days from the date that the tribunal declared the proceedings closed. Article 31 of the 2021 ICC Rules requires tribunals to render their final award within six months from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, should the parties refuse to take part in the drafting of the Terms of Reference, from the date of notification to the arbitral tribunal by the ICC Secretariat of the approval of the Terms of Reference by the ICC Court. The Court may extend the time limit following a reasoned request from the arbitral tribunal or on its own initiative.

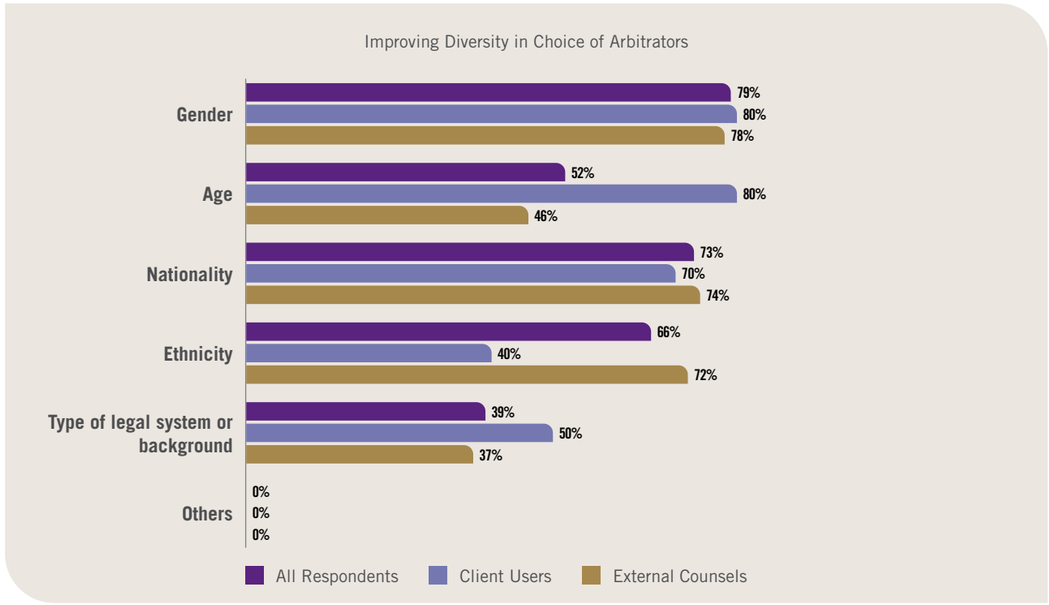
How Important is Diversity in the Selection of an Arbitrator

Exhibit 5.17



5.26 For this iteration of the SIDRA Survey, respondents were asked about the importance of diversity, in terms of gender, age, nationality, ethnicity, or background, in their selection of arbitrators. 44% of the respondents indicated that diversity was 'important'. Only 13% of the respondents found diversity as 'absolutely crucial'. It must be noted that Client Users (62%) found diversity more important than External Counsels (42%). None of the Client Users found diversity in arbitrators irrelevant. This may be because diversity is perceived to enhance the outcome of arbitration proceedings. It democratises the field, allowing more individuals with varying experiences and from different nationalities, ethnicities and legal systems to offer their perspective and contribute to the decision-making processes.

Exhibit 5.18



5.27 79% of the respondents would like to see more diversity in the gender of arbitrators. The majority of the respondents would also like to see more diversity in nationality (73%), ethnicity (66%) and age (52%) of arbitrators. Seeking diversity in these areas reinforces the challenge that arbitration is facing – that arbitrators are chosen from a relatively static pool of individuals.

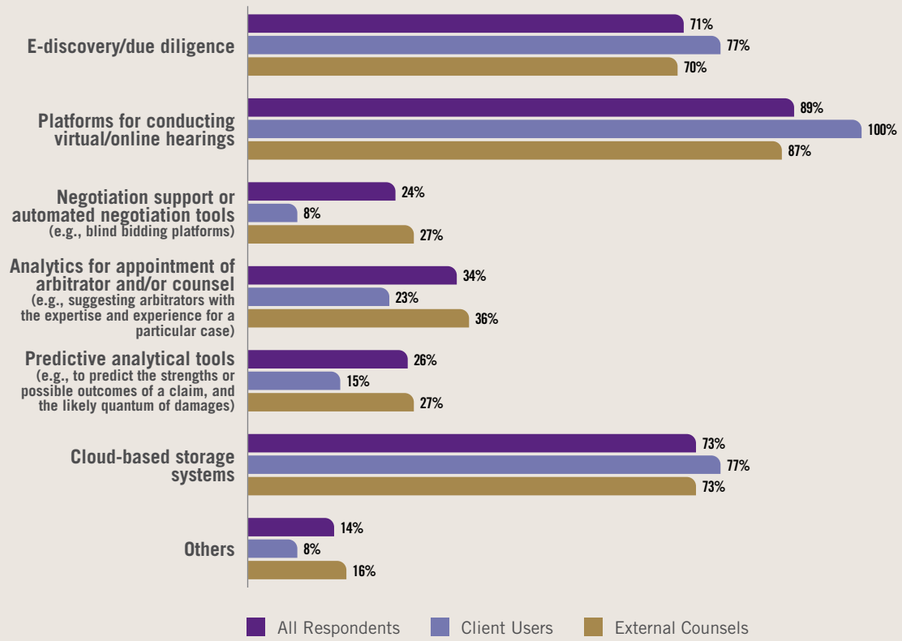
Point of Interest

The Cross-Institutional Task Force on Gender Diversity of the International Council for Commercial Arbitration ("**ICCA Task Force**") reported that in 2019, women comprised 21.3% of total arbitral appointments, up from 12.2% in 2015. While the number of women appointed as arbitrators is on the rise, more efforts need to be made to increase gender diversity. The ICCA Task Force highlighted the importance of having more women sit as arbitrators. Several women are highly qualified to be arbitrators; they have the "specific credentials, skills, temperament, and availability". More diverse arbitral tribunals also enhance the legitimacy of arbitration, especially when public interests are involved. Gender diversity also improves the decision-making process. It increases efficiency and avoids cognitive biases such as groupthink. Having individuals with various backgrounds and experiences enhances the arbitral process and outcome.[5]

5 *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf*

Usefulness of Technology in Supporting an Arbitration Procedure

Exhibit 5.19



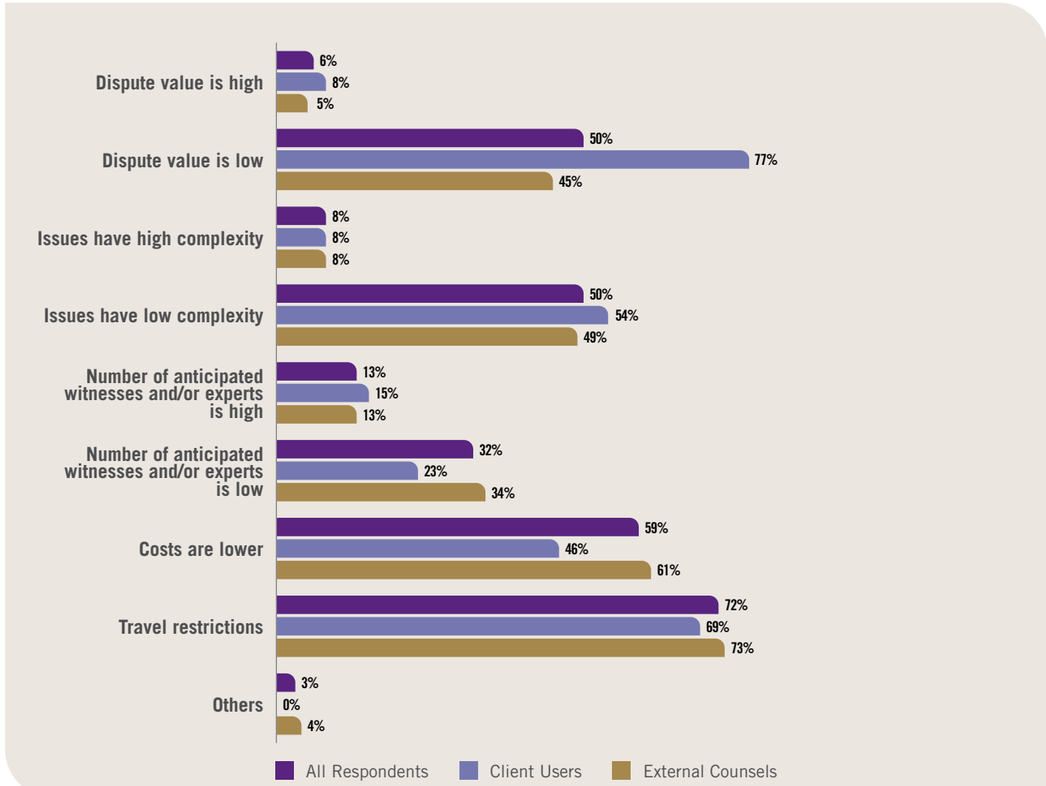
5.28 The SIDRA Survey Final Report 2020, published at the start of the pandemic, observed an increasing number of users and institutions incorporating technology in arbitration. The pandemic has accelerated this trend.

5.29 A large majority of the respondents identified the following technologies as either 'extremely useful' or 'useful': platforms for conducting virtual/online hearings (89%), cloud-based storage systems (73%) and e-discovery/due diligence (71%). This is very likely a result of the pandemic necessitating the remarkable pivot towards online hearings and work-from-home arrangements. By contrast, only 47% and 62% of the SIDRA Survey Final Report 2020 respondents had the same views of online hearings and e-discovery/due diligence respectively (respondents were not surveyed on cloud-based storage systems that year). It will be interesting to see whether arbitration users continue to embrace these technologies if and when travel and office work eventually resume at pre-pandemic levels.

5.30 Consistent with the SIDRA Survey Final Report 2020, fewer respondents found analytics for arbitrator and counsel appointments (34%), predictive analytical tools (26%) and negotiation support or automated negotiation tools (24%) to be 'extremely useful' or 'useful'. These ratings showed little change from the SIDRA Survey Final Report 2020, which posited that the ratings reflected how users may not be familiar with these technological tools. This suggests that these technological tools are not perceived as necessary, in comparison to online hearings and cloud-based storage systems that are needed to allow arbitration proceedings to take place during a pandemic.

Factors Affecting the Choice to Use a Wholly Online Platform to Conduct International Commercial Arbitration

Exhibit 5.20



5.31 Respondents were asked to select the top three factors that would make them choose a wholly online platform to conduct their arbitration proceedings. In another sign of these pandemic times, the vast majority of all respondents (72%) identified travel restrictions as one of their top three factors.

5.32 It seems likely that, in the absence of travel restrictions, respondents prefer to use online platforms in situations where the costs are lower, the dispute value is low and where issues have low complexity (as evidenced by these options being selected by 59%, 50% and 50% of respondents respectively). In this respect, little has changed since the SIDRA Survey Final Report 2020.

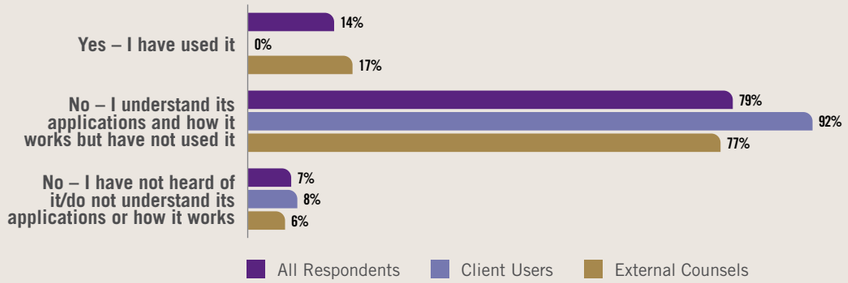
5.33 Client Users' views on the use of online platforms for arbitration were broadly similar to those of External Counsels. There was one interesting area of divergence - 77% of Client Users identified the low value of a dispute as one of their top three factors in choosing a wholly online platform for arbitration, while only 45% of External Counsels held the same view. It may be that, where the stakes are lower, Client Users are attracted by the speed and convenience of online proceedings.

Point of Interest

Another significant addition to the 2021 ICC Arbitration Rules is the provision on virtual hearings. The 2017 ICC Rules did not explicitly state that hearings could be done virtually. Given the technological shift brought about by the pandemic, Article 26 of the new 2021 ICC Arbitration Rules now gives the arbitral tribunal the power to decide, after consulting with the parties, whether to conduct hearings in person or remotely by videoconference, telephone, or other means of communication.

Use of Third-Party Funding in International Commercial Arbitration

Exhibit 5.21



5.34 Respondents were also asked about their use of third-party funding in international commercial arbitration. The majority of the respondents (79%) understand what third-party funding is but have not used it. Only 17% of External Counsels have used third-party funding and virtually none of the Client Users have had experience with the same. This shows that while several investment companies have emerged to finance disputes, third-party funding has not been widely used by parties to an arbitration.

Point of Interest

Third-party funding involves financial support from a funder – banks, hedge funds, or other entities that provide funding for profit – to facilitate arbitration proceedings. Newer instruments, such as the 2021 Canada Model Foreign Investment Promotion and Protection Agreement, European Union-Singapore Free Trade Agreement, and the new International Centre for Settlement of Investment Disputes ("**ICSID**") Arbitration Rules, have included donations or grants as forms of third-party funding. Before a third-party funder steps in, the third-party funder would generally scrutinise and evaluate the claimant's case before agreeing to fund it. Should a favourable decision be obtained, third-party funders receive a portion of the proceeds awarded. One of the advantages of employing third-party funding is the ability of parties to institute arbitration proceedings while shifting the financial risk to the funder, thus increasing access to dispute resolution proceedings that may otherwise have been out of the claimant's reach. Third-party funding is now widely available and permitted across different jurisdictions.

5.35 The United Kingdom ("**UK**") and Australia have long histories of allowing third-party funding in their jurisdictions. In 2005, the UK Court of Appeal held that third-party funders "provide help to those seeking access to justice which they could not otherwise afford".[6] A year later, the High Court of Australia upheld third-party funding agreements as well.[7] In both the UK and Australia, third-party funding operates "with little regulation".[8] For instance, there is no requirement in both jurisdictions to disclose the existence of third-party funding agreements and the identity of funders in litigation or arbitration. Recently, Australia has required funders to hold an Australian Financial Services License.[9] This is intended to make funders more transparent and more accountable.[10]

5.36 Singapore[11] and Hong Kong[12] changed their statutes in 2017 to permit third-party funding in international arbitration. Compared to the UK and Australia, Singapore and Hong Kong put in place a framework to regulate third-party funding. Third-party funders in Singapore must also comply with the Civil Law (Third-Party Funding) Regulations 2017. Funders in Hong Kong, on the other hand, must observe the practices and standards found in the Code of Practice For Third Party Funding of Arbitration. It must be noted that, in both Singapore and Hong Kong, disclosure of the existence of a third-party funding agreement and the funder itself is mandatory.

6 *Arkin v. Borchard Lines Ltd & Ors [2005] 1 WLR 3055.*
7 *Cambpells Cash and Carry Pty Ltd v. Fostif Pty Ltd (2006) 229 CLR 386.*
8 *Caroline Kenny, A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia, (2021), 87, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 2, pp. 170-190, available at https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/87.2/AMDM2021014*
9 *Corporations Amendment (Litigation Funding) Regulations 2020 (Cth).*
10 *Explanatory Statement, Corporations Amendment (Litigation Funding) Regulations 2020, Issued by authority of the Treasurer, available at http://www5.austlii.edu.au/au/legis/cth/num_reg_es/cafr2020202000942551.html#:~:text=The%20purpose%20of%20the%20Corporations,managed%20investment%20scheme%20(MIS)%20regime*
11 *Civil Law Act (Cap 43), ss. 5A, 5B.*
12 *Arbitration Ordinance (Cap 609), Part 10A.*

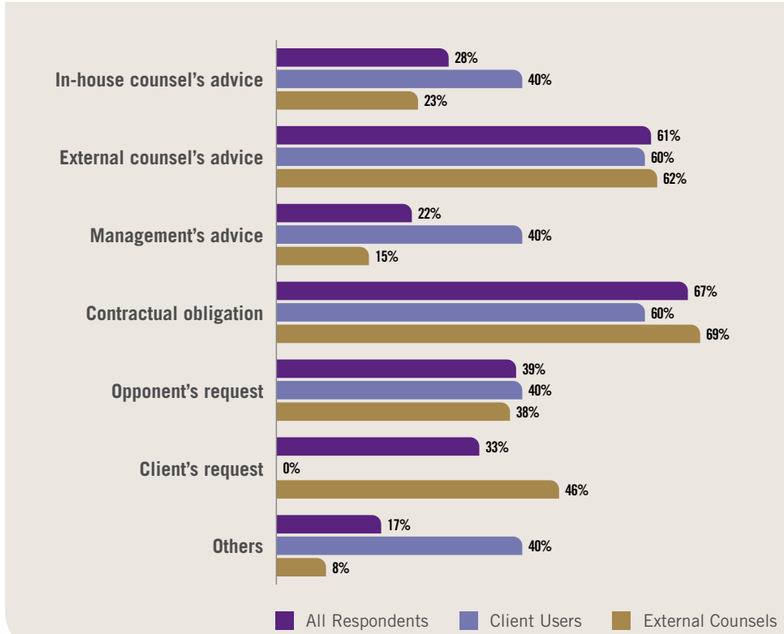
Section 6: International Commercial Mediation

At A Glance:

- The majority of the respondents identified preservation of business relationship, confidentiality and speed as the top three 'important' or 'absolutely crucial' factors for opting to use international commercial mediation to resolve disputes.
- The majority of the respondents were most satisfied with the ethical standards, language skills and dispute resolution experience of their chosen mediators.
- The majority of the respondents indicated that technology was most useful for conducting virtual/online mediation. Interestingly, Client Users found different technological tools, such as e-discovery/due diligence, automated negotiation tools and analytics for mediator appointment more useful than External Counsels.
- Gender, nationality and ethnic diversity in the pool of mediators were areas which the majority of the respondents thought should be improved.

Factors that Contributed to Respondents' Choice to Use International Commercial Mediation

Exhibit 6.1



6.1 The top two influences on respondents' choice to use international commercial mediation were contractual obligation (67%) and external counsel's advice (61%).

6.2 Contractual obligation may come in the form of mandatory mediation clauses or mixed mode dispute resolution clauses, and these include mandatory mediation before arbitration proceedings may be commenced. Such clauses have been held to be enforceable by Hong Kong, Australia, Singapore and UK courts.

6.3 These mixed mode clauses have become more prevalent, with dispute resolution centres around the world providing model clauses. For example, centres that have adopted such clauses include the LCIA and the Vienna International Arbitration Centre. Some institutions like the SIAC and Singapore International Mediation Centre ("**SIMC**") also provide variations of these multi-tiered clauses, such as Arb-Med-Arb clauses. Such mixed mode dispute resolution clauses seek to allow parties to resolve their dispute efficiently and to help all parties save time and costs.[13]

6.4 Saving time and costs is also one reason why External Counsels would recommend that parties opt for mediation. In fact, in the Singapore Rules of Court (2021) that took effect as of 1 April 2022, pursuant to O.5, r.1(1), a party to any proceedings has the duty to consider the amicable resolution of the party's dispute before the commencement and during the course of any action or appeal.

6.5 Hong Kong has a similar scheme. In Hong Kong, under Practice Direction ("**PD**") 31, the court has the discretion to make an "adverse costs order against a party on the ground of unreasonable failure to engage in mediation". While PD 31 does not impose mandatory mediation on parties, the practical effect is that parties (under legal advice of their solicitors and encouragement by the court) are more likely to attempt mediation to avoid the possibility of such an adverse costs order.

6.6 In the Philippines, courts are mandated to refer all ordinary civil cases, family law cases, select special civil actions, special proceedings related to the settlement of estates, intellectual property cases, commercial or intra-corporate controversies and environmental cases to court-annexed mediation ("**CAM**"). Mediators have a non-extendable 30 calendar days to complete the CAM.[14] The CAM is meant to push parties to reach a compromise agreement early on and prevent lengthy litigation.

Point of Interest

The Singapore Rules of Court (2021) took effect on 1 April 2022. Under O.5, r.1, a party is to make an offer of amicable resolution before commencing the action unless the party has reasonable grounds not to do so, which could include an offer to settle the action or making an offer to resolve the dispute other than by litigation, whether in whole or in part. It also provides that a party to any proceedings must not reject an offer of amicable resolution unless the party has reasonable grounds to do so. The terms of an amicable resolution are set out in O.5, r.2. First, an offer of amicable resolution and any rejection must be in writing. Second, the offer of amicable resolution must be open for acceptance for at least 14 days, unless parties agree otherwise. Third, the terms of an offer that has been made and not accepted must not be made known to the Court until after the Court has determined the merits of the action or appeal and is dealing with the issue of costs. Fourth, any offer of amicable resolution which does not state an expiry date expires once the Court has determined the merits of the action or appeal to which it relates unless the offeror has stated otherwise.

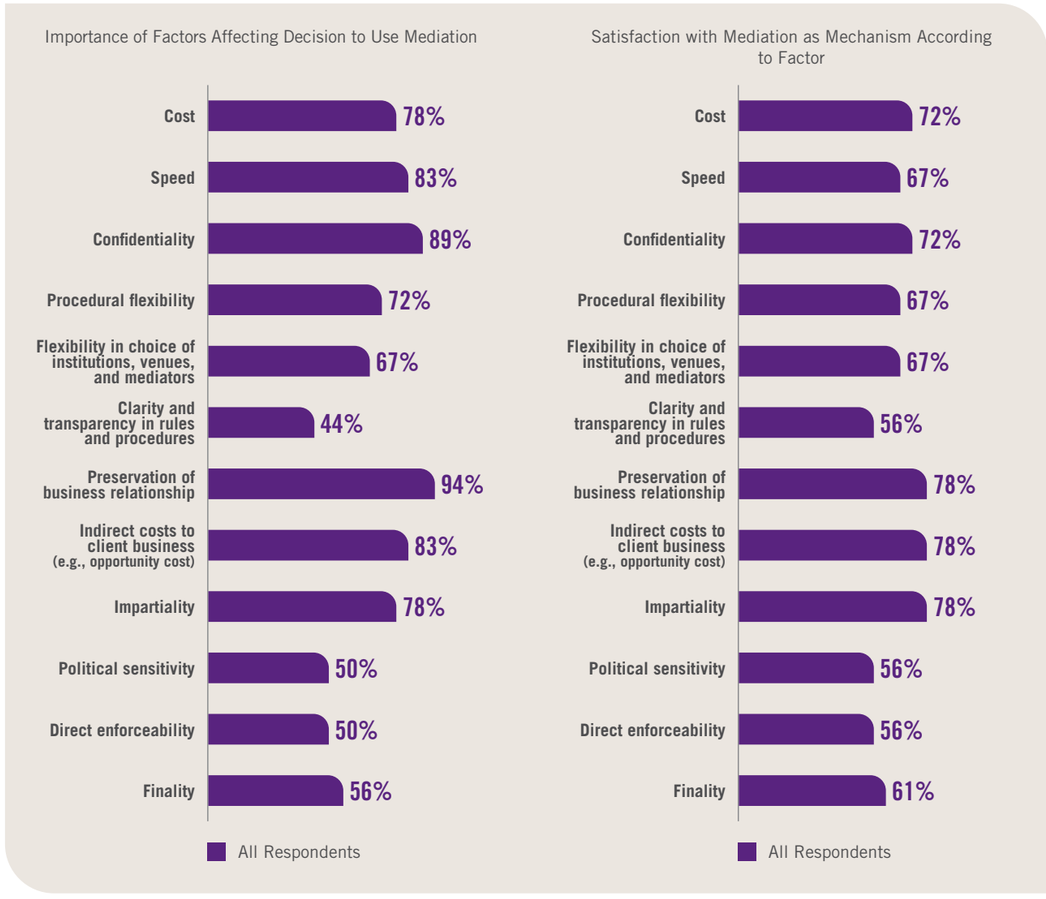
Under O.5, r.3 of the Singapore Rules of Court (2021), the Court has the power to order parties to attempt to resolve the dispute by amicable resolution. The Court can exercise its power to do so having regard to all relevant circumstances and the "Ideals" in civil procedure which include fair access to justice, expeditious proceedings, cost-effective work, efficient use of court resources and fair and practical results suited to the needs of the parties. Should a party inform the Court that the party does not wish to attempt to resolve the dispute by amicable resolution, the Court may order the party to submit a sealed document setting out the party's reasons for refusal, which will only be opened by the Court after the determination of the merits of the action or appeal and its content may be referred to on any issue of costs. The Court may also suggest solutions for the amicable resolution of the dispute to the parties at any time it thinks fit. There are cost consequences if parties do not discharge their duty to consider the amicable resolution of the dispute or to make an offer of amicable resolution in accordance with O.5 of the Singapore Rules of Court (2021).

