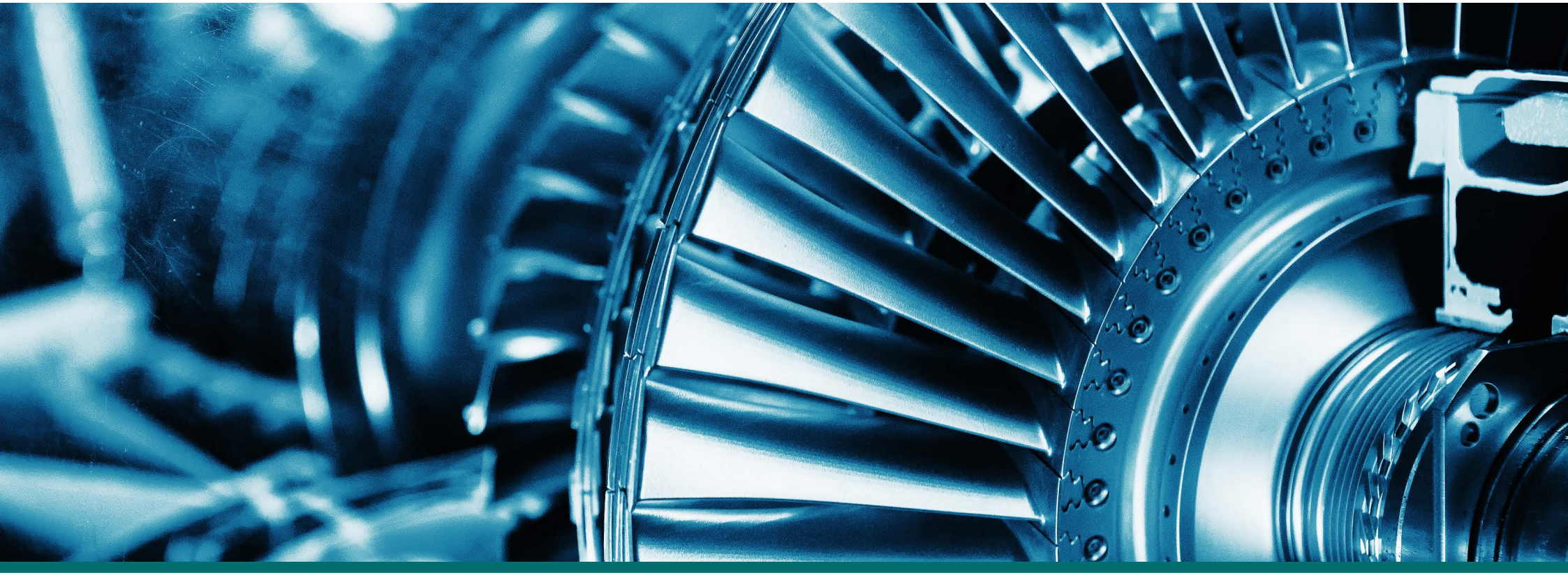
RUSSIAN ARBITRATION ASSOCIATION



THE 2022 RUSSIAN ARBITRATION ASSOCIATION SURVEY: THE IMPACT OF SANCTIONS ON COMMERCIAL ARBITRATION

FOREWORD

The 2013 RAA Arbitration Market Survey revealed that the Russia-related international arbitration market was dominated by four arbitration centers – the ICC, SCC, LCIA, and ICAC Rus[1].

When the EU, US and several states imposed anti-Russia sanctions in 2014, it became apparent that the findings of the 2013 Survey no longer reflected the actual situation. The sanctions imposed various restrictions on major Russian companies. As a result, these companies were forced to reconsider their dispute resolution habits.

In 2016, the RAA conducted a new survey among 160 respondents from various jurisdictions. The 2016 RAA Sanctions Survey confirmed that more Russian companies have started to consider various alternatives to traditional European arbitration centers, such as Asian arbitration centers and *ad hoc* arbitration[2].

Within recent years, the RAA has been receiving feedback from its members about procedural issues arising in sanctions-related cases. There has been a common feeling that preferences in arbitration are gradually changing because of dissatisfaction with the current situation.

This has led to the new 2022 RAA Sanctions Survey conducted among 182 respondents from various jurisdictions. The new survey demonstrates that the users of arbitration have been actively gathering and exchanging knowledge of sanctions-related practices in arbitration and have since adapted their preferences for arbitration rules, seats, and applicable laws.

One of the takeaways of the 2022 RAA Sanctions Survey has been that Asian and ad hoc arbitration rules have become viable options and are no longer treated as an exotic choice. If such dynamics continue, the arbitration market may evidence a tangible shift of Russia-related and sanctions-related arbitration cases to certain Asia-based arbitration centers.

It is well established that arbitration is a preferred method for resolving international business disputes. Although there is no doubt that it will hold this position, the question is whether the international arbitration community will be able to adapt to the changing circumstances, such as the rapid expansion of unilateral sanctions programs.

A possible way forward would be to exclude arbitration from the scope of sanctions. It is in the best interest of the arbitration community to spark this discussion and promote a sanctions-free arbitration to guarantee access to justice as a basic principle of the rule of law.

It is worth stressing here that international arbitration is a delocalized system with a large degree of contractual procedural freedom. The arbitration centers and tribunals' mandates are not based on national laws or ever-changing political preferences, but they are based on the parties' consent to arbitrate.

The 2016 and 2022 RAA Sanctions Surveys have been conducted in the hope that the findings will add to the global discussion on the subject and will further promote international arbitration.

