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Transnational Business Law

Part C.2 : INTERNATIONAL ARBITRATION

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Powerpoint

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PRESENTATION OUTLINE

I. ARBITRATION & ADR IN INTERNATIONAL BUSINESS

II. INTERNATIONAL ARBITRATION SURVEY

III. FRENCH INTERNATIONAL ARBITRATION LAW

PRESENTATION OUTLINE

I. ARBITRATION & ADR IN INTERNATIONAL BUSINESS

A. DEFINITION OF ARBITRATION & ADR

B. SCOPE OF APPLICATION : ARBITRABILITY

C. CLASSIFICATIONS OF ARBITRATION

D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

E. ARBITRAL PROCEEDINGS

A. DEFINITION OF ARBITRATION & ADR

- **Definition of Arbitration**

« Arbitration is a method aimed at obtaining the answer to a question concerning the relationship between two or more persons, by one or more persons - the arbitrator or arbitrators - who derive their powers from a private agreement and who adjudicate on the basis of that agreement, without being entrusted with that task by the State. »

(**René DAVID, L'arbitrage dans le commerce international, Economica, 1987, n° 2, p. 9**)

« Arbitration is the institution by which a third party settles the dispute between two or more parties, exercising the jurisdictional mission entrusted to it by both parties. »

(**Charles JARROSSON, La notion d'arbitrage, LGDJ, 1987, p. 372**)

A. DEFINITION OF ARBITRATION

- **Definition of ADR**

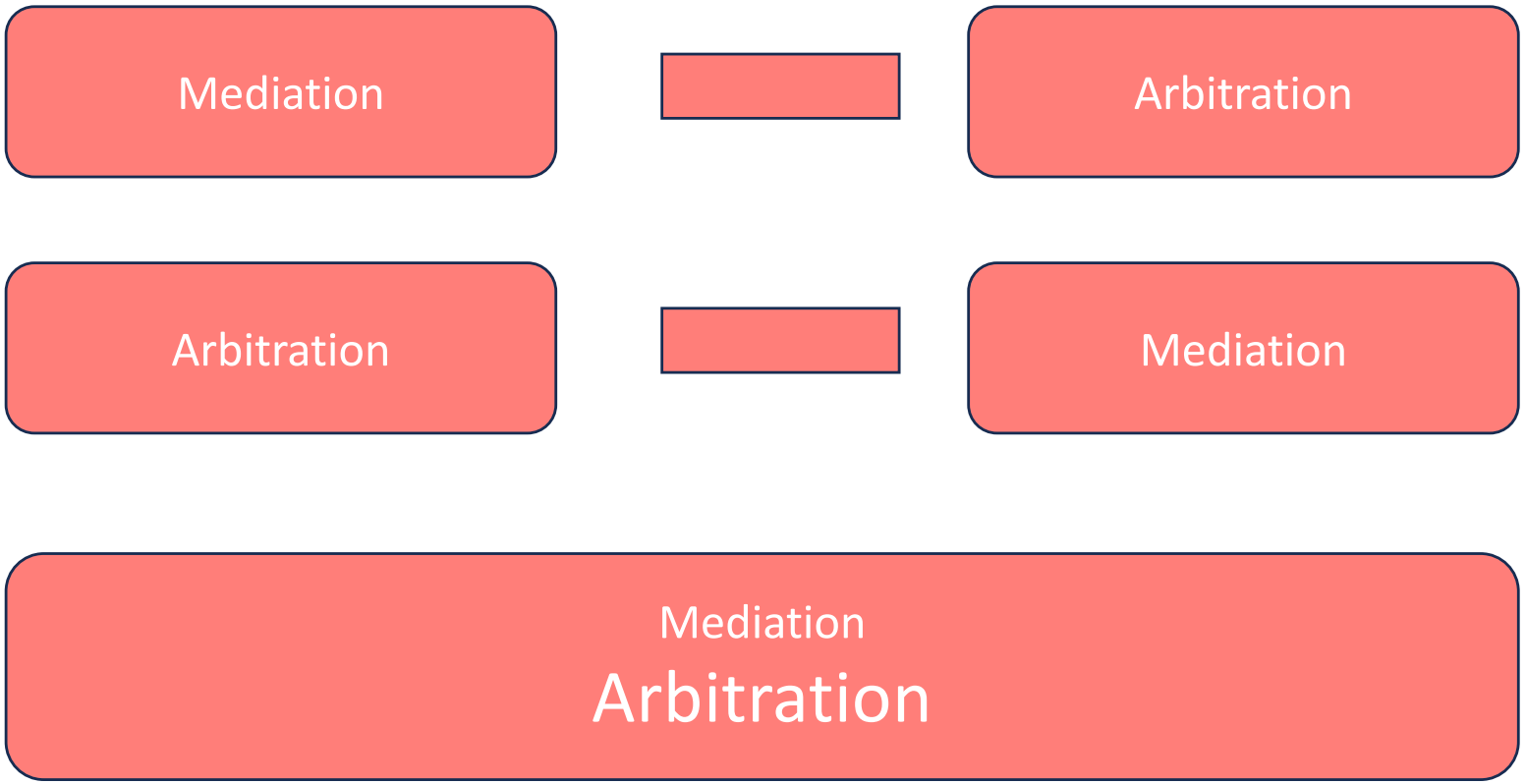
  - **Alternative dispute resolution** refers to procedures for setting disputes by means other than litigation before State courts