The Singapore Rules of Court (2021) is likely to encourage External Counsels to consciously consider the amicable resolution of disputes and/or the possibility of undergoing mediation to save time and costs, even before commencing an action in the Singapore Courts.

13 *See Section 8 on Mixed Mode (Hybrid) Dispute Resolution.*
14 *Philippine Supreme Court Resolution A.M. No. 19-10-20-SC, 2020 Guidelines for the Conduct of the Court-Annexed Mediation (CAM) and Judicial Dispute Resolution (JDR) in Civil Cases.*

Factors Affecting the Decision to Use Mediation and Respondents' Satisfaction with Mediation as a Mechanism

Exhibit 6.2



6.7 The top two considerations that the respondents had in mind in deciding whether to use mediation were preservation of business relationship (94%) and confidentiality (89%). It is unsurprising for these to be the top two considerations since they are interrelated. The confidential nature of mediation is a draw for parties who seek to preserve their business relationship.

6.8 Confidentiality may also be important for parties for other reasons. For example, in contractual disputes involving state-owned entities, governments would want to keep sensitive policy considerations confidential, and an investor would want to maintain confidentiality over its trade secrets. These, however, might be publicised if litigation or arbitration is initiated.

6.9 Respondents were also similarly satisfied with these two characteristics of mediation (78% for the preservation of business relationship and 72% for confidentiality). The respondents may have been satisfied with the preservation of business relationships as both parties were able to compromise and reach an amicable settlement. This is a distinct advantage of mediation in comparison with other dispute resolution mechanisms; mediation can bring out creative and constructive ideas for both parties to not only resolve the dispute, but to move on from it.

Point of Interest

Many institutions, including arbitration centres, have developed rules specifically for mediation and have stringent rules in place to ensure that the proceedings are confidential. These rules are similar in nature. Several aspects of these rules are worth noting.

First, the mediation proceedings are confidential. For example, Article 12 of the LCIA Mediation Rules states, amongst other things, that "[t]here shall be no formal record or transcript of the mediation".

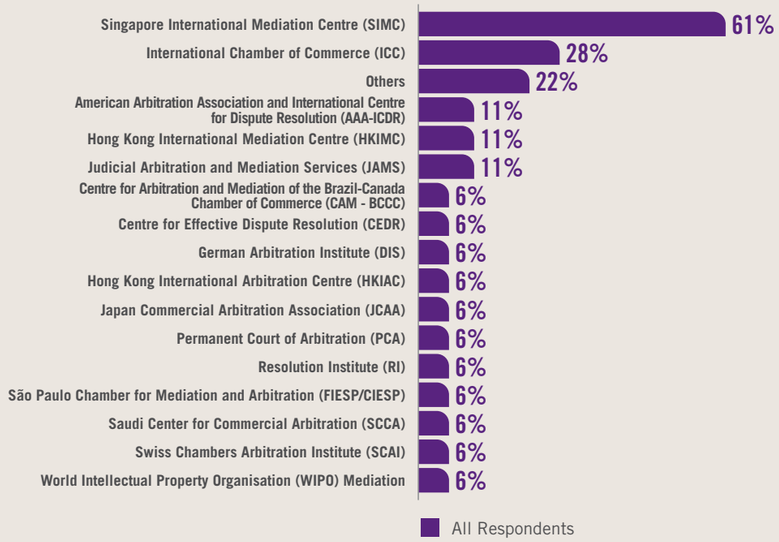
Second, mediators may not give evidence outside of mediation. For example, M-12 of the International Centre for Dispute Resolution ("**ICDR**") International Mediation Rules provides that "[t]he mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum". Rule 9.3 of the SIMC Mediation Rules is also similarly worded.

Third, communication or information disclosed during mediation is confidential too. For example, Rule 12 of the Hong Kong International Arbitration Centre ("**HKIAC**") Mediation Rules provides that "…[e]very document, communication or information disclosed, made or produced by any party for the purpose of or related to the mediation process shall be disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure. Confidentiality also extends to the settlement agreement except where its disclosure is necessary for implementation or enforcement…"

Fourth, confidentiality obligations are not absolute and are subject to exceptions in the law. This is seen in Rule 9.1 of the SIMC Mediation Rules and Rule 12.1 of the ICDR International Mediation Rules.

Choice of Mediation Institutions

Exhibit 6.3



6.10 Respondents indicated that their top two most used mediation institutions were the SIMC (61%) and ICC (28%).

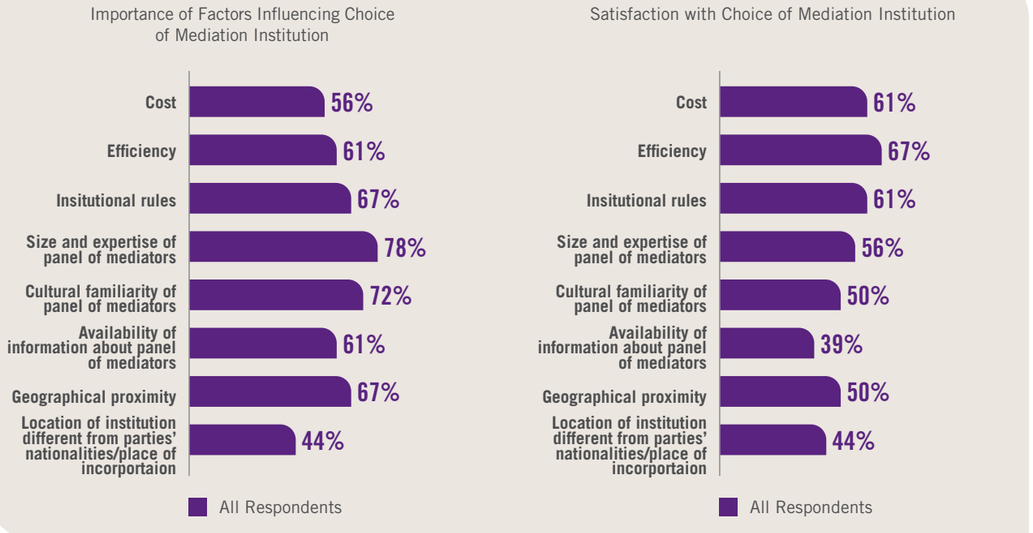
6.11 The SIMC was by far the most popular mediation institution that the respondents of the Survey used.[15] An important feature of the SIMC is the connectedness that the SIMC has with other institutions. One example is the SIMC-CAMP Joint COVID-19 Protocol, which targets businesses operating along the India-Singapore business corridor. This protocol seeks to offer international businesses access to economical, efficient and effective mediation amidst the COVID-19 pandemic. The two countries have seen bilateral trade rising over the years to about US$28 billion in 2019.[16] The SIMC also has a similar arrangement with the Japan International Mediation Center ("**JIMC**"). The JIMC-SIMC Joint COVID-19 Protocol expedites mediation for business relationships with a Japanese connection and is the first known COVID-19 mediation protocol between two international centres.[17] A unique feature of the JIMC-SIMC Joint COVID-19 Protocol is the appointment of co-mediators. In a mediation between a Japanese and a non-Japanese party, parties discuss their dispute with mediators who understand their respective jurisdiction and culture.

6.12 A further example is the innovative relationship between the SIAC and the SIMC. These two institutions together offer a comprehensive dispute resolution mechanism – the SIAC-SIMC Arb-Med-Arb. First, there is the SIAC-SIMC Arb-Med-Arb Model Clause. A mediated settlement agreement obtained through the Arb-Med-Arb process may be recorded as a consent award. The consent award is accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable under the New York Convention. Parties can achieve finality whether through the mediation process or arbitration process.[18]

15 In relation to this finding, it is important to note that the jurisdiction with the highest number of respondents is Singapore.
16 SIMC – CAMP Joint COVID-19 Protocol, available at https://simc.com.sg/simc-camp-joint-covid-19-protocol/
17 JIMC-SIMC Joint COVID-19 Protocol, available at https://simc.com.sg/jimc-simc-joint-covid-19-protocol/
18 Arb-Med-Arb, available at https://simc.com.sg/dispute-resolution/arb-med-arb/

Factors Affecting the Choice of Mediation Institutions and Respondents' Satisfaction with Mediation Institutions

Exhibit 6.4



6.13 Over 70% of the respondents stated that the size and expertise of the panel of mediators were important (78%) as well as the cultural familiarity of the panel of mediators (72%).

6.14 Different institutions are therefore seeking to have a variety of mediators on their panel and make this list publicly available. For instance, the Hong Kong Mediation Centre ("**HKMC**") provides a list of accredited mediators who sit on its panel and states their positions in private legal practice or in other relevant fields (i.e. Chartered Engineer, Facility Manager, Building Surveyor, etc). In Singapore, the SIMC has a geographically diverse panel of mediators, with 50% coming from Asia, 22% from Europe, 13% from Oceania and 12% from North America, publicly available on their website. The SIMC also provides information on the area of expertise, sector and language skills of their panel of mediators. The JIMC has a panel of non-resident mediators listed on its website, along with their curricula vitae. This panel includes mediators from the United States of America ("**USA**"), France, Australia, Canada, Hong Kong, UK and Singapore. In the USA, the International Institute for Conflict Prevention & Resolution ("**CPR**") has a list of neutrals, including mediators, which consists of prominent attorneys, retired state and federal judges, business executives and legal experts, on its website.

Point of Interest

To ensure the quality of mediators on a panel, various stakeholders must each play their part. For example, in Singapore, the Singapore International Mediation Institute ("**SIMI**") (formed in 2014) was tasked with introducing the highest international standards for professional mediators. SIMI's role is to certify the competency of mediators, set standards of professional mediator ethics, require continuing professional development for SIMI accredited mediators, increase awareness about mediation and develop tools available to assist parties in making basic decisions about mediation. SIMI has developed a four-tier accreditation and certification system which is designed for local and foreign mediators and relevant to domestic and international mediation practice.

SIMI also provides its mediators with feedback request forms to give to mediation parties and their representatives. This helps mediators to obtain real-time feedback on how to improve after each mediation. The Singapore Mediation Centre ("**SMC**") also reserves the right to dismiss mediators who run afoul of the SMC Code of Conduct. For Singapore lawyers acting as mediators, the Law Society's complaint procedures offer dissatisfied parties a channel for feedback.

6.15 While the size, expertise and cultural familiarity of the mediators were important in choosing mediation institutions, respondents were less satisfied with these areas. It is understandable why this might be the case in international commercial mediation. Parties might come from multiple jurisdictions and different cultures where disputes are resolved differently. Naturally, where there is a single mediator, or mediators from a particular region, this might result in certain cultural nuances being overlooked.

6.16 Efficiency of the mediation, on the other hand, was something that the majority of the respondents were most satisfied with (67%). The efficiency of a mediation hearing often heavily depends on the mediator. The mediator usually has control of the proceedings and as a neutral party, may be able to allocate time efficiently and effectively to each party. Hence, the skills of a mediator often correlate with the efficiency of the mediation.

6.17 To ensure that a mediator is well-equipped, institutions have taken various steps to train mediators. For example, the HKMC runs a 40-hour General Mediator Training Course to train and equip mediators with the right tools. In addition, the Hong Kong Mediation Accreditation Association Limited ("**HKMAAL**") has implemented a three-stage process before admitting a candidate as a general mediator. First, there needs to be a satisfactory completion of an HKMAAL-approved mediation training course. Second, the assessment stage requires candidates to mediate at least two HKMAAL simulated general mediation cases to demonstrate their competence. Third, a candidate may thereafter be called out for a personal interview and a possible further simulation supervised by a suitably qualified person chosen by the HKMAAL.

6.18 In Singapore, the SIMI credentialing scheme is a professional standards scheme developed by the SIMI to recognise the experience of mediators. A key feature of the SIMI Credentialing Scheme is the tiered system. This ensures that individuals with diverse mediation skills and experience are able to receive recognition and greater exposure to mediation. There are four tiers in the SIMI Credentialing Scheme – Level 1, Level 2, Level 3 and Certified Mediator –which seeks to encourage mediators to continually acquire more mediation experience and skills. To attain Level 1, a candidate needs to complete and pass a SIMI Registered Training Programme. For the subsequent levels, candidates are required to acquire increasing levels of experience as a mediator. SIMI Certified Mediators can also apply to become International Mediation Institute ("**IMI**") Certified Mediators without having to complete additional requirements.

6.19 Another body in Singapore that provides training and credentialing of mediators is the SMC. The SMC requires candidates to take a written assessment and a practical assessment (role-play simulation) before admitting them as an SMC Accredited Mediator. The learning does not stop there. To further one's mediation practice by becoming internationally certified, a mediator would need to apply with the IMI to become a Qualified Mediator. This would include completing an IMI-approved Certified Mediator Training Programme such as the SMC IMI Certified Mediator Training Programme which includes approximately 42 hours of training and various scenarios of role-playing.

Point of Interest

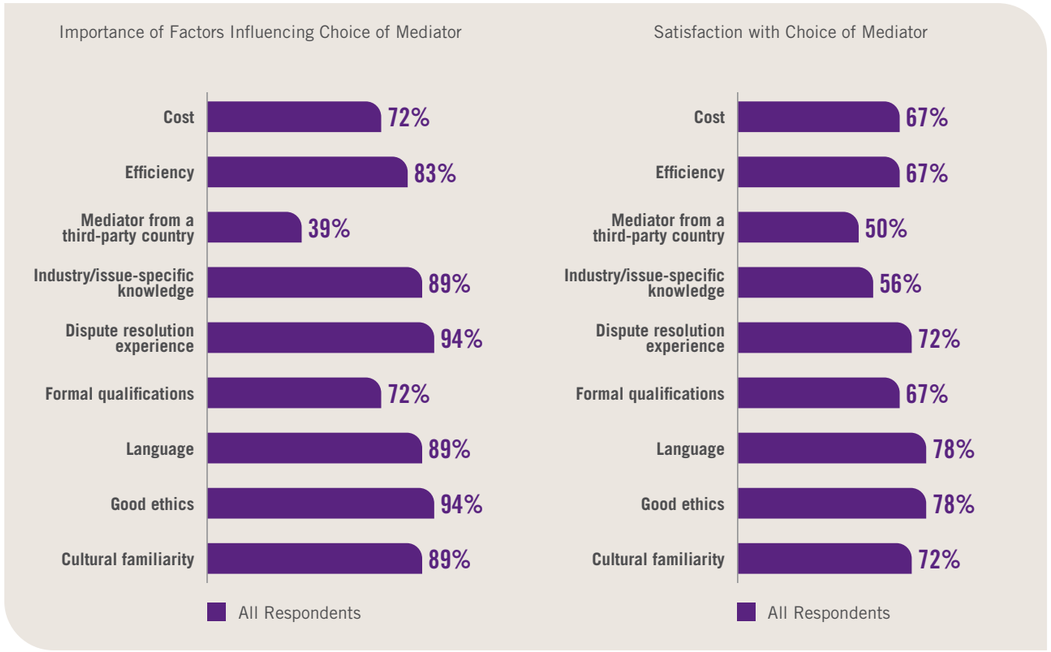
Recent regulatory developments in international mediation have emphasised the importance of professional standards for mediation.

For example, Articles 5(1)(e) and (f) of the Singapore Convention on Mediation provide that relief sought by a party relying on a mediated settlement agreement may be denied if "[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement" or if "[t]here was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement".

The *travaux preparatoires* of the Singapore Convention on Mediation reveals an interesting perspective on professional standards in mediation and the appropriate balance with enforcing a mediated settlement agreement. During discussions, there was a concern raised that terms such as "material impact" or "undue influence" were ambiguous and introduced uncertainties. However, it was explained that the introduction of these terms was an attempt to "incorporate more objective standards with a higher threshold". It was acknowledged that while those terms may be novel, enforcing authorities would not have much difficulty in interpreting them.

Factors Affecting the Choice of Mediators and Respondents' Satisfaction with Mediators

Exhibit 6.5



6.20 The top two factors influencing the choice of mediators were dispute resolution experience (94%) and good ethics (94%). Dispute resolution experience helps mediators understand what parties are looking for when there is a dispute. This is because parties may not always be looking at obtaining the instituted claims in a suit. Rather, these claims may just be a means to an end. Mediators who have dispute resolution experience would be able to understand such nuances and help parties to structure a creative solution, such that each party gets what they desire.

6.21 Mediators must have good ethics and should above all, be free of bias. This is important because parties attend mediation consensually and place considerable trust in the mediator to actively help both sides resolve their dispute.

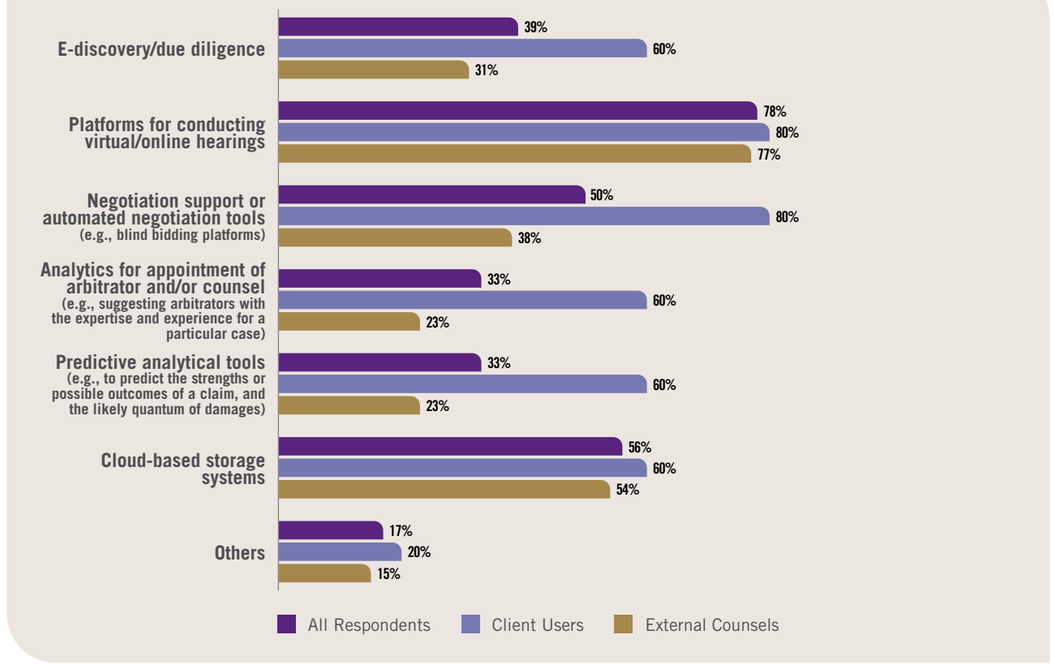
6.22 Interestingly, the least important characteristic in choosing a mediator is whether the mediator is from a third-party country (39%). This may be explained by the contrast between the role of a mediator and that of an arbitrator or judge. An arbitrator or judge will have to make a finding with a basis in law that would favour only one party, and hence the nuances that a judge or arbitrator may understand from a jurisdiction would be important. In mediation, however, the aim is to help both parties walk away from the mediation satisfied. Having a mediator from either side's country might even help the mediator understand where one party is coming from and propose a more tailored solution to resolve the dispute.

6.23 Most respondents were satisfied with the top two factors affecting their choice of mediator. 78% of the respondents were satisfied with the ethical conduct of mediators while 72% of the respondents were satisfied with the dispute resolution experience of the mediators.

6.24 However, only 56% of the respondents were satisfied with the mediators' industry/issue-specific knowledge. 89% of the respondents viewed this as an important characteristic in choosing a mediator. The data suggests that most respondents rate the subject-matter expertise of mediators as important. For instance, parties to investment-related, intellectual property or maritime disputes may require mediator expertise in these areas respectively. At the same time, it is important to note that there is a strong and ongoing debate in the professional mediation community about whether mediators expertise should be process-related rather than subject-matter related.

Usefulness of Technology in Supporting a Mediation Procedure

Exhibit 6.6



6.25 Unsurprisingly, the majority of the respondents of the Survey felt that technology was most useful for conducting virtual/online hearings (78%). The use of technology increased exponentially during the pandemic and has also made online hearings more cost and time efficient. Furthermore, the Survey results suggest that technology has not compromised the quality of mediation. Institutions around the world have adapted swiftly to these changes and have state-of-the-art facilities to conduct mediations in a conducive manner.

6.26 It also seems that Client Users are more dependent on, and comfortable with, technology as compared to External Counsels. For instance, more Client Users (60%) find technology useful for e-discovery/due diligence as compared to External Counsels (31%). This could be because External Counsels are more traditional in terms of legal practice and more sceptical about the automation of discovery, especially since some of the documents may be indirectly relevant and external counsel would need to make judgment calls regarding each of these documents, as compared to simply relying on technology.

6.27 Client Users (80%) also find technology more useful in negotiation support or automated negotiation tools as compared to External Counsels (38%). This may be explained by External Counsels' desire to have control over the negotiations as compared to leaving aspects of it to chance by using negotiation tools such as blind bidding platforms.

6.28 Client Users (60%) also find technology more useful in analytics for the appointment of a mediator and/or counsel as compared to External Counsel (23%). External Counsels experienced in mediation sometimes know mediators personally and this may influence the way a mediation is conducted. However, these factors become less relevant when using technology and thus may not be of much use for External Counsels.

6.29 Client Users (60%) also find technology more useful in predicting the results of a claim as compared to External Counsels (23%). No two claims are ever identical, and each case has its nuances. External Counsels may be more aware of how these nuances can ultimately shape a case and its outcome and may be sceptical about whether these nuances can be sufficiently captured by technology.

