Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?

Law Working Paper N° 525/2020
June 2020

Patricia Gil Lemstra
Tilburg University

Joseph A. McCahery
Tilburg University and ECGI

ECGI Working Paper Series in Law

Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?

Working Paper N° 525/2020

June 2020

Patricia Gil Lemstra
Joseph A. McCahery

We thank Carlos Eduardo Stefen Elias, Marcelo Godke Veiga, Randall Thomas, Selma Maria Ferreira Lemes, Walfrido Jorge Warde Junior and seminar participants at the 4th Pan-American Arbitration Congress in Sao Paulo and the International Class Action Conference at Vanderbilt University Law School. Evvi Angelis provided excellent research assistance.

Abstract

We survey law firms, firms and institutional investors to better understand their preferred method of intracorporate dispute resolution in Brazil. Consistent with a number of theories, we find that these organizations prefer arbitration to judicial claims as the method of intra-corporate dispute resolution. Our findings suggest that their choice of arbitration is based on the parties' preferred ranking of objectives: quality of the decision; time to resolution; and costs. We find that parties choose to resolve disputes involving up to US$ 2.5 million through mediation or conciliation. We also find that arbitration and mediation or conciliation are almost equally preferred methods for intra-corporate dispute resolution involving values above US$ 2.5 million.

Keywords: Arbitration, Shareholder Litigation, Mandatory Arbitration Provisions, Mediation

JEL Classifications: K22, K41, K42

Patricia Gil Lemstra
Researcher
Tilburg University Law School
Prof. Cobbenhagenlaan 221
5037 DE Tilburg, Netherlands
phone: +31 13 466 3883
e-mail: P.Gil@tilburguniversity.edu

Joseph A. McCahery*
Professor of Law
Tilburg University, Tilburg Law School
Prof. Cobbenhagenlaan 221
5037 DE Tilburg, Netherlands
phone: +31 13 466 2306
e-mail: J.A.McCahery@Tilburguniversity.edu

*Corresponding Author

Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?

Patricia Gil Lemstra[1]
Tilburg University Law School

Joseph A. McCahery
Tilburg University Law School, TILEC and ECGI

Cambridge International Handbook of Class Actions (Brian Fitzpatrick & Randall Thomas, eds.) (Cambridge University Press, 2020, forthcoming).

February 3, 2020

Abstract

We survey law firms, firms and institutional investors to better understand their preferred method of intra-corporate dispute resolution in Brazil. Consistent with a number of theories, we find that these organizations prefer arbitration to judicial claims as the method of intra-corporate dispute resolution. Our findings suggest that their choice of arbitration is based on the parties' preferred ranking of objectives: quality of the decision; time to resolution; and costs. We find that parties choose to resolve disputes involving up to US$ 2.5 million through mediation or conciliation. We also find that arbitration and mediation or conciliation are almost equally preferred methods for intra-corporate dispute resolution involving values above US$ 2.5 million.

Keywords: Arbitration, Shareholder Litigation, Mandatory Arbitration Provisions, Mediation

JEL Code: K22, K41, K42

---

[1] We thank Carlos Eduardo Stefen Elias, Marcelo Godke Veiga, Randall Thomas, Selma Maria Ferreira Lemes, Walfrido Jorge Warde Junior and seminar participants at the 4th Pan-American Arbitration Congress in Sao Paulo and the International Class Action Conference at Vanderbilt University Law School. Evvi Angelis provided excellent research assistance.

Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?

Patricia Gil Lemstra
Tilburg University Law School

Joseph A. McCahery
Tilburg University Law School, TILEC and ECGI

February 3, 2020

Introduction

Over the last two decades, policymakers and researchers have shown an interest in resolving shareholder disputes through mandatory arbitration and a ban on class actions.[2] Litigation is increasingly seen as problematic due to the increase in nuisance lawsuits and the increase in settlement value, the costs of which are ultimately born by shareholders.[3] Earlier literature has examined the benefits of mandatory arbitration across several contexts, including Delaware corporate law.[4] While researchers have identified several important benefits of mandatory intra-corporate arbitration, such as reduced cost and delays, relatively little is known about the attitudes and interests of the parties—such as corporations, limited liability companies, small and medium-sized enterprises, their law firms, and institutional investors—regarding intra-corporate conflicts and dispute resolution via mandatory arbitration.

