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REPORT

Business-to-Business Arbitration in the United States

Perceptions of Corporate Counsel

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RAND INSTITUTE FOR CIVIL JUSTICE

The research described in this report was conducted by the RAND Institute for Civil Justice, a unit of the RAND Corporation.

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Preface

Although arbitration clauses are used extensively for dispute resolution in consumer contracts, they are not included in most domestic commercial, or business-to-business, contracts. This research sought to understand why corporate counsel do not use arbitration more frequently. The authors describe their findings from a survey, along with follow-up interviews, of corporate counsel that was designed to identify the main factors affecting their decisions to use or not use arbitration.

This study was conducted within the RAND Corporation's Institute for Civil Justice. Its results should be of interest to multiple stakeholders. Policymakers will find information about the benefits that alternative dispute resolution can provide, as well as possible opportunities to improve the administration of justice. Those who provide alternative dispute resolution services will find insights about consumers of arbitration services. The business community will find out more about the perceived benefits and potential costs of these alternatives to litigation.

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Summary

Proponents of commercial, or business-to-business (B2B), arbitration point to its potential benefits for domestic dispute resolution compared with traditional litigation, including reduced congestion and costs for the courts, as well as expedited and less costly outcomes. However, a recurring complaint in the press and academic literature is that arbitration has become as costly and time-consuming as litigation, with sharp increases in pre-hearing discovery and motion work. Some evidence suggests that arbitration clauses are uncommon in business contracts—one survey found that only about 11 percent of thousands of B2B contracts included arbitration clauses—but there is scant research to suggest why this may be the case.

In this study, we set out to learn what a subset of corporate counsel think about the relative benefits of litigation and arbitration in resolving domestic B2B disputes. Commercial arbitration is not adequately researched or understood, in part because confidentiality leads to a lack of available data. Also, because the parties involved are of relatively equal sophistication and negotiating strength, commercial arbitration does not attract the level of attention paid to such issues as mandatory arbitration clauses in consumer contracts.

Key Findings

Our survey produced the following key findings:

- A majority of respondents believe that contractual arbitration is better, faster, and cheaper than litigation, with most claiming it is "somewhat" so.
- A large majority (71 percent) perceive professional arbitrators as tending to split awards, regardless of the merits of the case, rather than ruling strongly in favor of one party.
- A majority believe that in addition to time and cost savings, four factors encourage the use of arbitration: (1) avoiding exposure to potentially uncertain or emotionally driven jury awards; (2) control over the arbitrator's qualifications; (3) confidentiality of proceedings and decisions; (4) complexity of cases and/or contracts.
- A majority view only one factor as strongly discouraging the use of arbitration: denial of the right of appeal.

Our analysis indicated that there were potential differences among respondents (based on characteristics such as years of experience or company size), but our sample size was too limited for us to effectively parse the data in this way.

Conclusions

Given our small sample size (121 respondents), the results from this exploratory study cannot be generalized. However, the results are interesting and can be used to highlight the need for further research.

First, as expected, we found that a majority of respondents believe domestic B2B arbitration can save time and money compared with litigation, but we also found that corporate attorneys use a nuanced decisionmaking process that goes beyond simple economy and efficiency. If costs associated with arbitration of B2B cases rise, the other components of corporate counsel's calculus will inevitably become more important. In addition, our results suggest that predictability is an overarching concern of businesses—in terms of both the dispute's outcome and the indirect effects of potentially bad publicity.

At the same time, the respondents overwhelmingly believe that arbitrators tend to "split the baby" with their rulings—that is, they are unwilling to rule strongly for one party. Unless these perceptions change, they are likely to pose a barrier to increased use of arbitration for commercial disputes.

Second, if arbitration becomes essentially like private litigation in the future, policymakers should consider whether this trend will hamper efforts to reduce the burden on the courts and improve the civil justice system's efficiency. Arbitration was developed as an alternative to litigation to provide greater efficiency, with the cost to the public of some loss of both transparency and contributions to legal precedent. Policymakers, rule-makers, and the judiciary may take notice if arbitration essentially is perceived to (1) mirror litigation in terms of efficiency (cost and time to resolution), and (2) deliver benefits in B2B disputes by allowing parties to avoid uncertainty, minimize brand reputation risk, and maintain confidentiality. If widespread, these perceptions could undermine the policymakers' objectives of creating incentives and reforms to streamline the civil justice system and reduce the courts' burden.

Third, our findings point to potential negative trends in arbitration practice that have implications for arbitration service providers. Although our survey respondents believe that arbitration offers a faster and cheaper option, they also believe that arbitrators are unwilling to make strong rulings. And our interviews revealed a strong sense that arbitration is becoming increasingly like litigation, with greater discovery and pre-hearing motion work. If service providers were to make more data and analysis available to corporate counsel about outcomes, timing, and cost, they might provide a greater understanding of how arbitration works and help identify areas of concern.

This research raised more questions than it answered, but it also raises issues of concern for both policymakers and practitioners. If commercial arbitration is to remain a valuable alternative to litigation, more research is needed to investigate these issues.

Acknowledgments

We want to thank several people for their important contributions to this study: Amy Coombe for her tireless efforts in fielding the survey and compiling the data—she is an invaluable resource; Laura Zakaras for her keen insights into how to improve this report; Nick Pace for his important advice that guided the development of the research; Chung Pham, Bing Han, Kristin Lynch, and Jin Woo Yi for their contributions to the data analysis; Thomas Stipanowich, Geoffrey McGovern, and the members of the ICJ Board for their helpful reviews; and the members of the ICJ Board who came up with the idea for the study during a board meeting.

Abbreviations

AAA	American Arbitration Association
ADR	alternative dispute resolution
B2B	business-to-business
CPR	International Institute for Conflict Prevention and Resolution
EDGAR	Electronic Data Gathering, Analysis and Retrieval
ICJ	Institute for Civil Justice
JAMS	Judicial and Mediation Services

CHAPTER ONE

Introduction

Several methods of alternative dispute resolution (ADR) can be used instead of traditional litigation. One well-known method is arbitration, in which parties agree to present their dispute to a neutral arbitrator or panel of arbitrators that renders a binding (or sometimes non-binding) judgment. The process usually involves pre-hearing discovery, opening and closing arguments, witness testimony, and evidence presentation, just as in a court trial. However, arbitrators are not bound by legal rules of procedure, evidence, or precedent, and the proceedings and awards are confidential. An arbitrator's ruling is generally not appealable, and can be confirmed by a court of law and enforced like any other judicial decision.[1] Parties can agree to arbitration after a dispute arises. Usually, however, they include an arbitration clause in a contract to handle any future disputes; in fact, one study found that over 90 percent of companies surveyed used arbitration because of a prior contractual agreement.[2]

Arbitration has been touted as a viable and effective alternative to litigation for many reasons. It was developed to provide certain benefits—expedited proceedings, lower risk of unexpected process costs, and greater predictability of outcomes—at the societal cost of some loss in transparency and in contributions to common law precedent.

Because the arbitration process is more streamlined and informal than litigation, it is widely believed to be faster, simpler, and cheaper.[3] There is also a perception that arbitration is a more just process; in one study, 80 percent of attorneys and 83 percent of business persons ranked fair and just procedures and outcomes as the most important attributes of arbitration.[4] The limited scope of discovery, arbitrator's relevant expertise, preservation of good relationships, maintenance of confidentiality, and avoidance of legal precedent are also reasons cited

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[1] According to the Federal Arbitration Act (United States Code, Title 9, Section 10[a]), a court may vacate an arbitration award "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[2] Lipsky and Seeber, 1998, p. 17.

[3] In a 2005 survey, respondents asserted that arbitration was "faster (74%), simpler (63%), and cheaper (51%) than going to court" (Harris Interactive Inc., 2005, p. 5). A 2002 survey found cost, speed, monetary award, and arbitrator expertise in a four-way tie for the second most important attribute of arbitration (Naimark and Keer, 2002, p. 206). In a 1998 survey, almost 70 percent of respondents asserted that businesses elect to use arbitration because it saves both time (68.5 percent) and money (68.6 percent) (Lipsky and Seeber, 1998, p. 17). See also Brunet, 2006.

[4] Naimark and Keer, 2002. See also Harris Interactive Inc., 2005, which reports that most arbitration participants surveyed were satisfied with the fairness of the process (75 percent) and outcome (72 percent). Also see Lipsky and Seeber, 1998, which states that over 60 percent of respondents believed arbitration provides a more satisfactory process than litigation.

for selecting arbitration over litigation.[5] As a result of these perceived benefits, pre-dispute arbitration clauses have become common in all types of consumer contracts, especially in the telecommunication and financial services industries.[6]

The same cannot be said for arbitration clauses in domestic B2B contracts, however. Analysis of contracts from 21 large public corporations found that 77 percent of their consumer contracts included arbitration clauses, but only 6 percent of their non-consumer, non-employment contracts did.[7] Another study found that less than 10 percent of a sample of publicly available contracts contained arbitration clauses.[8] The discrepancy between the relative ubiquity of arbitration clauses in consumer contracts and the relative dearth of such clauses in commercial contracts indicates a need for further inquiry. Unfortunately, prior research has been mostly limited to surveys that do not adequately explore the reasons for the opinions.[9]

There are a number of possible reasons for the relative unattractiveness of arbitration compared with litigation in business disputes. In one study, for example,[10] the primary reason respondents gave for why businesses opt for litigation was the unwillingness of opposing parties to agree to participate in arbitration. And even though the relative finality of an arbitrated decision is desirable in some circumstances, almost 55 percent of the surveyed respondents cited the difficulty of appeal as a deterrent to using arbitration. The respondents indicated split views on the fact that arbitration is not confined to legal precedent and rules of procedure. Other reasons for not favoring arbitration included lack of confidence in arbitrators' neutrality and the belief that arbitration leads to compromised outcomes—i.e., that arbitrators' decisions seek to avoid alienating either party—often referred to as "splitting the baby." The press and academic literature have also argued that arbitration has become more akin to litigation, with continuing increases in complexity, formality, time, and cost.[11] Further, the general counsel for the American Arbitration Association (AAA) claims there has been a "gradual increase in litigation-style techniques being brought into the arbitration process" over the last decade.[12] Nevertheless, the actual reasons discouraging businesses from employing arbitration clauses in B2B contracts have not been sufficiently explored in previous research.