The Working Group of the 2022 RAA Sanctions Survey comprised among others Roman Zykov, Vladimir Khvalei, Mikhail Bychikhin, Doran Doeh, Yana Bagrova and Victoria Gladysheva.

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1 Legal Insight Journal No. 1 (27) 2014. P 16-27 (in Russian)

2 2016 Russian Arbitration Association Survey: The Impact of Sanctions on Commercial Arbitration at: arbitration.ru/upload/medialibrary/e1e/2016-raa-survey-on-sanctions-and-arbitration.pdf

EXECUTIVE SUMMARY

INTRO

When in 2014 several states and unions started imposing unilateral restrictive measures ('**URM**') against Russian persons ('**Sanctioned Persons**'), there was a debate on whether it would change Russian users' preferences in international arbitration.

Five years ago, the 2016 RAA Sanctions Survey revealed that Russian parties still opted for the ICC, SCC, LCIA and ICAC Rus arbitration rules; London, Stockholm, Moscow, Geneva and Paris as the seats for arbitrations; and Russian, English, Swedish and Swiss substantive laws.

Now, the results of the 2022 RAA Sanctions Survey allow us to understand what has changed since 2016.

Although the study was mainly aimed at establishing the preferences of the Russian users, it was also open to respondents from other states, targeted by URM (such as Belarus, China, Cuba, Iran, Lebanon, Libya, Mexico, Venezuela), and other states, including those which have imposed URM (EU, Japan, Norway, Switzerland, UK and USA).

We have analyzed the answers from 182 individuals, of which 28 were in-house lawyers and 154 external advisers ('**Users**'). Of all Users, 88 originated from Russia and 94 from other jurisdictions.

QUESTIONS

We asked 10 questions to understand the three key issues:

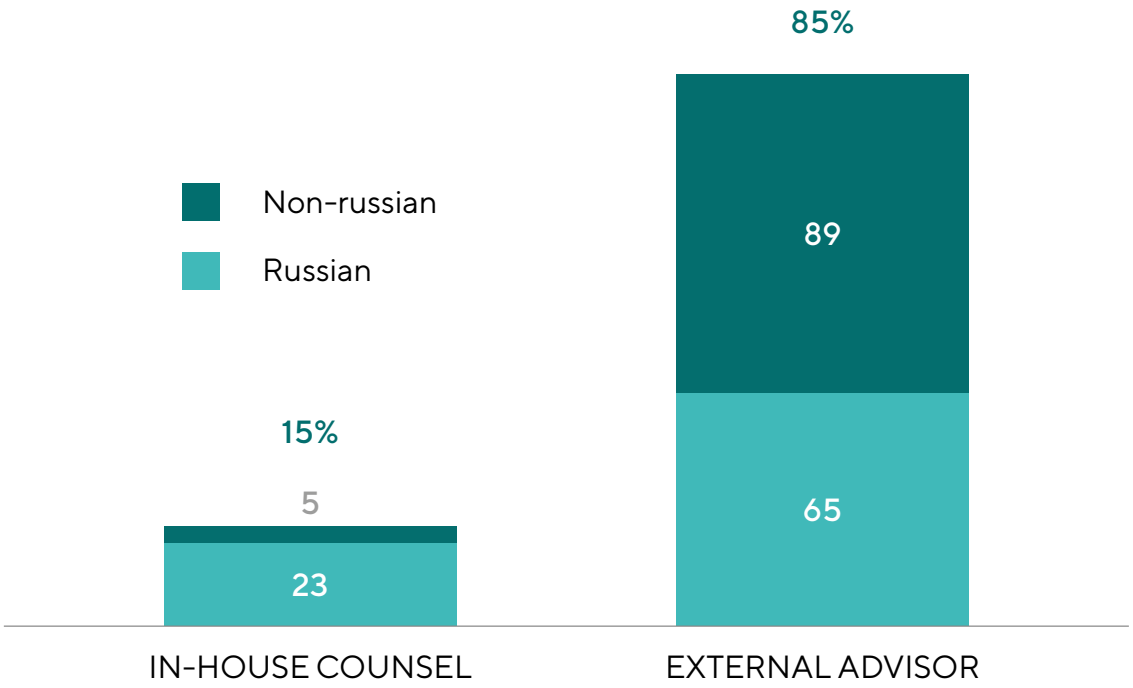
1. Whether URM have impeded arbitrations, i.e. whether URM affected:
   a. the Arbitration institutions ("**AIs**") case management process;
   b. the payment of arbitration costs;
   c. the candidates' decisions to act as arbitrators;
   d. the tribunals' decisions on the merits.
2. Whether URM impacted Users' preferences in arbitration, in particular:
   a. the choice between institutional and *ad hoc* arbitration;
   b. the choice of preferable arbitration rules, arbitration seats, and substantive laws;
3. Whether Users considered URM related risks in their dispute resolution clauses by:
   a. agreeing to use URM free currencies;
   b. agreeing to *ad hoc* arbitration and UNCITRAL Arbitration Rules;
   c. selecting neutral substantive laws and seats.

