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REPORT

Business-to-Business Arbitration in the United States

Perceptions of Corporate Counsel

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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.