Arbitration's popularity for resolving both commercial and investor-state disputes is borne out by institutional evidence presented in recent statistics, as both established and emerging markets compete to promote themselves as leading centres for dispute resolution.

In its latest report, the Paris-headquartered International Chamber of Commerce reported a total of 759 new filings at its court. The figure, the lowest since 2009, when 817 were filed, does not necessarily suggest evidence of a long-term downward trend, but rather a consistent demand. Across the Atlantic, the American Arbitration Association’s International Centre for Dispute Resolution received 996 new case filings in 2012 – the highest number among all the international arbitral institutions for that year.

White & Case, in its 2011 survey on Latin American arbitral institutions, found that established institutions enjoyed considerable recognition from local stakeholders. Launched in 1992, the Chilean Centro de Arbitraje y Mediacion e la Camara de Comercio de Santiago (CAM Santiago) was recognised as a popular seat for arbitration. With 1,380 cases in 2011, it was the most regularly-used Latin American arbitration institution.

The growth of regional arbitral institutions has been one consequence of greater demand for ADR as a global phenomenon. Are Latin American institutions the dark horses bringing up the rear? Dahlia Belloul investigates...
The local chambers of commerce have been promoting the use of arbitration,” confirms Katherine Gonzalez Arrocha, the ICC’s regional arbitration and ADR director. Rather than developing new, purpose-built centres, arbitral institutions in Panama, Peru, Chile and Colombia have all come under the umbrella of the national chambers of commerce.

One small step

The ICC’s figures show that cases emanating from Latin America have continued to grow over the past two decades. In 1993, 3% of all ICC cases filed were from the continent; in 2012, the figure had risen to 14.4%. “We have seen impressive growth in the use of arbitration in general in Latin America,” says Arrocha, “mainly because of the growth in the economy and the opening of national markets”.

“There has certainly been a growing shift,” confirms Joe Tirado, the global co-chairman of the international arbitration practice at Winston & Strawn. For the ICC, the “Latin American contingent is on the up” , says London-based Tirado, in contrast to the LCIA which saw only 1% of its referred disputes in 2012 emerging from Latin America – a 66% decrease from 2011.

The growth can in part be attributed to the economic crisis in Europe, says Tomás Leonard, the chairman of Winston’s Latin America practice. “As capital continues to flow into some countries in Latin America, new transactions generate contracts, and many of those contracts contain arbitration provisions,” he explains. The origin of the investor comes into play when deciding the seat, rules and centre for the arbitration.

The ICC, which has a dedicated Latin America secretariat of five employees, based in Paris, comes second only to the ICDR, the AAA’s dispute resolution centre, in being the chosen institution for Latin American disputes. The ICDR saw an increase in caseload from Peru, Brazil, Colombia, Chile and Nicaragua from 2012 to 2013. In 2013, it reported 149 new cases from Latin America, with Mexico and Nicaragua topping the list with 37 and 26 respectively.

“It’s not all about institutional competition, however,” says Richard Naimark, the senior vice president of the ICDR. “It doesn’t make sense for viable institutions to be squabbling over caseloads,” he says. “We should all be responsible stewards of the process and continue to advance. We like to have good results at the end of the year, but we don’t spend a lot of time being needlessly competitive.”

For newer centres though, it may feel like a different story. “If you think of it as a business,” says Naimark, He suggests that the inclusion of an arbitration clause often provides an imperative for settlement. One of the problems, at present, with mediation in Latin America, is its potential lack of recognition. Unlike arbitration, which is becoming accepted across the continent – namely through the adoption of the UNCITRAL Model Law – mediation, being a voluntary process, has very...
“it’s very difficult to make it work”. One way of avoiding potential growing pains is to create partnerships with existing centres – such a move has been seen in Bahrain, for example, when the AAA opened in partnership with the Bahrain Chamber for Dispute Resolution in January 2010, thereby giving presence to the larger institutions and viability to the local institution by association.

The chosen ones
There is also the need to select suitable arbitrators, as demand gradually increases. “People would like to select arbitrators who they think will rule in their favour,” says Naimark. That doesn’t always mean selecting someone from a neighbouring country, however. For his part, Leonard reports that there was “significant pressure from the client to appoint European arbitrators” – in particular, French and Swiss lawyers – to deal with Latin American arbitrations.

The statistics ring true at the ICC, which in 2012 saw 12.3% and 8.8% of the total number of arbitration appointments from Switzerland and France respectively, ranking second and third only to the UK. “10 years ago we were seeing that parties were nominating arbitrators from other parts of the world because there was not a lot of practice in Latin America,” says Arrocha. “But as arbitration has developed in recent years, we are seeing more arbitrators from Latin America and specialised practitioners from Latin America acting in international arbitration cases as counsel,” she adds.

White & Case’s report showed that 23% of the arbitration institutions surveyed required arbitrators to be nationals of the home state of the institution, including centres in Brazil, Costa Rica, Colombia and El Salvador. In 2012, two Latin American jurisdictions – Brazil and Mexico – featured in the top 15 countries of origin of arbitrators in the ICC’s report, with 44 and 29 confirmations respectively.

“I think we have done a good job in local regions of recruiting and cultivating perhaps less-known, locally-experienced arbitrators,” says Naimark, referring to the ICDR’s Arbitration Symposium programme which offers training on the ICDR rules and procedures to local practitioners. Yet take-up is still tentative as instability in the region keeps parties from fully embracing local talent.

“Political uncertainty may well be the benchmark that makes people cautious, especially if they have been bitten once before in a number of jurisdictions,” says Tirado. “Latin America is divided in two now,” adds Leonard. “There are the countries with stronger institutions, legal certainty and better economic performance, and they are attracting more and more capital.” He lists Brazil, Peru, Chile and Ecuador, while legal and economic uncertainty, compounded by weaker institutions, remains in Bolivia, Ecuador and Venezuela.

Only one Latin American country – excluding the Caribbean – has not ratified the New York Convention: Puerto Rico. Brazil and Nicaragua were the latest to do so, enforcing the UNCITRAL Model Law in 2002 and 2003 respectively. “The large majority of Latin American countries have enacted modern arbitration laws following the UNCITRAL Model Law. The laws are thus there,” says Arrocha.

“We just need more education for the users and the judiciary to support the whole system.” She adds: “We have seen an improvement, however. Latin American judges now have more knowledge of the process and of their role when they’re called to make decisions relating to arbitration.”

little legal infrastructure supporting its development. “We have to educate the users to learn more about these alternative dispute resolution mechanisms,” says Arrocha, “in order to make them aware of their great advantages”.

There is increasingly an appetite to do so, which is being led both by international institutions and local practitioners. The IBA’s mediation committee, for example, is studying the development of mediation in Brazil as part of its 2014 work programme. The programme, which is being led by Andrea Maia of FindResolution, the IBA’s South American lead for mediation, is examining the relationship between Brazil’s Arbitration Law of 1996 – used to regulate mediation – and reforms, originally proposed in 2005 to provide a framework for mediation, which are still awaiting final presidential approval.

Meanwhile, the region’s institutions are encouraging greater regional take-up of mediation. The ICC is hosting PANARB 2014 later this year in Panama, where the new ICC Rules on Mediation will be presented to the delegates. The rules came into force in January 2014 and include provisions for fees, costs, languages and conduct specifically for mediation.