  - The most frequent proceedings are **arbitration** and **mediation**

  - They are **not mutually exclusive** : mediation is generally attempted before arbitration

A. DEFINITION OF ARBITRATION AND ADR

- **Definition of ADR**



A. DEFINITION OF ARBITRATION AND ADR

- **Definition of ADR**

	State justice	Private justice
Jurisdictional procedure	Traditional judicial litigation	**Arbitration**
Non-jurisdictional procedure	Judicial Mediation / Conciliation	Contractual mediation

A. DEFINITION OF ARBITRATION AND ADR

- **Definition of ADR**

  - **Mediation:**
    - Attempt to resolve a legal dispute through an **amicable settlement by parties**
    - Through the active participation of a third party (mediator)
    - Who works in order to help parties reach a conclusive and **mutually satisfactory agreement**

  - **Arbitration:**
    - By contractual means (arbitration clause) the dispute is submitted to arbitrators (= private judges with **jurisdictional powers**)
    - The proceedings usually end with a decision called « award »
    - The award has essentially the same value as an ordinary judicial judgment

B. SCOPE OF APPLICATION

- **Arbitrability of a dispute**

  - Parties can submit their dispute to arbitration by un **agreement**, i.e.

    - **arbitration clause** (*clause compromissoire*) inserted in the initial contract,
    - **compromise** (*compromis*) concluded once the dispute has arisen

  - Arbitration is mostly used for disputes resulting from legal relationships dealing with international commerce

    - Arbitration is generally used in complex trans-boarder transactions
    - Arbitration is in particular appropriate for CISG governed transactions

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B. SCOPE OF APPLICATION

- **Arbitrability of a dispute**

  - Please note : the dispute matter must be arbitrable:

    - International conventions have not laid out the requirements for arbitrability

    - Arbitrability has been left to national legislation of each State

B. SCOPE OF APPLICATION

- **Arbitrability of a dispute**

FRANCE

Domestic arbitration

A dispute is arbitrable when the matter concerns „disposable rights“, which excludes public policy related and legally protected matters (art. 2060, 2061 French Civil Code)

International arbitration

Almost all disputes are arbitrable, because the arbitration agreement is generally considered as being valid. The grounds for inarbitrability are exceptional and limited to international public policy issues

B. SCOPE OF APPLICATION

- **Arbitrability of a dispute**

  - **Article 2060** - in force since 10 Jul 1975

    Compromise may not be entered into on questions of personal status and capacity, on
    those relating to divorce and legal separation or on disputes concerning public authorities and public establishments and, more generally, in all matters concerning public order.
    However, categories of public establishments of an industrial and commercial nature may be authorised by decree to compromise.

  - **Article 2061** - in force since 20 Nov 2016

    The arbitration clause must have been accepted by the party against whom it is asserted, unless that party has succeeded to the rights and obligations of the party who initially accepted it.
    Where one of the parties has not contracted in the course of his professional activity, the clause cannot be asserted against him.

B. SCOPE OF APPLICATION

- **Arbitrability of a dispute**

  - Some examples for public policy related matters (besides patrimonial aspects of these matters) :
    - Criminal law
    - Family law
    - Insolvency law
    - Intellectual property
    - Tax Law

  - Some examples for legally protected matters :
    - Consumer law
    - Employment law

C. CLASSIFICATIONS OF ARBITRATION

- **Two main classifications**

  - Domestic vs. International arbitration

  - Ad hoc vs. Institutional arbitration



C. CLASSIFICATION OF ARBITRATION

- **Domestic vs. International arbitration**

Domestic vs. International arbitration

Domestic arbitration: deals exclusively with national or domestic matters: all the elements of the arbitration must be related to one country / State (Art. 1442 – 1503 CPC)

International arbitration: no uniform definition exists. Under rules and practices of arbitration institutions, a dispute may be regarded as international in reference to its nature or its parties (Art. 1502 – 1527 CPC)

- UNICITRAL model law combines both approaches
- In FRENCH law, article 1504 CPC is widely drafted: *„an arbitration is international when international trade interests are at stake“.*

C. CLASSIFICATION OF ARBITRATION

- **Ad hoc vs. Institutional arbitration**

Ad hoc vs. Institutional arbitration

Ad hoc arbitration:

- Definition : Parties agree on **their own arbitration procedures** and are supposed to **carry out the proceedings themselves**: they choose not only the location, the language, the applicable law, the number of the arbitrators, but also the administrative rules
- The role of supporting judge (national courts) : if parties cannot agree on the administrative modalities for setting up the procedure, they can seek assistance from national Court („judge acting in support of the arbitration" – *juge d'appui*) whose powers are imperatively limited to administration issues (no jurisdictional powers about the merits of the dispute!)