CONCLUSIONS

1. Users reported that there had been cases where URM affected arbitral proceedings, in particular:
   a. 21% of Users reported that they were aware of situations where AIs have refused to administer cases due to URM;
   b. 38.5% of Users noted that they were aware of cases where AIs (or their banks) were unable to accept payments from Sanctioned Persons;
   c. 18% of Users reported that they were aware of cases in which arbitrators refused to act (to accept appointment or to act when the issue of sanctions arose while arbitration was pending).
   d. 20% of Users reported that they are aware of cases in which the arbitral tribunals rejected claims or reduced quantum because of URM restrictions.
2. To mitigate URM-related risks, Users seem to strive to delocalize arbitration:
   a. 21.5% consider using *ad hoc* arbitration instead of institutional arbitration;
   b. 69% use neutral currencies for payments under contracts;
   c. 14% consider using *lex mercatoria* to avoid the nexus to national legal regimes.
3. Arbitration rules of certain Asian arbitration centers, Asian states' national laws and Asian seats have improved their positions in the ranking. Comparing the two RAA Sanctions Surveys of 2016 and 2022, the SIAC has moved from 6th to 4th position and the HKIAC from 9th to 7th position among the preferred arbitration rules. Similarly, Singapore has moved from 7th to 2nd position and Hong Kong from 8th to 7th as the seats of arbitration. Singaporean law has moved from 6th to 4th place as the preferred substantive law.

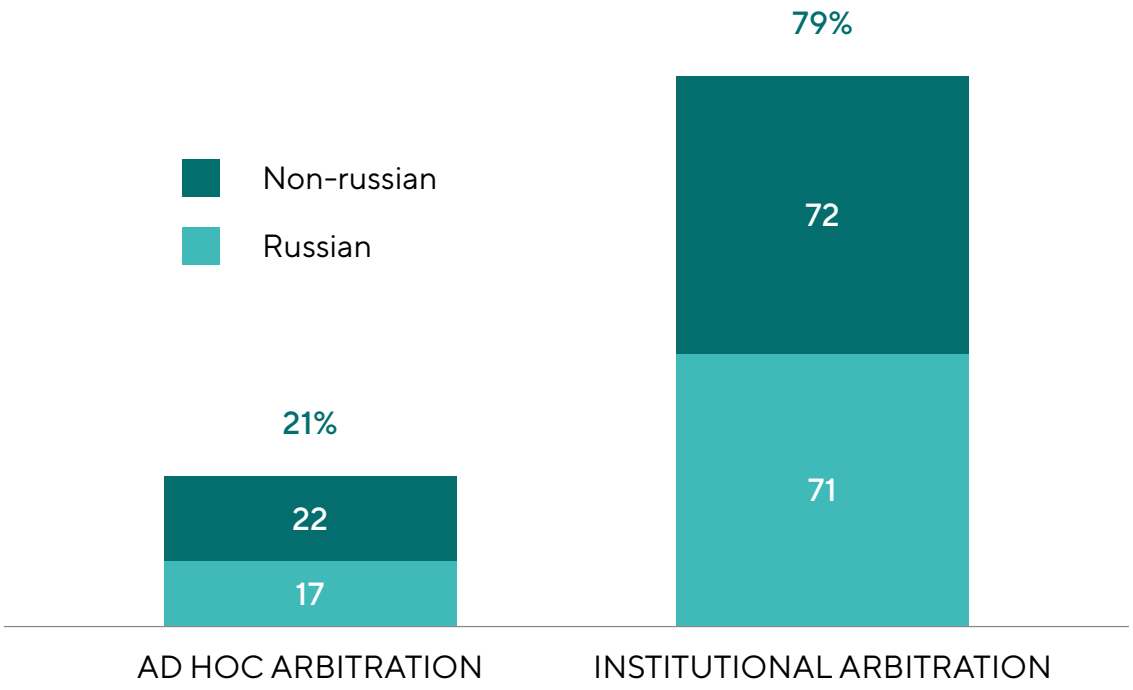
- The questionnaire was answered by 182 individuals, of which 28 were in-house counsel and 144 external advisers (Chart 1).
- The survey was completed by 88 Users from Russia and 94 from other jurisdictions. Non-Russian Users originate from URM targeted jurisdictions, such as Belarus, China, Cuba, Iran, Lebanon, Libya, Mexico, Venezuela, as well as from the jurisdictions which actively impose URM – EU member states, Japan, Norway, Switzerland, UK, USA.

Chart 1 **WHAT IS YOUR ROLE?**



- URM may impede Sanctioned Persons from having their claims and counterclaims heard under institutional arbitration rules, especially if the AI has a legal nexus to a Sanctioning State, such as the AI's location, the currency for payments, management team, etc (Chart 2).
- For example, URM may complicate or even prevent AIs from administering certain cases or, even more likely, from receiving payments of arbitration fees from Sanctioned Persons.
- Contrary to institutional arbitration, which is confined to a particular case management procedure under applicable arbitration rules, *ad hoc* arbitration is more flexible. In an *ad hoc* setup, parties are free to shape the arbitration procedure the way they want and are better positioned to deal with procedural impediments caused by URM.
- This chart demonstrates that 21.5% of Users view *ad hoc* as an effective procedural remedy against the negative effects of URM. This is a significant rise if compared to the 2016 RAA Sanctions Survey, where *ad hoc* under the UNCITRAL rules was mentioned by only 6.5% of Users.

Chart 2 **GIVEN THE RISK OF SANCTIONS, WHAT TYPE OF ARBITRATION WOULD YOU CHOOSE?**



- Most Users confirmed that the existing or potential sanctions affect the choice of contract currency.
- Indeed, the use of currencies of or foreign subsidiaries of banks of the Sanctioning States increases the risks of the non-performance of contracts and substantially reduces the chances of arbitral awards being enforced, even if enforcement is sought outside the Sanctioning States.
- International traders may use "neutral" currencies, denominate contracts in several alternative currencies or provide for contract adjustment/amendment mechanisms to mitigate negative consequences of URM.

