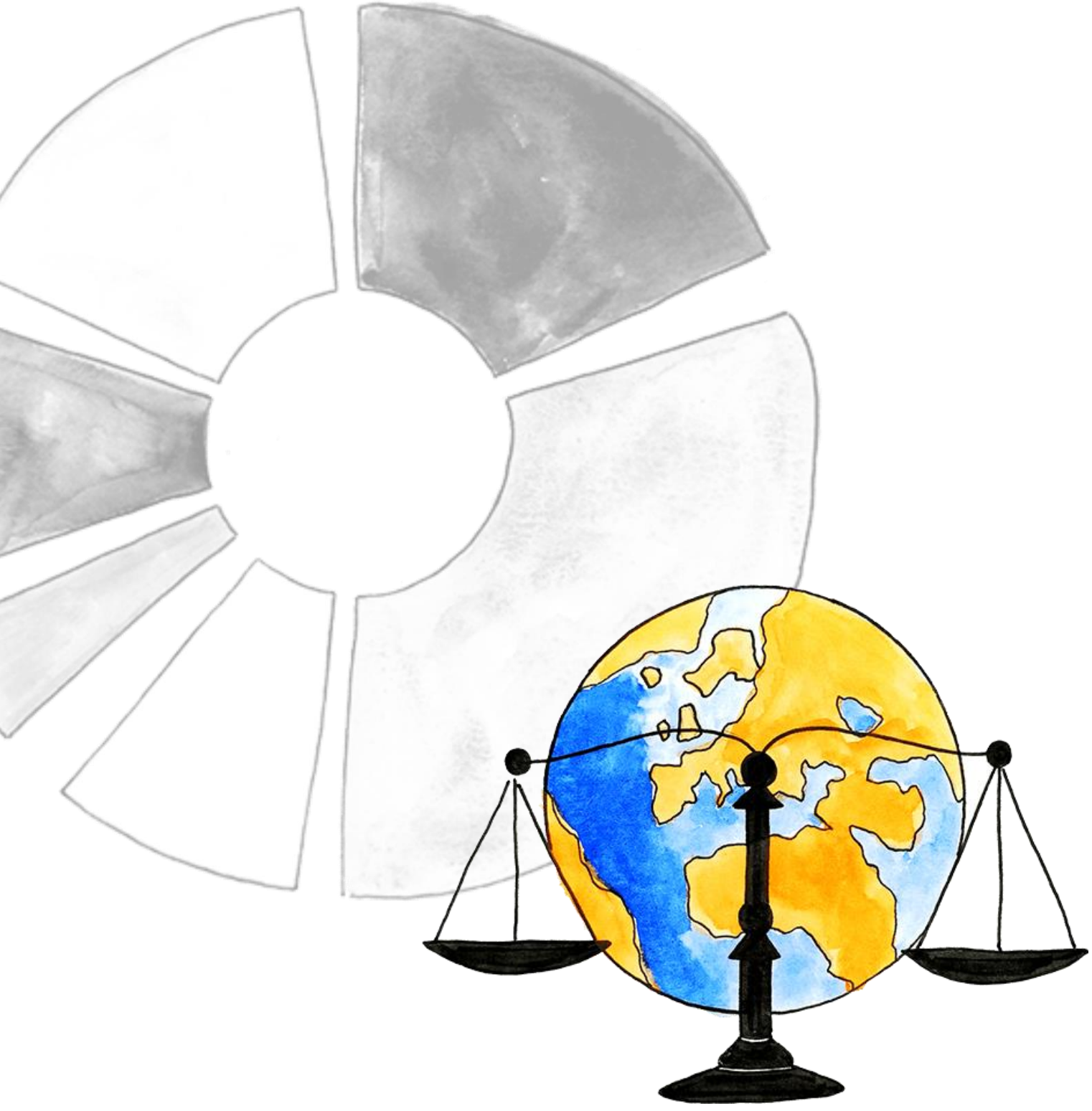
Dispute Resolution in Austria

Study Project

Research & Analysis



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1. Introduction

How do Austrian businesses settle their disputes? When do they file a lawsuit and when do they not? And how do businesses perceive the quality of the courts' and arbitrators' work? What are the perceived push and pull factors for litigation and arbitration? The research project "*Streitbeilegung in Österreich*" ("*Dispute Resolution in Austria*") is the first nationwide and comprehensive scientific study dealing with the dispute resolution behavior of Austrian businesses, and it aims to answer the above questions and more.

2. Research Question & Background

The aim of the research project is to investigate how Austrian businesses assess different methods of conventional and alternative dispute resolution and with which of these methods they are sufficiently familiar. The study focused on state court proceedings and on arbitration proceedings, with a particular emphasis on the resolution of national disputes. National disputes were defined as disputes that arise from a contract between Austrian contractual partners.

One trigger for conducting this study was the drastic 40% decline in court proceedings in recent years (buzzword "*Prozessebbe*"; see for example the Austrian journal AnwBl 2019, 440 with further references). The decline gives the research project a particular topicality: Are there fewer lawsuits? Has the Austrian economy lost its confidence in efficient dispute resolution through courts or is classic litigation simply no longer up to date? What role do private arbitrations play and how are they used? Do Austrian businesses know and effectively use alternatives to state court litigation?

The implementation of the project was further prompted by the opening of the 'Vienna International Arbitral Centre' (VIAC) for the administration of national disputes. Ever since the 2018 revision of the Vienna Rules, the VIAC's arbitration rules, in force from January 1, 2018, apply not only to international proceedings, but to national proceedings as well. This revision therefore offers a good opportunity to take a closer look at the practice and preferences of Austrian businesses as (potential) users of arbitration when it comes to settling their national disputes. In particular, the following question arises: Why are there virtually no national arbitrations in Austria (yet)?

3. Methodology

The centerpiece and foundation of the study project is an empirical survey on the topic. The survey is based on a structured questionnaire, which was created by an interdisciplinary team of legal and political scientists taking legal, practical, and empirical aspects into account. Based on a pre-test, the first version of the questionnaire was fine-tuned and finalized.

A total of 51 questions were asked concerning (i) the master data of the individual study participants, specifically location of their corporate seat, their industry, company size, internal organization of legal agendas (existence of a legal department), international business activity; (ii) the participants' previous knowledge of and experience with various dispute resolution mechanisms, with a focus on litigation and arbitration; (iii) the study participants' assessment of court and arbitration proceedings (the perceived advantages and disadvantages of a certain forum and thus the motivation for choosing one forum over the other).

At the beginning of the study all participants were required to complete a short quiz. In this quiz, they were asked to mark two true or false statements relating to arbitration and state court litigation respectively. A percentage quiz result (0-100%) for each participant was then calculated according to the number of correct answers to the statements ("questions"), to be able to, at least approximately, asses the individual's respective level of knowledge amongst the group of respondents. In the further stages of the research process, these quiz results served as the estimation of the participant's legal expertise, against which additional responses were measured and checked. The survey was carried out online between November 2019 and February 2020. Participation in the survey was confidential; contact details were provided exclusively on a voluntary basis. With the support of the Austrian Chamber of Commerce (WKÖ), a link to the online questionnaire was circulated to a sample of 15,000 Austrian companies. The interviewees were selected by means of a stratified random sample by the statistics department at the WKÖ, with the selection being based on the specifications of the project team. Nearly 900 addressees took part in the survey.

The requested data mainly referred to the industry, company size, internal organization, internationality, and – as the main area of questions – their knowledge of dispute resolution methods.

A quiz was used to test the participants' knowledge of dispute resolution mechanisms in order to be able to relate the study results to their legal knowledge.

About 1/5 of the respondents are part of the trade and other services sector each, around 1/10 are in the construction, freelancing, scientific, and technical services as well as information and communication sector.

The response rate was hence 5.8%, which is, by all means, high, considering the specificity of the topic.

Personal interviews with selected study participants which were planned as a further step of the research project, have been postponed for the time being in view of the COVID-19 pandemic which began to spread in Austria in spring 2020.

With the launch of the study, several information events were held in the Austrian cities of Vienna, Graz, Innsbruck, and Klagenfurt in winter 2019/20; at these events the research project and its scientific background were presented to the interested public. In the study's online survey, questions were asked regarding participation in (one of) these information events, to be able to investigate possible effects of such participation on the respondents' response behavior.

Survey participation was addressed to Austrian businesses in general, without any restrictions in terms of e.g. company size, existence of an in-house legal department, export activity, etc. In other words, the study did not exclusively reach out to big and sophisticated players, but the goal was rather to represent the broadest cross-section of the (small and medium-sized) Austrian economy possible. By design, lawyers were not part of the target group for the study. In fact, there were only 3.9% legal department employees among the respondents, with 8.66% of those surveyed confirming the existence of a legal department in the company in which they work.

By using a stratified sample, it was possible to mirror the structure of the Austrian economy in terms of geography, business sector and size in the group of respondents (for example: 32.58% of the respondents are based in Vienna, followed by 17.21% in Lower Austria, 12.30% in Upper Austria, 10% in Tyrol; the rest is distributed among the other federal states).

The distribution of the respondents among the individual economic sectors (around 15% of the respondents are in trade, 14% in "other services", and 12% in the construction sector; a further 11% in "freelancing, scientific, and technical services"; 10% in "information and communication", and 7% in the accommodation and gastronomy sector; the remainder is distributed among other sectors with less than 5% each) corresponds to the general population's sector distribution.

Likewise, the group of respondents basically reflects the structure of the Austrian economy size-wise: 65.71% of the surveyed companies employ less than 10 people - the majority of the respondents falling into the SME category. Only 5.75% of the companies surveyed employ more than 250 employees; and only about 10% employ more than 50 employees. Given the prevalent company sizes, it is not surprising that more than 90% of those surveyed do not have an internal legal department.

A slight majority of those surveyed export goods or services abroad, which is slightly below the general 2019 pre-pandemic Austrian export rate of around 55%. These exporters, too, however, are mostly "smaller" companies as measured by the number of employees (around 60% of exporting companies employ less than 10 people).

Due to the good correspondence of the main survey respondents' characteristics (location, company size, and industry) between the sample and the basic population achieved by the stratified sample, a separate weighting of the data was not necessary.

Based on an analysis of the results of the survey, it is yet to be evaluated whether and in what form a follow-up survey should be considered. Specifically, the study reflects on the pre-pandemic situation (carried out in winter 2019/20 immediately before the outbreak of the COVID-19 pandemic in Austria).

About 2/3 of the surveyed companies employ less than 10 people, altogether. About 16% have more than 50 employees.

Just over 1/2 of the respondents export goods abroad, of which around 60% have less than 10 employees.

As potential next steps in the research project, the study's findings can be finetuned by conducting personal interviews. Also, the focus of the study can be readjusted from currently contentious dispute resolution methods (i.e. litigation and arbitration) to non-contentious methods (including e.g. mediation).

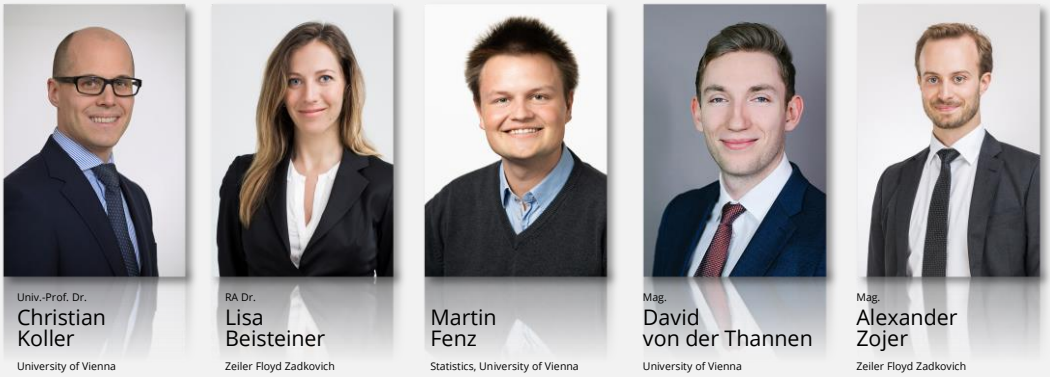
4. Data & Analysis

Following its collection, the survey data was subjected to a careful data analysis, and the research team was able to uncover several remarkable results. They are to be presented and reflected in this section in detail. The presentation follows the same content structure on which the study questionnaire is based:

After an introductory synopsis of the abstract level of familiarity with various dispute settlement methods among Austrian businesses, their experiences with domestic state court litigation proceedings will be examined first. These are then to be compared with the respondents' assessment of (national and international) arbitration proceedings. The final part of this paper summarizes the insights gained through this research.