Institutional arbitration :

- Definition: Parties are supposed to choose an **arbitral institution** that shall
- **apply its institutional arbitration rules in order to administer the arbitration**
- The arbitral Institutions provide the Parties with purely administrative services (no jurisdictional powers about the merits of the dispute!)
- Examples of arbitral institutions : ICC, AAA, Beijing arbitration commission (BAC), AFA, CMAP, etc.

C. CLASSIFICATION OF ARBITRATION

- **Ad hoc vs. Institutional arbitration**

  - Ad hoc vs. Institutional arbitration : advantages of institutional arbitration

    - **Often parties opt for institutional arbitration**, since ad hoc arbitration does not offer a sufficient organization framework for conducting the arbitration procedure efficiently: parties are in litigation and therefore do not agree any more on technical aspects related to the organization of the proceedings

    - **However ad hoc arbitration comes with several advantages**

      - Economical interest
      - Legal security

C. CLASSIFICATION OF ARBITRATION

- **Ad hoc vs. Institutional arbitration**

  - Advantages of *ad hoc* arbitration

    - **Economical interest:**

      - Ad hoc arbitration is generally less expensive than institutional arbitration

      - Since the parties do not have to pay a private / commercial institution

      - With regard to the assistance by the “supporting judge”: fees of national courts (if any) are rather low

C. CLASSIFICATION OF ARBITRATION

- **Ad hoc vs. Institutional arbitration**

  - Advantages of *ad hoc* arbitration

    - **Legal security :**

      - In case of an Institutional Arbitration, the arbitral institution will decide the controversy purely provisionally between the parties, whereas in an *ad hoc* Arbitration the national « judge acting in support of the arbitration / *juge d'appui* » will make a definitive procedural decision

      - Since the decision of the Arbitral Institution is not final (as opposed to a decision made by the national judge (supporting judge / *juge d'appui*) in case of the ad hoc Arbitration) there persists a real risk that one party brings an action for annulment (*recours en annulation*) of the award on one of the legal grounds for which the Arbitral Institution's administrative decision has no definitively binding character (whereas the same decision made by the "supporting judge" would have it).

D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- **Advantages of Arbitration vs. Litigation before State Courts**

  - The parties can **appoint the arbitrator(s)** and ensure that arbitrator(s) is/are expert(s) in the legal area regarding the dispute

  - Arbitration procedures are **quicker** compared to classic procedures in State courts which last longer

  - The procedural timetable is set by the arbitrator and the parties depending on their availability -> the procedure is therefore **very flexible**

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D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- Advantages of Arbitration vs. Litigation before State Courts

- International Arbitral proceedings can be made **confidential** (even if art. 1464 (4) CPC is not applicable to international arbitration)

- The New York Convention of 1958 facilitates the **enforceability of foreign arbitral awards** at a global level

- International Arbitration is also characterized by its **neutrality, predictability and legal efficiency**

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D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- Disadvantages of arbitration

- **Cost argument**: Higher / additional costs for institutional arbitration and arbitrators

- **Procedural efficiency argument**: Involvement of third party into the arbitration proceedings (based on a contractual relationship)

D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- **Disadvantages of arbitration**

  - **Cost argument** : arbitration is considered as being more expensive than proceedings before national courts (arbitral institution – arbitrators)

    - However: national proceedings are often much longer and generally conducted in several instances (which is not the case in international arbitration where there is no appeal!)

    - State courts may require translation of all legal documents (submitted to the proceedings) in the court's official language :

    - Arbitration proceedings and hearings are more flexible (often no physical presence required)

D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- Disadvantages of arbitration

- **Procedural efficiency** : the problem can arise in complex disputes that the arbitral tribunal cannot involve a third party (e.g., subcontractor, insurance company, mother company) in the proceedings:
  - The third party is not contractually bound by the arbitration agreement
  - In such case a parallel litigation before the State Courts shall be conducted with regard to the involvement of the third party
  - This bears the risk to face two different and potentially contradictory decisions made by the arbitral tribunal (between the contracting parties) and the State Courts (towards the third party)

D. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

- **Disadvantages of arbitration**

  - This **lack of procedural efficiency** may be resolved or attenuated by case law in different ways:

    - All entities are involved in the same dispute will hypothetically insert the same arbitration clause in each individual contract : in practice not very realistic
    - State judges can act in favor of arbitration while extending the scope of the individually concluded arbitration clause to other persons (third party) who shall be involved in the dispute
    - State judges can, on the express arbitral tribunal's invitation, order third-party to make available evidence to the benefit of the arbitral proceedings

E. ARBITRATION PROCEEDINGS

- (1) Preliminary checks
- (2) Starting the Case
- (3) Appointment of Arbitrators
- (4) Procedural timeline
- (5) Written submissions (statements)
- (6) Oral Phase : Hearings
- (7) The award
- (8) Post award stage: enforcement and challenges



E. ARBITRATION PROCEEDINGS

- **(1) Preliminary checks**

  - Confirm the validity of the arbitration clause/agreement

  - Verify the choice of forum :