Study Purpose

The purpose of this study was to assess corporate counsel's opinions on the relative advantages of arbitration and litigation in an attempt to ascertain why arbitration is not used more

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5 Lipsky and Seeber, 1998.

6 Demaine and Hensler, 2001, pp. 62–63. See also Eisenberg, Miller, and Sherwin, 2008, and Berner and Grow, 2008.

7 Eisenberg, Miller, and Sherwin, 2008, p. 881. The authors analyzed publicly available consumer contracts and contracts that were required to be filed with the Securities and Exchange Commission.

8 Eisenberg and Miller, 2007, p. 351. Eisenberg and Miller analyzed 2,747 non-employment contracts that had to be filed with the SEC in 2002.

9 For example, for five years, the law firm Fulbright & Jaworski has issued an annual report on a survey of corporate counsel. The 2008 report featured open-ended questions for the first time in the report series. See Fulbright and Jaworski, 2008.

10 Lipsky and Seeber, 1998.

11 See, e.g., Stipanowich, 2010, and "Arbitration Aggravation," 2007.

12 See Bar, 2007. See also New York State Bar Association, Dispute Resolution Section, Arbitration Committee, undated.

frequently. Contractual arbitration is an appropriate focus in seeking to identify the various components of corporate decisions to use arbitration because agreeing to the use of arbitration before a dispute arises requires prior consideration of whether the benefits of arbitration outweigh the disadvantages. Given the various perceived benefits of arbitration, as suggested by its extensive use in consumer contracts, we sought to identify the factors that influence corporate decisions to include binding, pre-dispute arbitration clauses in contracts between businesses.

To this end, we administered a survey of corporate counsel opinions on arbitration in general, with particular focus on pre-dispute arbitration clauses for domestic[13] B2B contracts, followed by interviews to assist in analyzing the potential rationales from which these opinions may have developed. We focused on the use of pre-dispute arbitration clauses—or contractual arbitration—because we think that agreeing to arbitration in advance of disputes is the best indicator of whether corporate attorneys consider it a superior option to litigation.

The findings of our study will be relevant to the range of stakeholders in the arbitration field. First, the findings offer policymakers information on the benefits that ADR can provide, as well as possible opportunities to improve the administration of justice. By providing alternative processes to address parties' unique needs and diverting cases from overburdened courts, arbitration and related methods can help increase the efficiency of the justice system. Our results may inform policymakers' efforts to encourage the use of ADR, as well as to identify opportunities for improving the justice system. Additionally, because parties' satisfaction with the justice process is reflected in decisions to use litigation rather than arbitration, our findings may provide policymakers with indicators of the justice system's effectiveness in commercial contexts.

Second, the findings are particularly relevant to business people because of the potential benefits and costs of alternatives to traditional litigation. Arbitration may serve corporate interests in protecting company autonomy, integrity, and privacy, and in minimizing costs and maximizing efficiency. Corporate counsel's attitudes toward arbitration may be useful in considering when to incorporate arbitration, how to negotiate future arbitration agreements, and how to improve upon existing arbitration policy. There is, of course, some tension between the interests of the business community and those of policymakers, but that was beyond the scope of this study.

Third, ADR service providers may find the findings informative as they seek ways to effectively market their services and offer useful arbitration rules and arbitration clause language. This study provides a window into perceptions that may discourage the use of ADR, perceptions that may be changeable through appropriately targeted publicity efforts.

Approach

Our approach was to field a survey of corporate counsel and then conduct follow-up interviews with a subset of survey respondents to further explore the issues revealed by our findings. The survey consisted of 28 questions to explore respondents' perspectives on the benefits of arbitration compared with litigation, the factors that encourage or discourage them to use arbitration

[13] International business disputes were specifically excluded from this study because arbitration is a more common dispute resolution method in that context.

clauses in B2B contracts, and their experiences with arbitration. (The full survey can be found in Appendix B.)

Some survey respondents indicated a willingness to be interviewed about their experiences and opinions; from this self-selected population, we chose interviewees representing a range of perspectives. We inquired about the reasons for their decisions about pre-dispute arbitration clauses in B2B contracts and their previous experience with arbitration. The interviews were intended to provide context to responses and to highlight issues that could not be explored in the survey.

Because of the Internet's cost-effectiveness and convenience, we used email invitations to solicit participation in the survey and a web-based questionnaire. We sent invitations to approximately 900 corporate attorneys.[14] Additionally, we sent the invitations to the chairs of 30 states' bar business or corporate law sections and several presidents of other local professional organizations with the understanding that they would forward them to their members. The email message encouraged recipients to complete the survey and forward the invitation to friends and colleagues employed as corporate counsel.

We received 121 responses to our survey. We were unable to calculate a precise response rate, however, because we do not know the total number of people who received the invitation. Nevertheless, the number of returned survey responses would represent an upper-bound response rate of no more than 13 percent if we consider only direct recipients. Our response rate was likely affected by corporate counsel's desire to avoid revealing sensitive information about their companies' work.

Limitations

Our study was exploratory research of limited scope and scale. Consequently, the survey is a sample of convenience that limits the extent to which results can be construed broadly. Our sample is the product of non-random selection of individuals with email accounts included in select company, friend network, and professional association lists who felt inclined to participate. Also, our sample is not representative of corporate attorneys, because over 50 percent of respondents had over 15 years of experience in litigation. For these reasons, our results are only suggestive of the factors that may explain why arbitration clauses are not common in B2B contracts.

Despite these limitations, the results are enlightening. Our survey offers insight into common perceptions of arbitration among an important community of attorneys—namely, those with experience in arbitration, litigation, and negotiating commercial contracts that may include pre-dispute arbitration clauses. Our findings are also valuable because of our inclusion of subsequent interviews, which allowed us to delve into the sources and rationales giving rise to the attitudes our survey measured.

Complete data about the characteristics of our sample population are in Appendix A.

[14] Some of these emails were returned as undeliverable, and some may have been delivered to accounts for individuals no longer working at those companies.

Organization of This Report

This report describes the results of our survey and subsequent interviews of corporate counsel. Chapter Two focuses on counsel's perceptions of the relative advantages of arbitration and litigation for commercial disputes. Chapter Three delineates specific factors that influence their decisions to include arbitration clauses in business contracts. Chapter Four summarizes our conclusions and explores the implications of our findings. Appendices A and B present, respectively, data on the demographics of our sample and the survey questions and results.

CHAPTER TWO

Attitudes Toward Contractual Arbitration

In this chapter, we show that the corporate counsel who participated in our survey hold strongly divergent views on the value of arbitration. In brief, respondents were

- sharply divided over whether arbitration is better, faster, and cheaper than litigation
- sharply divided over whether past experience with arbitration encourages or discourages future use
- overwhelmingly of the belief that arbitrators tend to split or compromise the award rather than ruling strongly for one party.

Perceptions of Arbitration Compared with Litigation

Most Believe Arbitration Is at Least Somewhat Better Than Litigation

A slight majority of respondents indicated that they believe contractual arbitration for domestic B2B disputes is better than litigation, and most of those respondents believe it is only somewhat better (see Figure 2.1).

These findings comport with prior research suggesting that there is general belief in the efficiency and utility of arbitration as opposed to litigation.[1] However, despite the ostensible benefits of arbitration, about 44 percent of respondents had no, neutral, or negative attitudes regarding arbitration. The neutral and no-opinion responses may be reflective of respondents not having enough experience to form a judgment,[2] or of being able to identify both systems' benefits and disadvantages in different circumstances but not to identify which system is better or worse overall. The large percentage of respondents who believe arbitration is worse than litigation may also be a result of potential bias in favor of litigation stemming from the respondents' large amount of litigation experience.

Our subsequent interviews revealed that many believe that arbitration is becoming increasingly akin to litigation, requiring substantial time in protracted pre-hearing efforts for discovery and money to pay for outside counsel and arbitrator(s). Both the interviewees who favor arbitration and those who do not expressed similar concerns. This perception of arbitration's trend toward litigation-style procedures, and respondents' experiences with it, may account for the significant proportion of negative perspectives revealed by the study.

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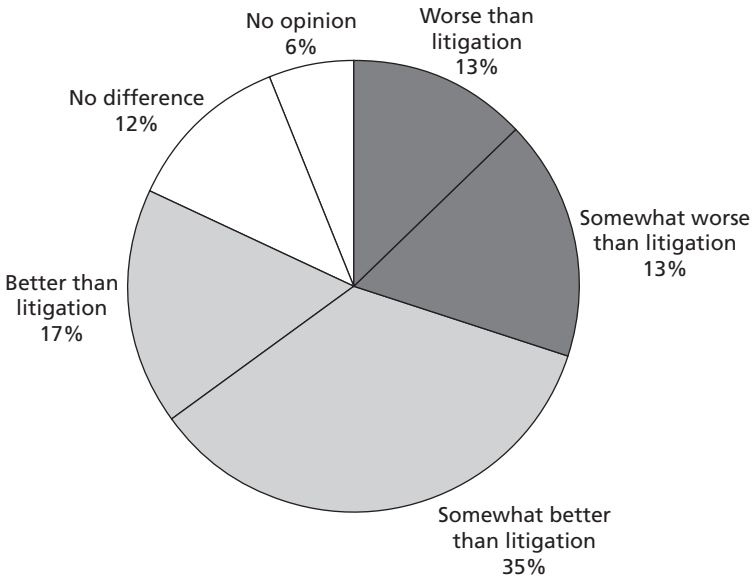
[1] See, e.g., Harris Interactive Inc, 2005.