Point of Interest

While technology may help parties in a mediation, these tools can also help the mediator. Some online dispute resolution systems leverage artificial intelligence ("**AI**") to modify the role played by the human mediator by providing information tools to assist the human neutral. Examples of such systems include Split-Up, which is used in Australia by judges, registrars, mediators and lawyers to advise on the division of property following divorce. The system considers 94 relevant factors and offers a percentage split of the assets.[19]

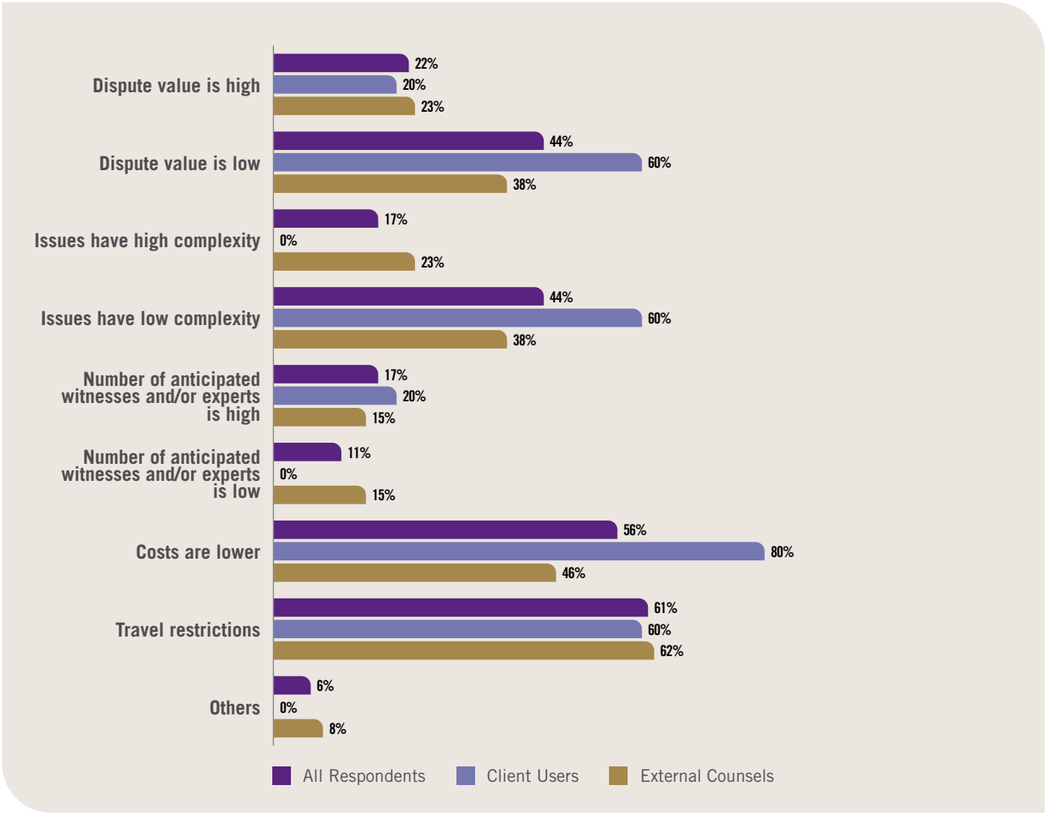
eBRAM, or Electronic Business Related Arbitration and Mediation, is a non-profit company based in Hong Kong that uses innovative technologies, such as blockchain and AI, e-Signature service, AI machine translation and highly secure video online meetings/hearings systems, to assist parties in resolving their disputes. In May 2022, eBRAM launched the Asia-Pacific Economic Cooperation Online Dispute Resolution ("**APEC ODR**") Platform, the first and only ODR Platform developed in Hong Kong under the APEC Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes. The APEC ODR Platform is accessible to micro, small and medium-sized enterprises ("**MSMEs**") from APEC countries and where the amount involved in the cross-border dispute does not exceed HK$775,000, unless parties agreed to use the APEC ODR Rules, regardless of the amount.[20]

19 *Effectively leveraging technology in mediation – Suggestions for a way forward in Asia by Eunice Chua and Asha A. Hemrajani, available at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5212&context=sol_research*

20 *eBRAM officially launches the APEC ODR Platform to promote access to justice, available at https://www.ebram.org/news_event_item.html?id=89; APEC Online Dispute Resolution (ODR) Service, available at https://ebram.org/apec_odr.html*

Factors Affecting the Choice to Use a Wholly Online Platform to Conduct International Commercial Mediation

Exhibit 6.7



6.30 The top two considerations for parties to use a wholly online platform to conduct international commercial mediation were travel restrictions (61%) and cost considerations (56%).

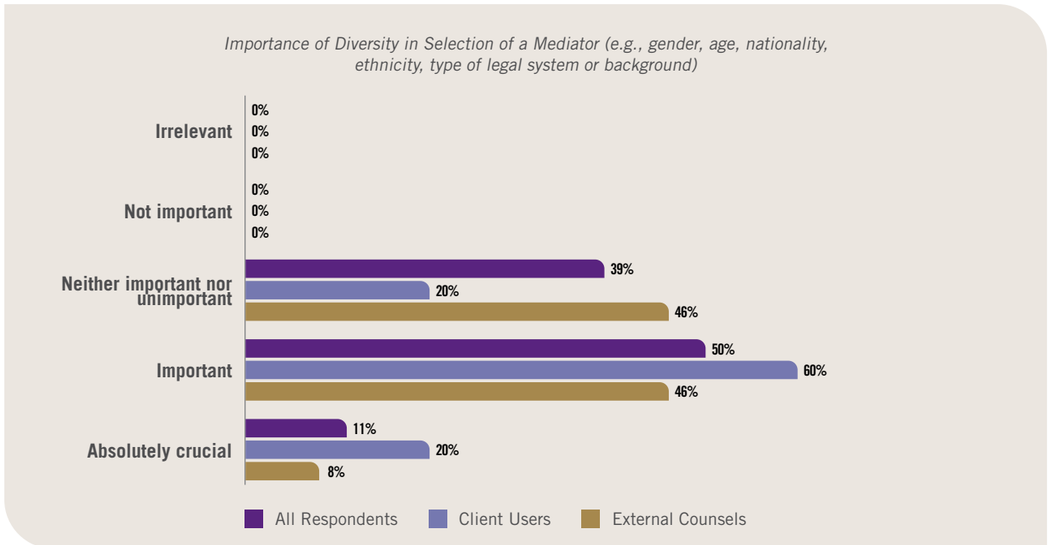
6.31 80% of Client Users considered costs the top factor, as compared to 46% of External Counsels. This might be explained by the fact that it is the clients who directly bear the costs of the proceedings, which may include air travel, accommodation and living expenses in a different country.

6.32 A wholly online platform to conduct mediation is also more favoured by Client Users (60%) when the dispute value is low, as compared to External Counsels (38%). Similarly, where issues have low complexity, Client Users (60%) prefer using an online platform compared to External Counsels (38%).

6.33 A common thread between these factors is that they have a direct impact on Client Users and are the most apparent factors that could affect Client Users. Other factors such as the number of anticipated witnesses would likely have a more direct impact on External Counsels' conduct of the matter as compared to Client Users.

Importance of Diversity in the Selection of a Mediator

Exhibit 6.8



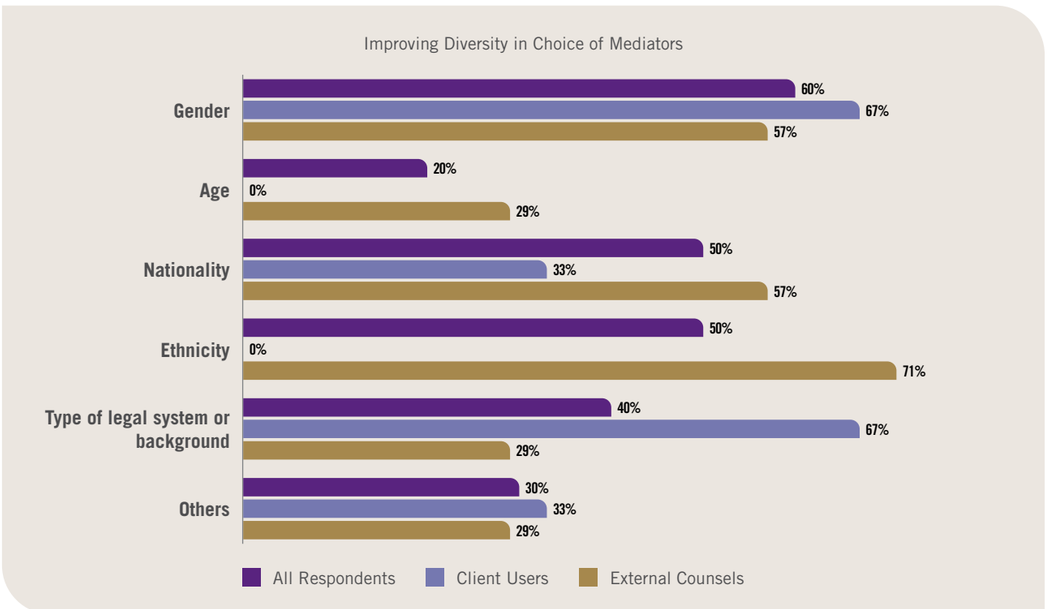
6.34 For the majority of respondents, diversity was important (50%) or absolutely crucial (11%).

6.35 Client Users were more concerned with diversity as compared to External Counsels. 46% of External Counsels viewed diversity as neither important nor unimportant, while only 20% of Client Users were of the same view.

6.36 It is possible that Client Users prefer diversity in mediators, with the expectation that a mediator would ideally possess some commonality with them. On the other hand, External Counsels might be more focused on the merits of the case and therefore discount the possible impact that diversity might have on a case.

Diversity in Choice of Mediator

Exhibit 6.9



6.37 The majority of the respondents (60%) wanted to see more gender diversity in the choice of mediators. Nationality and ethnicity were both second in line, with 50% of the respondents choosing these aspects.

6.38 Client Users viewed diversity of gender (67%) and legal system or background (67%) as their highest priority while, interestingly, External Counsels placed greater emphasis on diversity of ethnicity (71%), gender (57%) and nationality (57%) – a reflection perhaps of mediation's focus on practical problem-solving between people rather than applying the law.

Point of Interest

Mediation stakeholders are seeking not just diversity in choice of mediator, but also diversity of mediation practice models.

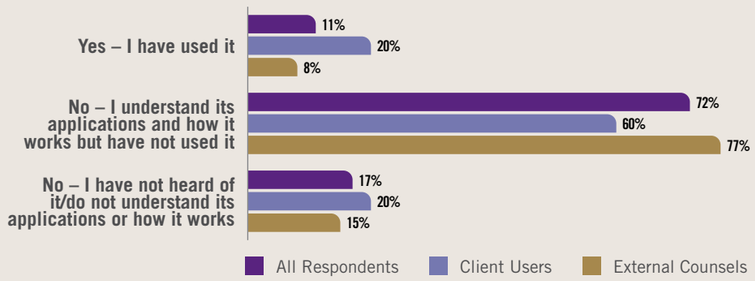
The IMI's worldwide mediator certification scheme recognises that mediators approach their practice in diverse ways and this may be a result of their values. While the National Mediator Standards in Australia are based on a facilitative mediation model, they also recognise diversity in practice as blended processes.

Singapore and Hong Kong are also seeking to introduce diverse mediation models. For example, in Singapore, training by SIDRA in diverse culturally fluent mediation models including Asian approaches to mediation can lead to nationally recognised accreditation by SIMI. In Hong Kong, the use of evaluative approaches to mediation such as expert advisory mediation has been promoted by the Government in intellectual property disputes.[21]

21 *Cultural Confusion — a good thing for mediation? By Nadja Alexander, available at http://mediationblog.kluwerarbitration.com/2017/09/05/cultural-confusion-good-thing-mediation/*

Use of Third-Party Funding in International Commercial Mediation

Exhibit 6.10



6.39 Most respondents have not used third-party funding for international commercial mediation (89%). Out of the 89%, 72% understand how it works but have not used it. The remaining 17% have either not heard of third-party funding or do not understand how it works.

6.40 This could be due to multiple reasons. For the group that understands how it works but has not used it, a potential explanation is that international commercial mediation does not typically involve huge costs as compared to arbitration or litigation, so parties might be better able to afford the costs of mediation. For the group that does not understand how it works or has not heard about it, this could be due to the lack of awareness of third-party funding in mediation.

6.41 Generally, third-party funding has been utilised more in arbitration and litigation.[22] In fact, there have been active debates on whether third-party funding should be allowed in arbitration and litigation due to potential conflicts of interest issues as well as the (low) possibility of recovering costs should the funded party lose the arbitration and/or litigation. Such conversations do not feature as much in mediation.

6.42 Third-party funding is largely unregulated in countries such as the UK and Australia. On the other hand, countries like Singapore and Hong Kong have started regulating third-party funding in mediation. Since 2021, Singapore has permitted third-party funding for mediation proceedings related to domestic arbitration proceedings, court proceedings arising from or connected with domestic arbitration proceedings, proceedings commenced in the SICC, for as long as those proceedings remain in the SICC, and appeal proceedings arising from any decision made in the proceedings commenced and remaining in the SICC.[23] According to the Singapore Ministry of Law, because of the pandemic, there may be a rise in disputes and companies facing the risk of insolvency. As such, extending third-party funding for mediation is meant to provide businesses with another option to fund meritorious claims that they would otherwise forgo because of financial constraints.[24] In Hong Kong, public consultation on the draft Code of Practice for Third Party Funding of Mediation commenced in August 2021 and ended two months later.[25] At the time of the publication of this Report, the comments received from the public are being considered.[26] The draft Code of Practice for Third Party Funding of Mediation requires funders to maintain access to a minimum of HK$20 million of capital. Funded parties are also required to disclose that a funding arrangement has been made and the identity of the funder.

22 See paragraphs 5.34 – 5.36 of the Report on the definition of third-party funding and regulation of third-party funding in different jurisdictions.
23 Civil Law Act (Third Party Funding) Amendment Regulations 2021.
24 Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore, available at https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore#fn3
25 Public consultation on proposed code of practice for third party funding of mediation starts today, available at https://www.info.gov.hk/gia/general/202108/16/P2021081600518.htm
26 Implementation, available at https://www.hkreform.gov.hk/en/implementation/index.htm

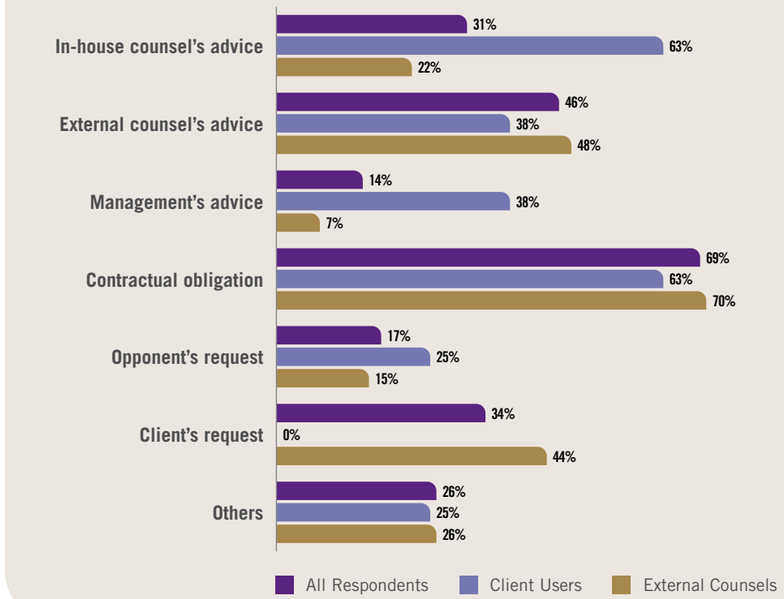
Section 7: International Commercial Litigation

At A Glance:

- The majority of the respondents indicated that finality is the most important factor influencing their decision to choose international commercial litigation as a dispute resolution mechanism. Other important factors included impartiality and direct enforceability.
- The majority of the respondents were satisfied with the clarity and transparency in rules and procedures, impartiality and direct enforceability and somewhat less satisfied with the procedural flexibility, preservation of business relationships, flexibility in the choice of institutions, venues and judges in international commercial litigation.
- Local courts were still more frequently used compared to international commercial courts such as the London Commercial Court and the Singapore International Commercial Court.
- The majority of the respondents identified platforms for conducting virtual/online hearings, e-discovery/due diligence and cloud-based storage systems as 'extremely useful' or 'useful' technologies in international commercial litigation.

Factors that Contributed to Respondents' Choice to Use International Commercial Litigation

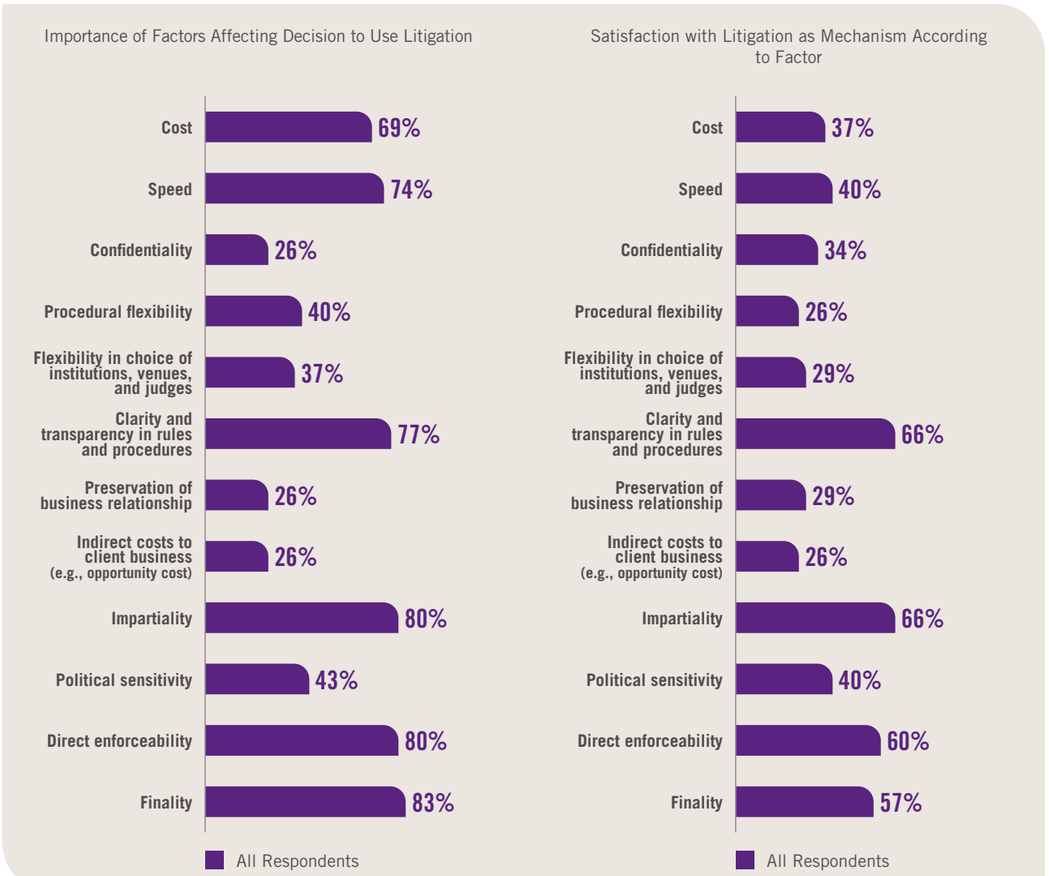
Exhibit 7.1



7.1 Contractual obligation (69%) was the top factor influencing the choice to use international commercial litigation to resolve a dispute. This was followed by External Counsel's advice (46%) and client's request (34%).

Factors Affecting the Decision to Use Litigation and Respondents' Satisfaction with Litigation as a Mechanism

Exhibit 7.2



7.2 The most important factor influencing the decision to take a dispute to international commercial litigation was finality (83%). This was followed by impartiality (80%), direct enforceability (80%), clarity and transparency in rules and procedures (77%) and speed (74%). It is worth noting that finality was also the most important factor influencing the decision to take a dispute to arbitration. By contrast, in the SIDRA Survey Final Report 2020,[27] enforceability and clarity in rules and procedures were jointly the most important factors.

7.3 The factors that had the least influence on respondents' choice of litigation as a dispute resolution mechanism were confidentiality (26%), preservation of business relationship (26%) and indirect costs to client business (e.g., opportunity cost) (26%).

7.4 Of the factors that influenced respondents' choice to use litigation as a dispute resolution mechanism, respondents were most satisfied with impartiality (66%), clarity and transparency in rules and procedures (66%), direct enforceability (60%) and finality (57%).

27 *SIDRA Survey Final Report 2020 at Exhibit 8.1.1.*

7.5 While finality was the most important factor when deciding to take a dispute to litigation (83%), only 57% of respondents indicated that they were satisfied in this regard. This suggests that there is room to improve on finality in the international commercial litigation process, perhaps by fine-tuning procedural rules.

7.6 Although direct enforceability was the second most important factor influencing the decision whether to litigate a dispute (80%), only 60% of respondents indicated that they were satisfied in this regard. When respondents were asked to provide comments on international commercial litigation, one respondent commented that in their view, cross-border enforcement of judgments was one factor that was preventing Singapore from becoming a hub for international commercial litigation.

7.7 Compared with users of arbitration (70%), litigation users were less satisfied with direct enforceability. This was also the case in the SIDRA Survey Final Report 2020.[28] One possible reason for this trend is that court judgements are not as internationally enforceable as arbitration awards through the New York Convention, to which nearly every country globally is a party. This seems to suggest that, while bilateral or multilateral enforcement agreements between states have become increasingly popular, respondents do not perceive an increase in enforceability in cross-border litigation.

Point of Interest

Although the 2005 Hague Convention on Choice of Court Agreements is said to have a similar effect to the recognition of arbitration agreements under the New York Convention,[29] there are only 32 contracting states to the 2005 Hague Convention on Choice of Court Agreements. In comparison, there are 170 contracting states to the New York Convention.

7.8 Among the five most important factors influencing the decision whether to refer a dispute to litigation, speed stood out for having the greatest disparity (34%) between the level of importance respondents placed on the factor (74%) and their level of satisfaction with the factor (40%). One possible explanation for this result is that the pandemic led to an unprecedented backlog, causing additional delays in the disposal of cases.