[2] Brian T Fitzpatrick, 'The End of Class Actions?' [2015] Arizona Law Review, Vol. 57, No. 1, 2015; Vanderbilt Public Law Research Paper No. 15-2; Vanderbilt Law and Economics Research Paper No. 15-5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576304>.
[3] John C. Coffee Jr., 'Reforming the Securities Class Action; An Essay on Deterrence and Its Implementation' (2006) *Columbia Law Review* 1534.
[4] Paul Weitzel, 'The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement through Arbitration Provisions in Charters and Bylaws' (2013) *Brigham Young University Law Review* 65; Joseph Lee, 'Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective' (2017) 83 *Arbitration* 85.

To be sure, policymakers around the world have reacted differently to mandatory arbitration of shareholder claims. In Italy, for example, the enforcement of arbitration agreements of listed companies or companies with diffused shares is prohibited.[5] Similarly, the United States Securities and Exchange Commission (SEC) has again recently opposed the inclusion of an arbitration provision in the corporate documents of listed companies.[6] However, it is worth noting that some courts show clear signs of favoring mandatory intra-corporate arbitration.[7] Moreover, some former and current SEC commissioners have expressed favorable views of mandatory arbitration.[8] In certain countries, such as China, arbitration is allowed, and it is encouraged in Chile and Argentina as a way to attract foreign investment.[9] Notably, Brazil has, perhaps, the most open attitude towards arbitration for intra-corporate disputes, mandating it as a prerequisite for registering in specific listing segments.[10]

---

[5] *Sentenza Cassazione Civile n 20674 del 13/10/2016* 1.

[6] Johnson & Johnson, SEC No-Action Letter 2019 < https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf > (February 11, 2019) accessed December 29, 2019. *See* SEC Chairman Jay Clayton, 'Public Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions' < https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions > accessed December 29, 2019.

[7] The US Supreme Court's and Delaware Court of Chancery's decisions have repeatedly favored arbitration in commercial contracts. *See*, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

[8] Former SEC Commissioner Michael Piwowar signaled a possible change in the SEC's attitude towards arbitration for intra-corporate dispute resolution. Samuel M. Ward and Michael A. Toomey, 'The Problems With Mandatory Arbitration of Securities Claims' (*Law360*, 2017) 6 <http://www.barrack.com/sites/default/files/The%20Problems%20with%20Mandatory%20Arbitration%20of%20Securities%20Claims%20Law360%20Ward.Toomey.pdf> accessed July 5, 2019. Current SEC Commissioner Hester Peirce has also shown support to the corporate mandatory arbitration clause. Alison Frankel, 'SEC commissioner Peirce signals shareholder arbitration is not dead yet' (*REUTERS*, 2019) <https://www.reuters.com/article/us-otc-arbitration/sec-commissioner-peirce-signals-shareholder-arbitration-is-not-dead-yet-idUSKBN1QP2DY> accessed November 11, 2019.

[9] International Finance Corporation, 'Investing Across Borders 2010: Indicators of foreign direct investment in 87 countries.' <http://documents.worldbank.org/curated/en/826251468341077303/pdf/643710WP0Inves00Box0361535B0PUBLIC0.pdf> accessed December 29, 2019.

[10] *See* John Armour and Caroline Schmidt, 'Building Enforcement Capacity for Brazilian Corporate and Securities Law' [2017] European Corporate Governance Institute (ECGI) - Law Working Paper No. 344/2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901698> for a comprehensive view on the rise of arbitration in Brazil.