[2] Approximately 25 percent of respondents had never attended an arbitration session. See Appendix A.

Figure 2.1
Impressions of B2B Arbitration



For B2B disputes, what is your impression of binding, contractual arbitration (i.e., arbitration stemming from a contract clause) compared with traditional litigation?

RAND *TR781-2.1*

Most Believe Arbitration Saves Time Compared with Litigation

Almost 60 percent of respondents agreed that arbitration saves time relative to litigation for B2B disputes (see Figure 2.2).

These findings are consistent with previous research suggesting that many believe arbitration is a speedier process than litigation.[3] Interestingly, in contrast to the responses to the general question on whether arbitration or litigation is better, nearly all respondents had an opinion about arbitration's time-saving potential.

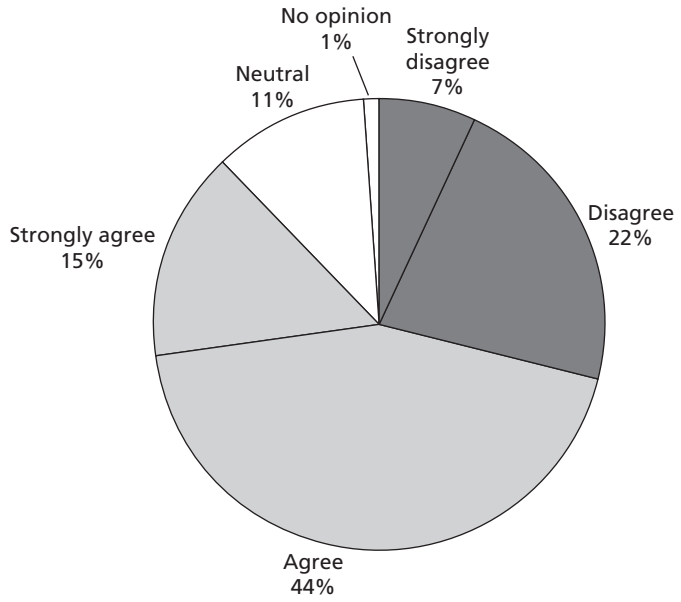
In our interviews, discussion of time-saving potential was again tied to the perceived trend of arbitration increasingly employing litigation techniques. Some respondents explained that arbitrators have low incentive to control the amount of discovery or time spent on pre-hearing disputes because they are paid by the hour. Interviewees believe that most arbitrators are now arbitrating full time (rather than part time, as they did in the past), which allows them to dedicate unlimited time to each case. Arbitrators may also be working on only one case at a time, whereas judges are responsible for managing a docket, working on multiple cases, and being held accountable for the court's performance.

Interviewees also noted that the use of arbitration panels—generally three arbitrators—has increased, creating scheduling challenges as multiple arbitrators attempt to balance their calendars with clients' needs.

Finally, interviewees noted that parties to arbitration may be extending the process because arbitration awards generally cannot be appealed. This creates an incentive for the parties and their attorneys to try to obtain as much information as possible during pre-hearing

[3] See, e.g., Lipsky and Seeber, 1998.

Figure 2.2
Does B2B Arbitration Save Time Compared with Litigation?



For binding B2B contractual arbitration, do you agree or disagree that arbitration saves time compared with litigation?

RAND *TR781-2.2*

discovery, which may be eliminating any potential time savings from the expedited process. This perception could make arbitration a less attractive alternative to litigation.

Most Believe Arbitration Saves Money Compared with Litigation

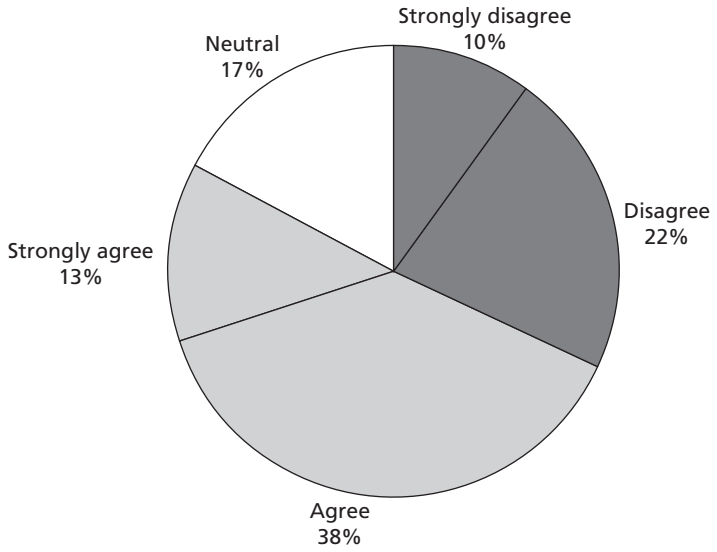
As for whether arbitration saves money compared with litigation in B2B contexts, a bare majority of respondents agreed that it does, one-third of them disagreed, and 17 percent had neutral opinions (see Figure 2.3).

Every respondent had an opinion on this question, suggesting the importance of cost to corporate attorneys. The fact that so many respondents disagreed about cost savings was somewhat surprising given prior opinion research.[4]

The significant proportion of negative perspectives revealed by the survey may stem from widespread belief that arbitration is becoming as expensive as litigation. In fact, this was the most common concern among interview respondents. One driver of growing expense may be that attorneys are increasingly being used to represent clients in arbitration (in part because of the complexity of business disputes), and it is only natural for attorneys to use their understandings of trial procedure and litigation tactics in arbitration processes. Further, these attorneys may be driving cost increases to replace revenue from litigation. Additionally, interviewees cited the growing use of panels of arbitrators as increasing the cost of arbitration, since the par-

[4] Harris Interactive Inc. (2005) reported that only 8 percent of survey respondents felt arbitration was more expensive than litigation, and almost 70 percent asserted that businesses elect to use arbitration because it saves money. See also Lipsky and Seeber (1998).

Figure 2.3
Does B2B Arbitration Save Money Compared with Litigation?



For binding B2B contractual arbitration, do you agree or disagree that arbitration saves money compared with litigation?

RAND *TR781-2.3*

ties to an arbitration session must pay for the services of the arbitrators. In litigation, time is money because of hourly rates for attorneys, but this fact is compounded in arbitration because arbitrators are also paid by the hour. For these and other reasons, arbitration has become increasingly expensive, and these findings suggest that opinions on its relative price vis-à-vis litigation may have begun to shift.

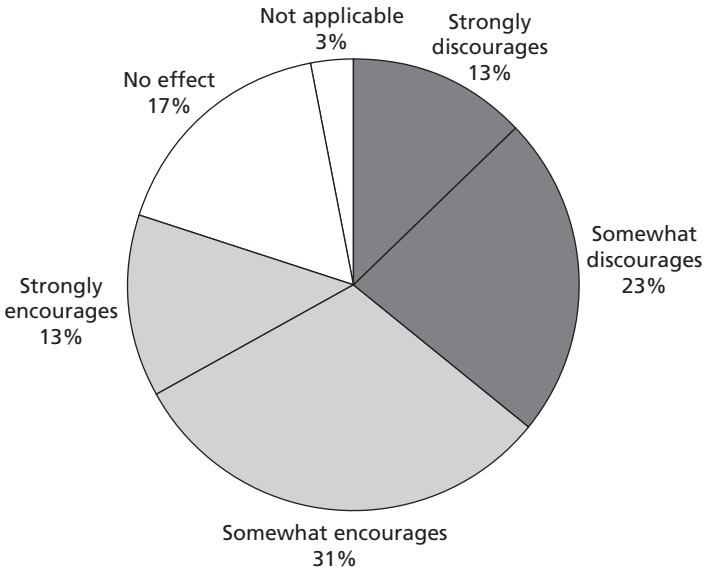
There Is Some Evidence That Corporate Counsel with the Most Experience Are Less Likely to Believe Arbitration Saves Time or Money

We also attempted to analyze the data by grouping the respondents based on their characteristics, such as type of business and years of experience. These analyses did not provide clear results, however, and for the most part were not statistically significant, which is partly a function of the small sample size. We did find some indication that respondents from the largest companies (in terms of number of employees) and respondents who draft or review the greatest number of B2B contracts were more likely to disagree that arbitration saves time or money compared with litigation. These kinds of distinctions within the corporate community merit further study.

Opinions Are Split Over Whether Experience with Arbitration Encourages or Discourages Future Use

Previous experience with arbitration had both a positive and a negative effect on respondents' judgments about including an arbitration clause. Forty-four percent indicated that their previous experience encouraged the use of a pre-dispute clause, 36 percent indicated that it discouraged such use, and 17 percent indicated that it had no effect (see Figure 2.4).

Figure 2.4
Effect of Previous Experience with Arbitration on Decisions to Include a Pre-Dispute Arbitration Clause



For B2B contracts, does your previous experience with arbitration encourage or discourage including an arbitration clause in the contract?

RAND *TR781-2.4*

These results are especially interesting given that a slight majority of respondents believe that contractual arbitration is better than litigation for B2B disputes. It is also possible that a single experience—especially a single bad experience—may have dictated some respondents' opinions.