    - Institutional arbitration : administered by bodies such as ICC, DIS, LCIA

    - Ad hoc arbitration : conducted by the parties with the assistance of the "supporting judge" and sometimes following agreed standard rules (e.g., UNCITRAL)

E. ARBITRATION PROCEEDINGS

- (2) Starting the Case

- Notice of Arbitration (request for arbitration)
  - Claimant files a request to institution or directly to respondent in ad hoc arbitration

- Response from respondent
  - Confirms participation and raises preliminary objections

- Possible jurisdictional objections

E. ARBITRATION PROCEEDINGS

- (3) Appointment of Arbitrators

- Generally, one or three arbitrators, as agreed in the arbitration agreement

- Appointment process under applicable rules
  - Either : Contractual rules of the Arbitral Institution chosen by the Parties
  - Or : Statutory rules of the applicable procedural law

- Independence and impartiality required : arbitrators must disclose conflicts of interest (obligation of disclosure)

- Confirmation of the arbitrators' appointment by institution

E. ARBITRATION PROCEEDINGS

- **(4) Procedural timeline**

  - First procedural meeting (generally by videoconference)

  - Procedural order issued by arbitral tribunal
    - Fixes deadlines for submissions, hearings, evidence

  - That way, the arbitral tribunal and the parties design the roadmap of the arbitration

E. ARBITRATION PROCEEDINGS

- **(5) Written submissions (statements)**

  - Statement of Claimant with setting out facts, law, remedies
  - Statement of Defendant with responses (and counterclaims)
  - Further written submissions if needed and allowed
  - The written phase frames the dispute and defines the issues for the tribunal

E. ARBITRATION PROCEEDINGS

- **(6) Oral Phase - Hearings**

  - Witnesses and experts examined
  - Oral pleadings by counsel
  - Evidence tested through cross-examination

E. ARBITRATION PROCEEDINGS

- **(7) The award**

  - Tribunal deliberates in private
  - Final, binding award issued
  - Allocation of costs and interest possible
  - The arbitral award is the equivalent of a court judgment, but usually with no appeal

E. ARBITRATION PROCEEDINGS

- **(8) Post award stage : enforcement and challenges**

  - Recognition and enforcement :
    - Governed by the New York Convention (1958)
    - Enforced like a Court judgment in most jurisdictions
  - Challenging the award :
    - Appeal on merits : in international arbitration excluded
    - Set aside/annulment : limited grounds (e.g., invalid agreement, due process violation, excess of mandate)

II. INTERNATIONAL ARBITRATION SURVEY

A. The current state of International Arbitration

B. Evolution of seats and institutions

C. The future of International Arbitration

II. INTERNATIONAL ARBITRATION SURVEY

A. The current state of International Arbitration

- Survey 2018
  - Research conducted by White & Case International arbitration group, the School of International Arbitration and Queen Mary University of London
  - Main objectives : analyze the evolution of international arbitration and its future development according to the principal drivers and stakeholders
  - Participants : in-house counsels (10%), private practitioners (47%), arbitrators, representatives of arbitral institutions, academics, experts etc.



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II. INTERNATIONAL ARBITRATION SURVEY

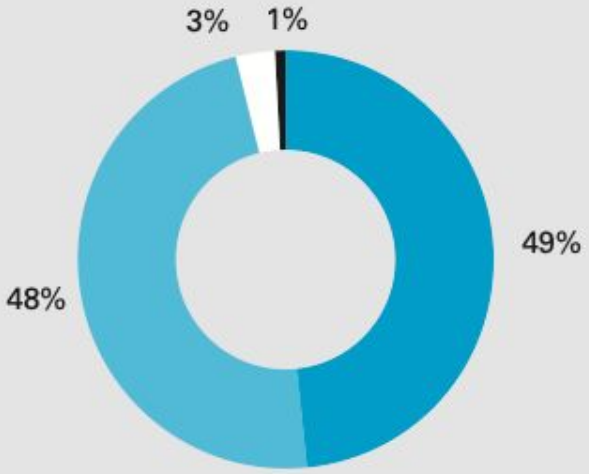
A. The current state of International Arbitration