28 *In the SIDRA Survey Final Report 2020, only 56% of litigation users indicated that they were satisfied on the issue of enforceability whilst 65% of arbitration users stated that they were satisfied with the same: see SIDRA Survey 2020 at Exhibits 6.1.2 and 8.1.4.*

29 *Convention of 30 June 2005 on Choice of Court Agreements, available at https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf*

Exhibit 7.3

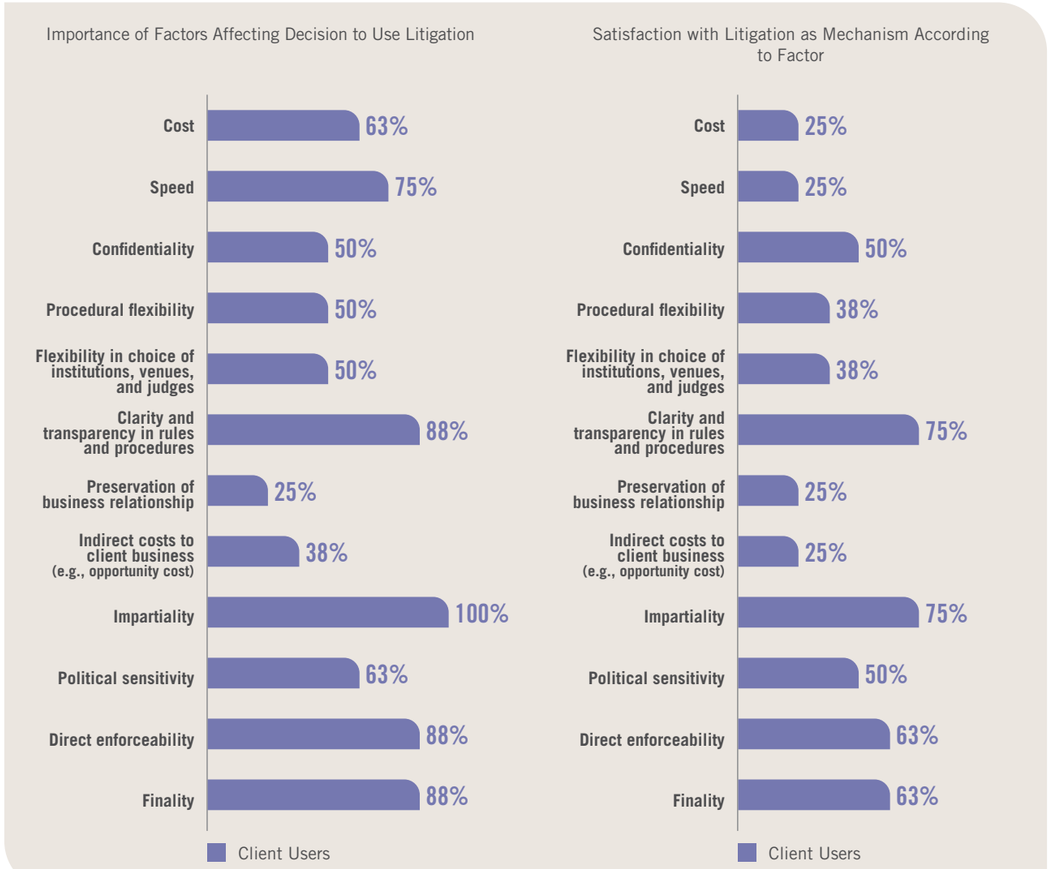
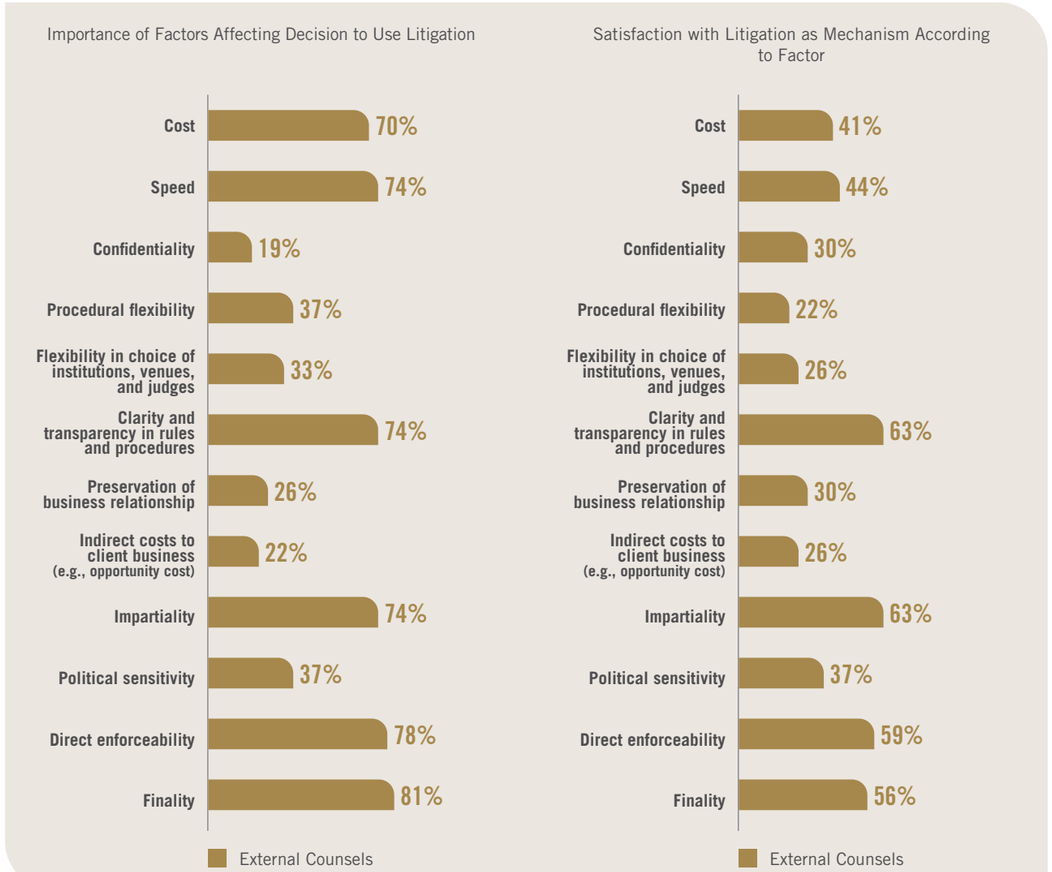


Exhibit 7.4



7.9 Exhibit 7.3 and Exhibit 7.4 show that the views of Client Users and External Counsels were broadly aligned in respect of the factors that most influenced their choice of litigation as a dispute resolution mechanism.

7.10 The five most important factors that influenced both Client Users' and External Counsels' choice of litigation as a dispute resolution mechanism were impartiality (100% of responses given by Client Users and 74% of responses given by External Counsels), direct enforceability (88% of responses given by Client Users and 78% of responses given by External Counsels), finality (88% of responses given by Client Users and 81% of responses given by External Counsels), clarity and transparency in rules and procedures (88% of responses given by Client Users and 74% of responses given by External Counsels) and speed (75% of responses given by Client Users and 74% of responses given by External Counsels).

7.11 Client Users and External Counsels differed in their perception of what was the least important factor influencing their decision to use international commercial litigation. Client Users ranked preservation of business relations (25%) as the least important factor. On the other hand, External Counsels ranked confidentiality (19%) as the least important factor.

7.12 Comparing the results with those in the SIDRA Survey Final Report 2020:[30]

- Impartiality, enforceability and clarity in rules and procedures retain their positions as the top three factors influencing both Client Users and External Counsels' choice to use international commercial litigation as a dispute resolution mechanism;
- Preservation of business relationships replaced cost as the least important factor influencing Client Users' decision to use litigation; and
- Confidentiality replaced cost as the least important factor influencing External Counsels' decision to use litigation.

30 *SIDRA Survey Final Report 2020 at Exhibit 8.1.3.*

7.13 Of the factors that influenced Client Users' choice to use litigation, Client Users were most satisfied with clarity and transparency in rules and procedures and impartiality (both at 75%), finality and direct enforceability (both at 63%), confidentiality and political sensitivity (both at 50%). Of the factors that influenced External Counsels' choice to use litigation, External Counsels were most satisfied with impartiality and clarity and transparency in rules and procedures (both at 63%), direct enforceability (59%) and finality (56%). It is worth noting that both Client Users and External Counsels ranked impartiality and clarity and transparency in rules and procedures as the factors they were most satisfied with.

7.14 Comparing the results with those in the SIDRA Survey Final Report 2020:[31]

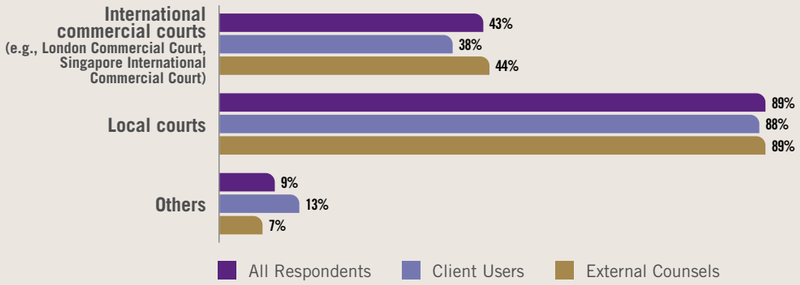
- Impartiality and clarity and transparency in rules and procedures replaced direct enforceability as the top factors that Client Users were most satisfied with;
- Impartiality and clarity and transparency in rules and procedures remained the top factors that External Counsels were most satisfied with;
- The level of satisfaction among both Client Users and External Counsels with the cost and speed of international commercial litigation remained below 50% in both iterations of the SIDRA Survey; and
- In the SIDRA Survey Final Report 2020, more External Counsels (65%) were satisfied with clarity in rules and procedures than Client Users (50%). This result was reversed in 2021's Survey, with a higher percentage of Client Users (75%) being satisfied with clarity in rules and procedures than External Counsels (63%).

Point of Interest

The SICC Rules 2021, which took effect on 1 April 2022, is said to enhance the dispute resolution process in the SICC with new procedures aimed at the expeditious and efficient administration of justice according to international commercial law, while providing for procedural flexibility through fair, impartial and practical processes. In drafting the SICC Rules 2021, prime considerations were given to saving parties' time and costs throughout the entire dispute resolution process through, inter alia, streamlining procedural steps.[32]

Dispute Resolution Mechanisms Used for International Commercial Litigation

Exhibit 7.5

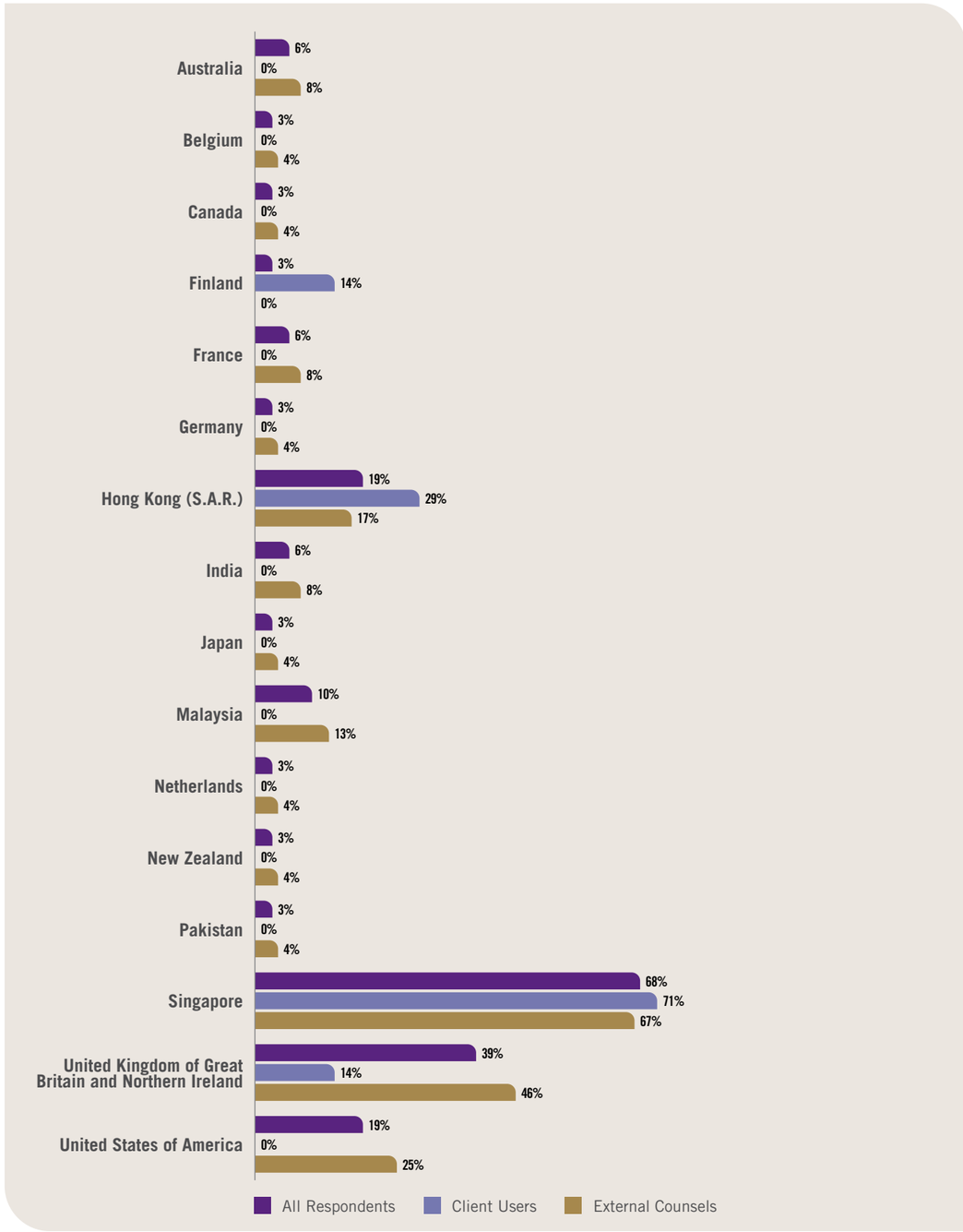


7.15 The most commonly used dispute resolution mechanism for international commercial litigation disputes was local courts (89%), followed by international commercial courts (43%).

31 SIDRA Survey Final Report 2020 at Exhibit 8.1.6.
32 Singapore International Commercial Court introduces standalone SICC Rules 2021 to incorporate international best practices and facilitate international dispute resolution, available at https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-singapore-international-commercial-court-introduces-standalone-sicc-rules-2021-to-incorporate-international-best-practices-and-facilitate-international-dispute-resolution

Most Commonly Used Jurisdictions Where Local Courts Were Used

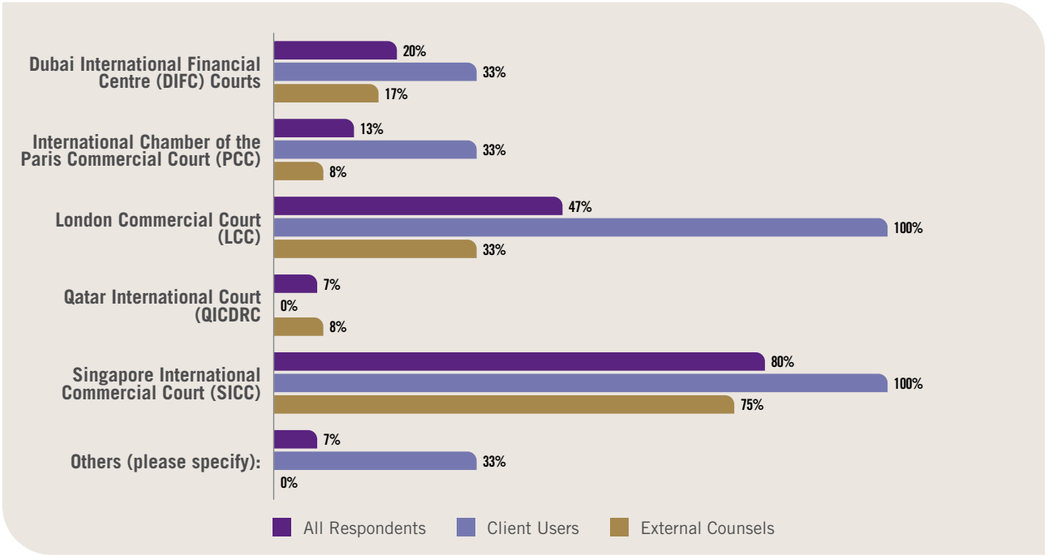
Exhibit 7.6



7.16 Where local courts were used for international commercial litigation, Singapore was the most commonly used jurisdiction (68%). This was followed by the UK (39%), USA and Hong Kong (both at 19%).

Most Commonly Used International Commercial Courts

Exhibit 7.7



7.17 The most commonly used international commercial court was the SICC (80%). This was followed by the LCC (47%) and the Dubai International Financial Centre ("**DIFC**") Courts (20%).

7.18 Comparing the results with those in the SIDRA Survey Final Report 2020:[33]

- The SICC and the LCC remained as the top two most commonly used international commercial courts among respondents. That said the SICC has now replaced the LCC as the most used international commercial court;[34] and
- The DIFC Courts replaced the ICC First Instance Commercial Court Paris as the third most commonly used international commercial court. The popularity of the DIFC Courts is expected to increase with its recent launch of a "Specialised Court for the Digital Economy" aimed at simplifying the settlement process of complex civil and commercial disputes related to the digital economy.[35]

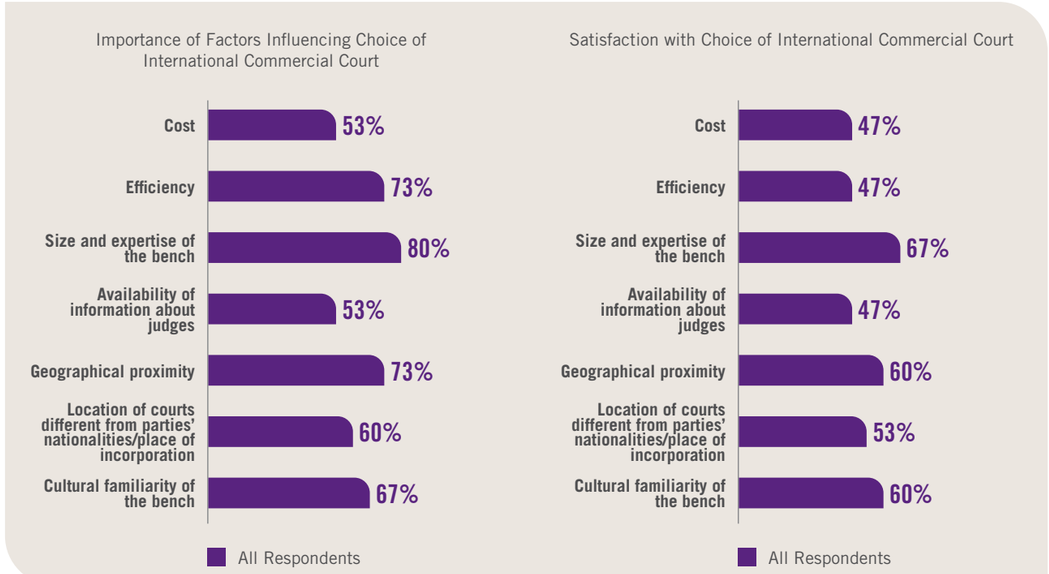
Point of Interest

The DIFC Courts launched the Specialised Court for the Digital Economy in late 2021. This court has jurisdiction over domestic and international cases related to current and emerging technologies such as big data, blockchain, AI, cloud services, unmanned aerial vehicles, 3D printing technologies and robotics.[36] A Digital Economy Court Rules Committee has been created to draft and approve rules for the conduct of proceedings in the Digital Economy Court.[37]

33 *SIDRA Survey 2020 at Exhibit 8.2.3.*
34 *In the SIDRA Survey 2020, the most commonly used international commercial courts were the LCC (55%), SICC (52%) and ICC First Instance Commercial Court (24%).*
35 *DIFC Courts launches specialised court for the digital economy, available at https://www.difccourts.ae/media-centre/newsroom/difc-courts-launches-specialised-court-digital-economy*
36 *Ibid.*
37 *DIFC Courts Order No. 4 of 2021 in respect of the Digital Economy Court Division, available at https://www.difccourts.ae/rules-decisions/judgments-orders/court-administrative-orders/difc-courts-order-no-4-2021-respect-digital-economy-court-division*

Factors Affecting the Choice of International Commercial Courts and Respondents' Satisfaction with International Commercial Courts

Exhibit 7.8



7.19 The top factors influencing the choice of international commercial court were size and expertise of the bench (80%), efficiency (73%) and geographical proximity (73%).

7.20 Of the factors that influenced respondents' choice of international commercial court, the top factors that respondents were most satisfied with were the size and expertise of the bench (67%), geographical proximity (60%) and cultural familiarity of the bench (60%).

7.21 Across all the factors influencing respondents' choice of international commercial court, respondents registered a disparity between the level of importance they placed on a factor and their level of satisfaction with their experience regarding the same factor. For instance, while 73% of respondents indicated that efficiency was an important factor in influencing their choice of international commercial court, only 47% of respondents indicated that they were satisfied with the level of efficiency they experienced. Further, whilst the size and expertise of the bench was the top consideration in selecting an international commercial court (80%), only 67% of respondents were satisfied with the size and expertise of the bench they appeared before.