Two opposing views can be distinguished with respect to arbitration for intra-corporate disputes. The first view holds that shareholders' right to redress through class actions is not a procedural, but a substantive, right. Hence, the choice of arbitration, whenever it includes a class action waiver, would result in shareholders losing their right to a judicial remedy.[11] The second view leads us to expect that mandatory arbitration bylaws and other corporate documents are procedural, as they merely determine the forum for dispute resolution and have no effect on substantive rights.[12] However, there is controversy regarding the nature of the bylaws and corporate charters. On the one hand, proponents who defend the applicability of contractual theory view bylaws and corporate charters as binding contracts between the company and its shareholders,[13] arguing for the validity of the mandatory arbitration provision in the referred corporate documents.[14] On the other hand, critics argue that the fiduciary doctrine should apply as a response to the natural disadvantage of minority shareholders, in terms of both their expertise and their ability to access evidence, endure costs and bargain effectively.[15]

In addition, ample literature examines the preference among companies for arbitration over litigation.[16] However, there is a division in the literature regarding the specific factors influencing the selection of mandatory arbitration.[17] For example, most surveys indicate that costs are considered a meaningful concern when parties have a preference for arbitration.[18] Still, few of the extant studies have focused specifically on

[11] Salvatore Graziano and Robert Trisotto, 'Keeping Investors out of Court - The Looming Threat of Mandatory Arbitration' (*Harvard Law Shcool Forum on Corporate Governance and Financial Regulation*, 2019) 3 <http://blogs.law.harvard.edu/corpgov/%5Cnfiles/1481/corpgov.html> accessed November 25, 2019.
[12] *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).
[13] *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 239 (Del. 2008).
[14] *Del Cnty Emps Ret Fund v Portnoy, Civil Action No 13-10405-DJC, D Mass [2014]* 16.
[15] Ann M. Lipton, 'Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws' (2016) 104 *Georgetown Law Journal* 59.
[16] Rick Porter, 'The Not So Great Debate: Arbitration v. Litigation' (Chubb) https://www.chubb.com/bm-en/_assets/documents/bermuda_arbitration_vs_litigation_4.9.pdf> accessed June 23, 2019.
[17] PwC/Queen Mary '2013 International Arbitration Survey' shows *expertise of the decision maker* as the top benefit of arbitration, whereas *enforceability of awards* is the most valuable characteristic of international arbitration according to White & Case/Queen Mary '2018 International Arbitration Survey: The Evolution of International Arbitration'.
[18] The results of both the PwC/Queen Mary 2013 survey and the White & Case/Queen Mary 2018 survey show that arbitration is the preferred choice of most businesses for international dispute resolution. Some of the disadvantages

arbitration as a method of intra-corporate dispute resolution. While it is common knowledge that firms in Brazil—in reaction to an overloaded and slow Judiciary—increasingly rely on arbitration to solve intra-corporate disputes,[19] researchers still tend to concentrate mainly on settlement values and the number of arbitration cases.[20] In the absence of data on the mechanisms at the institutional level, we use a survey to understand the variety of practices that law firms, corporations, limited liability companies and small and medium-sized enterprises use to manage and resolve their conflicts. We examine parties' preferred method of intra-corporate dispute resolution, the important factors that play a role in parties' choice for a dispute resolution method and whether there is variance in these preferences depending on the value involved in the dispute, as well as the reasons and impediments for choosing arbitration. In addition, we test existing assumptions about parties' view of the binding force of mandatory arbitration for intra-corporate dispute resolution in Brazil, the importance of law firms' advice in the choice of a dispute resolution method and the most significant expenses with intra-corporate arbitration. To complement the first survey, we obtained data from a second survey of institutional investors.

In this chapter, we focus on the rise of arbitration as a solution for intra-corporate disputes in Brazil and consider the extent to which arbitration is likely to fill the dispute gap. In Section 2, we briefly examine the main components of the legal and judicial system and highlight the recent introduction of mandatory intra-corporate arbitration. In Section 3, we introduce our survey data and investigate the attitudes of parties regarding the structure and practice of intra-corporate dispute resolution in Brazil. Section 4 concludes.

2. Intra-Corporate Dispute Resolution in Brazil

---

are delays and cost. *See* Christian Fischer and Miriam Frey, 'Solving International Commercial Disputes: A Critical Summary and First Insights from Firm-Level Data'< https://www.etsg.org/ETSG2018/papers/310.pdf>accessed December 29, 2019.

[19] *See* Gilberto Giusti and Ricardo Tadeu Dalmaso Marques, 'Brazil' in *The Dispute Resolution Review* (Jonathan Cotton ed. 7th ed. 2015).