Beliefs About Arbitrator Rulings

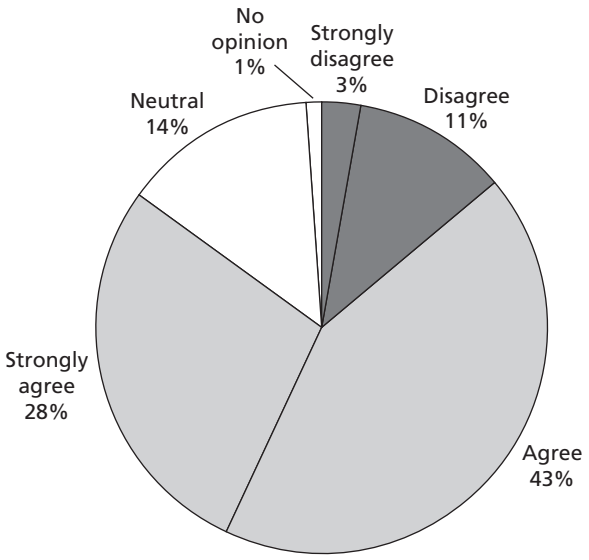
Most Respondents Believe Arbitrators "Split the Baby"

When asked whether they agreed or disagreed that arbitrators tend to "split the baby"—i.e., are less likely than a judge or jury to decide strongly in favor of one side or the other—over 70 percent of respondents agreed, and only 14 percent disagreed (see Figure 2.5). We found that respondents who used arbitration clauses most frequently tended to disagree with the view that arbitrators split decisions, although our sample size was not large enough to fully characterize this distinction.

The prevalence of this perception prompted the AAA to analyze 111 of its awards in 2009. It found that

- 7 percent of decisions awarded approximately half (41 to 60 percent) of what was claimed
- 41 percent awarded more than 80 percent of the amount claimed
- 19 percent denied claims completely.

Figure 2.5
Do Arbitrators Tend to "Split the Baby"?



For binding B2B contractual arbitration, do you agree or disagree that arbitrators tend to "split the baby," i.e., are less likely than a judge or jury to decide strongly in favor of one side or another?

RAND *TR781-2.5*

Despite these data, which show that splitting the baby is not the norm, most of our survey respondents believe it is. Our findings suggest that there is widespread belief that arbitration leads to compromised awards. Our interviews confirmed this and offered some reasons for the belief.

Some of those interviewed believe that full-time arbitrators are interested in repeat business and do not want to upset either party or gain a reputation for lopsided decisions. Others suggested that arbitrators who are "industry experts," i.e., not lawyers or judges, believe they need to split awards to appear to be fair to the parties; these arbitrators were viewed as not being accustomed to making "hard decisions" the way judges are.

In contrast, one interviewee said there was usually "enough blame to go around" in commercial disputes that neither party to arbitration was likely to be entitled to all or none of the claimed damages. This is consistent with the view about the complexity of the underlying contracts and the cases that arise. Another interviewee agreed with this notion and believed there is no real difference between arbitration awards and decisions from judges. In other words, people do not get everything they claim in court without an emotionally driven jury award.

The interviewees' insights may help explain some of the apparent disconnect between the findings of the AAA study and the perceptions of our survey respondents about arbitrators' decisions. Other factors may be the complex nature of commercial disputes, negative experiences with arbitration, lack of experience or knowledge of arbitration awards,[5] and the prefer-

[5] Approximately 25 percent of our survey respondents had never attended an arbitration session. See Appendix A.

ences of our sample population.[6] However, further study of arbitration awards (which is difficult at best) would be required to determine whether arbitrators are splitting awards.

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6 Over 50 percent of our sample had more than 15 years of experience in litigation. See Appendix A.

CHAPTER THREE

Specific Factors That Influence Decisions About Using Arbitration Clauses

In this chapter, we describe our survey findings for 15 specific factors (other than time and money) that influence corporate counsel's decisions about arbitration. Item 7 of our survey (see Appendix B) asked respondents to indicate whether these factors encourage, discourage, or do not affect their decision to include a pre-dispute arbitration clause in a B2B contract. Respondents were first asked about each factor individually; they were then asked which factor (if any) was the most important in decisions about arbitration clauses.

Most respondents indicated that four of the factors they were asked about encourage the use of arbitration, and just one factor discourages it. The other factors received mixed responses; responses about how a previous or existing business relationship with a company affects the decision to include arbitration were notable. No single factor was cited by a majority (or even a large minority) as being the most important in deciding whether to include an arbitration clause.

We discuss our findings for factors that encourage and discourage arbitration first, followed by the findings concerning previous/existing business relationships. Opinions about these factors serve as indicators of the nuances in business contracting decisions, and they point to additional lines of inquiry.

Factors Encouraging the Use of Arbitration

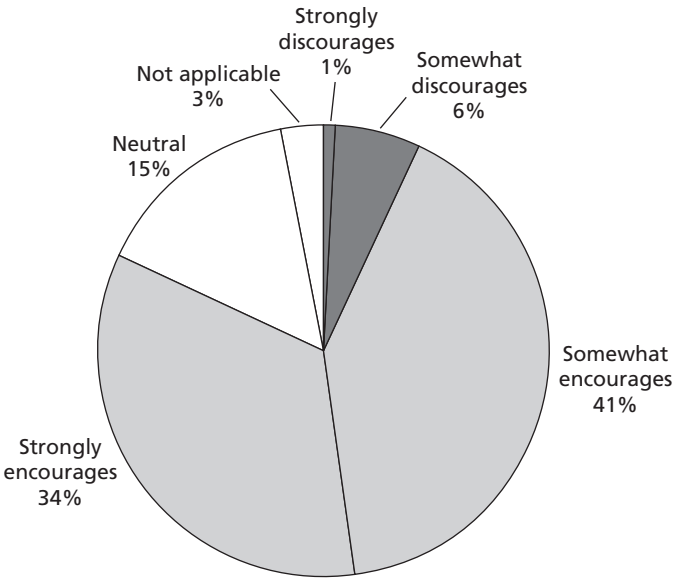
A majority of respondents indicated that four factors encourage them to add an arbitration clause to a B2B contract:

- avoiding potentially excessive or emotionally driven jury awards
- controlling the arbitrator's qualifications
- confidentiality of proceedings and decisions
- contract complexity.

The Most Important Factor Encouraging the Use of Arbitration Is Avoiding Excessive or Emotionally Driven Jury Awards

For 75 percent of respondents, the risk of excessive or emotionally driven jury awards encourages including arbitration clauses in B2B contracts (see Figure 3.1). Only 7 percent of respondents disagreed, and only 15 percent had neutral opinions.

Figure 3.1
Does the Risk of an Excessive or Emotionally Driven Jury Award Encourage the Use of Arbitration?



For B2B contracts, does the risk of an excessive or emotionally driven jury award encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.1*

Our findings suggest support for the idea that corporate counsel prefer arbitration in cases that risk disproportionate jury awards. Concerns about unpredictable jury awards are already reflected in the fact that many companies now require people to waive their rights to a jury trial as a condition of employment.[1] Previous research also suggests that litigation is preferred for resolving a dispute in cases where legal precedent would dictate a favorable outcome. However, arbitration is preferred in cases where the jury is likely to decide because of unfavorable or unclear legal precedent.[2]

These findings together suggest that outcome predictability is one of the most important factors encouraging the use of arbitration. Corporate counsel seek to anticipate the result of the dispute resolution process, something that "unpredictable" jury verdicts render impossible. Judicial administrators might want to consider ways in which the perception of the jury awards' potential excessiveness can be curtailed, and/or how court policy might be adjusted to provide improved predictability of outcome even in jury-determined cases.

Control over Arbitrator Qualifications Strongly Encourages Arbitration

Nearly 70 percent of respondents indicated that the ability to control the arbitrator's qualifications encouraged the use of contractual arbitration (see Figure 3.2).

While this result was not surprising, the 18 percent of respondents believing that this kind of control actually discourages the use of arbitration raised some interesting questions.

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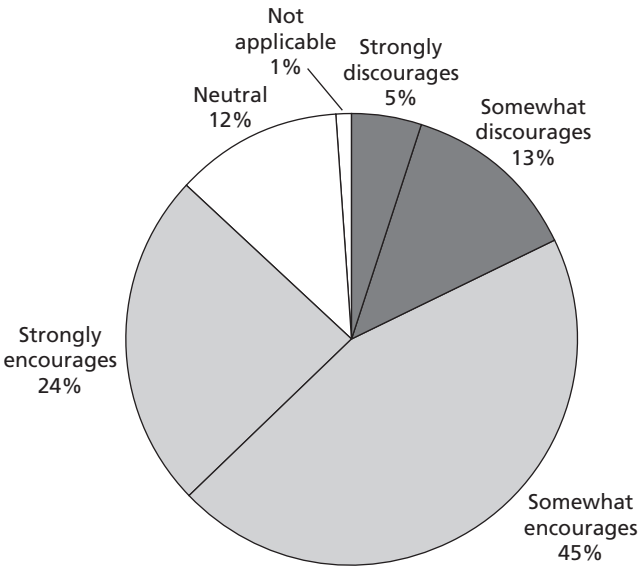
[1] See Elloie, 2008.

[2] See Lipsky and Seeber (1998), which reports that almost 40 percent of respondents believed that companies use arbitration to avoid legal precedent.

Figure 3.2
Does the Ability to Control the Arbitrator's Qualifications Encourage the Use of Arbitration?



For B2B contracts, does the degree of control over an arbitrator's qualifications encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.2*

Among the respondents we interviewed, control over the arbitrator's qualifications was the most frequently stated reason for choosing arbitration for B2B disputes. Common sense dictates that any attorney would like control over the people hearing the case, since it presumably is a way to impact the outcome. These results are consistent with previous research in which arbitrator expertise was one of four most highly ranked assets of arbitration.[3]

Interestingly, the interviewees diverged on what types of qualifications are important, more or less falling into two groups: those who think legal experience is important and those who think subject matter/industry experience is important.