97%

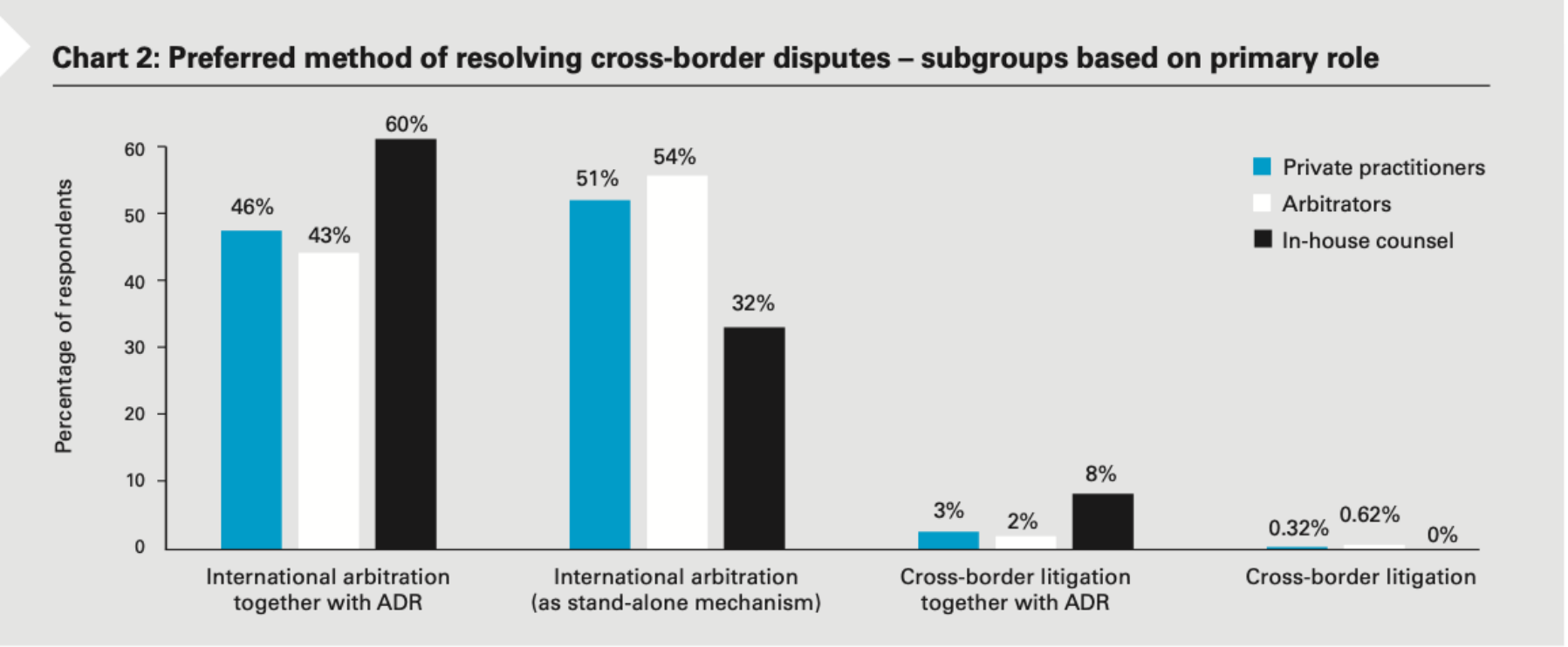
of respondents expressed that **international arbitration** is their preferred method of resolving cross-border disputes

Chart 1: What is your preferred method of resolving cross-border disputes?