Exhibit 7.9

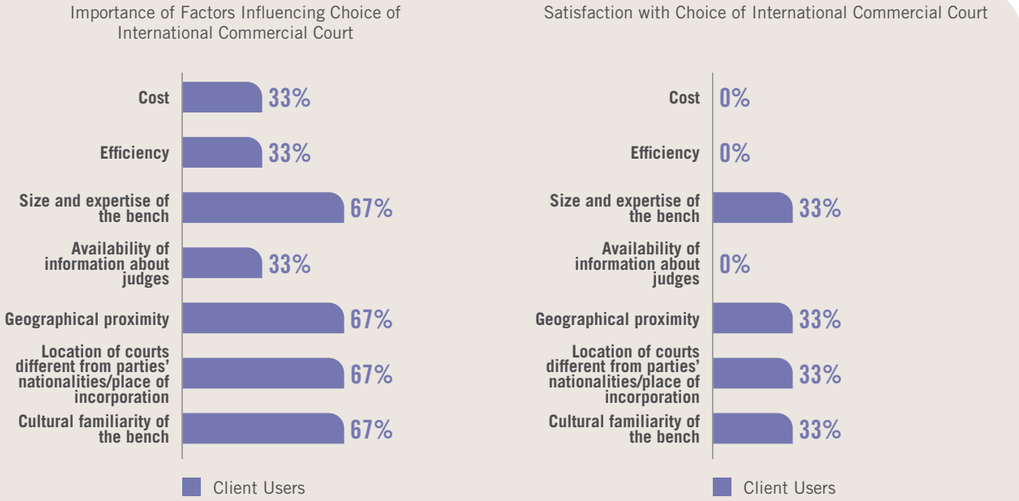
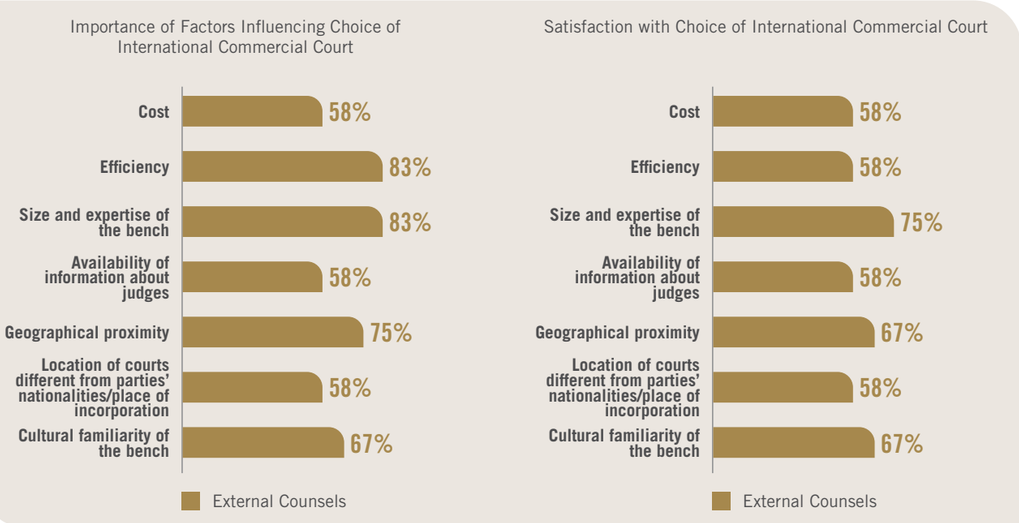


Exhibit 7.10

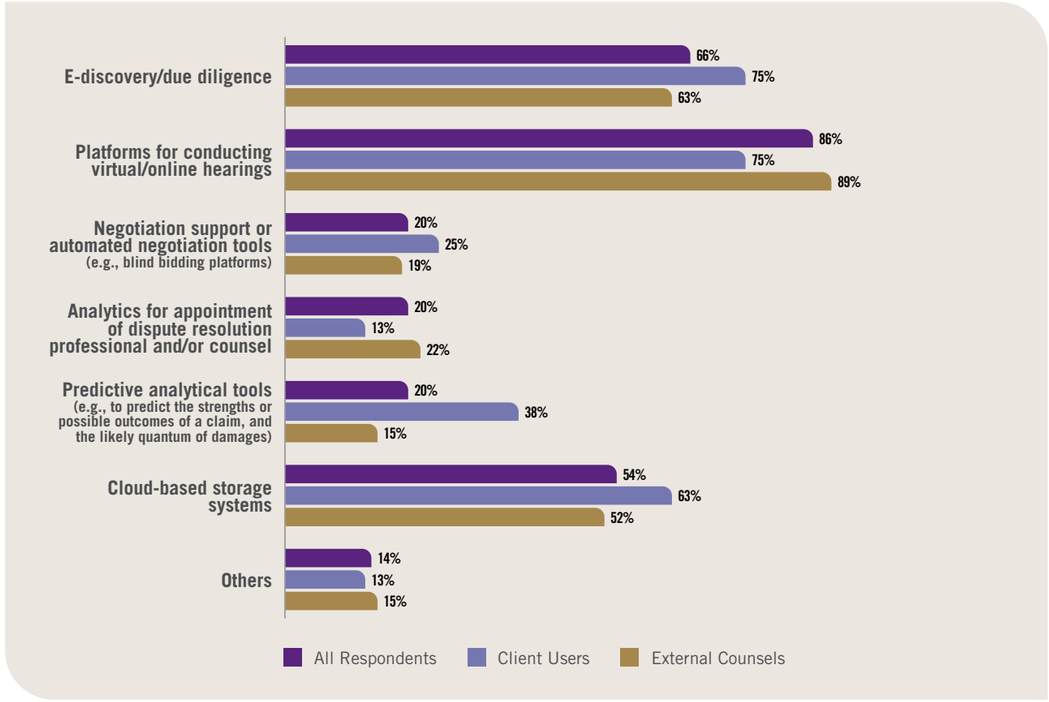


7.22 Such disparities were more pronounced among Client Users compared to External Counsels. The most important factors influencing Client Users' choice of international commercial court were size and expertise of the bench, geographical proximity, location of courts different from parties' nationalities/place of incorporation and cultural familiarity of the bench (all at 67%). However, Client Users' satisfaction with all four factors was only 33%. Further, although 33% of responses from Client Users indicated that cost, efficiency and availability of information about judges were important factors influencing their choice of international commercial court, none of the Client Users were satisfied with the aforementioned factors.

7.23 With respect to External Counsels, 83% of their responses indicated that efficiency was an important factor in choosing an international commercial court. However, only 58% of them were satisfied with efficiency. Their levels of satisfaction with costs (58%), availability of information about judges (58%), location of courts different from parties' nationalities/place of incorporation (58%) and cultural familiarity of the bench (67%) map to the levels of importance they placed on those same factors.

Usefulness of Technology in Supporting a Litigation Procedure

Exhibit 7.11



7.24 Technology plays an important role in litigation. This has been recognised by Singapore courts as early as the early 2010s, when the Supreme Court Practice Directions (Amendment 1 of 2012) introduced e-discovery in court proceedings, with the aim of allowing for more efficient exchange of documents, increasing productivity and cost savings.

Point of Interest

Singapore has recently reaffirmed its commitment to advancing the use of technology in its legal system, with the Ministry of Law launching the Legal Industry Technology and Innovation Roadmap ("**TIR**") on 2 October 2020. The TIR surveyed the global trends in the use of technology in the legal industry and identified "technologies that will impact and change legal services, and explores ways to support development and adoption of such technologies".[38] It envisions government support to help the legal industry develop and adopt ops-tech solutions, such as funding support for law firms to defray the large initial costs of LegalTech adoption, as well as knowledge and infrastructural support for dispute resolution institutions to help them implement the digitalisation of dispute resolution processes. The TIR also plans to build capacity among legal practitioners, with the aim of developing "tech-ready lawyers" who are ready to face the challenges of the coming decade.

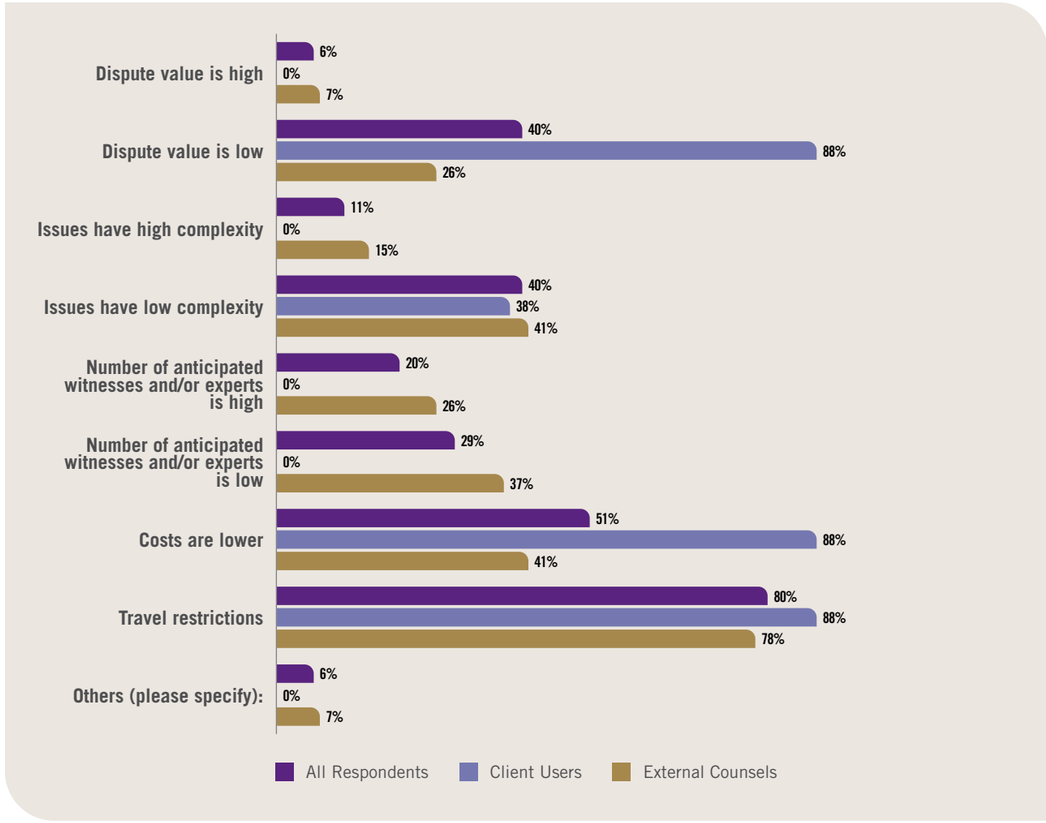
7.25 Respondents' attitudes towards technology in the litigation process have improved significantly since the SIDRA Survey Final Report 2020. Previously, a bare majority of responses (51%) considered e-discovery/due diligence as a technological tool that was 'extremely useful' or 'useful', and only a minority of users considered all the other technological tools as 'extremely useful' or 'useful'. Now, a majority of all responses identified the following three technologies as 'extremely useful' or 'useful': platforms for conducting virtual/online hearings (86%), e-discovery/due diligence (66%) and cloud-based storage systems (54%). This is likely the result of the pivot towards online proceedings and online collaboration during the pandemic.

7.26 Client Users and External Counsels generally had similar attitudes towards technology, with the exception of a divergence between Client Users' and External Counsels' perception of the utility of analytical tools to predict the strengths or possible outcomes of a claim and the likely quantum of damages. 38% of Client Users identified such tools as 'extremely useful' or 'useful', while only 15% of External Counsels did the same. This likely reflects Client Users' desire to reduce the uncertainty in the outcome of their claims.

38 *Legal Industry Technology & Innovation Roadmap Report, available at https://www.mlaw.gov.sg/files/news/press-releases/2020/10/Minlaw_Tech_and_innovation_Roadmap_Report.pdf. See also Technology and Innovation Roadmap Launched to Support Legal Industry in Adoption of LegalTech, available at https://www.mlaw.gov.sg/news/press-releases/2020-10-02-technology-and-innovation-roadmap-launched-to-support-legal-industry-in-adoption-of-legaltech*

Factors Affecting the Choice to Use a Wholly Online Platform to Conduct International Commercial Litigation

Exhibit 7.12

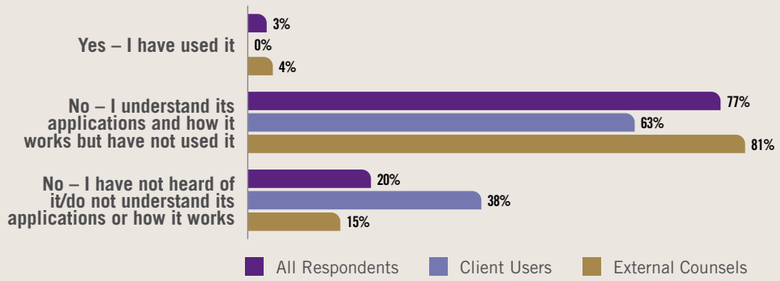


7.27 Respondents were asked to select the top three factors that would make them choose a wholly online platform to conduct their litigation proceedings. Similar to arbitration and mediation, a great majority (80%) of respondents identified travel restrictions as among their top three factors that would compel someone to choose a wholly online platform for litigation proceedings. 51% of respondents also identified lower costs as one of their top three factors, indicating an interest in reducing the costs of litigation through the use of online proceedings.

7.28 Client Users appear to be far more willing to use an online platform where the dispute value and costs of the litigation proceedings are low (88% of responses). By contrast, only a minority of External Counsels were willing to do so in the same circumstances, with only 26% of External Counsels' responses identifying the low value of a dispute and 41% identifying lower costs as reasons they would opt for a wholly online platform for litigation. This suggests that there is room for External Counsels to consider the use of online platforms in certain litigation situations, which may in turn produce greater client satisfaction.

Use of Third-Party Funding in International Commercial Litigation

Exhibit 7.13



7.29 Less than 5% of respondents indicated that they had used third-party funding in international commercial litigation (3%). For these respondents, the average value of each dispute was less than US$26 million.

7.30 77% of respondents indicated that though they had not used third-party funding for international commercial litigation, they understood its applications and how it works. 20% of respondents indicated that they had either not heard of third-party funding for international commercial litigation and/or did not understand its application or how it works.

Section 8: Mixed Mode (Hybrid) Dispute Resolution

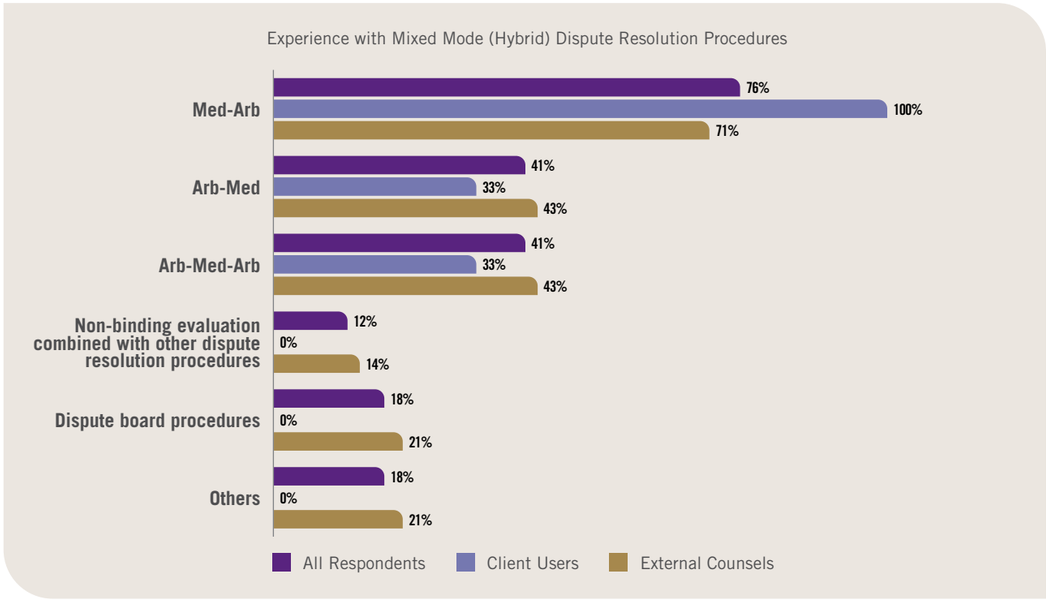
At A Glance:

- Mixed mode mechanisms have the potential to reduce the perceived disadvantages of standalone arbitration and mediation.
- The majority of the respondents indicated contractual obligation as the main reason for selecting a mixed mode dispute resolution mechanism.
- Where preservation of parties' business relationships, cost and speed were important factors, respondents chose mixed mode mechanisms as opposed to standalone arbitration.
- The majority of the respondents indicated that the preservation of business relationships and the relative procedural flexibility offered by mixed mode mechanisms were the important factors that they considered in choosing mixed mode mechanisms over standalone mediation.

Mixed Mode Dispute Resolution Procedures with which Respondents Have had Experience

8.1 For the purposes of the Survey and this Report, mixed mode dispute resolution mechanisms (also known as hybrid dispute resolution mechanisms) include any combination of two or more of the following dispute resolution processes: mediation, non-binding evaluation, arbitration or litigation. Mixed mode dispute resolution may involve multiple dispute resolution professionals or a single dispute resolution professional in multiple roles.

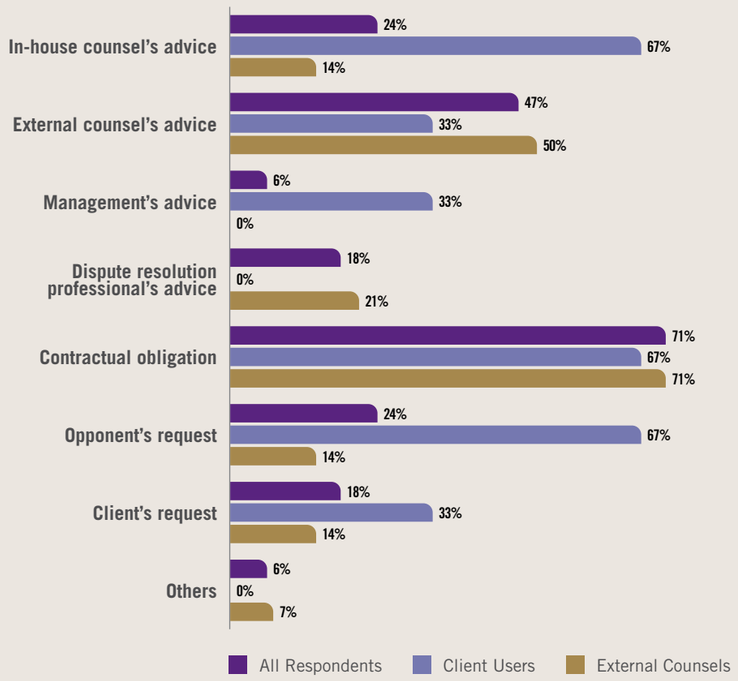
Exhibit 8.1



8.2 Of the respondents who have used mixed mode dispute resolution procedures, the majority (76%) have had experience with Med-Arb. A significant percentage of respondents have also used Arb-Med (41%) and Arb-Med-Arb (41%). Only a minority of respondents have used a dispute board procedure (18%) or non-binding evaluation combined with other dispute resolution procedures (12%).

Factors that Contributed to Respondents' Choice to Use Mixed Mode (Hybrid) Dispute Resolution

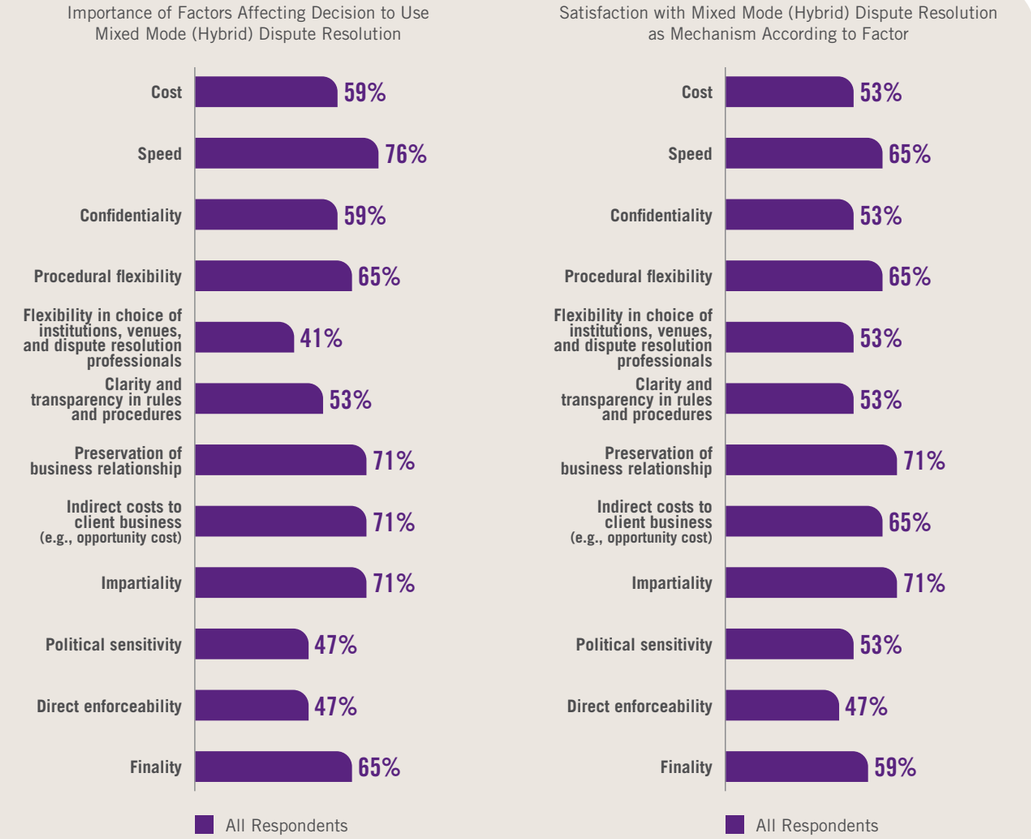
Exhibit 8.2



8.3 The majority of the respondents (71%) indicated contractual obligations among their top three influencing factors in their choice of a mixed mode dispute resolution mechanism. This is consistent with the SIDRA Survey Final Report 2020, where contractual obligations were identified as the most influential factor (61%). This suggests that it would be prudent for users who desire to use mixed mode dispute resolution procedures to build them into contracts from the start. A significant percentage of responses (47%) also identified External Counsel's advice among their top three factors. In-house counsel's advice (24%) and opponent's request (24%) were less influential factors. Interestingly, Client Users indicated that in-house counsel (67%) and management (33%) advised the use of mixed mode procedures, suggesting that Client User decision-makers are increasingly interested in mixed mode dispute resolution mechanisms.

Factors Affecting Respondents' Decision to use Mixed Mode Dispute Resolution and Respondents' Satisfaction with the Mixed Mode Dispute Resolution Mechanism

Exhibit 8.3



8.4 A significant majority of respondents identified the following characteristics of mixed mode dispute resolution as 'absolutely crucial' or 'important' to their choice to use it: speed (76%), preservation of the business relationship (71%), indirect cost to client business (e.g. opportunity cost) (71%), impartiality (71%), procedural flexibility (65%) and finality (65%). Surprisingly, only slightly more than half of responses (59%) thought of cost as an 'absolutely crucial' or 'important' consideration. It is conceivable that this finding reflects the perception – certainly not always justified – that the possibility of conducting two dispute resolution processes will cost more than one.

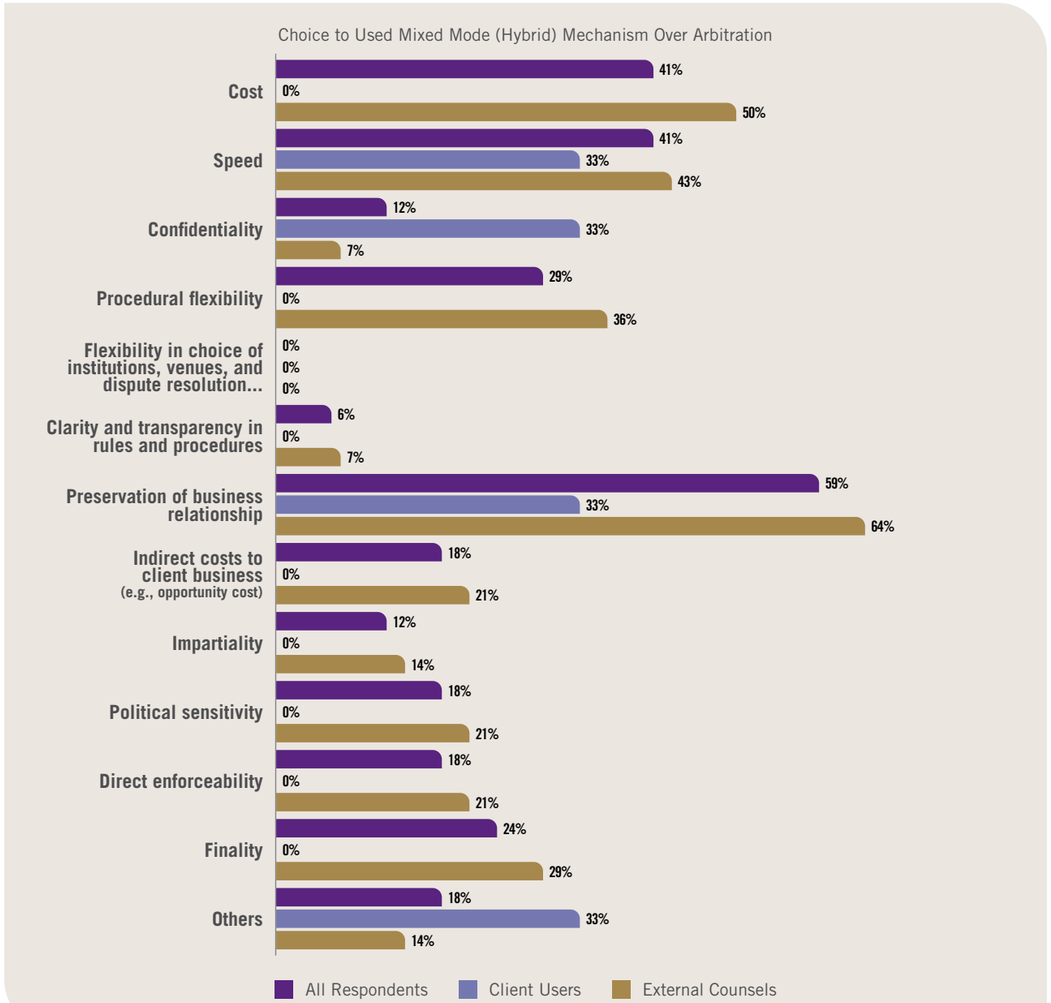
8.5 Respondents' satisfaction with the same characteristics approximately maps to the importance they placed on those characteristics when choosing the mixed mode dispute resolution mechanism.