The interviewees who view legal experience as important reasoned that judges and lawyers understand the structure of (and legal jargon in) contracts and are thus better equipped to resolve disputes. Contracts are generally written based on law and legal precedent in an attempt to ensure that both parties receive the benefits they expect. One interviewee explained that companies do not want juries to try to interpret complex contracts in the course of reaching a verdict, so arbitrators with experience in contract law are better equipped to rule correctly. Another interviewee stated that he hires only retired civil court judges as arbitrators because they have the requisite knowledge of contract law and evidentiary procedure. Juries ostensibly are more likely to ignore or struggle with legal rules and instead come to a decision based on something irrelevant to the dispute, such as emotion. The perception seems to be that an arbitrator with legal experience is more likely to adjudicate a case the same way as a judge, without risking the possibility of an arbitrary jury decision.

[3] Naimark and Keer, 2002, p. 206.

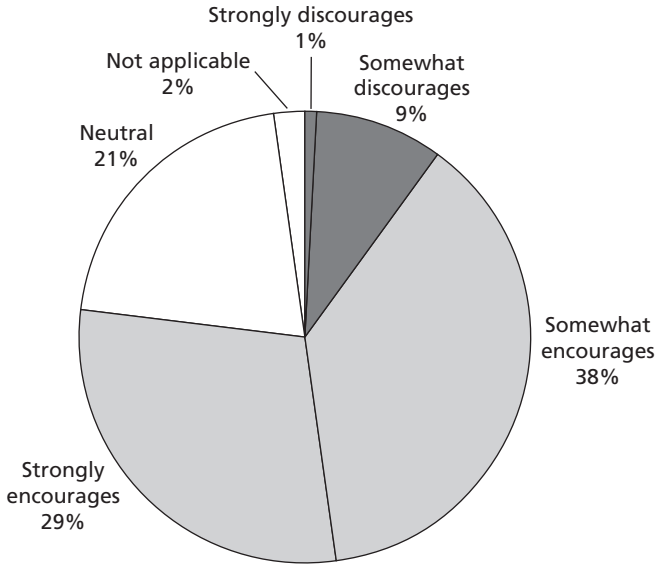
Some interviewees, however, said industry knowledge is a more important qualification because of the technical nature of disputes. They think judges and lawyers acting as arbitrators occupy themselves with procedures rather than the substance of the case. Arbitrators with subject matter or industry expertise tend to understand the realities of the commercial transactions giving rise to disputes. In this way, industry-specific customs and practice can be considered and interpreted in the proper context.

The importance of this kind of knowledge has been recognized by the traditional court system in the form of a special master,[4] who can be appointed for cases involving highly technical information with which a judge may struggle. One interviewee believes the availability of special masters rules out the need for an arbitrator with subject matter knowledge, and it may be that the option of using a special master should be more readily available to business users of litigation.

Confidentiality Is Another Key Factor Encouraging Arbitration

Two-thirds of the survey respondents indicated that confidentiality encourages using contractual arbitration (see Figure 3.3).

Figure 3.3
Does Confidentiality Encourage the Use of Arbitration?



For B2B contracts, does the confidentiality of arbitration proceedings encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.3*

[4] A special master or master can be appointed by the court "to assist it in specific judicial duties as may arise in a case," (Black's Law Dictionary, 1990, p. 975). See Cornell University School of Law Legal Information Institute definition of special master (Legal Information Institute, undated).

Again, this result is generally as we expected; it comports with previous research in which over 40 percent of respondents were found to believe that companies elect arbitration because of the confidential proceedings.[5]

Our interviewees considered confidentiality the second most important benefit of arbitration. They cited two key benefits of confidential proceedings:

- lack of publicity over a dispute and its outcome
- reduced risk of divulging trade secrets or other commercially sensitive information.

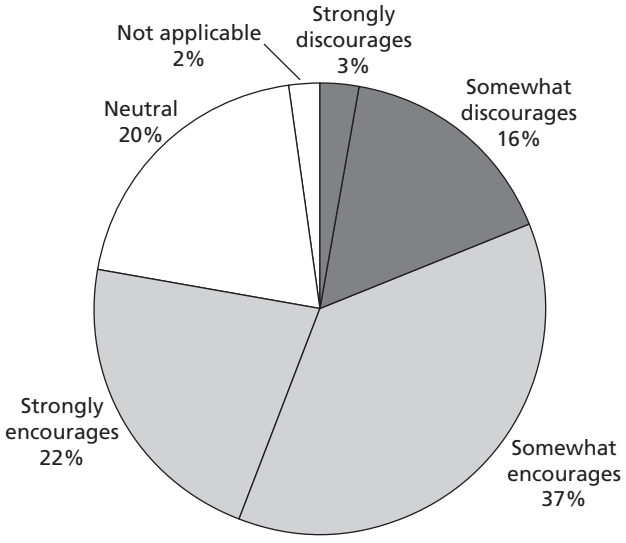
Some interviewees went so far as to say that they accept the risk of spending potentially large amounts of money on arbitrators and outside counsel to keep the details of a commercial dispute secret. For them, the desire to keep the dispute out of the public eye is more important than any concerns about not obtaining as large an award as might be expected in court. Brand reputation is an integral component of many companies' business strategies, and the possibility of threatening that reputation with details of disputes clearly provides a strong incentive for confidential arbitration proceedings.

B2B Contract Complexity Also Encourages Arbitration

A majority of respondents indicated that the complexity of B2B contracts encourages using arbitration (see Figure 3.4).

This finding is consistent with responses to related questions on our survey. For instance, respondents may believe arbitrators will understand complex contracts better than juries will,

Figure 3.4
Does Contract Complexity Encourage the Use of Arbitration?



For B2B contracts, does a complex contract encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.4*

[5] Lipsky and Seeber, 1998.

because arbitrators are selected based on their subject-matter experience. The choice to include arbitration clauses in complex contracts may also tie into concerns about confidentiality and technical trade secrets. In general, our findings show that many factors can influence whether a corporate attorney chooses arbitration over litigation.

Factor Discouraging the Use of Arbitration

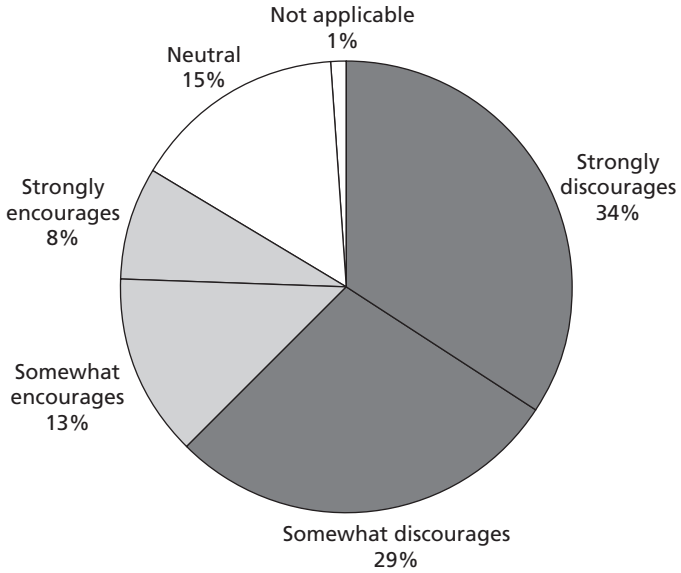
Preserving the Right to Appeal Discourages Using Arbitration

Preserving the right to appeal was the only factor cited by a majority of respondents as discouraging arbitration (see Figure 3.5).

This view, which is not surprising, is akin to the findings of a study in which almost 55 percent of surveyed respondents cited the difficulty of appeal as a deterrent to using arbitration.[6] In our survey, this factor was cited by a smaller majority (63 percent) than the factors discussed above as encouraging arbitration, except for complex contracts. This may indicate that corporate counsel are less concerned about being able to appeal an arbitration decision than about possible excessive jury awards (which can be appealed) and the qualifications of the people hearing the case.

It is important to note that one benefit of arbitration over litigation is that the parties may customize its procedures and rules to their needs. Therefore, parties who want the right

Figure 3.5
Does Preserving the Right to Appeal Encourage Using Arbitration?



For B2B contracts, does preserving the right to appeal encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.5*

[6] Lipsky and Seeber, 1998.

to appeal can draft this into their contracts.[7] Our findings suggest that more people would use arbitration if they had more information about its outcomes and the many options of tailoring its features.

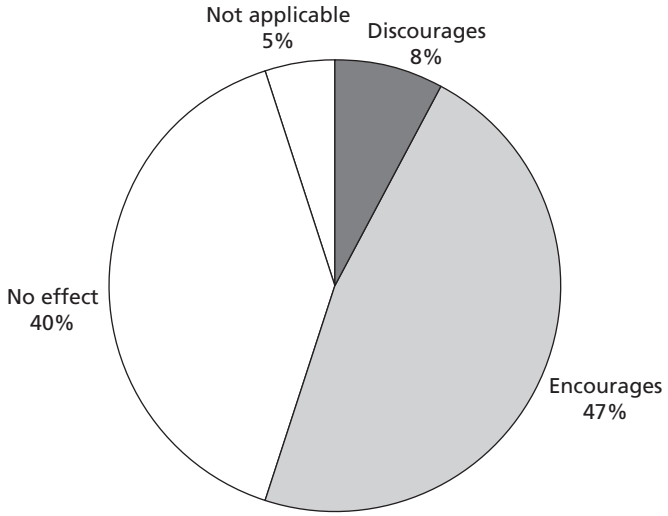
Influence of Business Relationships on Arbitration Decisions

Good Business Relationships Mainly Encourage or Have No Effect on Arbitration Decisions

We also analyzed the effect that having a good previous or existing relationship with the other company had on the decision to include an arbitration clause. As might be expected, a near majority of respondents believed a good relationship with another company encouraged adding an arbitration clause to the contract, whereas another sizable proportion believed this factor had no effect (see Figure 3.6).