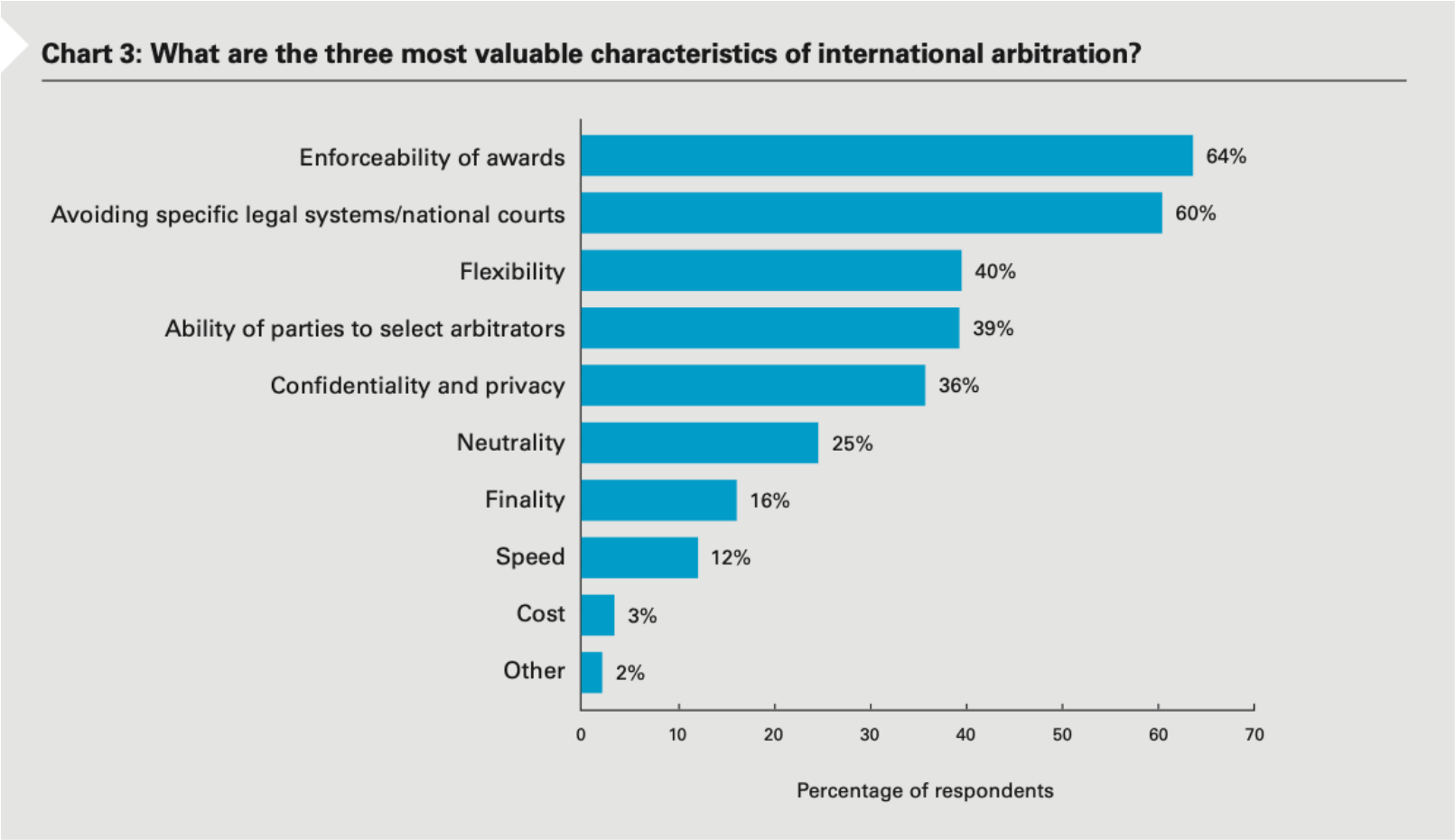
II. INTERNATIONAL ARBITRATION SURVEY

A. The current state of International Arbitration



II. INTERNATIONAL ARBITRATION SURVEY

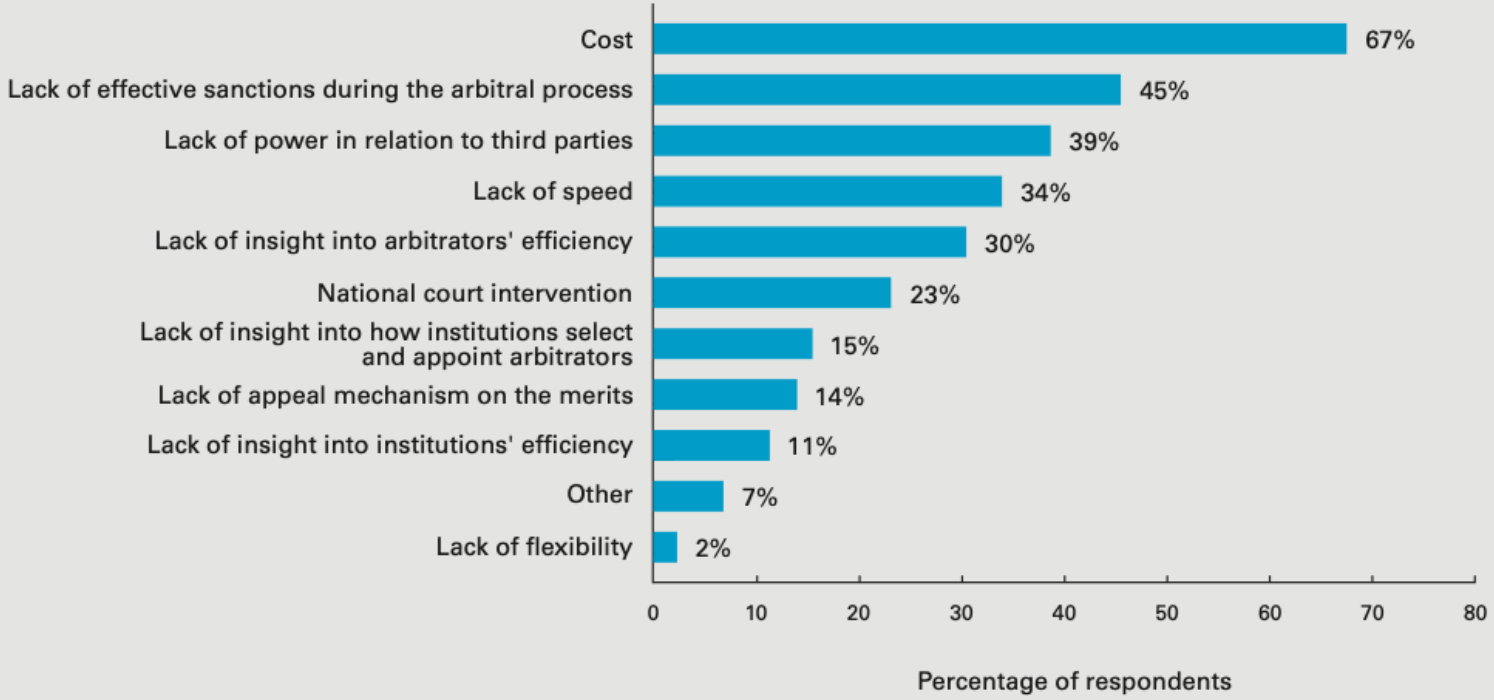
A. The current state of International Arbitration