Chart 3

DO SANCTIONS (EXISTING OR POTENTIAL) AFFECT YOUR CHOICE OF THE CONTRACT CURRENCY?

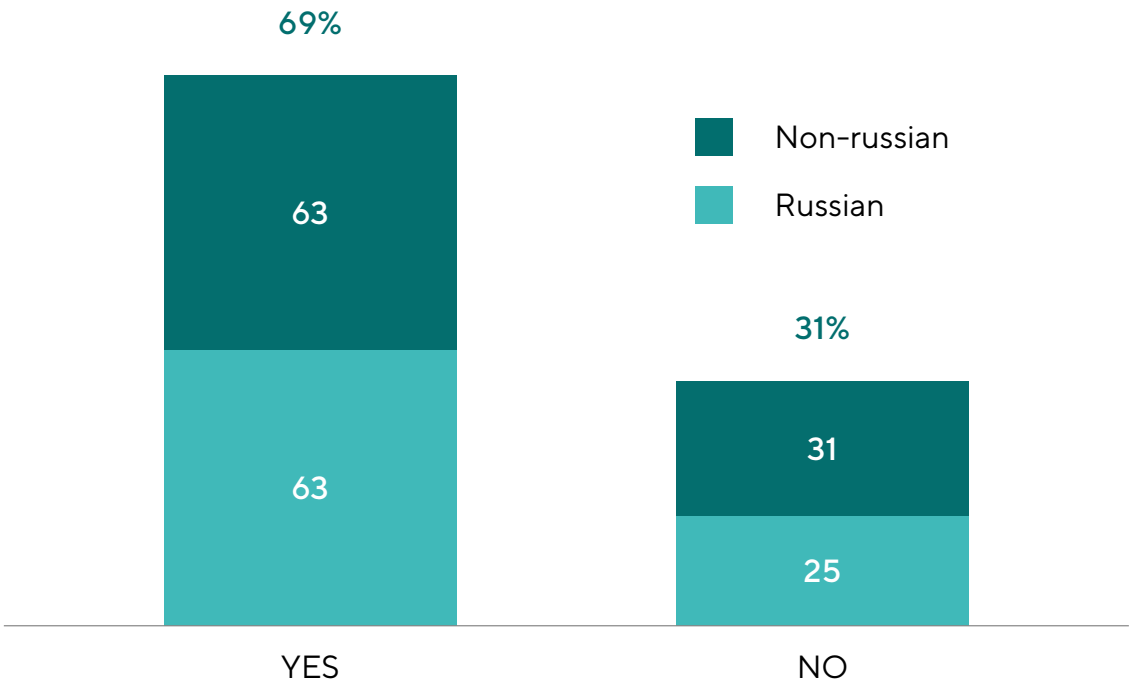
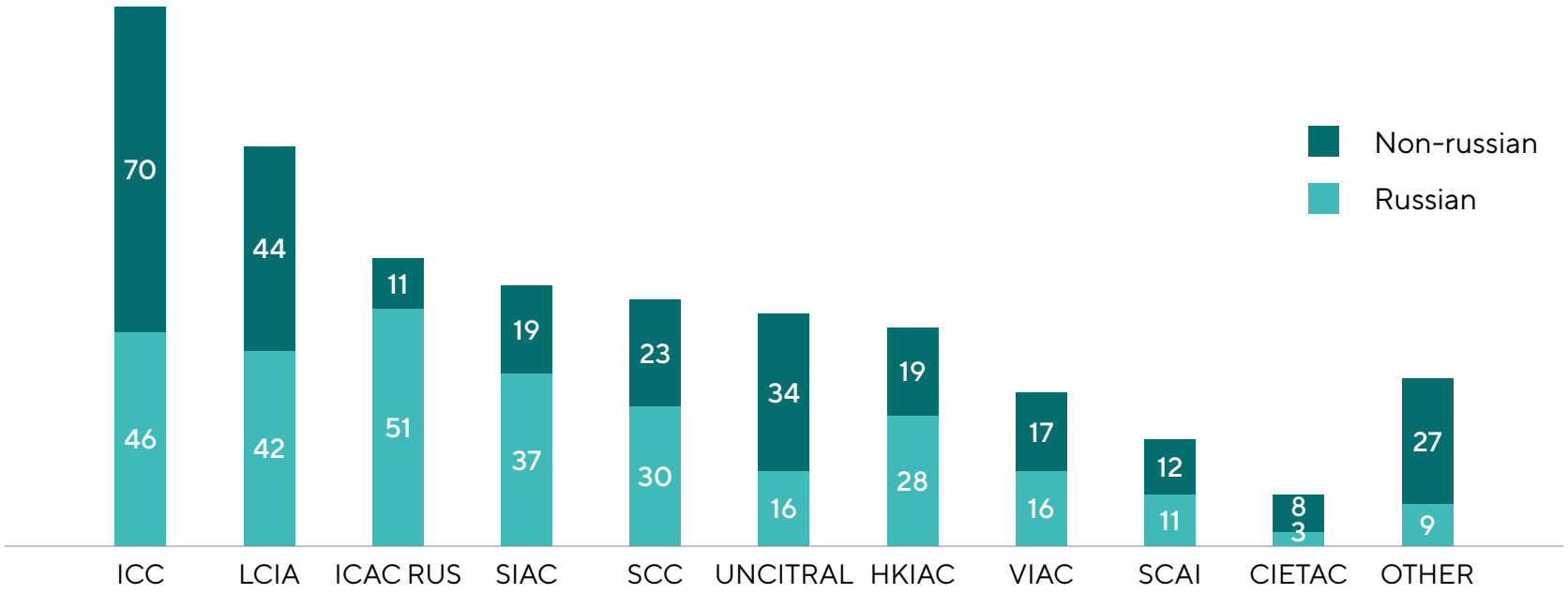