The Team

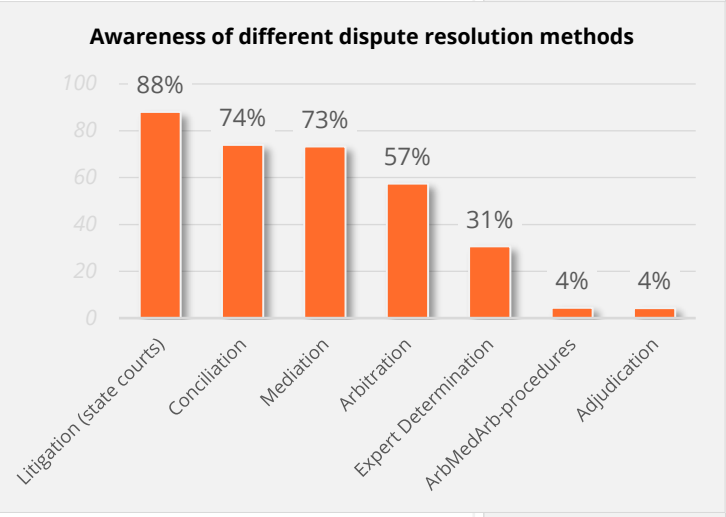
The study was planned, carried out and evaluated by an interdisciplinary team from science and practice (Univ.-Prof. Dr. Christian Koller, University Vienna; Dr. Lisa Beisteiner, Zeiler Floyd Zadkovich – both as co-heads of the study; Martin Fenz, Statistics, Vienna University; Mag. David von der Thannen, Vienna University; and Mag. Alexander Zojer, Zeiler Floyd Zadkovich) with kind support of the Austrian Chamber of Commerce (WKÖ) and the Vienna International Arbitral Center (VIAC).



Flyer created by: Daniela Daurer, LL.B., Zeiler Floyd Zadkovich

5. Awareness of Different Dispute Resolution Methods

As expected, the possibility of settling disputes in litigation - i.e. before state courts - is known to almost all respondents. Around 88% are aware of this option (possibly, an even higher level of awareness would have been expected). Alternative dispute resolution methods are slightly less well-known to businesses than state court litigation, but among them, conciliation ("*Schlichtung*") and mediation are relatively well known (at around 74% each). Arbitration, on the other hand, turns out to be much less prominent, as only slightly over half (57%) of the respondents state to be aware of this dispute resolution method. Other dispute resolution mechanisms seem to be only known to true insiders: While still one third of the respondents (31%) are familiar with the process of obtaining a "*Schiedsgutachten*" (expert determination; a form of contractual dispute resolution, somewhat akin to adjudication), the ArbMedArb procedure (a combination of arbitration and mediation procedures) and the adjudication procedure (4%) prove to be completely unknown territory for the vast majority of respondents.



A *detailed analysis* of the survey data impressively shows that respondents from "big" companies (big companies were approximated as those with more than 250 employees) are well informed about the various options of dispute resolution. For example, the issuing of an arbitration award was familiar to 80% of big company respondents, and therefore almost three times more popular than in small companies (i.e. 10-49 employees), where only about 27% of the respondents were familiar with this option. A similar trend can be identified - with varying degrees of clarity - for familiarity with almost all dispute resolution procedures.

The international orientation of a company also proves to be an important factor for the level of awareness with regard to arbitration proceedings. Within companies offering their goods or services (also) across borders, almost 68% of those questioned are familiar with arbitration; in companies operating exclusively within the domestic market, on the other hand, only every other person (54%) is familiar with it. In contrast, the internationality of a company has little effect on the awareness of other dispute resolution methods. This could lead to the assumption that arbitration is still primarily used as a means of resolving cross-border conflicts (*confer* p. 13) and is therefore particularly well-known in this context.

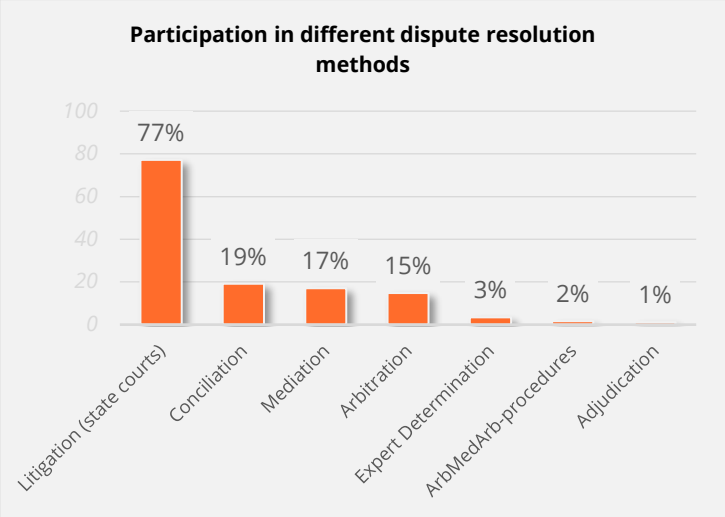
In addition to this international perspective, the awareness of arbitration proceedings - more than that of any other dispute resolution method - is closely linked to the level of legal expertise among the respondents. This is evidenced by the quiz results collected during the study (*confer* p. 3), which, as described above, serve as a rough indication of the legal knowledge of the respondents. While litigation, conciliation, and mediation procedures were also regularly known to respondents with less legal expertise, the arbitration procedure is significantly more familiar to "expert" respondents. For example, respondents familiar with the term "arbitration" answered an average of 63% of the quiz questions correctly, and respondents from businesses with arbitration experience even scored 72% on average. In contrast, the quiz results of the other respondents fell noticeably: Respondents from businesses with experience solely in litigation achieved an average of 62%; those with abstract conceptual knowledge of civil proceedings only achieved merely 58%. Thus, the corresponding reverse conclusion is evident: arbitration proceedings are - in comparison to other dispute resolution mechanisms - widely used and well-known especially by legally savvy companies, or in other words, a more elitist method of dispute resolution.

Last but not least, the attendees of the information events hosted to kick-off the study (*see* p. 3) also showed to have substantial basic knowledge about the various alternative dispute resolution options. It is precisely those alternative procedures that tend to be less well known among the general population, that seem to be significantly more familiar among these people: around 65% of the event attendees have heard of expert determination, while only 31% from the general respondent sample have. Attendees were three times more likely - namely 15% of this subgroup - to be familiar with the ArbMedArb procedure than other respondents. In this respect, the survey might indicate a positive correlation between the information events and the respondents' good quiz results with regard to their level of knowledge: While attendees of a kick-off event answered an average of 81% of the legal test questions correctly, the other respondents only scored an average of 58% correct answers. Whether this statistically significant (two-sided t-test, alpha = 0.05, p = 0.03) difference between event attendees and non-attendees is also causally attributable to the event itself, however, cannot be determined with certainty based on the available data. It would also be possible that the attendees already had a pronounced legal interest and consequently above-average knowledge and that is precisely why they attended.

In contrast, other parameters which the study took into account had little or no effect on the awareness of various dispute resolution options. Neither the position of respondents within their company nor the economic sector in which the company operates play a decisive role in their knowledge of dispute resolution procedures. Any abnormalities identified according to these criteria seem primarily due to the often low number of respondents in the particular response categories. For example, only very few respondents assigned themselves to the economic sectors of "mining", "agriculture" or "education / teaching". Making statements about these subcategories is therefore impossible with the data currently available. This gap within the research could only be filled by collecting more comprehensive data.

6. Litigation (State Court Proceedings)

Following the investigation presented above on the general awareness of dispute resolution methods, the respondents were asked as a further research step about their personal experiences with and assessments of Austrian state court litigation. The data will be described in detail below, with the answers analyzed according to potentially opinion-forming factors.

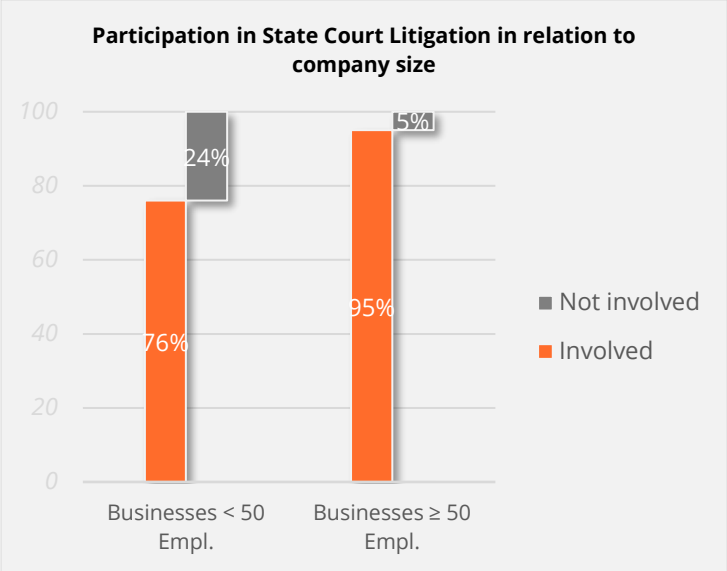


6.1. Experience with Litigation

A considerable proportion of the respondents speak from experience when assessing domestic litigation, as almost 77% state that their company has already been actively involved in a procedure in the past. In addition, almost every third respondent (31%) who gave a valid answer to the relevant question were personally involved in state court proceedings as a party within the preceding ten years. Accordingly, it comes as no surprise that litigation ranks as the undisputed front runner among the dispute resolution methods with which respondents have had experience. In line with the level of awareness (confer p. 4) of the various proceedings, it is conciliation ("*Schlichtung*"; 19%) and mediation proceedings (17%) which are practically the most important alternatives to litigation. Further, some 15% of respondents state that their company has participated in arbitration proceedings. Other procedures (including expert determination, "*Schiedsgutachten*"), are rarely recognized and only mentioned as an exception by the respondents.

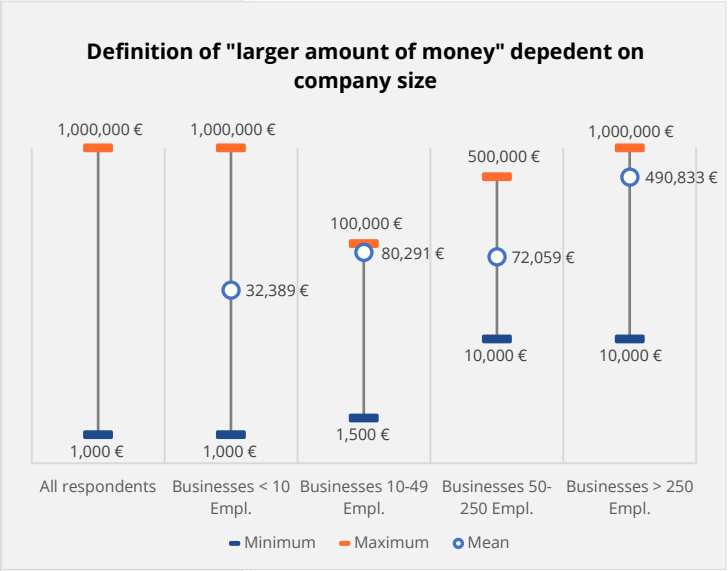
As a rule, civil litigation is an exception for both private individuals and the companies concerned: around 85% of those surveyed with personal experience in state court proceedings confirmed that they had been involved as a party in a case no more than twice in the past ten years. Only two respondents reported more than five participations in litigation within this period. A similar picture can be drawn with regard to the Austrian business landscape: According to the information from the interviewees who reported that their company was previously involved in a litigation case, 60% of these companies have been involved in at most two proceedings since 2010. Only around 17% of the litigation-experienced companies were involved in civil proceedings more than five times during this period.

Whether a formal dispute resolution procedure is actually used in the event of a dispute seems to depend, in particular, on the company size and the associated financial and other resources available to that company. The collected data makes this clear, not only with regard to participation in arbitration proceedings (*see* p. 12), but also for state court proceedings: While almost every (95%) company that employs over 50 employees has been previously involved in civil litigation, only 76% of small businesses (<50 employees) have been.



Considering the aforementioned financial and resource-related challenges that are regularly associated with court proceedings, the desire to avoid litigation seems to be particularly pronounced in small businesses: 80% of those surveyed from this group are generally opposed to settling disputes with their business partners in court. Only - but still - 68% of the respondents from large companies, on the other hand, state they would not go to court to handle a decision regarding their business disputes.

More than 80% of the respondents stated that they only bring their corporate disputes with a business partner before the courts if the matter involves "a larger amount of money". However, the specific ideas of what constitutes a "larger amount of money" vary greatly between the individual respondents, with the lower limit being 1,000 EUR and the upper limit being 1,000,000 EUR. Even when respondents are segmented by company size, there is a wide range of amounts: "Larger amount of money" averaged 490,833 EUR for companies with more than 250 employees and 72,059 EUR for companies with 50-249 employees. Companies with 10-49 employees stated that an average of 80,291 EUR represents a "larger amount of money" for them. For companies with fewer than 10 employees, the average was even less, at 32,389 EUR.



However, even smaller companies do not compromise when it comes to classic legal advice: In no way do the results of the study suggest that big companies would consult a lawyer more often than small companies in the event of a dispute. Around half of the respondents fully agreed with the statement that they would like to seek legal advice from a lawyer in the event of a dispute, regardless of the number of employees. This result indicates that legal advice obtained in the run-up to potential litigation or arbitration proceedings can also contribute to early conflict settlement.

In this context it is worthwhile to note that the respondents' own legal expertise does not make them less likely to retain external advice. Rather, the results of the study indicate an opposite trend, according to which even legally savvy respondents seek external legal advice in case of doubt: Those respondents who state they would seek external advice in the event of legal problems achieved - at least somewhat - better results in the initial quiz (ø 59% of the possible points) than those who did not consider legal advice necessary in such situations (ø 53%). Apparently, the specialist knowledge among the respondents entails an increasing awareness of the need to draw on competent external advice in a timely manner.