II. INTERNATIONAL ARBITRATION SURVEY

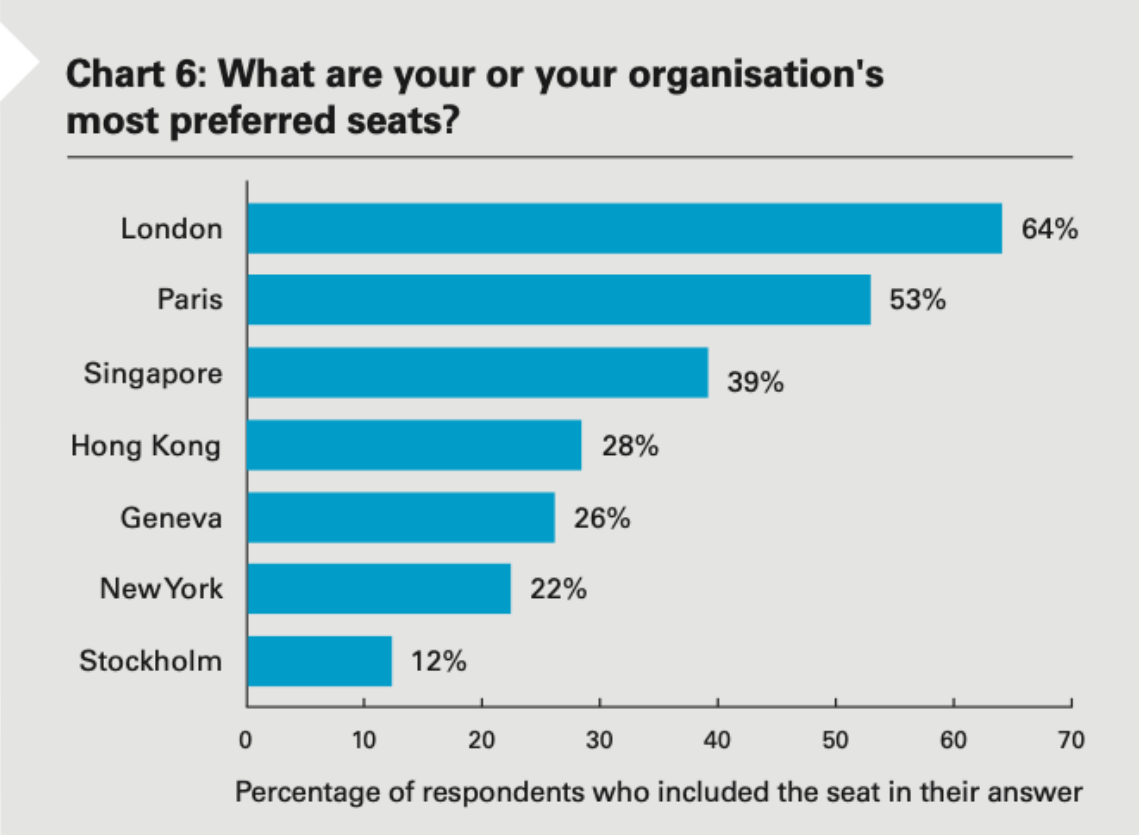
A. The current state of International Arbitration

Chart 4: What are the three worst characteristics of international arbitration?



II. INTERNATIONAL ARBITRATION SURVEY

B. Evolution of seats and institutions



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II. INTERNATIONAL ARBITRATION SURVEY

B. Evolution of seats and institutions

- London was selected as the most preferred seat by respondents in all regions



55%

of respondents think that **Brexit** is unlikely to impact the use of London as a seat