Chart 4

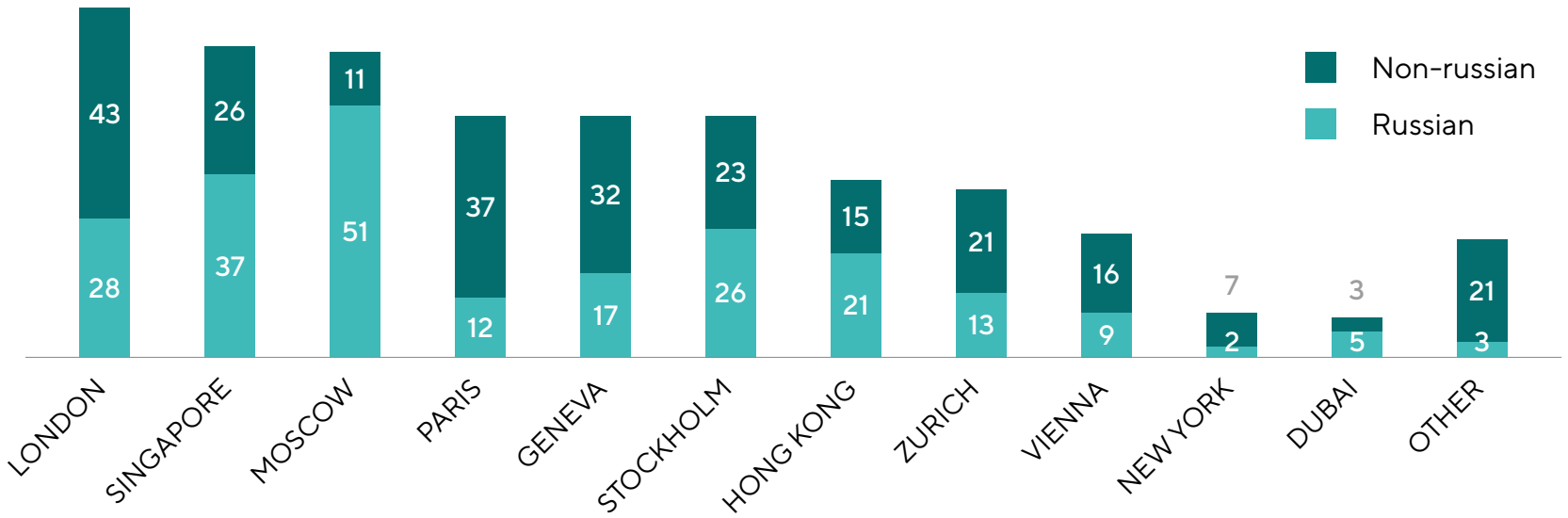
WHAT ARBITRATION RULES DO YOU INCORPORATE INTO YOUR CONTRACTS?



- The ICC and LCIA maintained the positions of leading AIs. The ICAC Rus is also a preferred choice of Russian Users (Chart 4).
- Notably, Asian AIs received high points from Russian Users. The SIAC secured 4th position (6th in 2016), and HKIAC – 7th position (9th in 2016). Both AIs are praised by Russian Users because they received permission to administer cases seated in Russia, and neither Hong Kong nor Singapore have adopted URM against Russian persons.
- Another notable development, if comparing with the 2016 RAA Sanctions Survey, is the appearance of the UNICTRAL among preferred arbitration rules. This is another sign of the rise of *ad hoc* arbitration in URM-related cases.