The logic is that if companies have good relationships with one another, they might be more inclined to use a dispute resolution process other than litigation, because they will be more likely to resolve disputes informally or can better predict the nature and magnitude of potential disputes. We asked the same question about whether an expected future relationship with the company would encourage choosing arbitration and got a very similar breakdown of responses.

Figure 3.6
Effect of Good Previous or Existing Relationship with Other Company on Decision to Include Arbitration Clause



For B2B contracts, does a good previous or existing relationship with the other company encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.6*

[7] See Stipanowich, 2009. Arbitration service providers have sample appeal clause language available. See, e.g., International Institute for Conflict Prevention and Resolution (CPR), 2007, and Judicial and Mediation Services (JAMS), 2003.

In another study, over 40 percent of respondents asserted that businesses elect arbitration because it preserves good relationships.[8] Although our findings are aligned with this result, we cannot explain why such a large proportion believed the relationship with the other company had no effect. These respondents may be thinking of each transaction as a discrete, arms-length event, with the same risk of dispute, regardless of previous relationships.

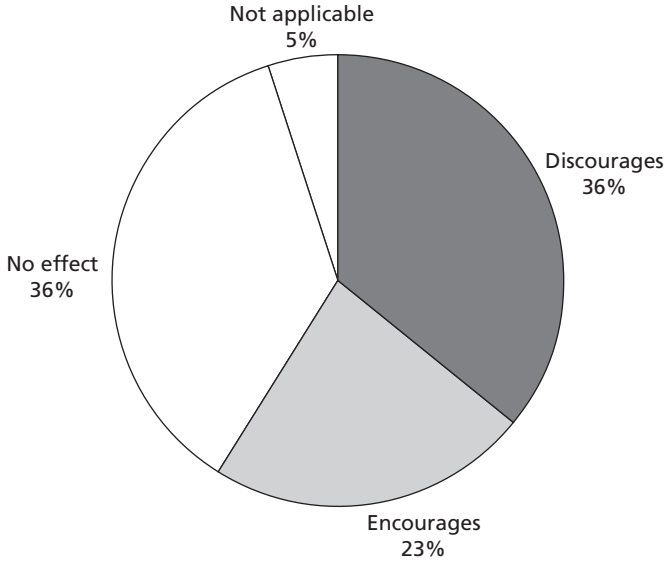
Notably, respondents with more than 15 years of experience were much more likely to believe that a good relationship with the other company or an expected future relationship with it would encourage including arbitration clauses. This may indicate that less-experienced corporate counsel are more cautious and more likely to evaluate each transaction without regard to human factors such as good business relationships.

Poor Business Relationships Have a Mixed Effect on Arbitration Decisions

Respondents were even more divided on whether a poor relationship with a company discouraged including an arbitration clause: 36 percent felt it did, and 36 percent reported that it had no effect. Another 23 percent felt a poor previous or existing relationship might encourage using arbitration (see Figure 3.7).

This result may mean that our respondents believe arbitration can better handle difficult disputes in certain situations. For example, arbitration's confidentiality may be appealing for resolving disputes when a poor relationship is involved.

Figure 3.7
Effect of Poor Previous or Existing Relationship with Other Company on Decision to Include Arbitration Clause



For B2B contracts, does a poor previous or existing relationship with the other company encourage or discourage including an arbitration clause in the contract?

RAND *TR781-3.7*

[8] Lipsky and Seeber (1998).

Experienced Litigators Believe Poor Relationships Discourage Arbitration

When we analyzed the responses in terms of years of experience with litigation, we found that the most-experienced litigators (those with more than 15 years) were the only ones who felt, on average, that poor relationships discourage using arbitration. Respondents with less than one year of litigation experience, in contrast, felt that a poor previous or existing relationship with the other company would encourage including an arbitration clause in a B2B contract—a result that may help explain the split in the overall opinions noted above. Unfortunately, it does not explain the reasoning used. This would require further study.

CHAPTER FOUR

Conclusions

Our study was intended to explore some of the reasons why corporate counsel do not include arbitration more often in domestic B2B contracts. As noted earlier, arbitration was developed as an alternative to litigation to provide the benefits of greater efficiency and predictability, with the cost to the public of losing both transparency and the opportunity to contribute to legal precedent in arbitrated cases. Although our findings cannot be generalized, they identify potential problems with arbitration today and provide direction for future research. In this chapter, we describe the implications of our findings for policymakers, commercial arbitration users, judicial administrators, and arbitration service providers.

As expected, a majority of respondents believe domestic B2B arbitration can save time and money compared with litigation. However, perceptions of arbitrators, trends toward including more litigation tactics in arbitration, and other factors indicate that corporate attorneys are using a nuanced decisionmaking process that goes beyond simple economy and efficiency. Specifically, our findings suggest that arbitration is becoming increasingly like litigation. As one survey respondent put it, "If both sides are willing to stipulate to agreed facts, reduce the number of witnesses, and submit as much as possible on briefs, then the cost savings [of arbitration] are considerable. Otherwise, the costs could balloon well past litigation."[1]

If arbitration is becoming essentially like private litigation in terms of efficiency (i.e., the cost and length of proceedings), policymakers should consider whether this trend will hamper efforts to reduce the court burden and improve the efficiency of the civil justice system. The survey highlighted the factors likely to be most important to corporate arbitration users in the absence of time and cost savings: perceived uncertainty of jury awards, control over the arbitrator's qualifications, confidentiality of proceedings and decisions, and contract complexity . Together, these factors point to predictability as an overarching concern of corporate attorneys, and this concern appears to be twofold. The business community is concerned about the ultimate outcome of the dispute, especially in terms of the jury's and judge's lack of understanding about the subject and the possibility of emotionally driven decisions. Corporate attorneys are also worried about the indirect effects of disputes, such as bad publicity and potential brand damage associated with a public lawsuit. In other words, arbitration could eventually be chosen in commercial disputes largely to avoid juries and maintain secrecy, which could undermine the objectives of policymakers to create incentives and reforms to streamline the civil justice system and reduce court burdens. Analyzing the tension between the interests of policymakers and the business community was beyond the scope of this study, but our results highlight the importance of further study.

[1] This response was to an open-ended question at the end of our survey that solicited additional thoughts.

We also found that most of our survey respondents believe that arbitrators offer split decisions. Despite some evidence to the contrary, these perceptions may pose a significant barrier to increased arbitration use for commercial disputes. When faced with a process in the future that costs the same as litigation, corporate counsel may essentially be weighing the benefits of confidentiality and experienced decisionmakers against the costs of a potentially smaller award—even if that cost is not real. The perceptions about arbitrator decisions and incentives clearly would benefit from further research.

Our findings also suggest that larger companies and corporate counsel with more litigation experience have a different opinion about commercial arbitration than do smaller companies and non-litigators. For example, respondents employed by larger companies tended to be more likely to disagree with the proposition that arbitration is faster or cheaper than litigation. This issue deserves further research to determine whether large businesses, as potential users, are unable to obtain the same benefits from arbitration as users from smaller companies. Larger companies are the greatest potential arbitration users because they have more commercial contracts and thus a greater number of cases requiring adjudication.

Judicial administrators should also take notice of the concerns about complex disputes and predictability of outcomes. They may wish to consider increasing the opportunities for litigants to use special masters to alleviate concerns about technical complexities in commercial disputes. They may also wish to consider how the perceived risk of excessive or emotionally driven jury awards can be addressed. Future research is needed to determine if arbitration use is increasing or decreasing and if there have been any effects on court dockets.

Our findings also have implications for arbitration service providers. As our results show, there is little agreement among corporate counsel about arbitration's relative advantages or expected outcomes. There may also be widespread misperceptions. Because most of the respondents found arbitrators through an arbitration service provider,[2] those organizations are in a position to assist the legal community. Arbitration service providers can further educate corporate counsel about arbitration by sharing their data and analysis on actual outcomes (similar to the 2009 AAA study) and other aspects, such as average timing and cost. They can also help corporate counsel understand how the arbitration process can be tailored to their needs—for example, to include a right of appeal if desired.

Although this exploratory research raised more questions than it answered, we hope it will be helpful to various stakeholders involved in this area. Our survey results suggest that more systematic research needs to be conducted on the problem areas we have described. Such research may show that policy options should be considered to preserve arbitration's intended benefits (as compared with litigation) in resolving commercial disputes.

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[2] Fifty-eight percent of respondents said they typically use an arbitration or ADR organization to find an arbitrator. Of those, AAA was cited most frequently (81 percent), followed by JAMS (50 percent), and CPR (11 percent). Also, 53 percent of respondents indicated that they typically use an arbitration or ADR organization to obtain arbitration rules or arbitration clause language. Of those, again AAA was cited most frequently (88 percent), followed by JAMS (23 percent), and CPR (9 percent). Respondents were allowed to indicate use of more than one organization.

APPENDIX A

Characteristics of Respondents and Related Limitations on Findings

Respondents' Legal Experience

Our sample population comprises highly experienced legal professionals, probably because the survey was distributed through professional networks in which seasoned attorneys are likely to participate. In particular:

- 85 percent of our respondents had more than 15 years of experience as an attorney
- 63 percent had more than 15 years of experience as corporate counsel
- 54 percent had more than 15 years of litigation experience
- 15 percent had 15 or fewer years of experience working as attorneys
- 36 percent had one to 15 years of experience as corporate counsel
- 28 percent had four or fewer years of experience in litigation.