Finally, it should also be noted at this point that certain research parameters show clearly to be of little or no importance in the use of civil proceedings. Internationally operating companies (78%) do not litigate in state courts more often than those that offer their goods or services exclusively on the national market (79%). For the epistemological interest of this study, these results are also beneficial insofar as they are in marked contrast with the data collected regarding arbitration proceedings (*confer* p. 12).

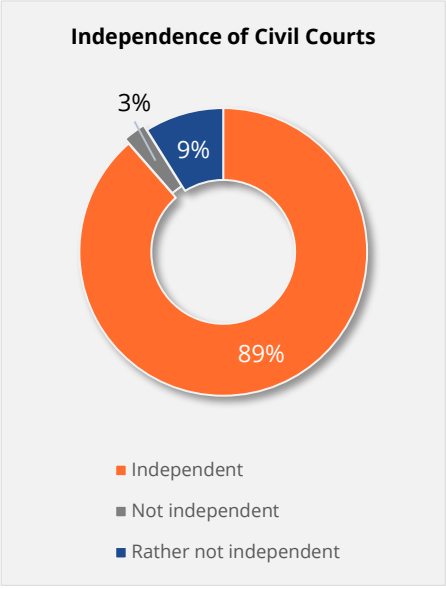
6.2. Assessment of (State Court) Litigation Proceedings

Upfront, it is noted that the study respondents perceive the Austrian civil procedure in an ambivalent manner: In addition to their fundamental trust in the civil justice system and its bodies (i.e. the courts and judges), the respondents also see considerable need for improvement in judicial practice, in particular with regard to the duration and costs of the proceedings.

Austrian civil litigation simply takes too long. At least 55% of the respondents hold this opinion,[1] as they negate the statement that civil proceedings would lead to a final decision within a reasonable time period. In addition, many respondents do not consider the Austrian civil procedure to be cost-effective. Accordingly, over 8 out of 10 respondents (81%) are of the opinion that the overall costs of the procedure are too high. In view of this, it is almost surprising that a little over half of the respondents (53%) still consider state court litigation an efficient way to resolve conflicts. However, of course, the flipside of this is that almost every other respondent considers the civil court procedure to be inefficient.

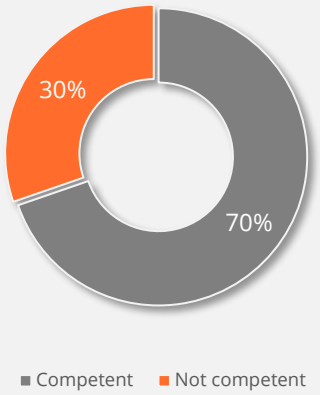
Notwithstanding, state courts are ascribed a particularly high degree of independence: the vast majority of respondents (89%) thus trust the Austrian judiciary, while only less than one in 40 respondents (just less than 3%) consider the domestic courts "not at all" independent in their decision-making.

The respondents also rate the professional competence of the state courts as positive. Some 70% of all respondents see complex factual and legal questions as being in good hands before the state courts.



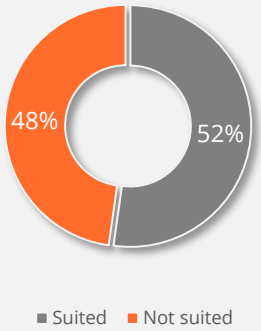
1 This excludes the 64 respondents answering with "no comment". For questions regarding their (subjective) assessments of litigation and arbitration proceedings, the respondents could at all times also choose the answer "no comment" in order to reduce the risk of purely speculative or merely guesswork answers. Therefore, the statistical presentations (percentages etc.) in the following refer exclusively to the answers with clear preference, thus excluding all those from the statistical analysis who have given "no

Competent to solve complex factual and legal questions



The respondents are undecided, however, when it comes to the question of whether international business disputes can be brought before the state courts with an equally clear conscience. Almost 38% of those questioned do not allow themselves any judgment (and hence made no statements in the survey) in this regard; of the remaining respondents, 43% agree and 57% disagree with the statement that state court proceedings are well suited to resolve international legal disputes. When asked whether state court litigation would allow for sufficiently confidential dispute resolution, only 52% of those questioned answered positively.

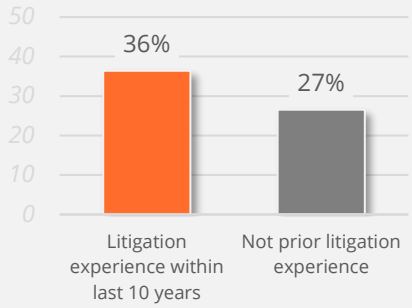
State court litigation suited for confidential dispute resolution



Of course, these assessments by the respondents only offer an initial overview of the status quo of domestic civil court proceedings. Here, the devil is in the details, too. In order to provide a deeper understanding of the strengths and weaknesses of civil litigation, the study results are therefore measured once again in view of various relevant influencing factors.

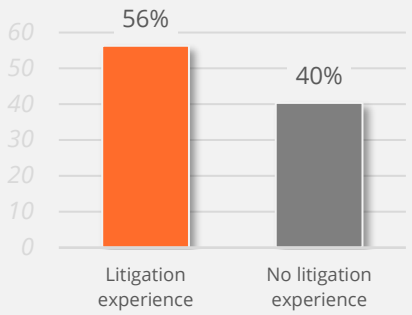
What is striking is that the respondents' assessments turn out to be significantly more skeptical where their own company has already been involved in civil proceedings in the past. Specifically, respondents whose company has been involved first-hand in state court litigation in the past 10 years are more critical of this procedure in almost every respect: More than 36% of the respondents with respective experience doubt that complex factual and legal issues can be handled properly by local courts. In contrast, the trust of respondents from companies without such litigation experience is significantly higher, with only 27% of them questioning the competence of the civil courts. This connection between personal experience and increasing skepticism towards civil litigation is all the more remarkable, as a diametrically opposite trend can be identified in the evaluation of arbitration proceedings (*confer* p. 13).

Doubts about state courts' competence to solve complex and legal questions, dependent upon prior litigation experience



A look at the respondents' perception of the duration of civil lawsuits draws a similar picture: While respondents from companies with litigation experience generally rate the process as too lengthy in 6 out of 10 cases (60%), only 52% of the remaining respondents criticize litigation as too lengthy a process.

Doubts about the efficiency of litigation, dependent upon prior litigation experince



These evaluations in turn lead to a particularly critical judgment about the efficiency of litigation and consequently to a particularly critical judgment about the efficiency of Austrian lawsuits. 56% of respondents whose companies had already been involved in litigation in the past doubt that civil proceedings are an efficient way of resolving conflicts. On the other hand, of the remaining respondents without such litigation experience, a significantly lower percentage (40%) were critical of the efficiency criterion.

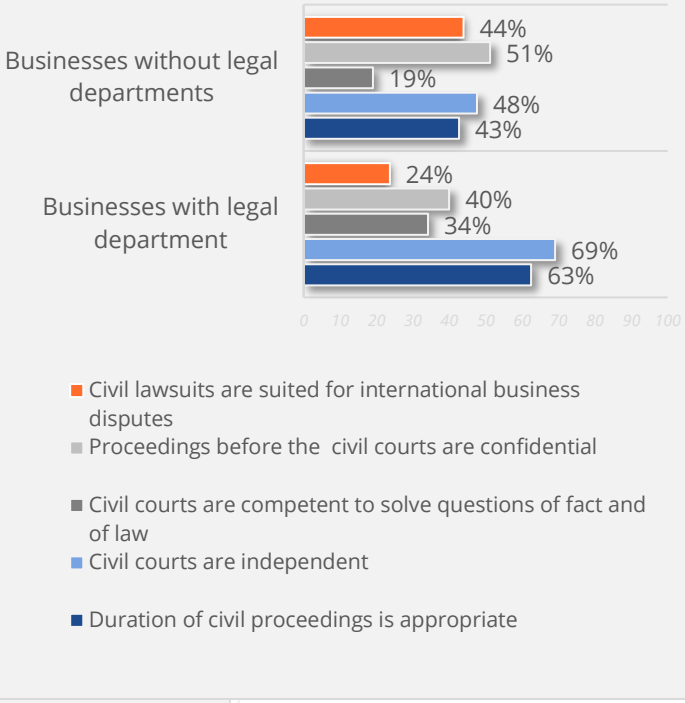
Solely when it comes to the assessment of domestic state courts as independent, prior litigation experience seems not to play a significant role.

From what has been said, the question arises as to whether the respondents' personal experiences could effectively be the cause of increasingly critical attitudes towards civil proceedings. This conclusion may seem obvious in view of the differences described between respondents from litigation-experienced companies and those from other companies, but should be accepted with caution only, in view of the remaining study data: In the survey, the respondents were also specifically questioned about the opinion-forming factors underlying their assessments.

The respondents who stated that their opinion was based largely on personal litigation experience were *not* significantly more critical of civil proceedings than respondents who, according to their own statements, did not allow such experiences to influence their opinion. In light of this, it is quite conceivable that many respondents' negative opinions may be shaped by anecdotes from third parties: Respondents in the study who based their assessments essentially on reports from colleagues and friends rated civil litigation particularly negatively. The above findings must hence be seen and understood against this background: Without denying actual need for improvement in domestic litigation, particularly critical tones may sometimes be attributed to anecdotal word of mouth within companies and similar.

A look at the companies with an internal legal department further relativizes the impression that respondents with litigation-experience are particularly hostile towards the state courts. Almost two thirds of the respondents (63%) from companies with a legal department consider the typical duration of a civil lawsuit to be appropriate, while respondents from companies without in-house legal departments only agree with this statement in 43% of the cases. Last but not least, the confidence of this former group of respondents in the independence as well as competence of the state courts turns out to be significantly higher: 69% of these respondents have complete confidence in the independence of the judiciary (compared to 48% of respondents from companies with no in-house legal department) and 34% have no doubts entrusting the state courts with complex factual and legal issues to resolve conflicts (compared to 19%).

Assesment of different aspects of state court litigation, in relation to existence of inhouse legal department



In contrast, respondents from internally advised companies do express specific concerns with regard to such procedural aspects that usually concern legal departments in particular. These respondents criticize the low level of confidentiality in civil litigation and its lack of suitability for international business disputes: only 40% of the respondents from companies with a legal department (compared to 51% of the other respondents) attribute sufficient confidentiality to the civil litigation process and only one in four respondents (24%) of this group (compared to 44%) state that cross-border conflicts can also be efficiently resolved by the domestic courts.

In this context, it is also worth taking a look at the assessments by companies that offer goods or services (also) across borders. Along with what has been written above, it also applies here that companies seem to be

increasingly critical of civil courts on those aspects which personally affect them most: While there are no deviations in the assessment of the remaining procedural aspects, clear differences become noticeable as compared to the answers of respondents from companies that operate on a purely national basis, when it comes to assessing suitability of civil litigation for international commercial disputes. While almost two thirds (63%) of respondents from internationally active companies consider state courts as unsuitable for resolving cross-border commercial disputes, only 52% of respondents from companies with exclusively domestic activity share this opinion.

In addition, data analysis with regard to company size illustrates the hypothesis developed hereabove, according to which respondents most strongly criticize factors which relate to their own procedural concerns. While companies with a particularly large number of employees are concerned about the lack of confidentiality and the suitability of state court litigation for solving international commercial disputes, respondents from smaller companies take particular issue with the costs incurred in the course of a civil lawsuit.

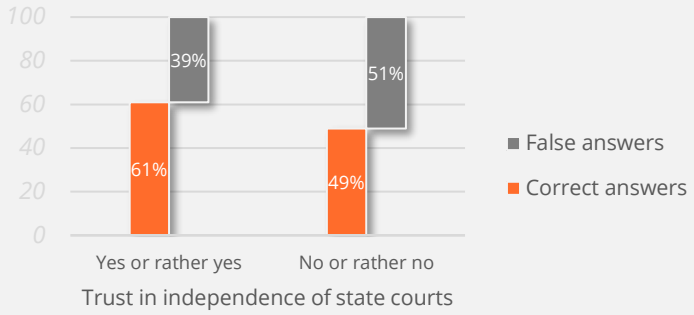
Remarkably, the results show that the respondents also draw different overall conclusions on civil procedure: In smaller companies (<50 employees), 54% of the respondents still consider civil litigation an efficient form of conflict resolution. In contrast, respondents from larger companies draw a much more critical overall conclusion and only consider civil litigation an efficient method of dispute resolution in 31% of cases.

Furthermore, it remains to be assessed to which extent the respondents' legal expertise influences their opinion on civil litigation. In this respect, possible interrelations were already transpiring when looking at the answers of respondents from inhouse legal departments. These interrelations are to be re-examined here, drawing upon the quiz results as a proxy for the respondents' legal knowledge.

For example, the data analysis confirms that those respondents with high (or very high) confidence in the independence of the judiciary also have pronounced legal expertise. This group of respondents scored significantly higher in the knowledge quiz (ø 61% of the possible points) than those respondents who consider Austrian civil courts to be less independent (ø 49% of the points).

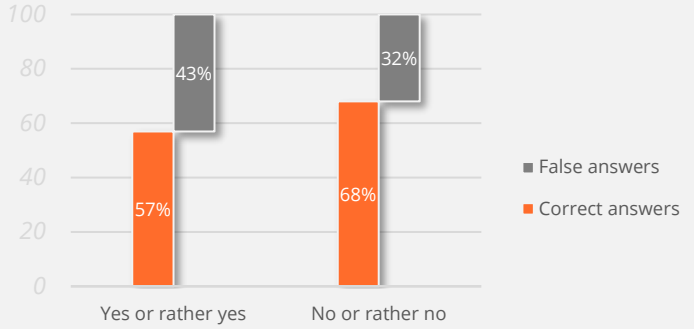
Of course, this does not justify any conclusions about the correctness of the various assessments. However, legal expertise certainly appears to be beneficial for the respondents' trust in legal institutions.