Chart 5

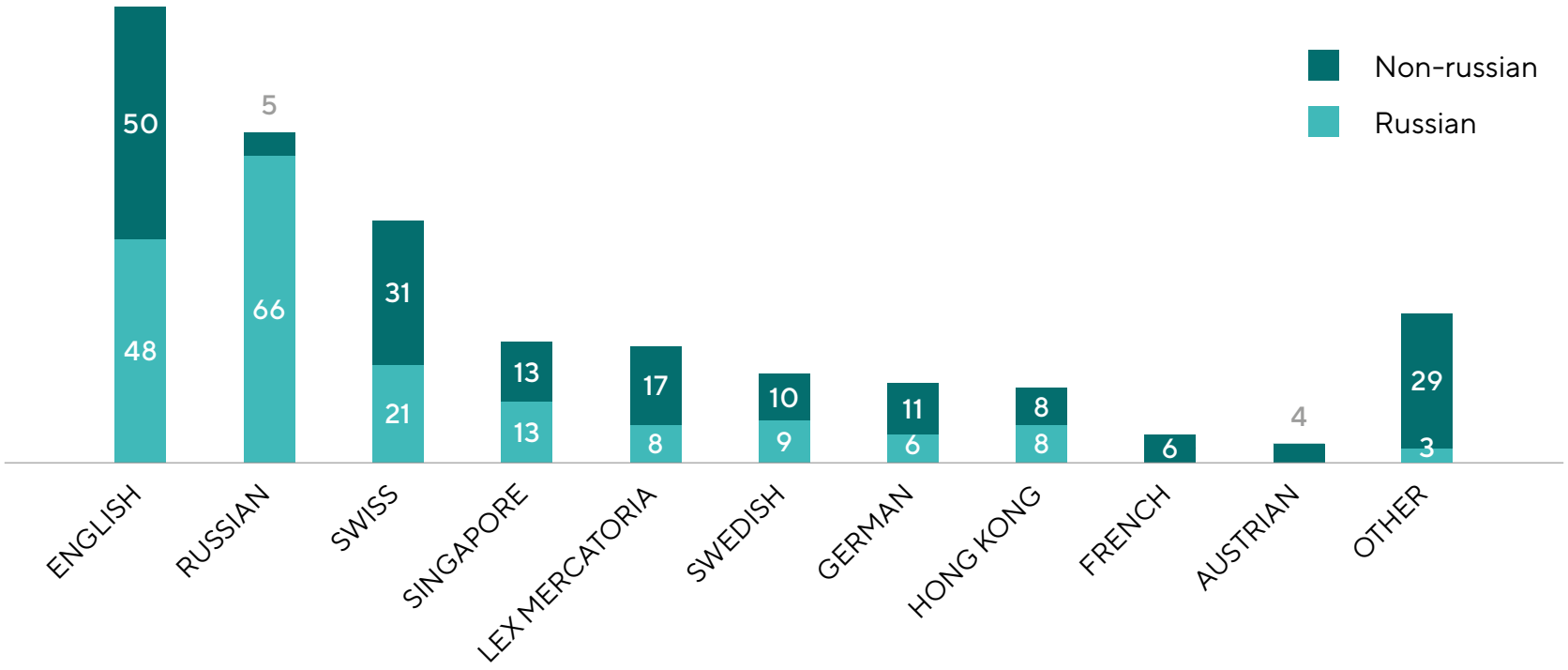
WHAT SEAT OF ARBITRATION DO YOU CHOOSE FOR RESOLVING SANCTIONS DISPUTES?



- According to Users, London, Moscow, Paris and Geneva remain the most preferable seats for sanctions-related cases (Chart 5).
- Compared to the 2016 RAA Sanctions Survey, Singapore has advanced to 2nd position (from 7th in 2016), while Stockholm has dropped to 6th position (from 2nd in 2016).

Chart 6

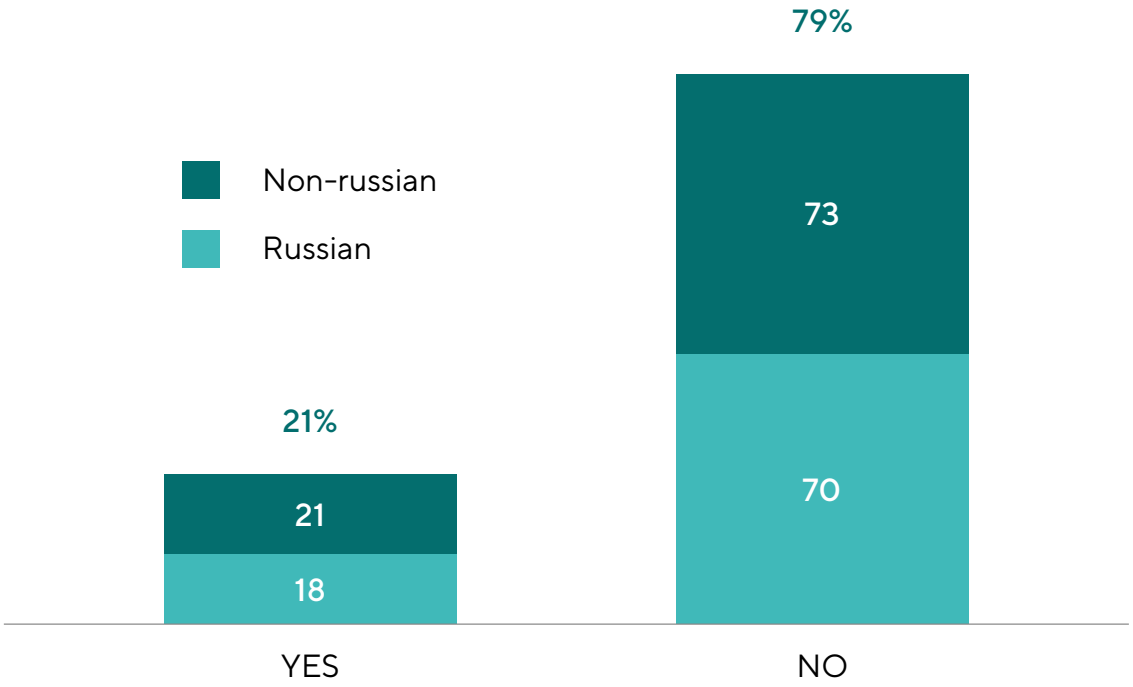
WHAT SUBSTANTIVE APPLICABLE LAW DO YOU CHOOSE?



- Although English law remains the top choice, Swiss, Russian and Singaporean substantive laws are also at the top of the list (Chart 6).
- Swedish, German and Hong Kong substantive laws are also popular among Users.
- Notably, *lex mercatoria* has received a mention in the survey. When choosing the law of a particular state, the counterparties automatically bind themselves to the law firms, arbitrators, and legal experts of those states, who may subsequently become unable to provide legal services due to the URM imposed by such states. In such a circumstance, *lex mercatoria* represents a "hypoallergic" set of laws detached from any national regime and free of any restrictions.