Because such a large proportion of respondents have been litigators for many years, it is possible that they have a preference for litigation over arbitration simply because they are more familiar with its processes.

Nearly all respondents also had experience reviewing or drafting B2B contracts:

- 67 percent reviewed or drafted six to 75 contracts each year
- 23 percent had a contract load of over 100 per year.

These data suggest not only that respondents had extensive experience with B2B contracts, but ostensibly that respondents with greater contract workloads were more likely to have at least considered pre-dispute arbitration clauses. For these reasons, the respondents appear to be sufficiently experienced and qualified to have formulated their own opinions on B2B arbitration. For complete data, see questions 3, 26, 27, and 28 of the survey, provided in Appendix B.

Respondents' Arbitration Experience

Respondents claimed less experience in arbitration than in litigation. In terms of their direct participation in arbitration sessions:

- 22 percent had never attended an arbitration session in any capacity
- 41 percent had attended one to five arbitration sessions
- 36 percent had participated in six or more proceedings.

For some survey questions, the frequency of neutral and non-responses may have been affected by respondents feeling they had inadequate experience upon which to form opinions. Another potential problem is that attorneys who have participated in a greater number of arbitration sessions may be more likely to have favorable opinions of arbitration. This may have altered our findings toward a more favorable view of arbitration that is not shared by the broader corporate community. For these reasons, the distribution of experience with arbitration in our sample population is important to bear in mind when reviewing our results. For complete data, see questions 4 and 5 in Appendix B.

Despite the large contract loads of our sample, 45 percent of the individuals surveyed claimed that only 1 to 25 percent of their B2B contracts include binding arbitration clauses. An additional 24 percent of respondents asserted that only 26 to 50 percent of their contracts include such provisions. These results may be indicative of the low popularity of the use of predispute arbitration clauses in B2B contracts.

Respondents were relatively more experienced in other forms of ADR than arbitration. Nearly all, 89 percent, had participated in mediation, 73 percent had participated in settlement conferences, and a mere 9 percent had participated in no form of non-binding ADR. Such widespread experience with other forms of ADR may suggest that respondents do have the interest and opportunity to pursue alternatives to litigation. In fact, 45 percent of respondents prefer non-binding ADR to arbitration, whereas only 27 percent prefer binding arbitration. For complete data, see questions 14 and 15 in Appendix B.

Businesses and Industries Represented

Nearly all of the major industries are represented in our sample, with the bulk of respondents in manufacturing (22 percent); financial activities, insurance, and real estate (25 percent); and professional and business services (27 percent). It is possible that cultural norms and practices in these three industries affected the overall results, especially given the small sample size.

Businesses represented in our sample are also geographically varied. Respondents are located in 21 states, with at least one respondent located in each of the most populous states. Our sample is therefore roughly geographically representative of broader populations.

The respondents also work for companies representing a range of sizes. In fact, companies were fairly evenly distributed by size, with 13 to 21 percent of companies having a number of employees from 1 to 50, 51 to 250, 251 to 1,000, 1,001 to 5,000, and 5001 to 10,000. Annual company revenue is less uniformly distributed, with 18 percent of respondents working for companies earning less than $10 million, 20 percent from $10 million to $200 million, 12 percent from $200 million to $1 billion, 17 percent from $1 billion to $5 billion, and 22 percent at over $5 billion. See questions 20, 21, 22, 23, and 24 in Appendix B for complete results.

APPENDIX B

Survey Questions and Results

Launched Date: 06/19/2008 Closed Date: 02/13/2009

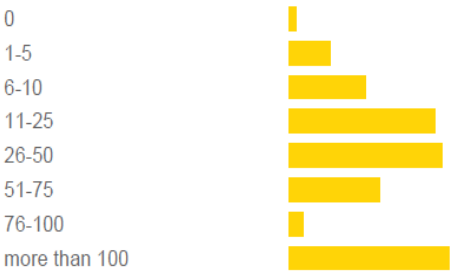
1. Please provide your first and last name.

Total Respondents: 121

2. Email:

Total Respondents: 121

3. How many times per year do you draft or review a proposed business-to-business contract, i.e., a contract with another company?



	Response Total	Response Percent
0	1	1%
1-5	7	6%
6-10	12	11%
11-25	24	21%
26-50	25	22%
51-75	15	13%
76-100	2	2%
more than 100	26	23%

Total Respondents: 112
(skipped this question): 9

4. What percentage of your business-to-business contracts include a binding arbitration clause?

	Response Total	Response Percent
0%	4	4%
1-25%	50	45%
26-50%	27	24%
51-75%	12	11%
76-100%	15	13%
unknown	4	4%

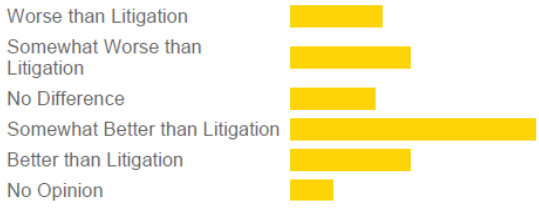
Total Respondents: 112
(skipped this question): 9

5. How many arbitration sessions have you attended in any capacity?

	Response Total	Response Percent
0	25	22%
1-5	46	41%
6-10	17	15%
11-25	11	10%
26-50	7	6%
more than 50	6	5%

Total Respondents: 112
(skipped this question): 9

6. For business-to-business disputes, what is your impression of binding, contractual arbitration (i.e., arbitration stemming from a contract clause) compared with traditional litigation?



	Response Total	Response Percent
Worse than Litigation	15	13%
Somewhat Worse than Litigation	19	17%
No Difference	13	12%
Somewhat Better than Litigation	39	35%
Better than Litigation	19	17%
No Opinion	7	6%

Total Respondents: 112
(skipped this question): 9

7. For business-to-business contracts, do the following factors encourage or discourage including an arbitration clause in the contract?

	Strongly discourage	Somewhat discourage	No effect	Somewhat encourage	Strongly encourage	Not applicable	Response Total
Company policy regarding arbitration	7.69% (8)	10.58% (11)	22.12% (23)	18.27% (19)	25.96% (27)	15.38% (16)	104
Supervisor/Senior counsel views of arbitration	12.5% (13)	15.38% (16)	18.27% (19)	19.23% (20)	25.96% (27)	8.65% (9)	104
Good previous or existing relationship with other company	0% (0)	7.69% (8)	40.38% (42)	29.81% (31)	17.31% (18)	4.81% (5)	104
Poor previous or existing relationship with other company	13.73% (14)	22.55% (23)	36.27% (37)	10.78% (11)	11.76% (12)	4.9% (5)	102
Lack of previous relationship with other company	5.88% (6)	9.8% (10)	57.84% (59)	11.76% (12)	9.8% (10)	4.9% (5)	102
Expected future relationship with other company	0.98% (1)	5.88% (6)	42.16% (43)	32.35% (33)	15.69% (16)	2.94% (3)	102
Simple contract	9.62% (10)	24.04% (25)	31.73% (33)	22.12% (23)	9.62% (10)	2.88% (3)	104
Complex contract	2.91% (3)	15.53% (16)	20.39% (21)	36.89% (38)	22.33% (23)	1.94% (2)	103
Frequent formation of this type of contract	2% (2)	6% (6)	41% (41)	33% (33)	14% (14)	4% (4)	100
Previous experience with arbitration	12.62% (13)	23.3% (24)	17.48% (18)	31.07% (32)	12.62% (13)	2.91% (3)	103
Preserving right to litigate and appeal	33.65% (35)	28.85% (30)	15.38% (16)	13.46% (14)	7.69% (8)	0.96% (1)	104
Confidentiality of arbitration proceedings	0.97% (1)	8.74% (9)	21.36% (22)	37.86% (39)	29.13% (30)	1.94% (2)	103
Degree of control over an arbitrator's qualifications	4.85% (5)	12.62% (13)	11.65% (12)	45.63% (47)	24.27% (25)	0.97% (1)	103
Risk of an excessive jury award or jury award driven by emotion	0.96% (1)	5.77% (6)	15.38% (16)	41.35% (43)	33.65% (35)	2.88% (3)	104
Venue, choice of governing law, etc., are well-defined in the contract	2.94% (3)	12.75% (13)	40.2% (41)	24.51% (25)	17.65% (18)	1.96% (2)	102

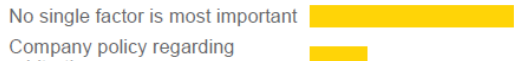
Total Respondents: 104
(skipped this question): 17

8. For binding business-to-business contractual arbitration, do you agree or disagree with the following statements?

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion	Response Total
Arbitration saves time compared to litigation	6.73% (7)	22.12% (23)	10.58% (11)	44.23% (46)	15.38% (16)	0.96% (1)	104
Arbitration saves money compared to litigation	9.71% (10)	22.33% (23)	16.5% (17)	37.86% (39)	13.59% (14)	0% (0)	103
Arbitration provides better remedies than litigation	17.48% (18)	29.13% (30)	30.1% (31)	17.48% (18)	4.85% (5)	0.97% (1)	103
Arbitration provides a more satisfying outcome than litigation	11.65% (12)	34.95% (36)	27.18% (28)	20.39% (21)	3.88% (4)	1.94% (2)	103
Arbitration provides outcomes at least as fair as litigation	5.83% (6)	21.36% (22)	30.1% (31)	29.13% (30)	11.65% (12)	1.94% (2)	103
Arbitrators tend to "split the baby," i.e., are less likely than a judge or jury to decide strongly in favor of one side or another.	2.91% (3)	10.68% (11)	14.56% (15)	42.72% (44)	28.16% (29)	0.97% (1)	103
Arbitrators are more likely than judges to understand the subject of the arbitration	3.88% (4)	11.65% (12)	17.48% (18)	45.63% (47)	19.42% (20)	1.94% (2)	103

Total Respondents: 104
(skipped this question): 17

9. Which factor from questions 7 and 8 is most important in deciding whether to include or not include an arbitration clause in a business-to-business contract?