Quiz results, dependent upon trust in independence of judiciary



Under no circumstances, however, do respondents who are particularly well-versed in law rate litigation more positively across the board. Sometimes the opposite even seems to be the case. While those respondents who consider civil proceedings sufficiently confidential only answered 56% of the legal technical questions correctly, the skeptics in this regard seem to be significantly more legally versed, answering 65% of the test questions correctly on average.

Quiz results, dependent upon assessment for solving international business disputes



The respondents' opinions on the suitability of civil litigation for solving international commercial disputes suggest something similar: Those who consider state court proceedings to be suitable, on average, scored significantly worse in the legal questions test, with a score of 57%.

In contrast, respondents having an opposite opinion answered an average of 68% of the questions correctly. As a result, the respondents' particular knowledge of the law indicates a tendency towards a more critical opinion on the settlement of international commercial disputes before the state courts. Viewed against the backdrop of equally skeptical findings from literature and practice, such critical tones should not be entirely dismissed.[2]

In contrast, the respondents' legal expertise is unlikely to play a major role in their assessment of certain other aspects of civil proceedings. This is especially true for the assessments of the state courts' competence with regard to complex factual or legal questions, or of the duration of proceedings as reasonable: The respondents with positive and negative assessments of these aspects scored equally well in the quiz survey, with a score of about 60% each.

Overall, the respondents' legal know-how has a considerable influence on their opinions on civil litigation, but a trend in the sense of generally positive or critical assessments cannot be determined. Rather, at times respondents rate certain procedural aspects very similarly, regardless of their legal expertise.

Although the assessment of civil proceedings and of the state courts running such proceedings depends on a whole series of factors as presented here above, certain variables prove to be less important. Neither the respective corporate seat of their company (i.e. in which Austrian federal state a company is headquartered), nor the respondents' specific position within that company (exception: employees of the legal department, *confer* p. 9) seem to play a decisive role in the assessment of civil litigation. In order to effectively examine the influence (if any) of the respective industry sector of a company on its assessment of civil proceedings, the conduct of further surveys with an adapted sample size would be required.

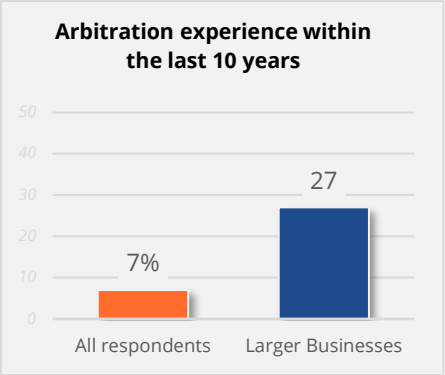
7. Arbitration

The second part of the survey dealt with Austrian businesses' experience with and assessment of arbitration proceedings.

7.1. Experience with Arbitration

First of all, it does not come as a particular surprise that the vast majority of respondents have no previous experience with arbitration proceedings - only a small portion of less than 7% of respondents state that they have been involved as a party in an arbitration within the last ten years. From those proceedings, only a fraction qualify as "Austrian only", i.e. domestic arbitration proceedings. For the purposes of the study, domestic (or national) proceedings means proceedings where all parties are Austrian.

Among businesses which offer services and goods across borders (e.g. exporting goods, offering cross-border services), experience with arbitration proceedings is slightly higher, at about 9%.



The company size factor has a stronger effect on respondents' arbitration experience: Amongst respondents from larger companies (with at least 50 employees), 27% have arbitration experience; when considering the respondents' personal experience, which also includes experience gathered at previous employers, the figure is slightly higher at 29%.

Experiences with domestic arbitration proceedings are few and far between - as expected. Just four of surveyed large companies stated that they had experience with national arbitration proceedings. Overall, regardless of the size of the company, only eight respondents have experience with national arbitration proceedings.

In companies with an internal legal department, the general arbitration experience is, unsurprisingly, higher: Almost half of those respondents who work in legal departments state that their company has already been involved in an arbitration proceeding (47%).

7.2. Assessment of Arbitration Proceedings - Overview

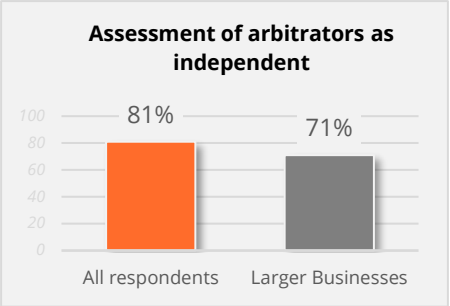
The questionnaire section concerning the assessment of commercial arbitration was answered by a large number of respondents (568 to be precise), although small and medium-sized companies in particular often chose the "no answer/comment" option for certain sub-items. Among the larger companies (>50 employees), which tend to be more experienced in arbitration, the proportion of those who selected „no answer/comment" for questions regarding the evaluation of arbitration is low, at 22%.

Having regard to the respondents' limited arbitration experience as detected above, it should be noted at the outset that the vast majority of respondents are not personally experienced with the dispute resolution mechanism they are asked to assess. Accordingly, their evaluation primarily reflects the public perception of arbitration proceedings (*see* p. 25).

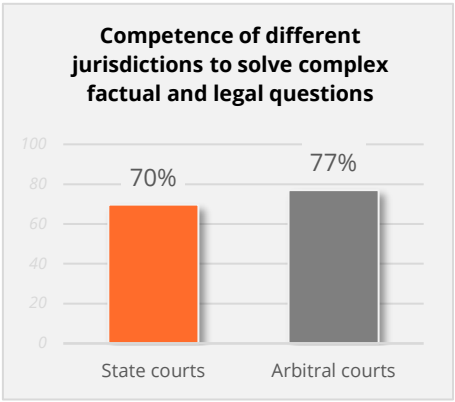
The detailed analysis of how respondents evaluate arbitration, shall be preceded by a brief overview: Arbitration is primarily perceived – by those respondents who did provide specific answers to these questions, rather than "no answer/comment" – to be confidential (80% agree), independent (81% agree) and efficient (82% agree). Also, arbitration proceedings seem to be considered as suited for the resolution of complex factual and legal issues (more than 77% agree). However, when it comes to costs almost 70% think procedural costs are too high (here it is noticeable that more than half of the respondents do not consider themselves in a position to judge whether the costs of the proceedings are appropriate).

7.3. Analysis of Responses

Independence: About 81% of the respondents agree with the statement „*Arbitral tribunals are independent in their decision-making*". Compared to the perception of the state courts, which 89% of the respondents perceive as independent, this approval value for private arbitral tribunals is quite high. Larger - hence by tendency more arbitration-experienced – companies are slightly more skeptical when it comes to the independence of arbitral tribunals:

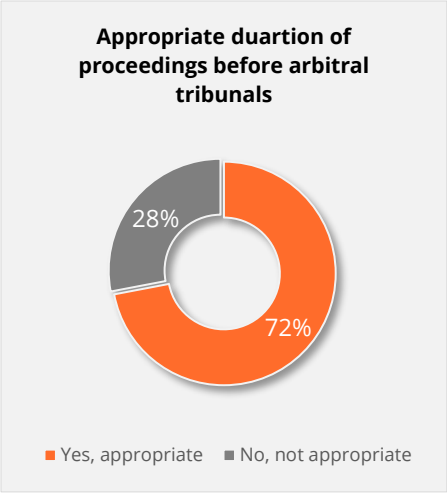


Excluding those respondents who did not provide specific answers to this question, the agreement rate is at 71%. Anyone who has ever been through an arbitration procedure apparently sees the independence of arbitrators in a somewhat differentiated manner. Whether this may be due to a certain expectation of one's own party-appointed arbitrator "guaranteeing" the consideration of one's own arguments in the deliberations of the tribunal, should be examined separately.

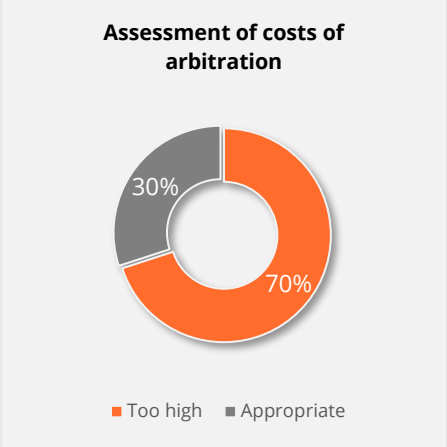


Competence: For the statement "*Complex factual or legal issues are in good hands before arbitral tribunals*", the approval rate of over 77% was also on the higher end. The majority therefore (also) considers complex legal issues to be in good hands before arbitral tribunals. Compared to the perception of state jurisdiction (70%), this value is even slightly higher: Arbitral tribunals, one could deduce, are perceived to be even better at solving complex questions than civil courts.

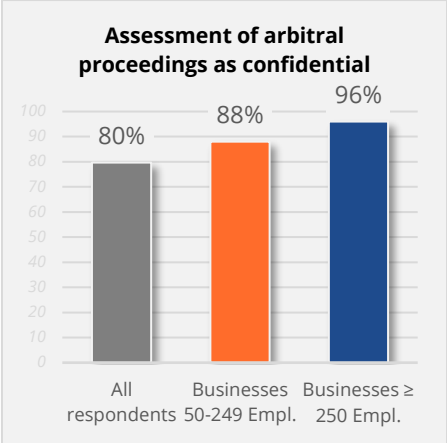
If one looks at the responses from larger companies - and thus with above-average arbitration experience - the competence agreement rate is significantly higher, at 85%. Personal experience evidently has a positive impact - at least in terms of evaluating competence - on the assessment: Anyone who has tried it once - one could conclude - is (even) more convinced of the quality of arbitration.



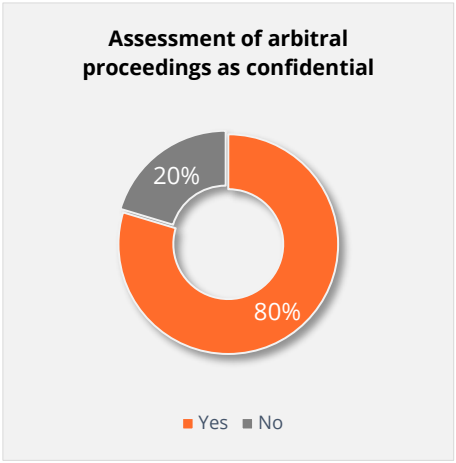
Duration of proceedings: 72% of the respondents believe that arbitration proceedings will lead to a final decision within a reasonable period of time. In comparison to the other statements, this level of approval seems somewhat conservative. The narrative of arbitration as a quick alternative to state court litigation is clearly not entirely in line with actual perception. In the case of larger companies, which tend to be more experienced in arbitration, the level of approval is again above average: More than 81% of this group believe that the duration of the proceedings is appropriate. Personal experience has a positive effect – apparently, when it comes to arbitration this also applies to the assessment of the process duration.



Procedural costs: A good third of the respondents (35%) agreed with the statement "*The costs of arbitration proceedings are too high*" (whereby costs were defined as total costs for the institution, arbitrator fees and costs of legal representation); around 15% rate the costs as reasonable. It is noticeable that over 50% of the respondents abstained from answering this question. Of the remaining respondents – i.e. those who felt confident to assess this aspect of the arbitration process - on the other hand, almost 70% are of the opinion that conducting an arbitration procedure is too expensive. Focusing on the larger companies, a substantial number of participants (32%) also refrained from answering. The majority of the rest who did respond, consider the procedural costs to be too high (59% agree with this statement). Arbitration proceedings do not seem to have the image of an inexpensive alternative to civil proceedings. Whilst this seems to correspond to some anecdotal narratives of arbitration proceedings being or becoming too expensive, it should also be noted that the way the question was phrased (a negative statement – "*costs … too high*" – as compared to the remaining positive statements) may have influenced the assessment.

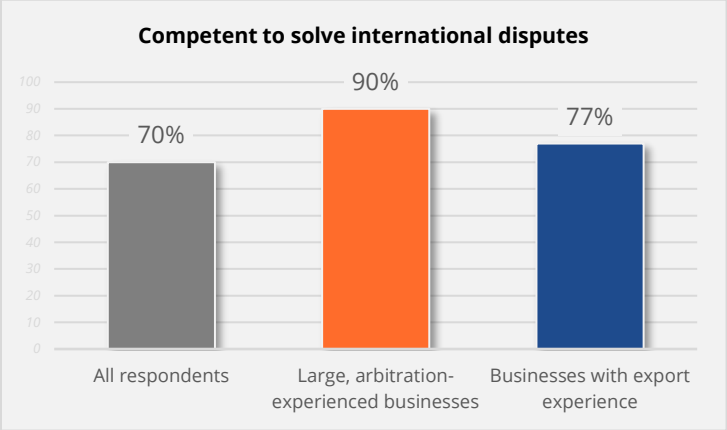


Confidentiality: There was strong agreement amongst respondents (80%) with the statement that "*Arbitration offers sufficient opportunities for resolving a conflict confidentially*.". The approval values among larger companies (>50) are around 88%, and among companies with more than 250 employees even 96%.