- 21% of Users reported that they are aware of situations where AIs have refused to administer cases due to URM (Chart 7).
- Licenses may be required to provide services to Sanctioned Persons or receive payments from them. Not only does this take time, but it also has an impact on confidentiality because sensitive case information is disclosed to state authorities.
- This may also explain why 21.5% of Users preferred *ad hoc* arbitration over institutional arbitration (see Chart 2).

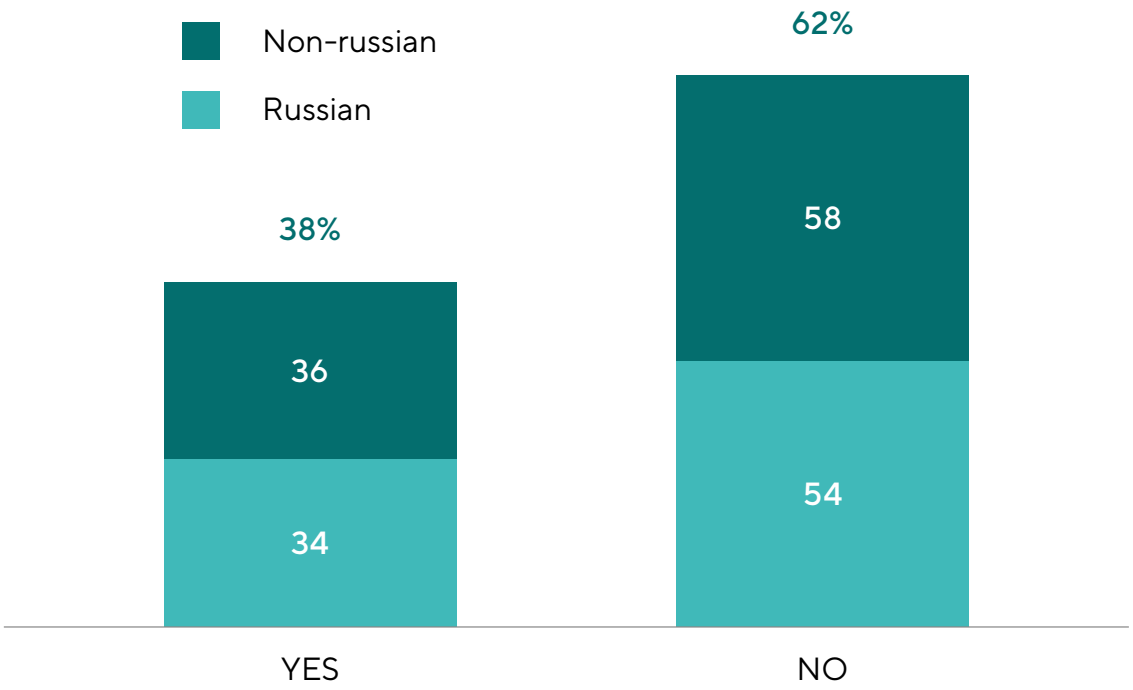
Chart 7 **ARE YOU AWARE OF CASES WHERE ARBITRAL INSTITUTIONS HAVE REFUSED TO ADMINISTER CASES BECAUSE ONE OF THE PARTIES WAS TARGETED BY UNILATERAL SANCTIONS?**



- 38.5% of Users noted that there had been numerous examples when AIs (or their banks) were unable to accept payments from Sanctioned Persons. Naturally, AIs or the parties may face similar problems when returning funds from the arbitration costs to the parties after the case has been completed.
- Commonly, AIs are linked to their local banks and refuse to explore other payment options. Considering the rapid expansion of URM programs across the globe, URM present a potential risk to many notable market players—there is no guarantee that a person will not be subject to URM in the future.
- Payment of arbitration costs is an Achilles heel for institutional arbitration. In such a circumstance, ad hoc arbitration is more flexible in relation to accepting arbitration fees from the parties.

Chart 8

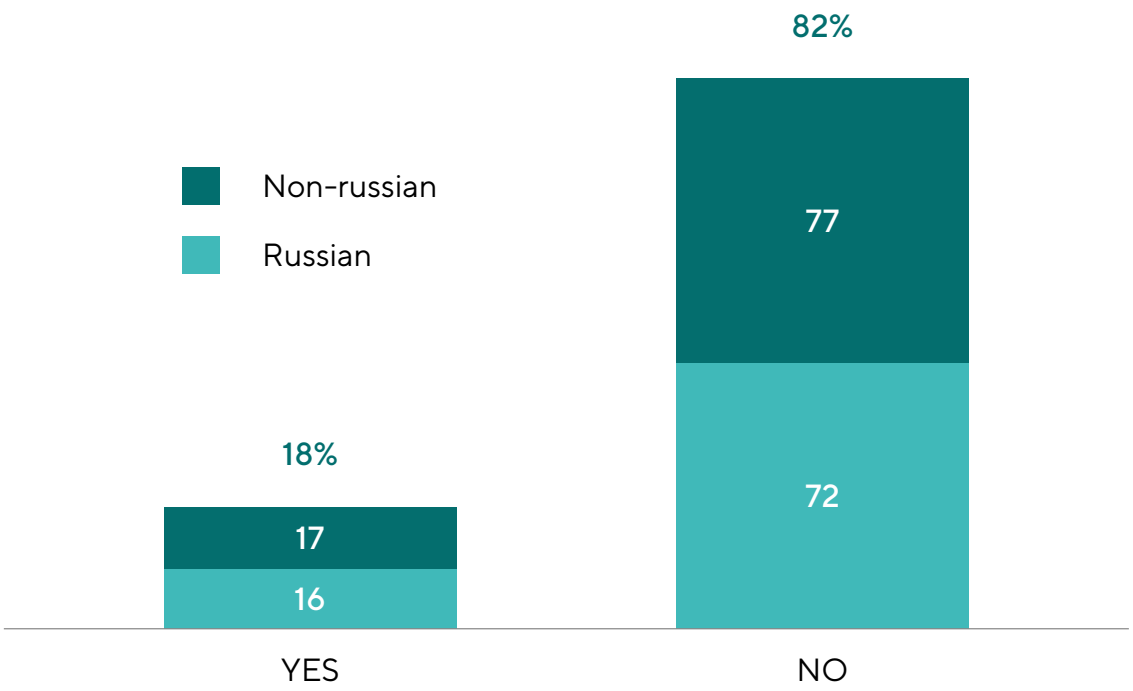
ARE YOU AWARE OF CASES WHERE AN ARBITRAL INSTITUTION (ITS BANK) WAS UNABLE TO ACCEPT PAYMENT OF ARBITRATION COSTS?