8.6 For instance, 76% of respondents indicated that speed was 'absolutely crucial' or 'important' to their decision, and 65% of respondents were 'very satisfied' or 'somewhat satisfied' with the speed of the mixed mode proceedings that they had experienced. Similarly, 71% of respondents were 'very satisfied' or 'somewhat satisfied' with how mixed mode proceedings preserved business relationships, as well as the impartiality of those proceedings. This broadly corresponds with the 71% of responses that valued the mixed mode mechanism's ability to preserve business relationships and the impartiality of the mechanism. Even the level of respondents' satisfaction with the cost involved (53% 'very satisfied' or 'somewhat satisfied') was similar to the importance they placed on cost as a factor in choosing mixed mode (59% considered it 'absolutely crucial' or 'important'). This indicates that respondents are likely to overall be satisfied with their experience in mixed mode proceedings.

Factors Affecting the Choice to Use Mixed Mode Mechanisms Over Arbitration and Mediation

8.7 Mixed mode dispute resolution mechanisms are useful alternative mechanisms in international dispute resolution as they incorporate the advantages of both arbitration and mediation. A prime example of this is the SIAC-SIMC Arb-Med-Arb Protocol, which gives parties a fixed timeframe of eight weeks to reach a mediated settlement before resuming arbitration. If parties are able to settle, the mediated settlement can be recorded as a consent award, thus combining the flexibility and efficiency of mediation with the enforceability and finality of arbitration. The sections below explore factors influencing respondents' choice of a mixed mode dispute resolution mechanism, as opposed to arbitration or mediation.

Exhibit 8.4

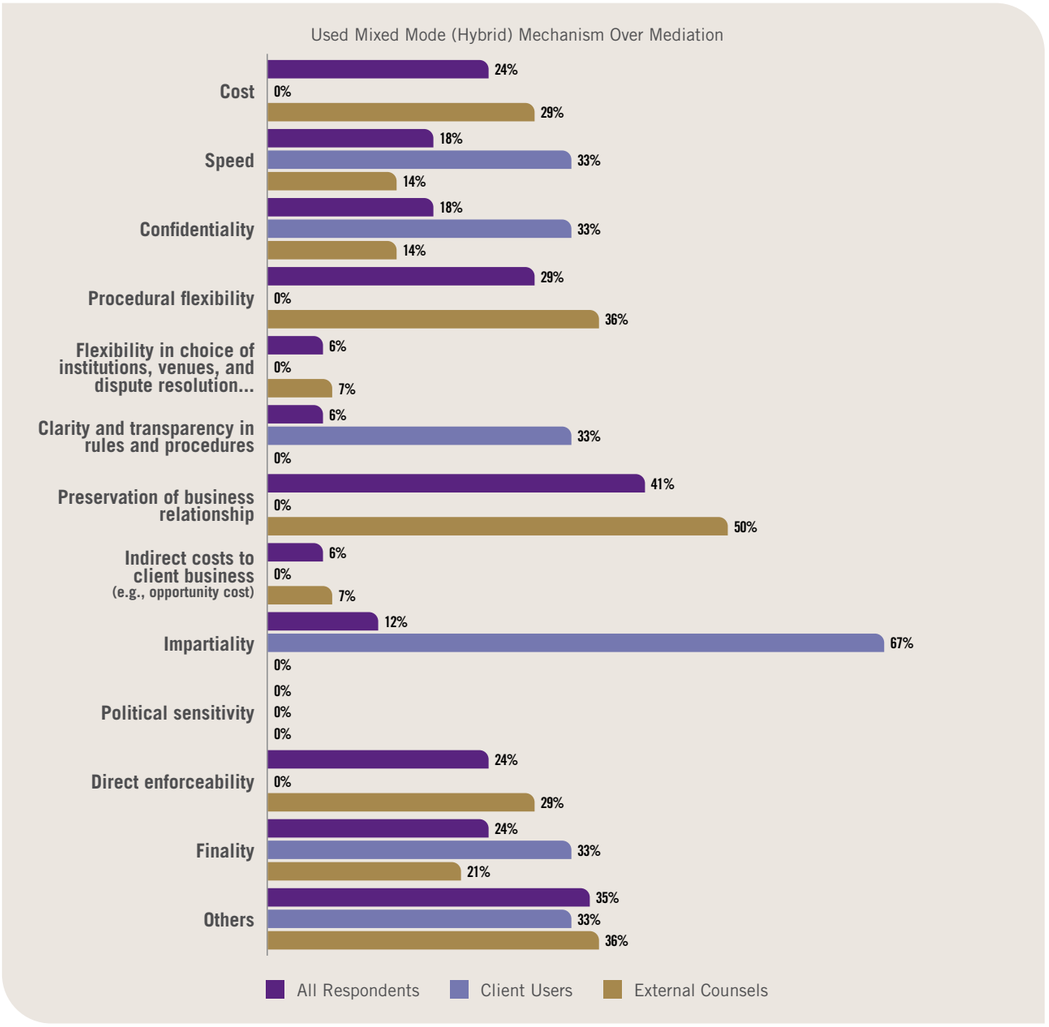


8.8 Overall, respondents who opted for a mixed mode dispute resolution mechanism instead of arbitration were primarily motivated by their desire to preserve the business relationship (59%). Cost (41%) and speed (41%) were influential factors as well. This seems to reflect the more adversarial nature of arbitration, which in turn tends to increase costs and lengthen proceedings, in comparison to the more conciliatory approach in a mixed mode dispute resolution procedure.

8.9 Looking specifically at Client Users, the data shows that they identified the preservation of the business relationship, speed and confidentiality as equally important reasons (33%) for choosing a mixed mode mechanism over arbitration. It is likely that they consider confidentiality a crucial factor in their overall choice of dispute resolution mechanism and that they perceive that a mixed mode dispute resolution procedure can better preserve the relationship, while also being as confidential as most arbitral proceedings.

8.10 External Counsels chose mixed mode proceedings over arbitration proceedings mainly to preserve the parties' business relationship (64%) and because of cost considerations (50%). Speed (43%) and procedural flexibility (36%) also weighed on their minds.

Exhibit 8.5



8.11 Respondents had varied reasons for choosing mixed mode procedures over mediation. The highest percentage of respondents (41%) identified the preservation of business relationship. 35% had been motivated by 'Other' reasons, with one respondent praising mixed mode's "efficiency and ability to resolve dispositive issues and *find creative solutions with adjudicative input the parties could then negotiate based on*".[39] That speaks to that user's desire to have the guidance of adjudicative input while retaining some measure of control over the outcome of the proceedings through direct negotiation between parties.

39 Emphasis added.

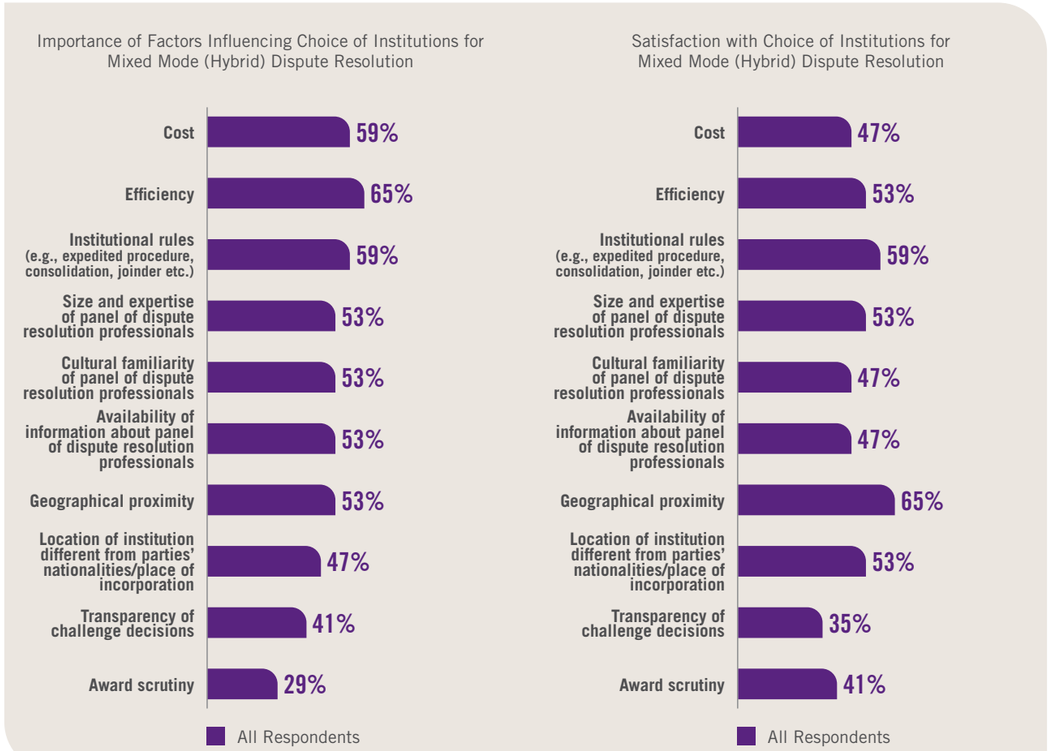
8.12 Procedural flexibility was selected by 29% of respondents.

8.13 Cost, direct enforceability and finality were reasons given by only 24% of respondents overall. This is a marked decrease from the SIDRA Survey Final Report 2020, when these reasons were chosen by 53%, 48% and 45% of respondents respectively. Perhaps one explanation is that, while respondents were asked to answer the question based on their past experience, they may have nevertheless been anticipating that the Singapore Convention will make enforcement of international mediated settlement agreements easier.

8.14 Splitting the respondents into Clients Users and External Counsel, the data shows that Client Users selected impartiality (67%), followed by speed (33%), confidentiality (33%), clarity and transparency in rules and procedures (33%) and finality (33%) as their main reasons for choosing a mixed mode mechanism over standalone mediation. As for External Counsels, the preservation of business relationship (50%) was their top reason, followed by procedural flexibility (36%). Cost (29%), direct enforceability (29%) and finality (21%) were less important though still somewhat influential reasons for their choice.

Factors When Choosing Institutions for Mixed Mode Proceedings and Respondents' Satisfaction with the Choice of Institutions

Exhibit 8.6



8.15 The top three factors influencing respondents' choice of mixed mode dispute resolution institutions were efficiency (65%), cost (59%) and institutional rules (e.g. expedited procedure, consolidation, joinder etc.) (59%). The quality of the panel of dispute resolution professionals linked to a mixed mode dispute resolution institution was also fairly important, with 53% of respondents indicating that the size, expertise, cultural familiarity and availability of information about the panel of dispute resolution professionals was 'absolutely crucial' or 'important' to their choice of institution.

8.16 Geographical proximity (53%) was similarly influential, though more so than having the institution be located in a place different from the parties' nationalities/place of incorporation (47%). It appears that the convenience of geographical proximity very slightly outweighs concerns about the perceived neutrality of an institution (or, potentially seat of arbitration if arbitration is one of the processes involved) due to the nationality of parties. The transparency of challenge decisions (41%) and award scrutiny (29%) were at the bottom of the list of influential factors. This perhaps reflects users' tendency to focus on first achieving an outcome and only worrying about enforcement or non-compliance much later down the road.

8.17 Looking specifically at respondent satisfaction with their experience at the mixed mode dispute resolution institutions of their choice, 53% and 47% of respondents were 'very satisfied' or 'somewhat satisfied' with the efficiency of and costs at their chosen institution. 59% of respondents were 'very satisfied' or 'somewhat satisfied' with the institutional rules, 53% with the size and expertise of the panel of dispute resolution professionals, and 47% with the cultural familiarity of the panel as well as the availability of information about the panel. 65% were also 'very satisfied' or 'somewhat satisfied' with the geographical proximity of their chosen institution, and 53% with the institution's location being one that was different from the parties' nationalities or places of incorporation.

8.18 That said, only 35% of respondents were satisfied with the transparency of challenge decisions, and 41% were satisfied with the award scrutiny performed by the institution. Both these factors relate to the arbitration aspect of mixed mode dispute resolution processes.

8.19 65% of respondents indicated efficiency was 'absolutely crucial' or 'important' to their decision, while only 53% of respondents were 'very satisfied' or 'somewhat satisfied' with the efficiency of the institution that they had chosen. This might reflect the need for more streamlined mixed mode procedures across dispute resolution institutions generally. Similarly, 59% of respondents considered cost as 'absolutely crucial' or 'important' reasons in their choice of institution, but only 47% were 'very satisfied' or 'somewhat satisfied' with the costs they eventually incurred at the mixed mode institution of their choice.

8.20 Taken altogether, it is possible that the respondents expected slightly more of their chosen institutions in terms of geographical proximity, transparency of challenge decisions and award scrutiny, though overall they remain generally satisfied with the institutions.

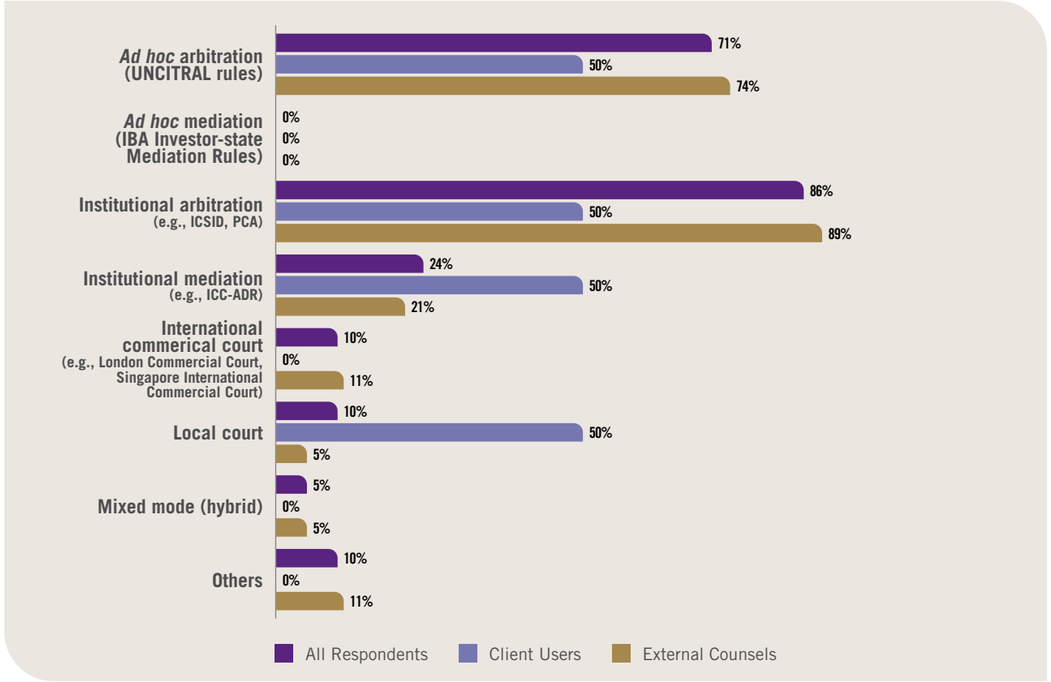
Section 9: Investor-State Dispute Settlement

At A Glance:

- International arbitration remained the dispute settlement mechanism of choice of most of the respondents in resolving investor-state disputes, with majority of the respondents choosing institutional or *ad hoc* arbitration.
- Direct enforceability and political sensitivity were still the top considerations in choosing a dispute resolution mechanism for investor-state dispute settlement.
- More respondents were now using institutional mediation to resolve investor-state disputes.
- The majority of the respondents indicated that they were satisfied with the speed, confidentiality, ability to preserve business relationships, impartiality and political sensitivity that mediation offers.

Most Commonly Used Dispute Resolution Mechanisms for Investor-State Disputes

Exhibit 9.1



9.1 The most commonly used dispute resolution mechanism for investor-state disputes and multilateral investment disputes across all respondents is arbitration, followed by mediation. This is unsurprising given the prevalence of arbitration clauses in treaties and contracts, which results in a mandatory obligation to participate in arbitration should one party submit the dispute to a tribunal. Of note, this is a development from the results found in the SIDRA Survey Final Report 2020, where respondents ranked arbitration first, followed by international courts and local courts with respect to investor-state disputes.[40]

9.2 In arbitration, respondents preferred institutional arbitration (86%) to *ad hoc* arbitration (71%). This could be due to the ease proffered by institutions with respect to their institutional rules, procedures and administration. In 2021, ICSID, which handles a large number of investor-state arbitration cases, registered a record number of cases.[41]

40 In the SIDRA Survey Final Report 2020, arbitration was the top choice of dispute resolution mechanism in investor-state dispute resolution, followed by courts and mediation.

41 It was reported that ICSID handled 66 cases in 2021. The ICSID Caseload – Statistics (Issue 2022-1), available at https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf

Point of Interest

On 1 July 2022, the amended ICSID Rules went into effect. The amendment process took over six years and was described as the "most extensive review to date".[42] The amendments cover (1) the Regulations and Rules for ICSID Convention Proceedings (including the ICSID Administrative and Financial Regulations, ICSID Institution Rules, ICSID Arbitration Rules and ICSID Conciliation Rules), (2) ICSID Additional Facility Proceedings, (3) ICSID Mediation Proceedings and (4) ICSID Fact-Finding Proceedings.

Notable changes to the ICSID Arbitration Rules include: requiring parties to provide prompt notice of the existence of a third-party funder (Rule 14), requiring parties to submit documents electronically (Rule 4) and requiring tribunals to render awards within a specific timeframe (Rule 58). The amended ICSID Arbitration Rules also introduced Expedited Arbitration (Chapter XII), which parties must jointly consent to (Rule 75), and requires tribunals to render awards as soon as possible or no later than 120 days after the hearing (Rule 81).

9.3 The preference for arbitration over mediation might be attributed to various factors. First, there is a limited track record of mediation in this area as compared to that of arbitration, as mediation proceedings are confidential. This means that even successful mediations may not be publicised and correspondingly, very little information is available as to how many mediations take place. Second, there are political concerns at play when a claim is settled against a state. For example, where a dispute is settled behind closed doors with no supervisory jurisdiction (as compared to arbitration), such realities could lead to speculations of impropriety which may detract from selecting mediation as a mechanism.

9.4 While not as popular as arbitration, the use of mediation as a means of resolving investor-state disputes is still significant (24%) and comes behind arbitration as the second choice. In particular, parties preferred institutional mediation to *ad hoc* mediation. This could be due to the need for structure and facilities that institutions can provide parties with, which could lead to an increase in efficiency and efficacy. Further, the advent of the Singapore Convention on Mediation could have raised the profile and possibility of resolving disputes through mediation, which is a positive development.

Point of Interest

The rise of mediation in the context of investor-state disputes has not gone unnoticed. In the Possible Reform of Investor-State Dispute Settlement which was conducted by the UNCITRAL Working Group III in its thirty-ninth session, it was noted that there was a "general interest in pursuing further work on alternative dispute resolution (ADR) methods, including mediation, with a view to ensuring that these methods could be more effectively used". In the Note by the Secretariat, multiple options were put forth to encourage mediation, including inserting a clause in the investment treaty where mediation is an express option as a possible means for resolving disputes, or inserting a clause in the investment treaty where parties undertake to commence mediation (with no obligation to complete it), or to insert a clause in the investment treaty which mandates parties to undergo mediation.[43]

Another important development in investor-state mediation is the new ICSID Mediation Rules, which are specifically designed for mediation of investment matters involving States or Regional Economic Integration Organisations and their respective sub-divisions or agencies. Under the new ICSID Mediation Rules, parties can institute mediation proceedings based on a prior party agreement (Rule 5). Parties that do not have a prior written agreement may institute mediation proceedings by filing a Request with the ICSID Secretary-General (Rule 6).

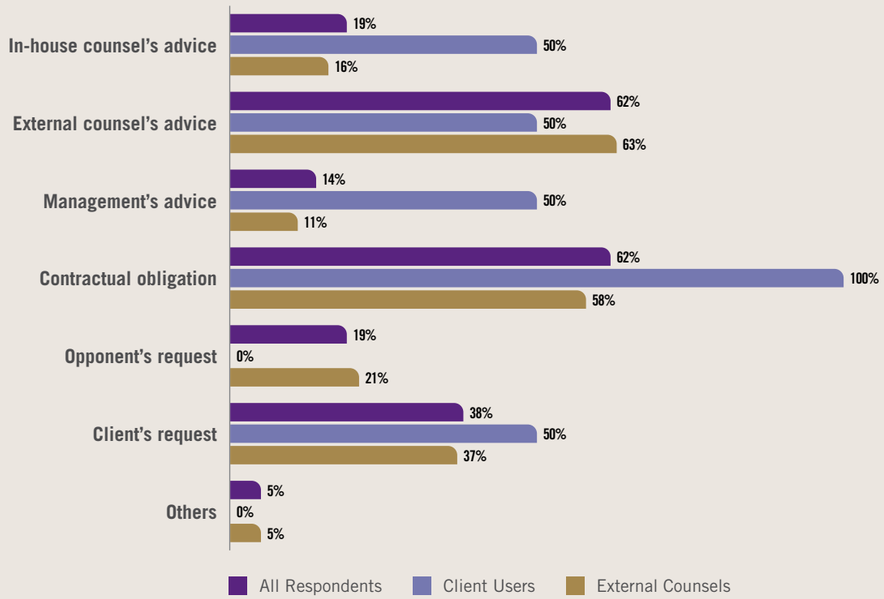
9.5 There was a significant difference between responses from Client Users and External Counsels as to the various dispute resolution mechanisms for investor-state disputes. Client Users indicated that they used arbitration and mediation more evenly, whereas External Counsels indicated a stronger preference for arbitration. This may be explained by Client Users having more incentive to save time and costs, as well as the fact that Client Users are more involved in mediation as compared to arbitration. It may also indicate that External Counsels are hesitant about mediation particularly in investor-state disputes owing to a lack of familiarity with the mechanism, as mediation in investor-state disputes would involve a different complexion from mediation in commercial disputes.