International disputes: Around 70% of the respondents affirmed that arbitration is well suited to resolve international commercial disputes. Here, too, there is a clear difference

when it comes to larger, arbitration-experienced companies, where more than 90% agree with this statement. The proportion of votes rejecting this statement (44%) is surprising, since the resolution of cross-border disputes is generally one of the best-known advantages of arbitration, and therefore one of its unique selling points. Further, equally surprising are the approval values for the suitability of arbitration for national dispute resolution, which are comparatively high (around 74%). Presumably, above all, those respondents who do not operate across borders, do not perceive arbitration a suitable

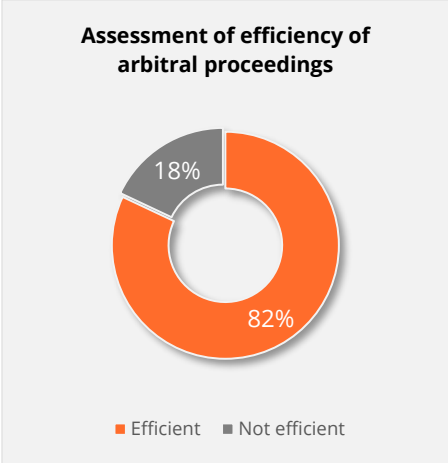


mechanism for resolving international disputes. In fact, the approval rate among those respondents who operate across borders is around 77%, and therefore slightly above average. Beyond that, however, the group of exporting companies does not display any particular difference in its evaluation of the arbitration procedure.

National disputes: Excluding "no comments" replies to the statement that *"arbitration proceedings are well suited to resolve purely national economic disputes [...]",* some 74% of respondents agree – which, surprisingly, is higher than the approval rate in relation with international arbitration. Larger companies, on the other hand, rate the suitability of arbitration proceedings for national disputes more skeptically as compared to the total number of respondents: only 64% of larger company-respondents consider arbitration suitable for national disputes. Last but not least, this suggests that big, arbitration-experienced companies differentiate more between national and international disputes and perceive arbitration as being more suitable for the latter.

Efficiency: Finally, there is generally a high rate of agreement with the statement that "*Arbitration is an efficient way to resolve a legal dispute.*": Almost 82% of the respondents consider the arbitration process to be efficient.

In summary, larger and more experienced companies generally rate arbitration more positively, in particular the aspects of confidentiality, suitability for international disputes, competence of the arbitrators (suitability for resolving complex questions) and the duration of proceedings. In contrast, this group is somewhat more cautious about the suitability of arbitration for resolving national disputes.



In general, the costs and the duration of the proceedings clearly appear as perceived weaknesses of arbitration proceedings: While this may have been compounded by the formulation of the question regarding costs ("*The costs ... are too high*."), the question regarding the duration of the proceedings was phrased positively ("*Arbitration will lead to a final decision within a reasonable time* "). This gives the rather restrained general approval rating of 72% additional weight.

When relating the respondents' quiz performance to their evaluation of arbitration proceedings, no particular connection can be detected: In particular, a possible hypothesis that those who know more about the arbitration procedure would also tend to rate it more positively cannot be confirmed: Rather, it seems like better-informed respondents perceive both the advantages and the disadvantages of the arbitral process more clearly.

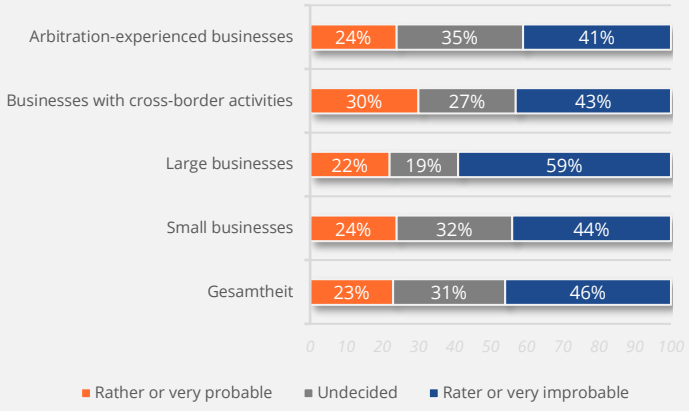
When looking at how companies with specific arbitration experience within the last ten years assess the work of arbitral tribunals, it is noticeable that those grant significantly higher approval rates when it comes to confidentiality (around 93%) and suitability for resolving international disputes (85%). However, only around 70% of this group consider arbitrators to be independent (which is below average), and around 76% consider the procedural costs to be too high (again, this assessment is more critical than the average).

Opinions regarding the process duration and its suitability for resolving complex questions is, again, more positive than the average: 84% consider the duration to be appropriate, and 84% affirm the arbitral proceedings' suitability for resolving complex questions. 76% of this group consider arbitration to be suitable for resolving national disputes.

What is striking, however, is that those who state to have experience with *arbitration* proceedings criticize civil *litigation* more harshly, especially with regard to the resolution of international disputes. Here, a comparison of the work of arbitral tribunals and civil courts evidently results in a more critical assessment of the latter.

Being employed in an internal legal department has only minimal effects on voting behavior. Looking at the responses from employees in the legal department (as opposed to responses from entrepreneurs, managing directors, authorized signatories, etc.), it becomes clear that the confidentiality of arbitration, its appropriate duration and the process' suitability for international disputes are widely accepted within this group. An above-average number in this group also see arbitral tribunals as being suitable for solving complex issues (88%). On the other hand, it is noticeable that a below-average number - namely only 59% - consider arbitration to be suitable for resolving *national* disputes. This trend is comparable to the assessment by respondents from larger companies and from companies that have experienced arbitration first-hand. Independence of arbitrators is approved by 71%. The costs are considered too high by just over 70%.

Probability of including an arbitration clause in a national contract



Even if only a small portion of the respondents attended one of the kick-off events (26 respondents), one might tentatively conclude that additional information (as in this case, through attending an information event) may have an impact on the assessment of the respective dispute resolution mechanisms. While no effect in terms of judging civil litigation is observed, statistically, arbitration is assessed significantly better by event participants. This is not surprising, however, as it will likely be a selection of respondents particularly amenable to alternative dispute resolution methods which, in the first place, have found their way to an information event. 23% of this group have arbitration experience - an above-average amount.

8. Comparison of National and International Arbitration

8.1. Survey Experiment

As mentioned above, one focus of the study was an investigation of national arbitration compared to international arbitration. For this purpose, the respondents were randomly assigned to one of two groups of equal size. One group answered additional questions on *national* arbitration, the other on *international* arbitration (within the survey experiment).

8.2. National Arbitration

Austrian businesses present themselves as surprisingly open to national arbitration proceedings: when asked whether they would include an arbitration agreement in a contract they are to conclude with an Austrian business partner ("national contract") - so that disputes arising from this contract are not resolved by a state court, but by an arbitral tribunal - almost one quarter of the respondents considered this option as (very or rather) likely (23%).

In contrast, almost 46% of those questioned are more cautious when it comes to entering into an arbitration agreement with an Austrian business partner and would be (very or rather) unlikely to consider this. It is interesting that of the rest - about a third (31%) - a not inconsiderable part is undecided ("so-so"): It may be assumed that these respondents did not have enough information (for example about their contract or the implications of choosing national arbitration) to commit to an answer.

The group of information event participants seems to be much more willing to make decisions in this regard: percentage wise

significantly more respondents were either in favor of including an arbitration clause in their national contracts (27%) or, respectively, against this option (55%) - both significantly higher percentages than in the population of all respondents. Accordingly, only 18% of the event visitors - compared to 31% in the total population - were unsure whether a national arbitration clause would be advantageous for them or not. At this point, too, the particular interest and knowledge of event participants become evident.

Whether one interprets these approval values for the inclusion of arbitration clauses into national contracts as "open-mindedness" or rather "reluctance" depends on the benchmark. Based on the fact that national arbitration proceedings have so far hardly existed in Austria, a cautiously positive interpretation may seem appropriate.

Companies with a maximum of 50 employees (and almost no arbitration experience) are somewhat more open to national arbitration proceedings (15% very unlikely, 29% rather unlikely, 32% so-so, 19% more likely, 5% very likely).

Larger companies, which tend to have experience in the arbitration field, conversely, are somewhat more skeptical of national arbitration proceedings than the average: While slightly less (22%) consider it likely to include an arbitration clause in a national contract, the group of the undecided (with 19%) individuals is smaller here. The skepticism can be clearly seen in the 59% (instead of the average: 46%) group, who consider it (very or rather) unlikely to include an arbitration clause in a national contract.

In comparison, companies with export activities would be more likely to include an arbitration clause in contracts with Austrian business partners: 30% consider this to be more likely or very likely; the proportion of those who consider the inclusion of an arbitration clause in an Austrian contract to be (very or rather) unlikely in this group has barely noticeably decreased to 43%.

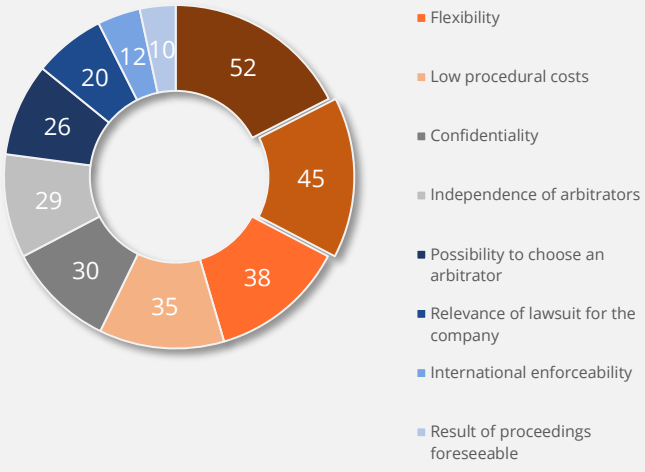
Importantly, legal department employees are more skeptical than average about national arbitration proceedings. Only 9% would likely include an arbitration clause in a national contract, while 55% state they would be (very or rather) unlikely to do so. In this group, at 36%, there is a particularly large number of undecided individuals (or, respectively, as could be assumed these respondents would answer this question in a more nuanced manner and hence refrain from answering just "likely" or "unlikely").

As regards respondents from companies with arbitration experience, 24% consider the inclusion of an arbitration clause in a national contract to be likely, 41% to be unlikely. With increasing arbitration experience, the approval of national arbitration proceedings does not increase (unlike for *international* proceedings). On the contrary, as illustrated by the example of the larger companies and those with arbitration experience, the obvious conclusion is that the more "sophisticated" the player, the lower the approval rate of national arbitration proceedings.

8.2.1 Pro National (Domestic) Arbitration

From the factors that speak most in favor of concluding an arbitration agreement with an Austrian business partner, from the respondents' point of view - regardless of whether they themselves would be willing to conclude such an agreement - the following pull factors stand out:

Factors in favour of domestic aribtration proceedings



Speed („*The procedure quickly leads to a resolution of the dispute.*"): About 52 % consider this criterion crucial with regard to national arbitration proceedings.

Competence of arbitrators ("*The parties can choose arbitrators who have particular experience and expertise*"): Over 45% consider this to be an argument in favor of national arbitration.

Flexibility ("*The procedure can be designed flexibly" (e.g. procedural language, schedule, evidence procedures, etc.".*)): Around 38% of the respondents emphasize the value of the flexibility of national arbitration proceedings.

Low procedural costs ("*The procedural costs are low.*"): More than a third found, when asked about national arbitration, that the procedural costs were low. This is in some contradiction to the assessment of arbitration costs in general, according to which around a third of the respondents consider the costs to be too high (and around 50% abstain from answering). In view of the limited practical experience with national arbitration proceedings, however, we consider the informative value of this result to be low.

Next are the *confidentiality* of the procedure (approx. 30%), the *independence of the arbitrators* (approx. 29 %) and the option to *choose the arbitrator* (ca 26 %). When one combines the affirmative responses to the pull-factor "competent arbitrators (chosen by the parties)" and "Possibility of choosing an arbitrator", there is an even clearer focus on the possibility of choosing one's arbitrator (with special expertise). This aspect, it seems, constitutes a very important pull factor for national arbitration.