[20] *See* Selma Lemes, '*Arbitragem em Números e Valores.*' *Seis Câmaras. 8 Anos* <http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf >accessed June 23, 2019.

In this section, we provide a brief review of recent trends in corporate litigation in Brazil. We examine the factors that influence parties in their selection of mandatory arbitration mechanisms for resolving shareholder disputes. We then present the civil procedure process at the state and federal level and the filing of both derivative and class-action lawsuits. Finally, we describe the structure and characteristics of intra-corporate dispute arbitration. This analysis will serve as a foundation for our hypotheses.

2.1 History and Background

In recent years, the importance of reform of the Brazilian judicial system has grown widely.[21] In this context, there are a number of factors influencing the need to resolve intra-corporate disputes more efficiently. For example, a lengthy delay in issuing a final binding decision for corporate disputes results in significant losses to both the company and the shareholders.[22] Indeed, research on the speed of dispute resolution by the Brazilian judiciary shows that it takes, on average, three years and nine months for a court of first instance to issue a decision.[23] The relative lack of speed can often create difficulties for shareholders who require the court to issue a faster final decision regarding the challenge of a board decision or a shareholder resolution. Unsurprisingly, shareholder activism appears to be largely ineffective due to legal

[21] *See* Armour and Schmidt (n 10).
[22] *See* Luciana Gross Cunha 2017. Relatório ICJBrasil,1 semestre 2017< http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/19034/Relatorio-ICJBrasil_1_sem_2017.pdf?sequence=1&isAllowed=y> accessed July 12, 2019.
[23] Justiça em Números 2018: ano-base 2017/Conselho Nacional de Justiça - Brasília: CNJ, 2018< file:///C:/Users/u286384/Desktop/backup/Arbitragem/Articles%20as%20inspiration/Justica%20em%20numeros/cnj%202018.pdf> accessed July 12, 2019.

and other constraints that play a significant role in minimizing institutional investor actions,[24] with very few exceptions, against Brazilian companies.[25]

In order to overcome these problems, policymakers have implemented a set of reforms to address the existing weaknesses of the judiciary and to ensure the rapid and efficient settlement of corporate disputes.[26] Given the specific nature of corporate disputes, in an attempt to revive corporate litigation, Brazil has introduced specialized judicial circuits in Sao Paulo for adjudicating business matters. It is reasonable to expect these measures to result in shorter resolution periods.[27] Moreover, Constitutional Amendment n. 45/2005 has instituted a sort of binding precedent in the Brazilian system, the so-called *sumula vinculante,* which are pronouncements issued by the Supreme Courts with its final position on specific issues. [28] Subsequently, the new Code of Civil Procedure (Federal Law n. 13,105/2015), which became effective in 2016, has extended binding power to the Superior Court's decisions in disputes involving constitutionality or for repetitive cases or appeals.[29]

[24] Paula Guimaraes and others, 'Shareholder Activism Impact on Efficiency in Brazil' (2019) 19 Corporate Governance (Bingley) 141 <https://www.emerald.com/insight/content/doi/10.1108/CG-01-2018-0010/full/pdf?title=shareholder-activism-impact-on-efficiency-in-brazil>.

[25] Petrobras, a major oil and gas company in Brazil, faced different class actions in New York after a money-laundering and corruption scheme was unveiled through the "Car Wash" operation (see In Re: Petrobras Securities Litigation, 312 F.R.D. 354 (2016)), resulting in a USD 2.95 billion settlement in 2018. See SEC 'Press Release on Petrobras Reaches Settlement with SEC for Misleading Investors' (September 27, 2018) < https://www.sec.gov/news/press-release/2018-215>. This was the most significant settlement involving a foreign issuer.

[26] *See* Gov Risk, 'UK-Brazil Cooperation: Improving Efficiency and Performance in Brazil's Judiciary', 2016/17. Available at www.cnj.jus.br. See, also, Paula Guimaraes et al. 'Shareholder Activism Impact on Efficiency in Brazil,' (2019) 19 *Corporate Governance International* 141.

[27] *See* Marcelo Guedes et al., 'Opinion' (February13, 2018) < https://www.conjur.com.br/2018-fev-13/opiniao-varas-empresariais-tj-sp-sao-avanco-brasil >accessed July 12, 2019.