	Response Total	Response Percent
No single factor is most important	30	29%
Company policy regarding arbitration	8	8%
Supervisor/Senior counsel views of arbitration	4	4%
Relationship or lack of relationship with other company	1	1%
Simplicity or complexity of the contract	3	3%
How frequently this type of contract is formed	1	1%
Previous experience with arbitration	7	7%
Preserving right to litigate	6	6%
Confidentiality of proceedings	4	4%
Potential control over arbitrator's qualifications	0	0%
Risk of excessive or emotionally-driven jury award	8	8%
Venue, choice of governing law, etc., defined in the contract	2	2%
Time expended compared to litigation	7	7%
Money spent compared to litigation	5	5%
Difference of remedies compared to litigation	0	0%
Satisfaction with outcome	3	3%
Fairness of process	1	1%
Likelihood of arbitrators to "split the baby"	7	7%
Likelihood of arbitrator to understand the subject of the arbitration	6	6%

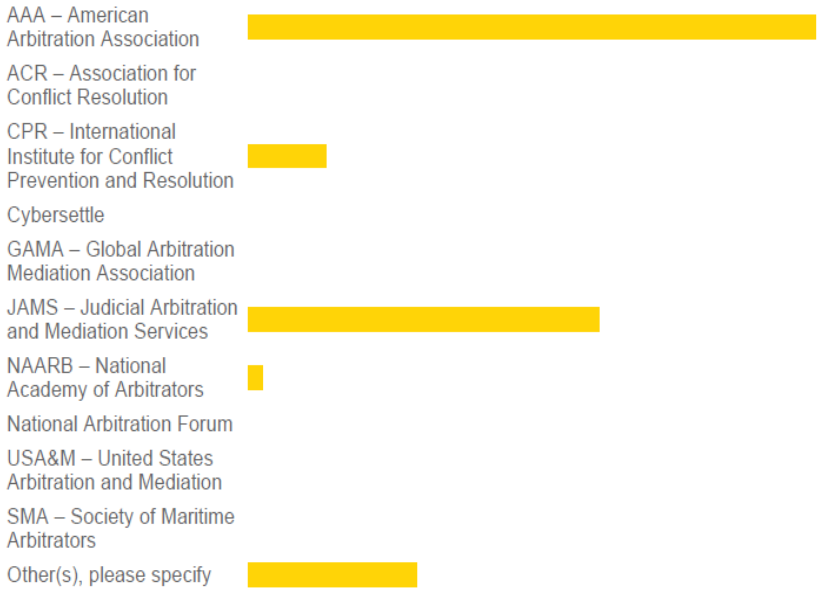
Total Respondents: 103
(skipped this question): 18

10. Do you or your company typically use an arbitration/ADR organization to obtain an **arbitrator**?

	Response Total	Response Percent
Yes	59	58%
No	29	28%
Unknown/Never hired an arbitrator	14	14%

Total Respondents: 102
(skipped this question): 19

11. If so, which one(s) do you typically use?



	Response Total	Response Percent
AAA – American Arbitration Association	50	81%
ACR – Association for Conflict Resolution	0	0%
CPR – International Institute for Conflict Prevention and Resolution	7	11%
Cybersettle	0	0%
GAMA – Global Arbitration Mediation Association	0	0%
JAMS – Judicial Arbitration and Mediation Services	31	50%
NAARB – National Academy of Arbitrators	1	2%
National Arbitration Forum	0	0%
USA&M – United States Arbitration and Mediation	0	0%
SMA – Society of Maritime Arbitrators	0	0%
Other(s), please specify	15	24%

Total Respondents: 62
(skipped this question): 59

12. Do you or your company typically use an arbitration/ADR organization to obtain **arbitration rules or arbitration clause language**?

	Response Total	Response Percent
Yes	54	53%
No	40	39%
Unknown/Never use	8	8%

Total Respondents: 56
(skipped this question): 65

13. If so, which one(s) do you typically use?

	Response Total	Response Percent
AAA – American Arbitration Association	49	88%
ACR – Association for Conflict Resolution	0	0%
CPR – International Institute for Conflict Prevention and Resolution	5	9%
Cybersettle	0	0%
GAMA – Global Arbitration Mediation Association	0	0%
JAMS – Judicial Arbitration and Mediation Services	13	23%
NAARB – National Academy of Arbitrators	0	0%
National Arbitration Forum	0	0%
USA&M – United States Arbitration and Mediation	0	0%
SMA – Society of Maritime Arbitrators	1	2%
Other(s), please specify	9	16%

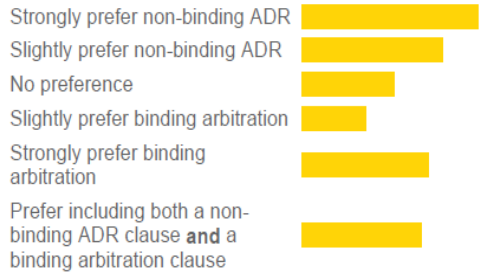
Total Respondents: 56
(skipped this question): 65

14. What forms of non-binding ADR have you participated in?

	Response Total	Response Percent
None	9	9%
Mediation	92	89%
Neutral Evaluation	21	20%
Non-Binding Arbitration	31	30%
Private Trial	14	14%
Settlement Conference	75	73%
Other(s), please specify	2	2%

Total Respondents: 103
(skipped this question): 18

15. For a business-to-business contract, do you prefer to include a clause for non-binding ADR or a binding arbitration clause?



	Response Total	Response Percent
Strongly prefer non-binding ADR	25	25%
Slightly prefer non-binding ADR	20	20%
No preference	13	13%
Slightly prefer binding arbitration	9	9%
Strongly prefer binding arbitration	18	18%
Prefer including both a non-binding ADR clause **and** a binding arbitration clause	17	17%

Total Respondents: 102
(skipped this question): 19

16. Are you willing to participate in an interview or group discussion on business-to-business arbitration with the researchers?

	Response Total	Response Percent
Yes	32	32%
No	69	68%

Total Respondents 101

(skipped this question) 20

17. What else would you like to tell us about business-to-business arbitration?

Total Respondents: 25
(skipped this question): 96

18. If you know of other counsel who could provide helpful data, please list their contact information below so we may give them access to this survey, or please forward the original email to them.

Total Respondents: 6
(skipped this question): 115

19. What is your company's name?

Total Respondents: 82
(skipped this question): 39

20. In which state are you located?

Total Respondents: 92
(skipped this question): 29

21. Is your company publicly traded?

Total Respondents: 95
(skipped this question): 26

22. In which type of business is your company primarily involved?

	Response Total	Response Percent
Agriculture, Forestry, Fishing, and Hunting	1	1%
Mining	1	1%
Construction	4	5%
Manufacturing	19	22%
Wholesale and Retail Trade	8	9%
Transportation and Utilities	6	7%
Information	2	2%
Financial Activities, Insurance, and Real Estate	22	25%
Professional and Business Services	24	27%
Education and Health Services	5	6%
Leisure and Hospitality	1	1%
Public Administration	0	0%
Other(s), please specify	13	15%

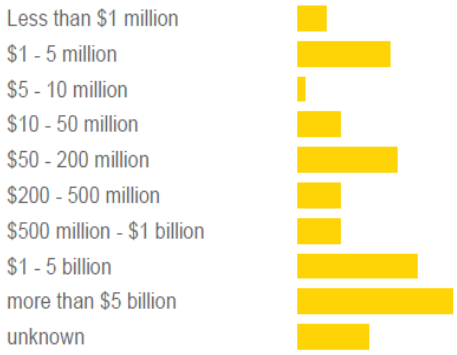
Total Respondents: 88
(skipped this question): 33

23. Approximately how many employees work for your company?

	Response Total	Response Percent
1 - 50	13	14%
51 - 250	17	18%
251 - 1,000	17	18%
1,001 - 5,000	19	21%
5,001 - 10,000	14	15%
more than 10,000	12	13%
unknown	0	0%

Total Respondents: 92
(skipped this question): 29

24. What is your company's approximate annual revenue?



	Response Total	Response Percent
Less than $1 million	3	4%
$1 - 5 million	10	13%
$5 - 10 million	1	1%
$10 - 50 million	5	6%
$50 - 200 million	11	14%
$200 - 500 million	5	6%
$500 million - $1 billion	5	6%
$1 - 5 billion	13	17%
more than $5 billion	17	22%
unknown	8	10%

Total Respondents: 78
(skipped this question): 43

25. How long have you been with your current company?

	Response Total	Response Percent
Less than 1 year	6	6%
1-4 years	25	26%
5-10 years	18	19%
11-15 years	15	16%
more than 15 years	32	33%

Total Respondents: 96
(skipped this question): 25

26. How many years of experience do you have as a corporate counsel?

	Response Total	Response Percent
Less than 1 year	1	1%
1-4 years	9	10%
5-10 years	13	15%
11-15 years	10	11%
more than 15 years	56	63%

Total Respondents: 89
(skipped this question): 32

27. How many years of experience do you have in litigation?

	Response Total	Response Percent
Less than 1 year	15	16%
1-4 years	11	12%
5-10 years	5	5%
11-15 years	11	12%
more than 15 years	49	54%

Total Respondents: 91
(skipped this question): 30

28. How many years of experience do you have as an attorney?

	Response Total	Response Percent
Less than 1 year	0	0%
1-4 years	3	3%
5-10 years	6	6%
11-15 years	5	5%
more than 15 years	82	85%

Total Respondents: 96
(skipped this question): 25

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