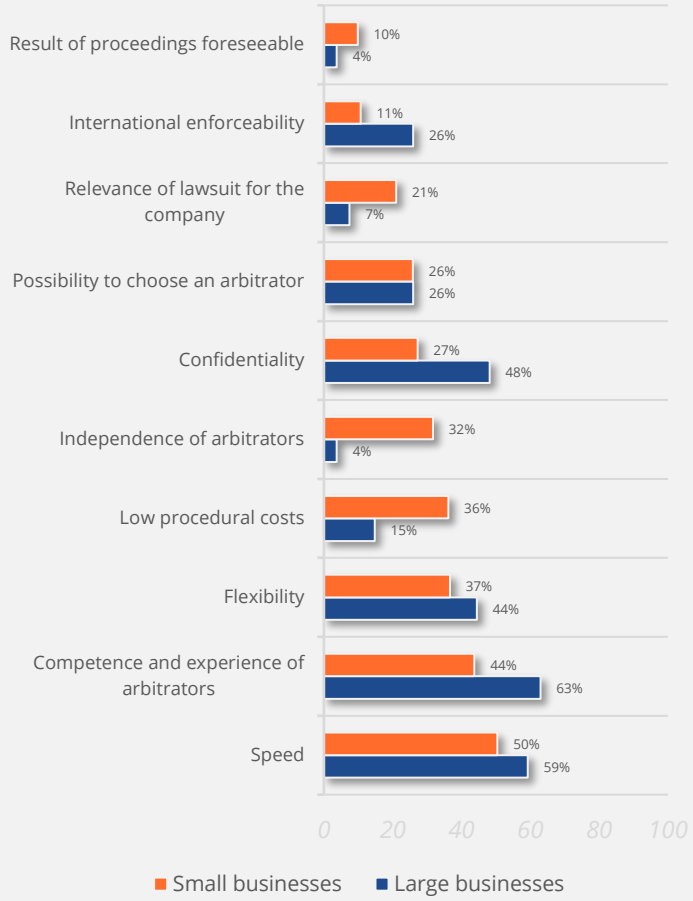
The *relevance of a given contract for the company* (amount in dispute or importance of the contract for other reasons) seems to be the decisive factor for only every fifth respondent when determining whether they should take the dispute to national arbitration and not to the state courts (approx. 20%). However, those parties who stated that the amount in dispute was a decisive factor in choosing arbitration indicated that it was particularly important.

The argument of *international enforceability* of the arbitral award only accounts for around 12%, which - unsurprisingly - can be explained with the context of the question (namely, *national* business relationship).

It is also not surprising that just under 10% of the respondents consider the *results of the procedure to be foreseeable*. The predictability of the outcome of the proceedings does not constitute a pull factor for national arbitration (by the way, the same holds true for international arbitration, in which this factor is also in last place with only 6%). Even more so than in court and on the high seas – as the saying goes - one obviously sees oneself in God's hands in front of an arbitral tribunal.

In addition, the inclusion of an arbitration clause is sometimes viewed as less of a burden on the relationship between the business partners.

Factors in favour of domestic arbitration proceedings, dependent upon company size



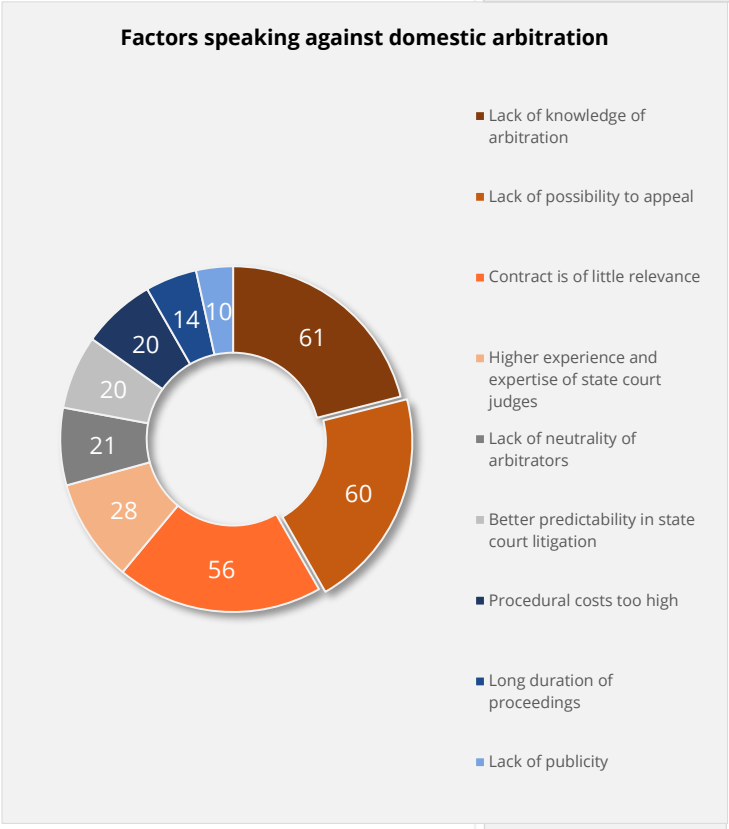
If one only looks at how larger companies view the pull factors of national arbitration, it is noticeable that the - already generally important - competence of the selected arbitrators constitutes an even more important factor for this group, at 63%. The fact that the arbitration procedure quickly leads to a solution is an important factor for 59%. Of above-average importance for the group of larger companies, however, is the confidentiality of proceedings with 48% (instead of just under 30% of all respondents); the flexibility factor is also more popular with 44%. In contrast to the total number of respondents, the pull factor of international enforceability is rated significantly higher by this group, at 26% (comparison: 12% of the total number). It is also noticeable that the larger companies are apparently more critical of the procedural costs of the arbitration: A proportion of only 15% of this group (compared to a third of all respondents) think the procedural costs are low. Among the larger companies, the factor

of whether the contract at hand is an important contract is significantly lower, at 7%, than in the group as a whole.

Looking at the companies that state to have previous arbitration experience, it becomes apparent that the competence of the arbitrators (selection of experienced arbitrators) is particularly important too (or even the most important factor for this group), with 53%. The answers of this group compared to the total respondents in terms of procedure duration and flexibility differ only slightly. On the other hand, confidentiality is again of greater importance (for 47% and thus on par with the duration of the procedure in second place).

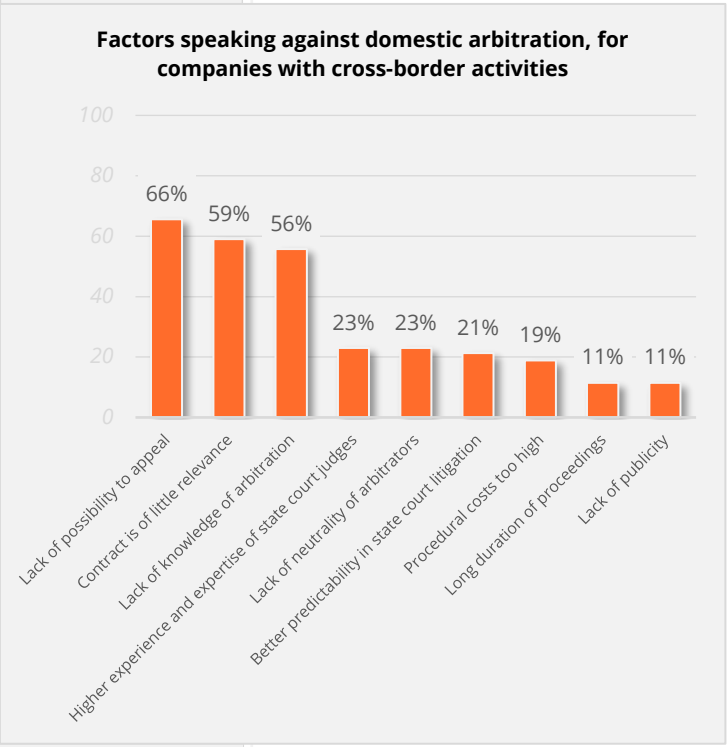
8.2.2 Contra National (Domestic) Arbitration

Evaluating the factors which speak against the conclusion of a "national arbitration agreement", a substantial amount of skepticism towards the "unknown" is revealed: Among the factors which, from the respondents' point of view, speak most against the conclusion of an arbitration agreement with an Austrian business partner, the following push factors stand out:



Lack of knowledge of arbitration („*I don't have enough knowledge about the arbitration process.*"): A large majority of respondents, over 61%, refer to their lack of knowledge, which for them speaks against national arbitration.

Lack of possibility to appeal ("*The options to appeal against an arbitrator's award are substantially limited.*"): A large majority of those questioned about national arbitration proceedings, at almost 60%, agree with this statement.

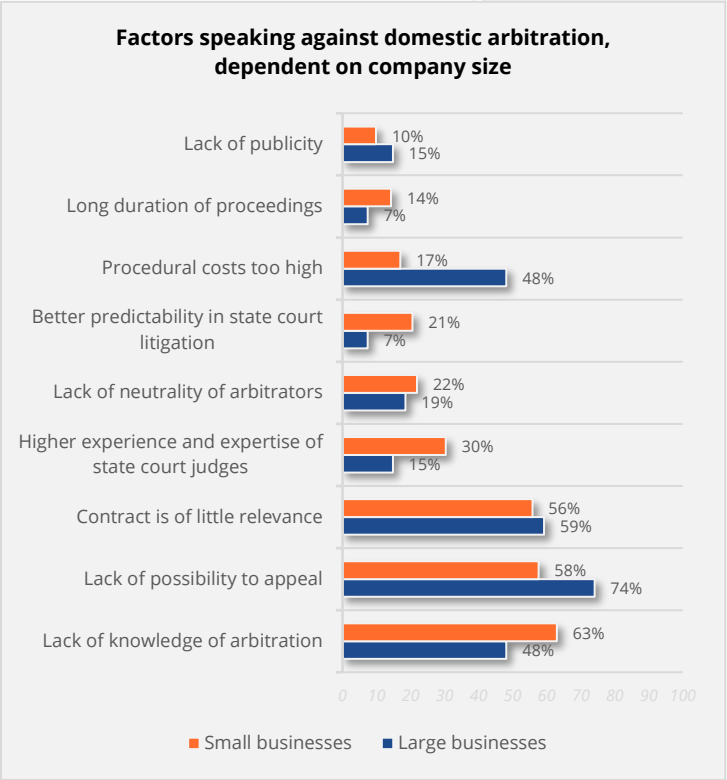


Contract is of little relevance ("*The contract is not about much*"): For more than 56% of the respondents this factor still speaks against an arbitration clause in a national contract.

About 28% also believe that state court judges have more *experience and expertise* and about 21% are of the opinion that arbitrators are not *neutral*. The fact that arbitration proceedings are *expensive* and the outcome of the proceedings in state proceedings is more *predictable*, each result in around 20% being against arbitration proceedings in a national context. Around 14% say that the arbitration process will *take a long time.* A slim, yet still significant, 10% miss the *public nature of proceedings* when it comes to national arbitration proceedings.

These factors are weighted slightly differently among respondents with cross-border activities: 66% see the limited appeal options as the greatest disadvantage, 59% consider national arbitration proceedings to be unsuitable for insignificant contracts. For 56% of this group, unfamiliarity with the arbitration procedure is still the main reason to not conclude a national arbitration

agreement.



Among the larger companies, the lack of an appeal mechanism - here with an even higher 74% - clearly comes first amongst the push factors, followed by the "insignificant contract" factor, which for 59% of this group speaks against national arbitration. Less people in this group see the fact that they are not sufficiently familiar with the arbitration procedure as a push factor, namely 48%. The same percentage considers domestic arbitration to be too expensive (48%; as compared to only 21% of arbitration-experienced respondents considering *international* arbitration too expensive). In this group, only 15% believe that state court judges have more experience and expertise (in comparison to 28% of all respondents); among the larger companies a lack of neutrality on the part of the arbitrators is perceived as a push factor by slightly fewer respondents (19%). Only few large company respondents think that the arbitration procedure takes a long time - (7% compared to 14%).

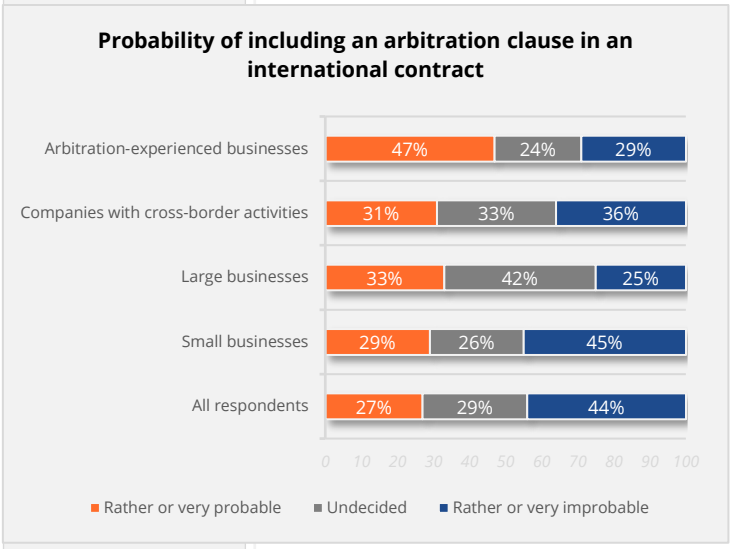
For 82% of the legal department employees, the "insignificant contract" is the most important push factor against an arbitration agreement in a purely domestic business contract. The lack of appeal options follows with 64% and - what is particularly noticeable - the high costs of (domestic) arbitration with 55%. Less than half of legal inhouse counsel (45%) say they do not have sufficient knowledge of arbitration.

Even among the arbitration-experienced respondents, the "insignificant contract" is the most important push factor with 65%, followed by the lack of knowledge with 59% (this is surprising, given that these respondents all stated to have been involved in arbitration proceedings within the past 10 years), and 53% were particularly pushed back by the limited possibilities of appeal against arbitral awards.

As expected, the statement "*I am not sufficiently familiar with the arbitration procedure*" applies to a smaller proportion of the respondents who would "very likely" include an arbitration agreement in a contract with an Austrian contractual partner (40% instead of 61%). The group of respondents who would (more) likely conclude an arbitration agreement in a "national contract" also rates the factor "lack of appeal" as a more decisive push factor than the group who would not include such an arbitration agreement in contracts with Austrian business partners (70% of the group are "rather likely" and 67% of the group "very likely" compared to 47% of the group "very unlikely" and 54% of the group "rather unlikely").