42 ICSID Rules and Regulations Amendment, available at https://icsid.worldbank.org/resources/rules-amendments

43 UNCITRAL Draft Clauses on Mediation, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf

Factors Influencing Respondents' Choice of Investor-State Dispute Resolution Mechanism

Exhibit 9.2

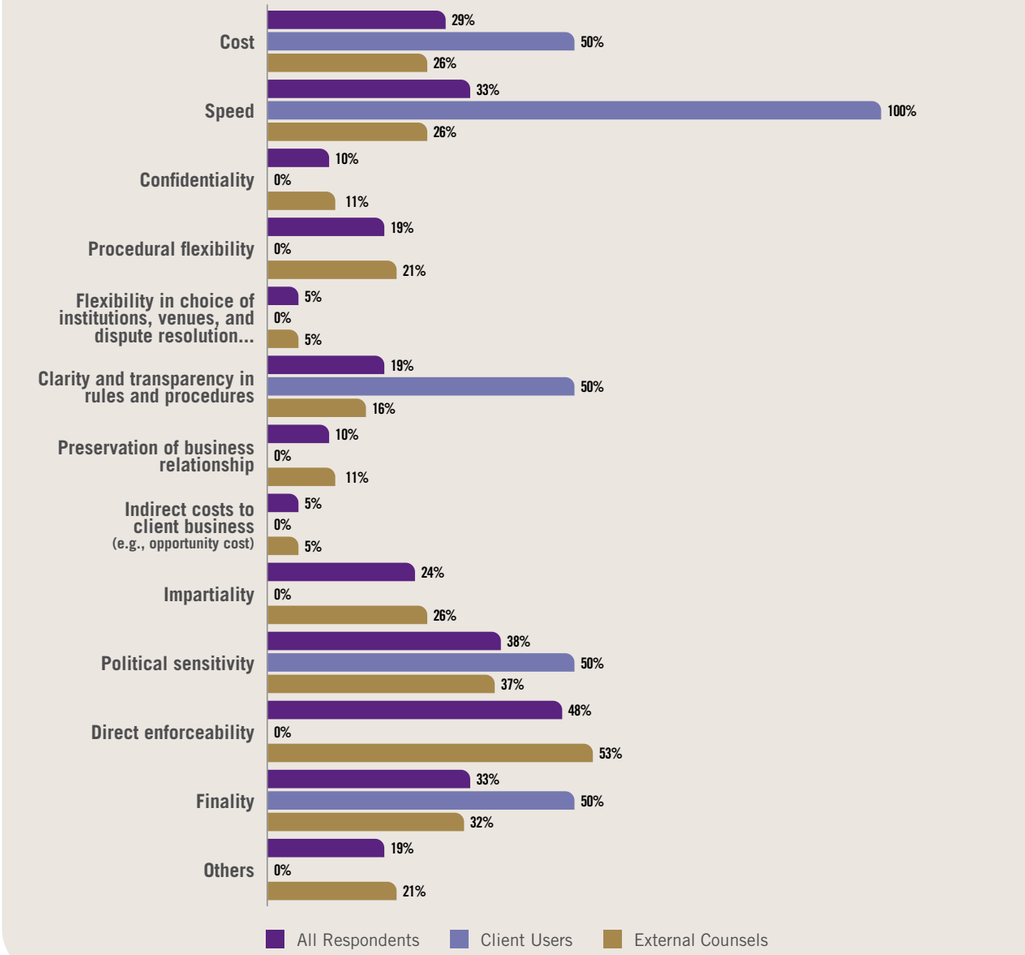


9.6 The top two factors that have contributed to the choice of the investor-state dispute resolution mechanism were contractual obligation (62%) and external counsel's advice (62%). This is followed by client's request (38%). It is understandable that a contractual obligation would influence the choice of the investor-state dispute resolution mechanism, especially if there are mandatory arbitration or mediation clauses (or both) to which parties have consented to prior to the dispute.

9.7 It is interesting to note that External Counsels' advice is an equal factor that contributes to the choice of investor-state dispute resolution mechanisms. As mentioned above, External Counsel had indicated a strong preference for arbitration. Taking the findings in context, it is evident that parties would rely on External Counsels' advice to proceed to arbitration. This points to the key role of External Counsel in investor-state disputes, as investor-state disputes are often very complex with complicated procedures and multiple issues of fact and law.

Considerations in Choosing Mechanism for Investor-State Dispute Resolution

Exhibit 9.3



9.8 The top two considerations in choosing a mechanism for Investor-State Dispute Settlement ("**ISDS**") were direct enforceability (48%) and political sensitivity (38%). While the top choice of direct enforceability was the same in the SIDRA Survey Final Report 2020, political sensitivity ranked third and has increased in its importance as a factor in the 2021 iteration of the Survey.[44] Many ISDS awards amount to considerable sums of money and a significant measure of time and costs would also have been incurred during the process of obtaining such awards. It is therefore natural that parties place high importance on the enforcement of an award, lest it becomes a paper judgment.

9.9 While enforceability is key, the public interest that is pervasive in each investor-state dispute explains parties' desire for political sensitivity in choosing the mechanism for ISDS. It is common for an investor to have multiple ongoing investments with the state and for the investor to seek to preserve these relationships with the state despite having an ongoing dispute with them. Furthermore, it is also in the state's interest for the ISDS mechanism to be politically sensitive as the state will need to account to the public with respect to the investor and its investment(s) as well as the ongoing dispute.

44 *The top three factors influencing the choice of dispute resolution mechanism in investor-state disputes in the SIDRA Survey Final Report 2020 were enforceability (65%), impartiality (53%), and political sensitivity (38%).*

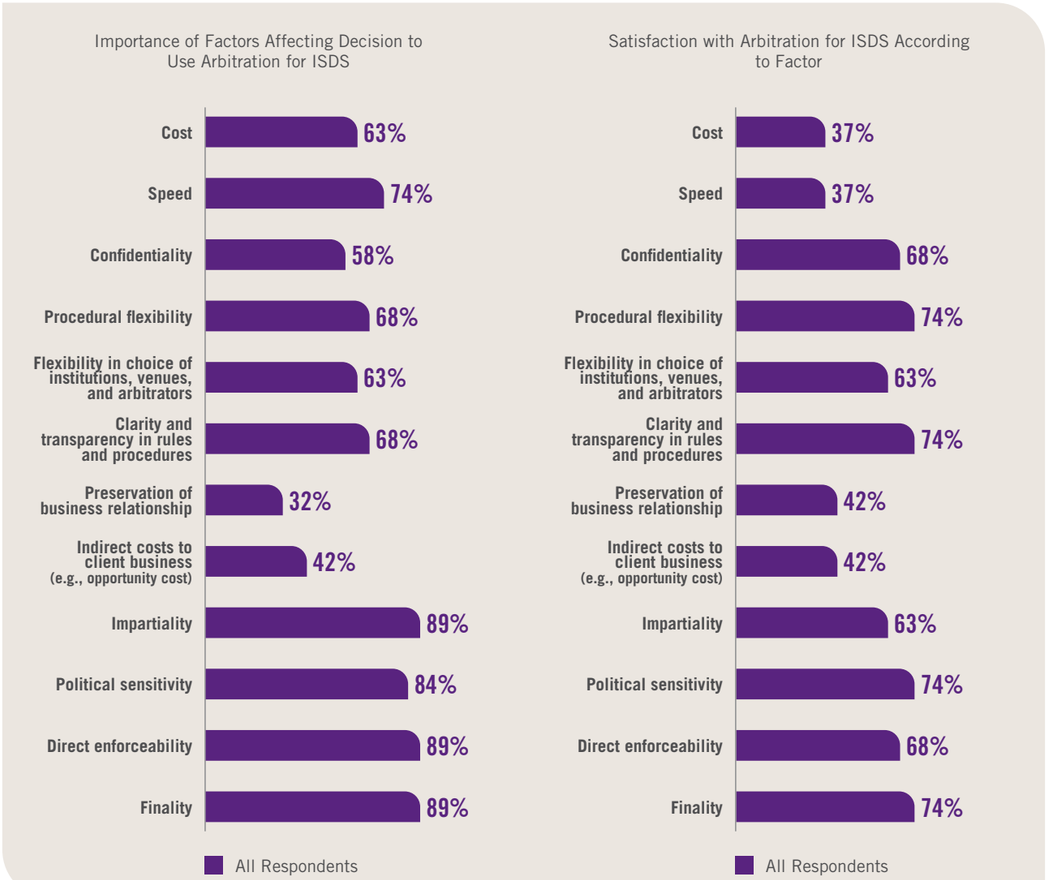
9.10 It is interesting to note the different responses between Client Users and External Counsels, where Client Users value speed (100%) and cost (50%), while External Counsels place less importance on these factors, with speed and cost only at 26%.

9.11 For Client Users, the main consideration is from an accountability aspect – whether the monies gained outweigh the time and costs spent, and if the time and costs spent on the dispute could be better placed elsewhere in its business. For External Counsels, their priority is ensuring that their clients win the dispute and can reap the fruits of the award, particularly since the average length of an ISDS procedure/arbitration is about three years.[45]

9.12 The Survey results are indicative of the different roles that client and counsel play - the External Counsels are focused on the specific dispute, while clients are focused on the larger commercial picture and the antecedent effects of the dispute on its business.

Factors Affecting the Decision to Use Arbitration for Investor-State Disputes and Respondents' Satisfaction with Arbitration

Exhibit 9.4



9.13 The top three considerations for using arbitration for investor-state disputes were the finality of the award, the direct enforceability of the award and the impartiality of arbitration proceedings. 89% of respondents rated these three considerations equally as the top three factors.

45 *Duration of ISDS Proceedings by Holger Hestermeyer and Anna de Luca, available at https://www.ejiltalk.org/duration-of-isds-proceedings/*

9.14 It is unsurprising that two of these three considerations (finality and direct enforceability) are related to the award itself. Many ISDS awards, including ICSID awards, are final and binding. This reduces the need for review or appeals of the award, which in turn saves time and costs. The enforceability of arbitration awards is greatly attributed to the widespread subscription to treaties, chiefly the New York Convention and the ICSID Convention. This has been constantly recognised as arbitration's advantage against litigation, especially since not all local court judgments are recognised in foreign courts.

Point of Interest

ISDS has come under severe criticism due to the lack of consistency with respect to the arbitral decisions and awards. Hence, some have sought to introduce appellate mechanisms to ensure that the awards come under greater scrutiny due to public interest.

One such appellate mechanism can be found in the European Union-Canada Comprehensive and Economic Trade Agreement which allows for appeals to be made in certain situations.[46] While it is relatively new, this development in investment law will certainly be one to monitor. It remains to be seen if such a system which goes against the principle of finality of arbitration awards will affect the attractiveness of arbitration as a mechanism for resolving investment disputes.

9.15 Impartiality of arbitration proceedings is also important, especially due to the large sums in dispute and public interest involved.

9.16 In contrast, only 32% of the respondents saw the preservation of business relationships as one of the most important characteristics of arbitration. While arbitration does preserve confidentiality, many investor-state arbitration decisions (especially ICSID arbitration cases) are publicly available and as such, they do affect the business relationships of parties. Furthermore, arbitration is still an adversarial process where only one party would benefit as a winner. This could be another explanation why the preservation of business relationships is one of the lowest-ranked factors, as the decision to arbitrate would entail strain on a commercial relationship.

9.17 On the satisfaction criteria, the respondents have been satisfied with four main aspects of arbitration, namely, the finality of the award, political sensitivity, procedural flexibility and clarity and transparency in rules and procedures. 74% of the respondents rated these four considerations equally as the criteria they were most satisfied with.

9.18 On the other end of the spectrum, the respondents have not been satisfied with the speed and costs of arbitration proceedings. This is understandable especially given the recent history of investor-state arbitration. A recent survey found that, on average, an investor-state dispute would take more than three years to conclude[47] and this may be longer than many court proceedings. The concern has surfaced in the recent UNCITRAL Working Group III ISDS Reform and it remains to be seen how this issue will be tackled.

Point of Interest

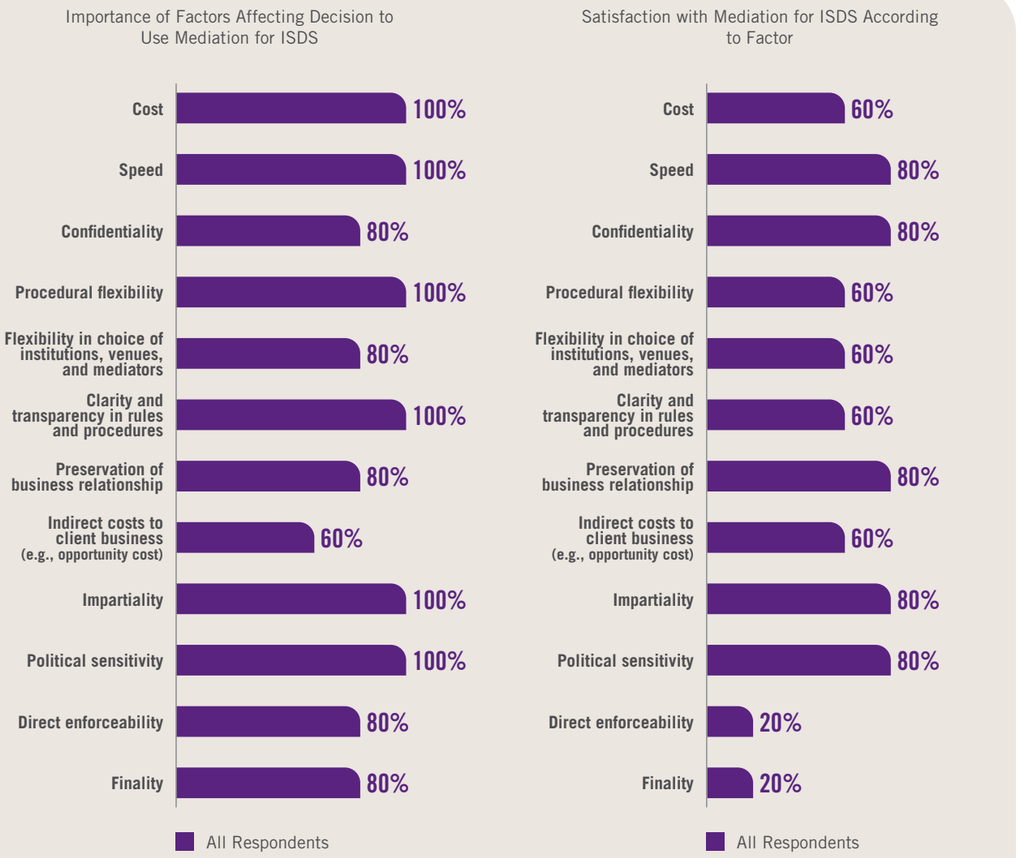
One of the longest-running ICSID cases is *AES v. Argentina* commenced in 2002 under the Argentina-USA Bilateral Investment Treaty (1991). To date, the case of *AES v. Argentina* is still pending and the dispute has not been resolved.[48] The dispute involves the controlling interest in several electricity generation and electricity distribution companies in Argentina, and the claims have arisen out of Argentina's alleged refusal to apply previously agreed tariff calculation and adjustment mechanisms with regard to claimant's investments. There has been a Decision on Jurisdiction dated 26 April 2005, but the decision on liability is still pending.

To address dissatisfaction with the speed of investor-state arbitration proceedings, the new ICSID Arbitration Rules mandate that tribunals and parties conduct proceedings in good faith and in an expeditious and cost-effective manner (Rule 3). Save for awards related to preliminary objections, tribunals are now mandated to render an award within 240 days after the last submission (Rule 58).

46 *Article 8.28 of the EU-CETA treaty, available at https://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf*
47 *Álvarez Zárate, J. M., Baltag, C., Behn, D., Bonnitcha, J., De Luca, A., Hestermeyer, H., Langford, M., Mistelis, L., López Rodríguez, C., Shaffer, G., & Weber, S. (2020). Duration of Investor-State Dispute Settlement Proceedings, The Journal of World Investment & Trade, 21(2-3), 300-335, available at https://doi.org/10.1163/22119000-12340174*
48 *AES v. Argentina (ICSID Case No. ARB/02/17), available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/84/aes-v-argentina*

Factors Affecting the Choice to Use Mediation for Investor-State Disputes and Respondents' Satisfaction with Mediation

Exhibit 9.5



9.19 The top considerations for mediation for investor-state disputes were cost, speed, procedural flexibility, clarity and transparency in rules and procedures, impartiality and political sensitivity (all at 100%). It is worth noting that the considerations of direct enforceability and finality are not among the top considerations (both at 80%).

9.20 Such a response may be explained through the advantages that mediation offers, as compared to arbitration or litigation. First, mediation is typically much faster as the proceedings are less formalistic and much more flexible in terms of procedure, which allows disputes to move along quickly. Second, mediation allows parties to compromise and resolve their disputes creatively, since mediation does not have a winner-takes-all approach, as compared to arbitration or litigation. Third, the mediation process is confidential and discussions are often not made available to the public. This is to ensure that information (especially politically sensitive information which is often ubiquitous in investor-state disputes) is not disclosed.

9.21 The results also indicate two areas that respondents remain unsatisfied with – direct enforceability and finality of the mediated settlement agreements (both at 20%). This is an issue that the Singapore Convention on Mediation seeks to rectify.

Point of Interest

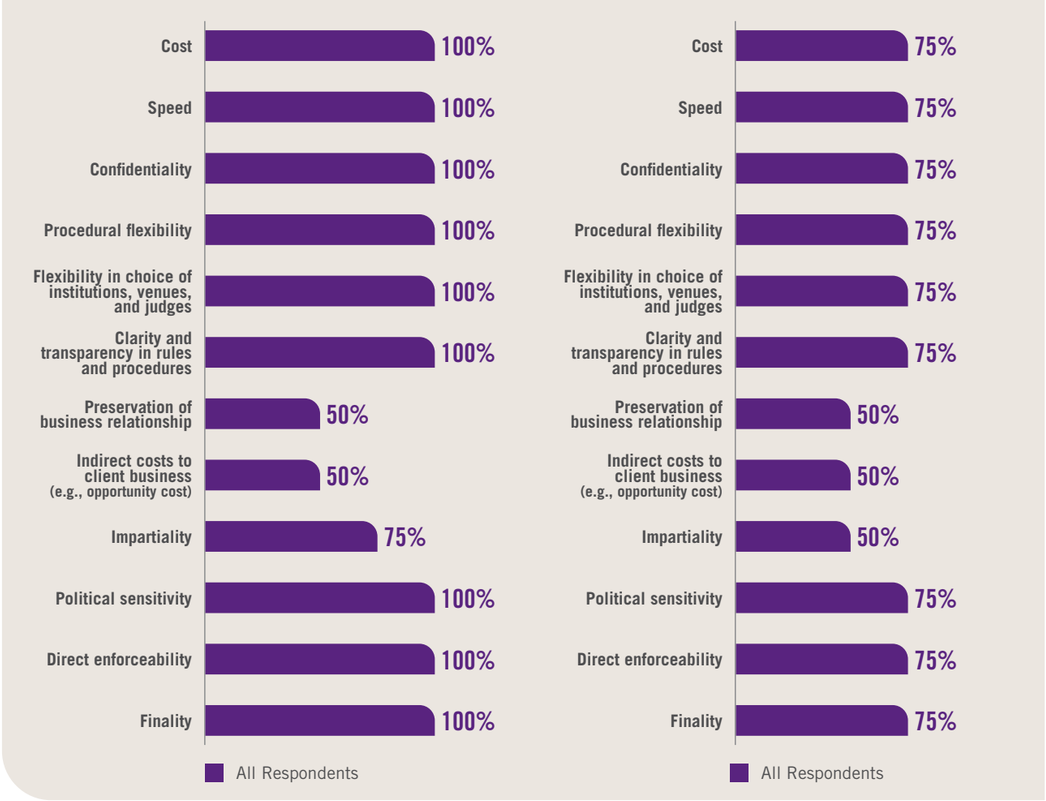
The Singapore Convention on Mediation entered into force in 2020 and has 55 signatories as of February 2022. In contrast, the New York Convention entered into force in 1959 and has 170 state parties.

While some have suggested that the Singapore Convention on Mediation could have the same impact as the New York Convention, others have cautioned that this may not come to pass, partly due to "status quo bias". In the context of international dispute resolution, this bias means that users are likely to stay with the status quo – procedures with which they are familiar such as arbitration or litigation — rather than explore new procedures that are less familiar such as mediation, even if these new mechanisms would likely maximise benefits to them.[49]

The above notwithstanding, the Singapore Convention on Mediation provides a mechanism for the direct enforcement of international mediated settlement agreements which would save parties time and costs in enforcing the mediated settlement agreement as a contract.

Factors Affecting the Decision to Use International Commercial Courts for Investor-State Disputes and Respondents' Satisfaction with International Commercial Courts

Exhibit 9.6



49 Nadja Alexander, The Singapore Convention: What happens after the ink has dried?, American Review of International Arbitration (ARIA) Vol. 30, No. 2 (2020) at pp 236-237.

9.22 The SIDRA Survey 2021 shows that almost every single characteristic of local courts in resolving an investor-state dispute has been ranked as unsatisfactory. This may be the reason why investor-state disputes are typically not resolved within the local courts, particularly if it is in the local court of the respondent state. This gives rise to the use of international commercial courts.

9.23 The results show that the most important characteristics towards deciding whether to use international commercial courts for investor-state disputes include cost, speed, confidentiality, procedural flexibility, flexibility in choice of institutions, venues and judges, clarity and transparency in rules and procedures, political sensitivity, direct enforceability and finality (all at 100%). The least important characteristics include preservation of business relationships (50%), indirect costs to client business (50%) and impartiality (75%). Further, the respondents have been satisfied with most of these characteristics in the international commercial courts.

9.24 This may be because international commercial courts were formed specifically to cater to these types of specialised disputes, and the courts are adequately equipped with international judges and more flexible rules for these disputes.

ⓘ Point of Interest

The SICC was set up to meet the demands of increased cross-border investment and trade into and between the Asian economies. One of the main aims of the SICC is to position Singapore as Asia's premier dispute resolution hub to handle the growth in complex investment disputes.

In fact, the Report of the SICC highlighted that "in the context of investment arbitration, inconsistent arbitral decisions undermine the legitimacy of the investment arbitration regime" and may "impact the growth of trade and investment in the region".[50]

In light of this concern, the Report of the SICC stated that there is a "need for a freestanding body of international commercial law in tandem with Asia's continued growth as a trade and investment hub" and the SICC seeks to serve such a purpose.[51]

To this end, the SICC comprises international judges with significant expertise in these areas of law and has specific rules designed for these specialised disputes. These judges include the likes of Justice Sir Jeremy Cooke who is known for his expertise in energy, insurance and reinsurance, professional negligence, shipping and maritime law, international trade, banking and derivatives, Justice Robert French who specialises in intellectual property, competition, commercial and public law, Justice Douglas Samuel Jones AO who is one of the ten most highly regarded arbitration practitioners in London and Justice Lord Jonathan Hugh Mance who was a commercial lawyer and whose practice developed a substantial international element.