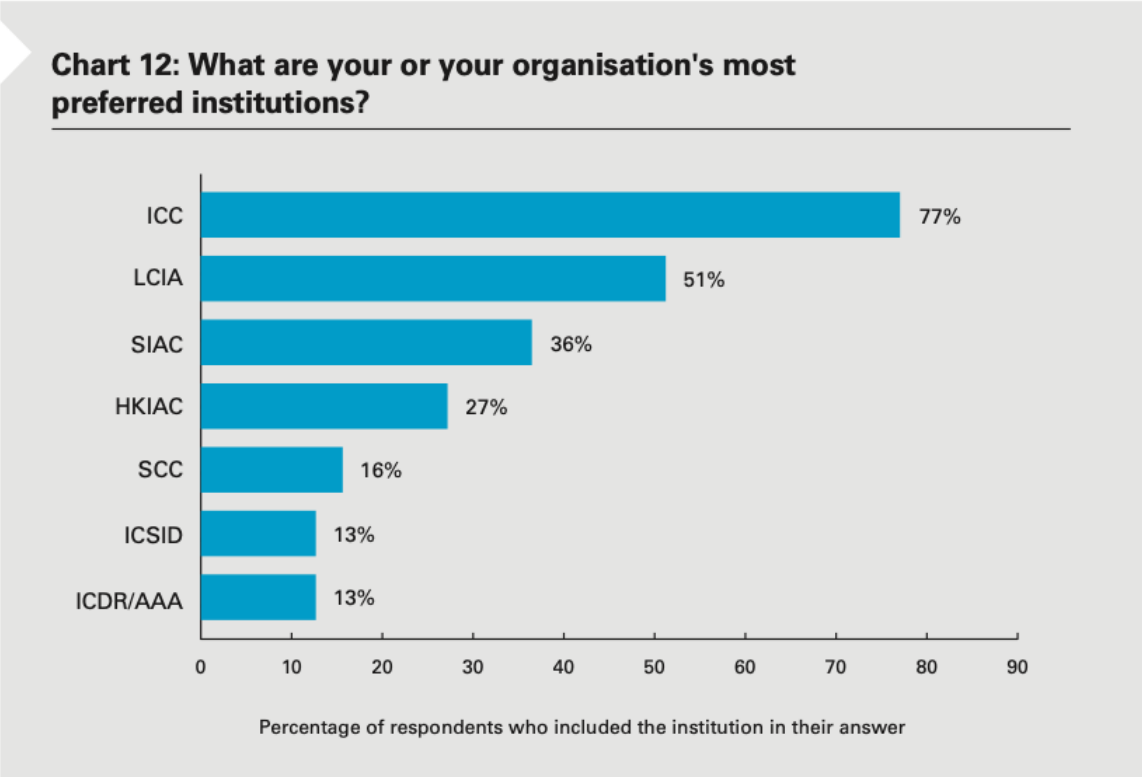


70%

of respondents think **Paris** is the seat that will most benefit from the impact of Brexit

II. INTERNATIONAL ARBITRATION SURVEY

B. Evolution of seats and institutions

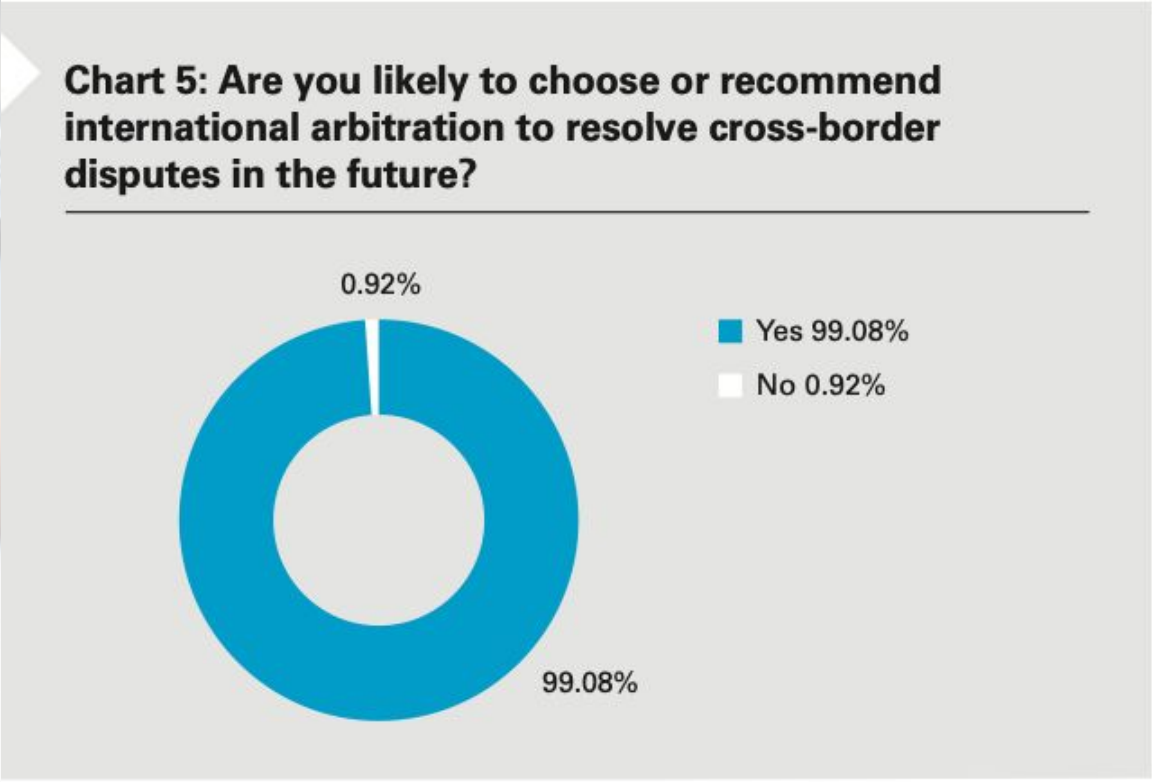


- Preference determined by general reputation and recognition, followed by a high level of administration and the previous experience of the institution

- Parties are likely to select an institution capable of handling arbitrations conducted in a multiple of locations around the world

II. INTERNATIONAL ARBITRATION SURVEY

C. The future of International Arbitration



- The use of arbitration is likely to increase in the Energy, Construction/Infrastructure, Technology, and Banking and Finance sectors

II. INTERNATIONAL ARBITRATION SURVEY

C. The future of International Arbitration



80%

of respondents would welcome arbitration rules regulating the **conduct of arbitrators**



73%

of respondents think that the **conduct of the parties and their counsel** should be subject to specific arbitration rules

- Parties in factually and legally uncomplicated cases have a desire for a more rapid resolution
- The idea of imposing deadlines for issuing awards enjoyed a particular popularity among respondents.