8.3. International Arbitration

Among lawyers, an arbitration clause is essentially regarded as the gold standard in cross-border business – i.e. in international contracts. Conversely, in the domestic business arena, in states with a well-functioning court system arbitration must still earn its spurs. However, the respondents only partially confirm this picture:



From the total group of respondents, "only" 27% are likely to include an arbitration clause in an international contract. At 44%, a surprising number of respondents consider this to be unlikely and just under 29% are undecided. It is currently noticeable that the distribution of the answers deviates only slightly from that of the national contract: almost a quarter of the respondents would probably conclude an arbitration agreement in *national* contracts, almost 46% of the respondents think this is unlikely, just less than a third (31%) is undecided (see above). A slightly higher proportion of respondents compared to the national procedure - but still surprisingly few - consider it very likely to conclude an arbitration agreement in an international context (9% (international) to 5% (national)).

Focusing on the group of respondents active across borders, it becomes clear that - as is to be expected - they are more positive about international arbitration: A share of 31% (instead of 26%) consider the inclusion of an arbitration clause in an international contract (very or very) likely; only 36% (instead of 43%) consider this to be (very or rather) unlikely.

This suggests a further explanation for the surprisingly small difference between the two groups in the survey experiment: Individuals from companies that do not operate cross-border but were asked about their opinion on a potential international contract may not have been sufficiently aware of the differences between national and international matters. The company's international orientation seems to have a general impact on voting behavior. Both national and international arbitration proceedings are generally rated more positively among the international companies than among the total group of participants; in addition, international arbitration is rated significantly more positively than national arbitration.

Within the group of larger companies, approval of international arbitration proceedings is even higher at 33% (they would very or more likely include an arbitration clause in a contract with an international business partner). The number of those who consider the inclusion to be unlikely falls again significantly to 25%; that of those who are undecided (so-so) or, respectively, would want to provide a differentiated answer is 42%.

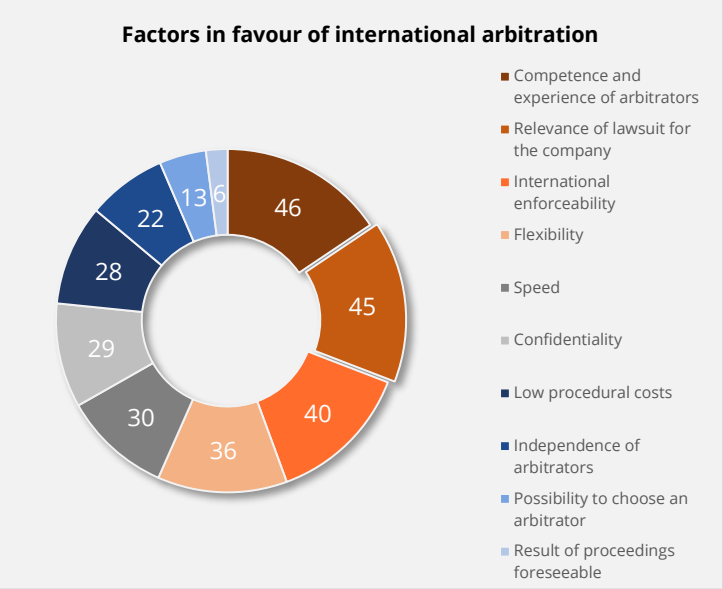
It is not surprising that among the legal department employees, as many as 63% are in favor of concluding an arbitration agreement in international contracts. Not a single respondent in this group indicated that the inclusion of an arbitration clause would be unlikely.

47% of respondents from companies experienced in arbitration consider it likely to include an arbitration clause in an international contract; the group of those who consider this to be unlikely is 29%: unsurprisingly, the greater the arbitration experience, the greater the approval rate of international arbitration.

Finally, in this context, the group of those who attended one of the aforementioned kick-off events stands out: Among these, 60% of the respondents would include an arbitration clause in their international contract; only 13% of the event attendees are opposed to including an international arbitration clause.

8.3.1 Pro International Arbitration

Upon analysing the factors that respondents reported as most favorable for entering into an arbitration agreement when concluding a contract with an *international* business partner, the following pull factors for international arbitration emerge:

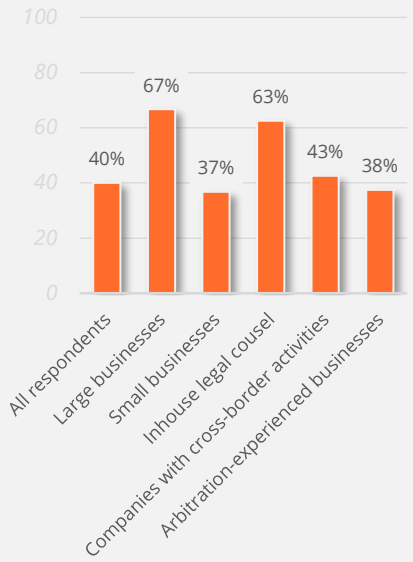


Competence: Almost 46% consider it crucial that "*the arbitrators, the parties can choose, [...] have particular experience and expertise*". Hence, the quality of the arbitrators and the influence on their selection are of particular importance.

High value in dispute / particular relevance of the contract: For a good 45% of the respondents, there is a particular argument in favor of an arbitration clause in the international context if *"[the] contract [is] about a lot of money or the contract [is] otherwise particularly important for the company*".

International enforceability: The "usual suspect" – the practically worldwide enforceability of the arbitral award - ranks third in the overall group of respondents with almost 40%. Among the group of cross-border operating companies, this factor is slightly higher at 43%. When it comes to larger companies, it climbs up to 67%, to the undisputed number 1 of the factors that speak for the conclusion of an arbitration agreement in an international contract.

Relevance of international enforceability for different groups

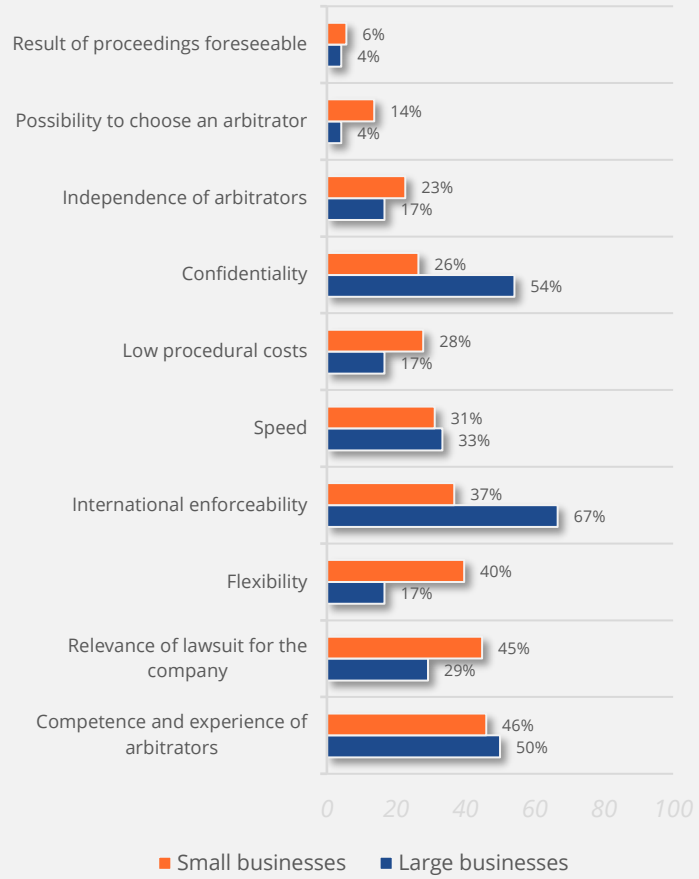


It may be questionable, however, whether in the overall group of companies surveyed, the factor "international enforceability" is effectively attributed the importance that scholars and practitioners generally ascribe to it. It is also noticeable in this context that only 25% of those surveyed who stated the international enforceability of the arbitral award as a factor for the conclusion of an international arbitration agreement also named it as the most important factor (second most important factor: 43%; third most important factor: 31%). Among companies that operate across borders, only 19% view international enforceability as the most important factor.

When ranking the pull factors of international arbitration procedures, *flexibility* of the procedure (36 %), the *speed* of the procedure (30 %), as well as its *confidentiality* (close to 29 %) are next. 28% of the respondents also believe that *low procedural costs* speak in favor of international arbitration.

If one only looks at the group of larger companies, it becomes apparent that, as explained above, the international enforceability of the arbitral award is clearly seen as the most important factor (67%), followed by the confidentiality of the proceedings with 54% (an apparently underestimated factor in the general group of respondents with only 29%), as well as the experience and expertise of the arbitrators to be selected by the parties (50%).

Factors in favour of international arbitration, dependent upon company size



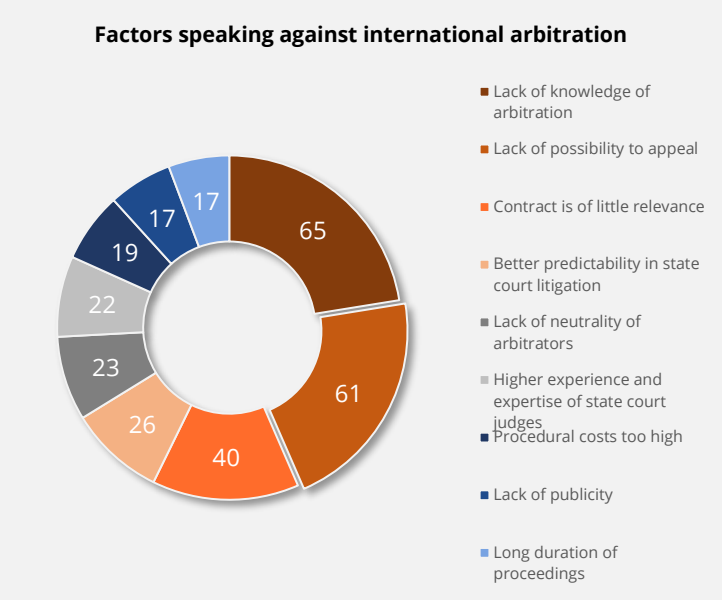
Among the legal department employees, the experience and expertise of the arbitrators is ranked particularly high at 75% (or, combined with the possibility of arbitrator selection, it even climbs up to 88%); followed by international enforceability (63%) and procedural confidentiality (63%).

For respondents from companies with arbitration experience, the specific

experience and expertise of the (party-appointed) arbitrators is of paramount importance (81%). The flexibility of the procedure is in second place for this group (lagging behind with 44%), but it is more important than for the entire group of respondents. The international enforceability ranks third (38%), ex aequo with the confidentiality and the duration of the procedure.

8.3.2 Contra International Arbitration

Based on the group's responses, the following push factors speak most against the conclusion of an arbitration agreement in the international arena:



Lack of knowledge: More than 65% of the respondents state: "*I am not sufficiently familiar with arbitration proceedings*".

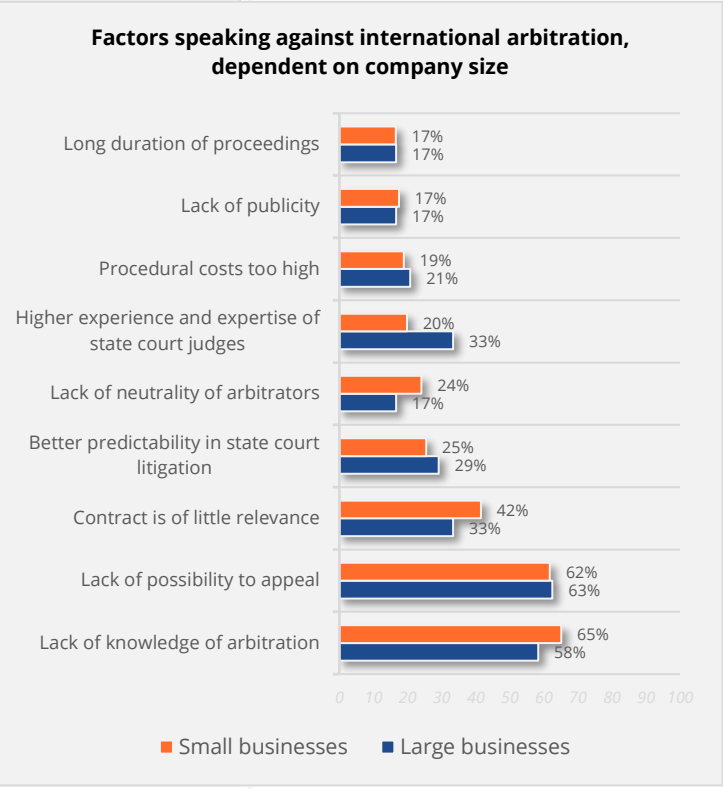
Lack of appeal: The substantially limited appeal options are perceived by 61% of the respondents as a factor that speaks against international arbitration.

Significance of the contract / low contract volume: If "*the contract is not about a lot*", this speaks against the conclusion of an (international) arbitration clause for 40% of respondents.