- Approximately 18% of Users reported that they are aware of cases where arbitrators refused to act, which includes the refusal to accept the appointment or to act when the issue of sanctions arises during arbitration proceedings (Chart 9).
- As a practical consideration, parties may avoid choosing the substantive law of the contract of a state which has imposed URM. Similarly, parties may wish to avoid selecting a seat of arbitration in a sanctioning state or a state which may potentially impose URM in the future.
- Some Users also reported that AIs' inability to accept payments made arbitrators withdraw because of potential problem with the payment of their fees.

Chart 9

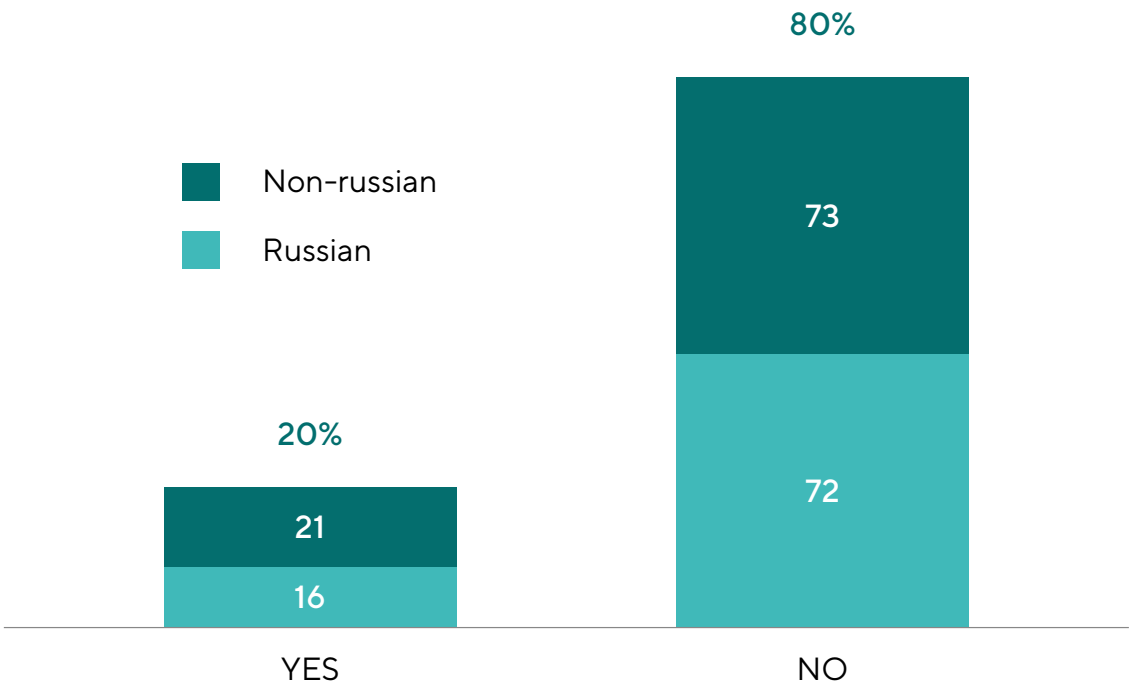
ARE YOU AWARE OF CASES WHERE ARBITRATORS HAVE REFUSED TO ACT IN A CASE WITH A SANCTIONED PARTY?



- Approximately 20% of Users reported that they were aware of cases where arbitral tribunals considered URM regulations when deciding cases on the merits.
- It is believed that the risks of tribunals rejecting claims or reducing the claimed amounts may be mitigated by agreeing to substantive and procedural laws not affected by URMs, by providing flexible payment mechanisms, by allocating contractual risks of URMs between counterparties, by carefully drafting force majeure clauses and by agreeing on contract adjustment mechanisms which allow one to minimize negative effects of URMs.

Chart 10

ARE YOU AWARE OF CASES WHERE CLAIMS WERE REJECTED (OR THE CLAIMED AMOUNTS WERE REDUCED) DUE TO THE FACT THAT OBLIGATIONS UNDER A CONTRACT IN QUESTION WERE IN BREACH OF SANCTIONS?



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