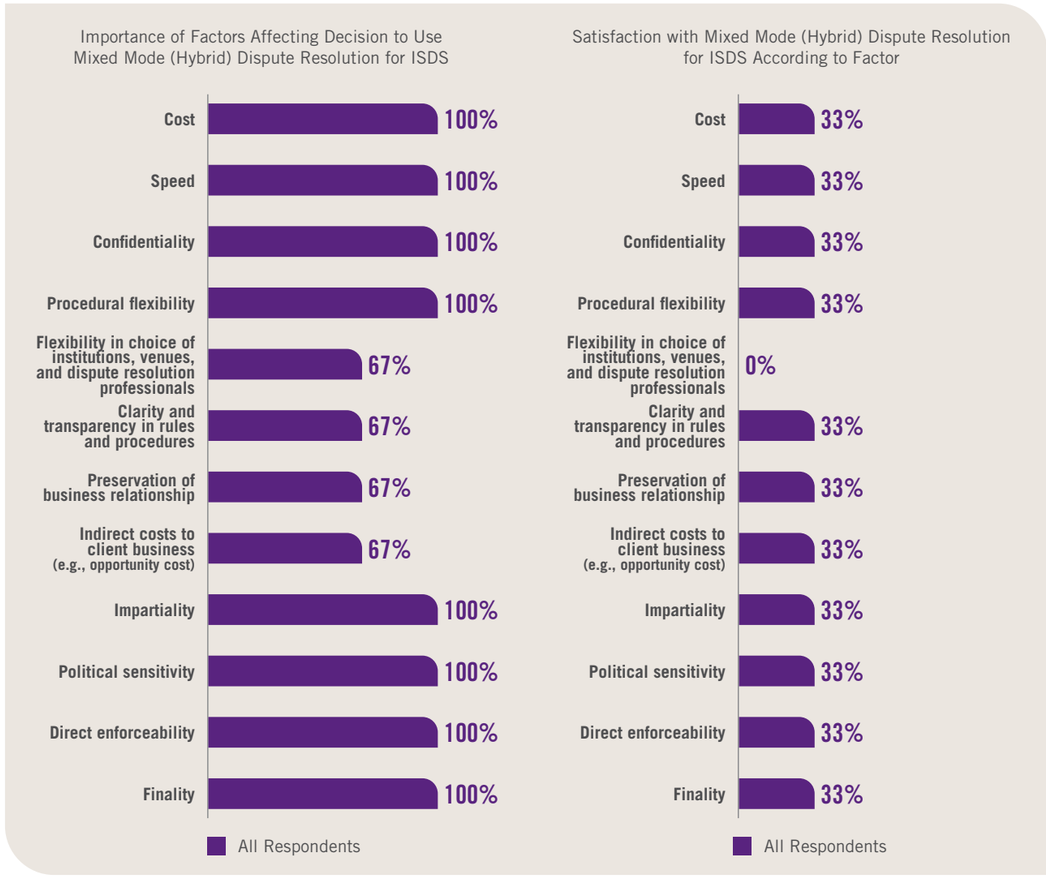
The SICC judges come from various jurisdictions, which include the USA, Australia, UK, France, Canada, Japan and Hong Kong.

50 *Report of the Singapore International Commercial Court Committee, available at https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf*

51 *Ibid.*

Factors Affecting the Decision to Use Mixed Mode Dispute Resolution for Investor-State Disputes and Respondents' Satisfaction with Mixed Mode Dispute Resolution

Exhibit 9.7



9.25 Respondents were generally not satisfied with how mixed mode procedures were used in settling investor-state disputes. This could be due to a few reasons.

9.26 First, mixed mode dispute resolution gives hope for a much faster and less costly resolution of an investment dispute. However, not many institutions that administer investor-state disputes have established mixed mode rules for investor-state disputes. Therefore, there may be potential for mixed mode dispute resolution, but such mechanisms need to be further developed by institutions.

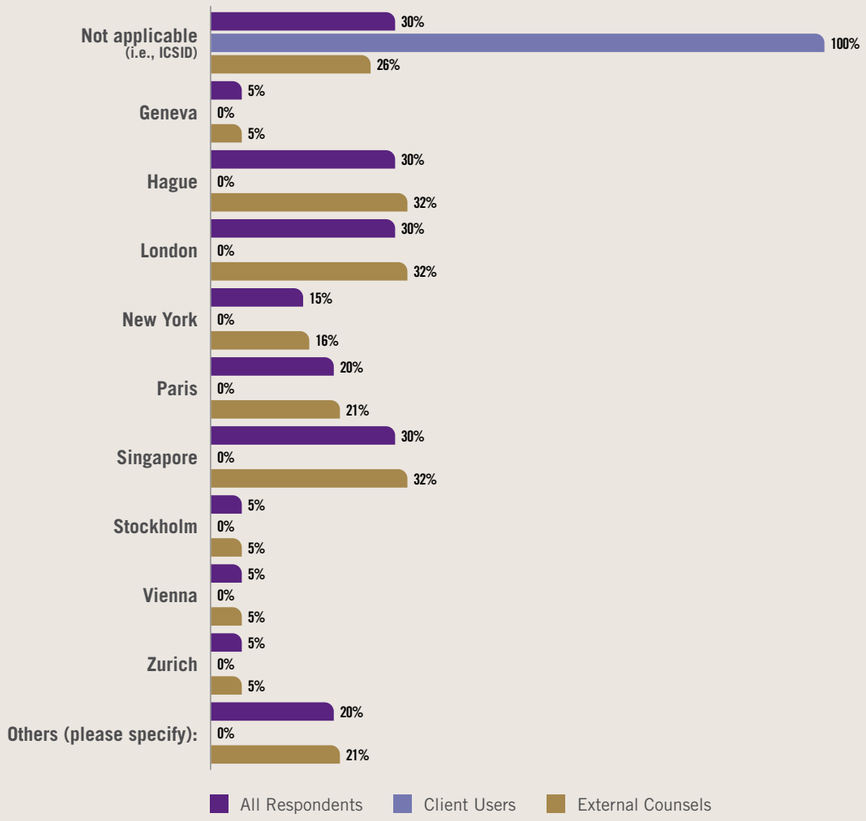
9.27 Second, while mixed mode dispute resolution seeks to encourage an early settlement of the dispute, this could be counter-productive in certain situations. For example, where parties are at opposite ends, mediation further prolongs the length of time needed to resolve the dispute and parties end up incurring more costs as a result.

9.28 Third, mixed mode dispute resolution sometimes results in a mediated settlement agreement which is not enforceable in certain jurisdictions. This may be because, until recently, there was no such instrument as the New York Convention for arbitration available for mediation. One possible workaround could be for the arbitral tribunal to record the mediated settlement agreement as part of an arbitration award, so that these awards may be enforced accordingly.

9.29 Generally, the results do show that there is much room for improvement in mixed mode procedures for investor-state disputes and that institutions, courts and the international community should be encouraged to continually develop this dispute resolution mechanism, especially when it holds much potential.

Most Commonly Used Seats for Arbitration in Investor-State Disputes

Exhibit 9.8



9.30 The top three seats for investor-state arbitrations are the Hague, London and Singapore (all at 30%).

9.31 The seat of an arbitration is particularly important as the seat determines the efficiency of the arbitration, the enforceability of the arbitral award and the impartiality and independence of the arbitration proceedings. These features are common between the Hague, London and Singapore.

9.32 The Hague is the home of the Permanent Court of Arbitration ("**PCA**"), and the Netherlands is a popular choice for the seat of investment arbitrations. Where investment disputes are handled by the PCA, parties may use the facilities in the Hague and in other countries which the PCA has concluded agreements with at no charge.

9.33 London has been an attractive seat for investor-state arbitrations and is likely to continue to be so. In fact, the recent Brexit makes London an even more attractive jurisdiction since they are no longer bound by the judgments of the Court of Justice of the European Union. One such consequence of this is the ability of the English courts to grant anti-suit injunctions restraining proceedings commenced in any other European Union member state.

9.34 Singapore's status as a neutral country makes it an attractive option as a seat for investor-state disputes. Singapore's convenient geographic location makes it a "gateway between the East and the West".[52] Further, it is "naturally comfortable culturally and economically for peoples from all over the world due to its distinctive history and consequent multicultural demography".[53]

9.35 While these three seats are pro-arbitration, a significant feature of the three seats in respect of investor-state disputes is the high standard of review of investment treaty awards. In the Dutch courts, it was recently confirmed that there is a standard of *de novo* review with respect to an arbitral tribunal's jurisdiction.[54] The same standard of review also applies in the English[55] and Singapore courts.[56]

Factors Affecting the Choice of Seat of Arbitration for Investor-State Disputes and Respondents' Satisfaction with Seat of Arbitration

Exhibit 9.9

9.36 The three most important factors in choosing an ISDS seat were domestic law governing international arbitration (e.g., availability of interim measures) (79%), the enforceability of arbitral award (71%) and political stability of the jurisdiction (71%).

9.37 The domestic law governing international arbitration would include, among others, the availability of interim measures, the confidentiality of the arbitral proceedings and the powers of the court supervising the arbitration. These are important considerations because they give parties different options in aid of the arbitration and in some circumstances, can allow parties to take the necessary measures to preserve their rights while arbitration proceedings are carried out.

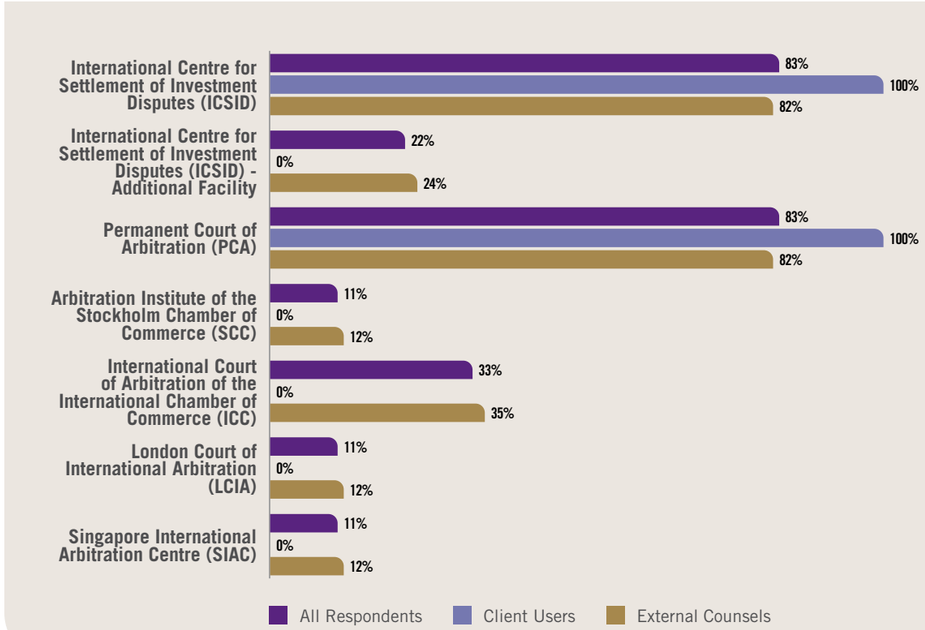
52 *Singapore as a Seat for Investor-State Disputes, available at https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/169-singapore-as-a-seat-for-investor-state-disputes*
53 *Ibid.*
54 *Russian Federation v. Veteran Petroleum Ltd et al., Judgment of Hague Court of Appeal, 18 February 2020.*
55 *Republic of Korea v. Mohammad Reza Dayyani et al. [2019] EWHC 3580 (Comm).*
56 *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic [2016] 5 SLR 536.*

9.38 The enforceability of arbitral awards is naturally an important consideration to ensure that the arbitration award obtained at the end of the proceedings is effective and worth the time and costs spent. This is particularly significant as the amounts awarded in investor-state arbitration can be considerable. Excluding the outlier *Yukos* case,[57] the average claim in such cases is US$454 million, and the average amount awarded is US$125 million.[58]

9.39 Respondents generally had satisfactory experiences with respect to these factors, with the slight exception of the enforceability of the award. Only 57% of respondents indicated that they were very or somewhat satisfied with their enforcement experience. This may be explained by the high standard of review of arbitral awards applied by more popular seats. For example, the standard of review with respect to an arbitral tribunal's jurisdiction in London, Singapore and the Netherlands is a *de novo* review which could result in some awards being unenforceable.

Most Commonly Used International Arbitration Institutions in Investor-State Disputes

Exhibit 9.10



9.40 ICSID (83%) and the PCA (83%) were the most commonly used international arbitration institutions in ISDS. It is not surprising that ICSID was a popular choice since it has specific rules that cater to such specialised disputes. Further, ICSID also has the support of the ICSID Convention to, among other things, enforce arbitral awards and ensure that these awards are final and binding, in accordance with Article 53 of the ICSID Convention.

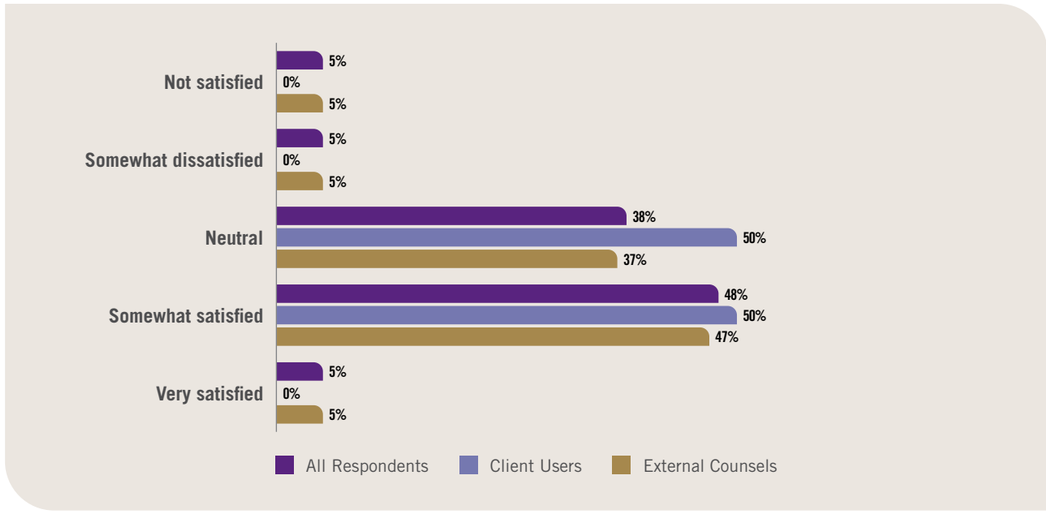
9.41 The PCA's popularity can be attributed to the hearing facilities and logistical support that are not just available in The Hague, but at various locations around the world. Furthermore, the PCA gives parties more flexibility as it frequently administers arbitrations under different institutional rules, including the PCA Rules and the UNCITRAL Arbitration Rules. In fact, under the UNCITRAL Arbitration Rules, the Secretary-General of the PCA serves as the appointing authority upon the request of a party to an arbitration proceeding.

57 Damages awarded in the Yukos arbitration have been more than US$50 billion. The average amount awarded, including the Yukos award, was US$504 million and the median was US$20 million.

58 It should be noted that these amounts do not account for interest or legal costs, and that some of these awards may have been subject to set-aside or annulment proceedings. UNCTAD, World Investment Report 2018: Investment and New Industrial Policies (United Nations 2018), available at https://unctad.org/system/files/official-document/wir2018_en.pdf

Satisfaction with Enforcement of Outcomes in Investor-State Disputes

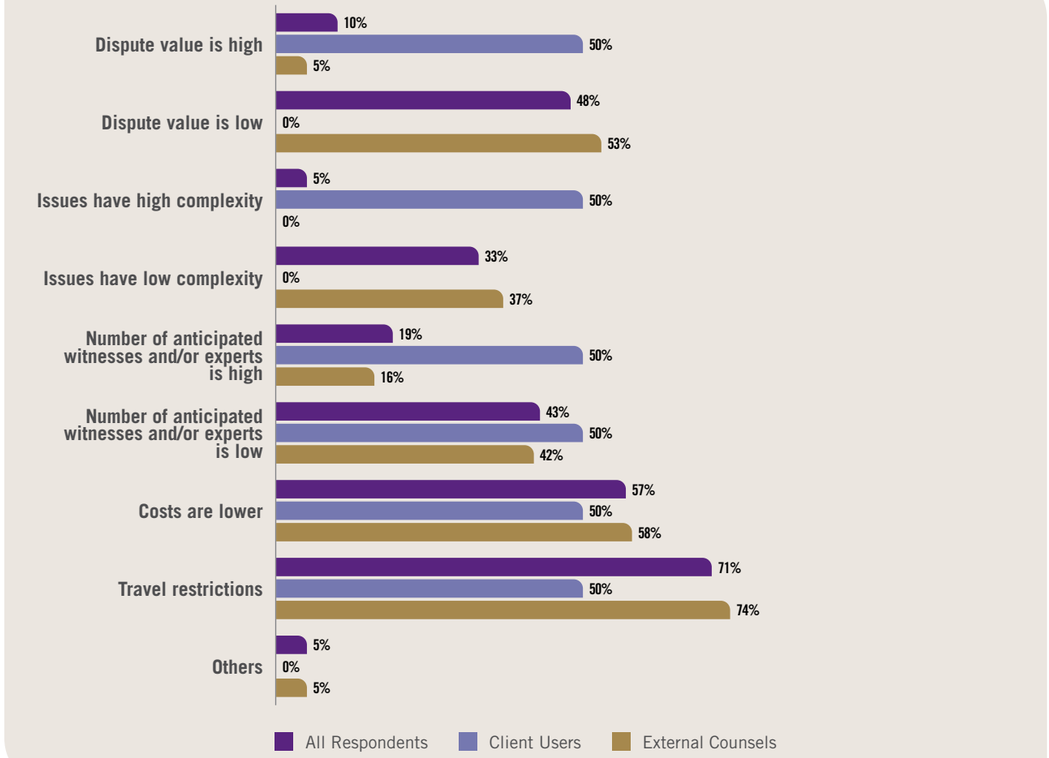
Exhibit 9.11



9.42 Both the responses of External Counsels and Client Users were similar in that they rank enforcement of outcomes in ISDS as "neutral" to "somewhat satisfied". This may be explained by the high standard of review of the arbitral awards in more popular seats. Enforcement also tends to be a difficult and lengthy process. Parties may need to spend significant financial resources and require specific expertise to satisfy an arbitral award.

Factors Affecting the Choice to Use a Wholly Online Platform to Resolve Investor-State Disputes

Exhibit 9.12



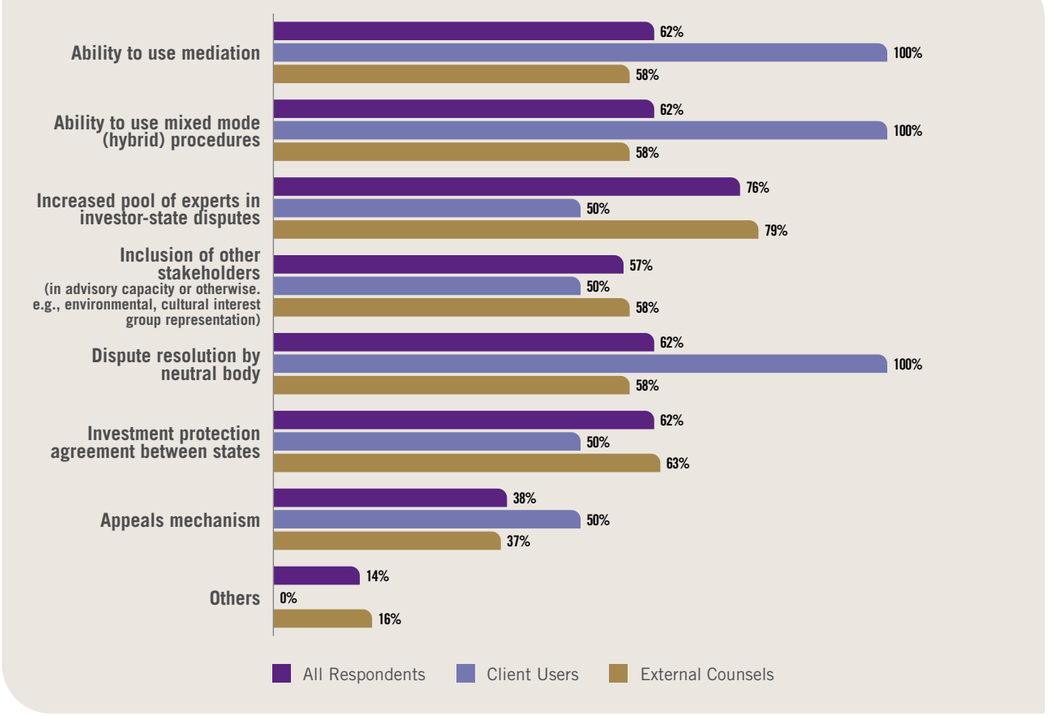
9.43 It is not surprising in this pandemic era that travel restrictions were the most popular reason for choosing a wholly online platform to resolve investor-state disputes (71%).

9.44 The second-ranked factor was cost concerns (57%). Conducting the entire investor-state dispute online would likely save on the large costs which would otherwise be incurred in a physical hearing. These costs include travel expenses for arbitrators, counsel and witnesses, as well as the rental of facilities for an in-person arbitration hearing.

9.45 Where the dispute value is low, a significant percentage of the respondents (48%) did not mind having the arbitration proceedings held virtually. In contrast, where the dispute value is high, parties were less likely to choose a wholly online platform to resolve the investor-state dispute (10%). This may reflect the scepticism that parties have towards online hearings, especially in light of issues such as witnesses referring to a script on their computer during cross-examination or internet connectivity issues which could disrupt the proceedings. It is understandable that parties would want to minimise the risk as far as possible when the value of the dispute is high.

Developments that would Improve the Dispute Resolution Procedure for Investor-State Disputes

Exhibit 9.13



9.46 Respondents suggested that an increased pool of experts in investor-state disputes would be useful in improving the dispute resolution procedure for ISDS (76%). Such a development should be encouraged for a few reasons. First, in investor-state disputes, practitioners may double-hat as counsel and arbitrator. This could lead to conflicts of interest, which would undermine the legitimacy of the ISDS system. Second, an increased pool of experts would allow for more diverse opinions in investment arbitration. This would increase parties' options for expert witnesses and encourage the development of international investment law.

9.47 Client Users, as compared to all respondents, have greater concerns regarding the procedure of ISDS. Client Users seek to have mediation or mixed-mode procedures as part of the dispute resolution mechanism for investor-state disputes. Such procedures may help Client Users save much time and costs, especially given that investor-state disputes require more than three years on average to be resolved. It shows that parties are becoming more open to the idea of mediation and resolving disputes amicably as compared to adversarial procedures such as arbitration or litigation.

9.48 It is also noteworthy that all Client Users seek dispute resolution to be done by a neutral body. This development is crucial in the ISDS context given the public interest that surrounds the dispute, and the small circle of investment arbitrators and counsel who double-hat and decide on disputes that involve huge amounts of public monies.

9.49 It is also interesting to note that the least popular suggestion was instituting an appeals mechanism for ISDS. This could indicate that such a development would not be well-received, perhaps due to fears that it might further prolong proceedings and lead to increased delay and costs.

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