The majority of the "international arbitration agreement" group, too, stated that they did not have sufficient knowledge of the arbitration procedure (65%), which naturally speaks against the conclusion of an arbitration agreement. The factor "lack of opportunity to appeal" is almost equally important (61%). Here, too, the result essentially mirrors that of the "national arbitration agreement" group. The costs of the arbitration proceedings speak against the conclusion of an arbitration agreement for 19% of the total respondents, which also roughly corresponds to the answers of the group "national arbitration procedure". In addition, almost 26% find that the outcome of the state procedure is more predictable. In addition, almost 23% see the arbitrators as not neutral and almost 22% believe that state court judges have more experience and expertise.

In addition, it was noted as a negative factor that arbitrators would tend to strike a compromise between conflicting positions instead of resolving the dispute in accordance with the applicable law ("*Arbitrators always split the baby*.").

Looking at the group of cross-border companies, the limited appeal factor is at the top of the list of arguments against the conclusion of an arbitration agreement with an international business partner (66%). The second most important factor against an arbitration agreement is the lack of knowledge of the procedure with 65% and third (but substantially more significant than for the total number) is the insignificance of the contract (47%). In comparison to the assessment of the national arbitration procedure by the group of cross-border businesses, it is noticeable that lack of knowledge of the arbitration procedure in the international arena clearly precedes the argument of the "insignificant contract".



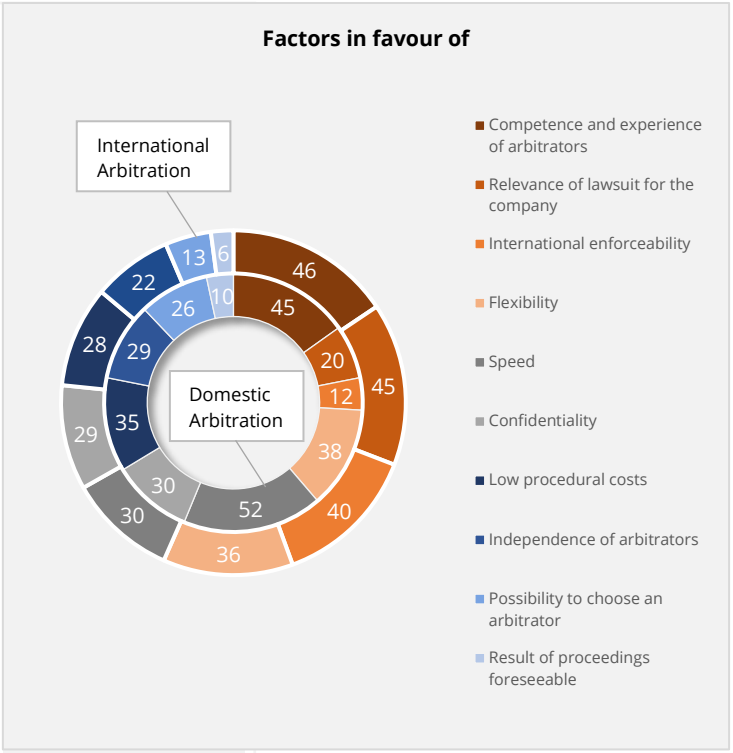
The restricted appeal option is clearly in first place as a push factor with 63% for the larger companies as well; this is followed by the lack of knowledge of the arbitration procedure with a significantly reduced rate of 58%, and finally a share of 33% for the fact that the contract is not significant enough, making businesses decide against the conclusion of an arbitration agreement. It is noticeable that 33% of the larger companies (compared to around 22% of the total group) state that the state court judges have more experience and expertise (which speaks for them against an arbitration agreement). A slightly above-average number of 29% find the outcome of the proceedings in state court litigation more predictable.

The legal department employees also see the limited opportunity to appeal as the greatest push factor (88%), followed by the lack of knowledge of the arbitration procedure (63%) itself. Next is the "insignificant contract" factor (38%) and the procedural costs of the arbitration (38%).

Respondents from companies experienced in arbitration cite - interestingly - the lack of knowledge of the arbitration procedure as the most important push factor at 69%, followed by the limited appeal options at 63% and finally the low significance of the contract at 44%. The fact that arbitration is expensive is a push factor for some 31% and the long duration of proceedings for one in four (25%).

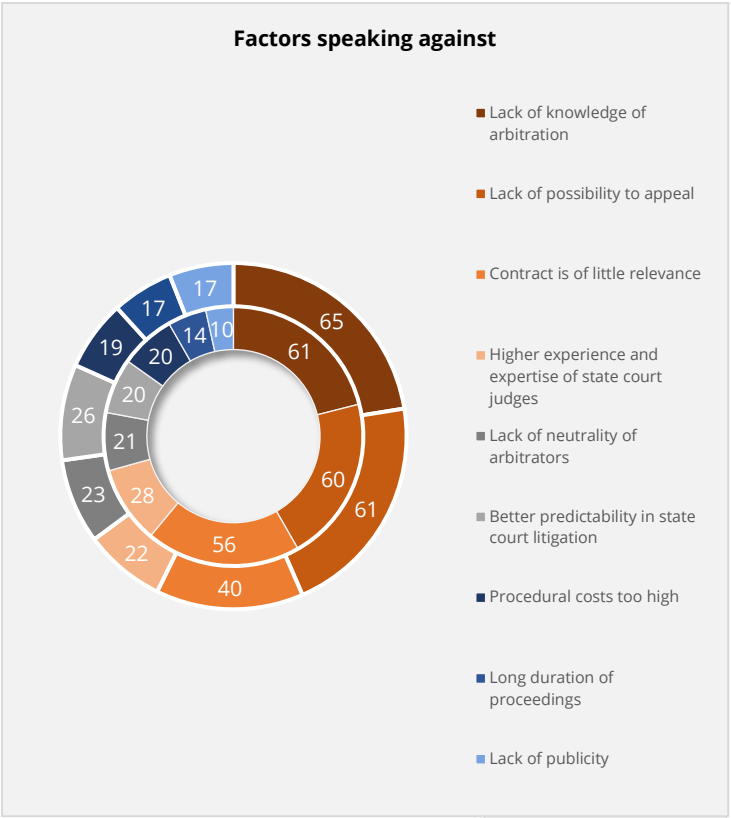
9. Comparing the Asessment of International and National Arbitration

The pull factors mentioned by the group of respondents answering questions about *national* arbitration differ from those mentioned by the group on *international* arbitration – at least in some areas - and, interestingly, are in contrast to the *push* factors. Apparently, the inadequacies or disadvantages of arbitration proceedings are perceived similarly by the respondents for both national and international arbitration. The factors that speak in favor of *national* arbitration, conversely, appear to be perceived differently from those that speak in favor of *international* arbitration.



It is striking, for example, that the most important argument in favour of concluding an arbitration agreement in a *national* context is the speed of proceedings. In an international context, this factor only ranks fifth (with around 30%, a relatively large proportion of respondents still consider this criterion to be important). The possibility to appoint competent and experienced arbitrators is a key argument in favor of arbitration for both groups. This clearly underlines that deviating from the party appointment of arbitrators, as discussed at times, is likely not in the interests of the potential users of arbitration.

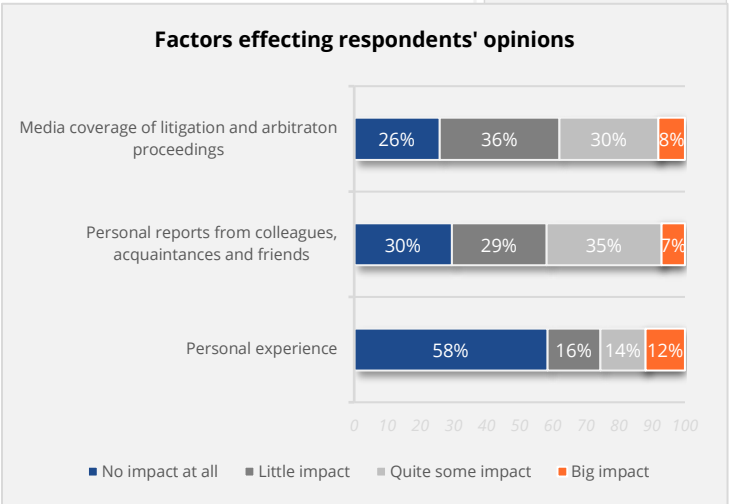
In both groups, the *substantially limited appeal mechanism* ranks among the most important push factors. This may come as a surprise, given that the lack of appeal options and the resulting decision in one single instance are typically praised as the central characteristics - and advantages - of arbitration. In contrast, as far as can be seen, multi-instance arbitration proceedings are de facto non-existent in the realm of commercial arbitration. Against the background of these results, this could be re-evaluated, especially for national arbitration proceedings as a potential alternative to civil litigation.



In any event, these high percentages must be put into perspective in the light of the specific formulation (*arg.* "substantially restricted" appeal options).

10. Opinion-forming Factors

Apparently, the respondents' evaluation of the various dispute resolution mechanisms is less influenced by personal experience than by reports from friends, colleagues and media coverage:



As mentioned in the beginning, only a small proportion of the respondents have personal experience with arbitration proceedings; personal experience with state court proceedings is also rather limited (see p. 12). Accordingly, the majority of the respondents (around 74%) state that personal experiences gained in the course of participation in actual proceedings had little or no influence on their opinion expressed in this survey. In the case of larger companies, this proportion is only 52%. As expected, a majority (64%) of respondents who experienced arbitration state that their personal experience has an influence on their opinion.

In contrast, "hearsay", i.e. "personal reports from colleagues, acquaintances and friends", apparently had a little more influence on the opinions of the respondents. For almost 42% of the respondents, those factors had a major or at least a considerable influence. Media coverage of arbitration and state court proceedings had a fair or major impact for 38% of the respondents. In the group of larger companies, this had a large or fairly significant influence for as many as 48%.

11. Conclusion

In summary, *inter alia* the following key statements and findings emerge from the evaluation of the survey:

Apart from larger, internationally oriented companies, especially those with inhouse legal departments, Austrian businesses **have little experience with international arbitration** and even less experience with national arbitration proceedings. Their opinion and assessment of arbitration is therefore more shaped by **word of mouth and media coverage** than by personal experience.

Arbitration is generally perceived as **efficient, independent, and confidential**; very high approval rates also apply to its **suitability for resolving complex factual or legal questions**. While at least two thirds of the respondents state that the duration of the procedure is reasonable, not even one third consider the costs to be reasonable. **Larger companies and those that tend to have more arbitration experience rate** the arbitration proceedings more **positively** than small companies that tend to have less or no experience with arbitration, and in some respects in a **more differentiated** manner. In particular, the confidentiality of the arbitral process, its suitability for resolving international disputes, the appropriate duration of the proceedings and the competence of the (party-appointed) arbitrators are rated above average by the group of companies with

arbitration experience. The efficiency of the process and the arbitrators' independence – with approval ratings of above 80% each among the total group of respondents - are viewed by the arbitration-experienced respondents in a somewhat more reserved and nuanced manner.

Almost a quarter of all respondents consider it likely to include an arbitration agreement in a contract with an Austrian contractual partner, which - cautiously optimistically - could be interpreted as an open-mindedness towards this dispute resolution method. In contrast, the filtered group of larger and more experienced companies are somewhat more **reluctant to consider arbitration for resolving national disputes**. The skepticism towards national arbitration also applies to the opinions of respondents working in **legal inhouse departments.** With increasing arbitration experience, approval of national arbitration proceedings does not increase correspondingly; this is different for international arbitration, where the following applies: the more "sophisticated" the player, the more likely the inclusion of an arbitration clause.

Potential **disadvantages** of arbitration proceedings (i.e. the **push factors**) are perceived similarly by respondents for both national arbitration and international arbitration. First and foremost among the push factors, is a **lack of knowledge** of the arbitration procedure, which is associated with a general skepticism towards this procedure, and - interestingly - **the lack of appeal options**. In addition, larger and more experienced businesses take particular issue with the associated costs of national proceedings; this group would also tend not to include an arbitration clause in "less important" national contracts.

In contrast, the perceived **advantages** of national arbitration (i.e. the **pull factors**) seem to differ more clearly from the perceived advantages of *international* arbitration: It is particularly noticeable that the first reason for concluding an arbitration agreement **in a national context** is the perceived **speed of proceedings**, which – conversely – only ranks fifth in the international context. In both national and international proceedings, the competence of the deciding arbitrator, jointly with the possibility of **choosing the arbitrators** stand out as pull factors, especially for larger companies and for those with experience in arbitration. The latter also perceive **confidentiality** as an important pull factor of arbitration - above average. However, unsurprisingly, the primary argument for these companies in international arbitration – as opposed to the total group of respondents - is **international enforceability**.

In contrast to the limited general arbitration experience, more than three quarters of the respondents have already had experience with Austrian **civil proceedings.**

The desire to generally **avoid** civil court or arbitration proceedings in the event of a dispute is **particularly pronounced in smaller companies.**

In addition to **fundamental trust** in the **judiciary** and its bodies, especially with regard to their independence and the professional competence of civil judges, the respondents also see a **need for improvement** in civil court practice, in particular with regard to the duration and costs of proceedings before state courts. (Only) Around every second respondent considers civil proceedings to be an efficient way of resolving disputes. **Smaller companies** generally rate the efficiency of civil proceedings more **positively** than the larger companies surveyed. In general, it is noticeable that a more critical assessment of litigation proceedings tends to correlate with increasing litigation experience.

Last, there is a noticeable interest in mediation, especially for commercial disputes. **Mediation** is largely perceived as an inexpensive and efficient alternative to other forms of dispute resolution.

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We are looking forward to your feedback and questions!

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