[28] Although the *sumulas vinculantes* have not been particularly useful to solve intra-corporate disputes, they may have an indirect effect in solving the high backlog of cases in the Brazilian Judiciary.

[29] Articles 927 and 988.

However, the effect of these measures to build a high-quality system for resolving corporate disputes are unclear to date. As indicated already, trust in the Judiciary continues to decline.[30] This raises the important question regarding the role of mandatory intra-corporate arbitration as an alternative to the shareholder dispute resolution regime.[31] The effectiveness of this approach has been popular with both local and international investors. Table 1 provides preliminary evidence of the popularity of arbitration: new cases increased from 128 in 2010 to 293 in 2018.

Table 1: Cases Submitted to Arbitration v. Value Involved: 2010 – 2018 (in billions)

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Cases	128	129	158	188	218	222	249	275	293
Value (BRL)	2.8	4.2	4.7	4.2	11.7	10.7	24.3	26.3	88.3

Table 1 also reports that the value of arbitration increased from BRL 2.8 billion (approximately US$ 700 million) in 2010 to BRL 88.3 billion (approximately US$ 22 billion) in 2018. Finally, another important indication is that corporate disputes represent the majority of cases (42.58%) resolved by Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), which is the Arbitration Chamber with the highest number of arbitrated cases in Brazil.

2.2 Judicial System in Brazil

[30] See Luciana Gross Cunha 2017. 'Relatório ICJBrasil, 1 semestre 2017' <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/19034/Relatorio-ICJBrasil_1_sem_2017.pdf?sequence=1&isAllowed=y> accessed July 12, 2019.

[31] Selma Lemes, 'Arbitragem em Números e Valores. Seis Câmaras.' 8 Anos < http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20Valores-%202010%20a%202017%20-final.pdf> accessed June 23, 2019. For 2018, see 'Câmaras de Arbitragem: Sua Briga é o Nosso Negócio, Revista Exame', Grupo Abril, March 6, 2019, p.46 < https://exame.abril.com.br/revista-exame/sua-briga-e-o-nosso-negocio/ > accessed May 20, 2019.

Our discussion so far has focused on mandatory dispute resolution. In this section, we will provide a brief introduction to the Brazilian judicial system, which is based on the civil law tradition, operating at both the federal and state levels. First, regarding the legal framework, the court system is regulated by the Constitution and a federal statute, Federal Law 13,105/2015, the Civil Procedure Code. Cases involving the national interest or government agencies or federal public companies (Articles 108-109) fall under the jurisdiction of federal courts, while cases involving matters outside the scope of other courts (including labor, electoral and military) are governed by state courts.

Second, with regard to civil procedure, the state-level justice system consists of first instance courts, where judges handle cases and issue judicial verdicts. Second instance state courts, by contrast, consist of panels of judges who adjudicate appeals lodged against decisions by the court of first instance. Similarly, regional federal courts[32] are responsible for adjudicating appeals lodged against decisions of the federal court of first instance.[33] Within the Brazilian system, which is quite complex, there are two higher courts. The Superior Court of Justice, governed by article 105 of the Constitution, may review appeals of treaty or federal law decisions by regional federal courts or second instance courts. The Federal Supreme Court, the highest court in Brazil, has the duty to review decisions of federal and state court involving constitutional issues and cases involving article 102 of the Constitution when provoked.[34]

Third, the protection of minority shareholders against violations of their rights and irregularities and against fraudulent actions is possible through different types of lawsuits. Arguably, most claims are handled at state level unless a federal entity is one of the parties involved in the dispute, in which case jurisdiction is shifted to the federal level (*e.g.*, cases involving state-controlled companies or cases to which the Securities and

[32] There are also courts to deal specifically with electoral, labor and military disputes.
[33] Regional Federal Courts can also issue decisions over original lawsuits in some specific cases.
[34] *See* Antonio Gidi, 'Class Actions in Brazil - A Model for Civil Law Countries' [2003] American Journal of Comparative Law 318 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=903188>. *See also* chapter [include], 'Class Action in Brazil: Overview, Current Trends and Case Studies', by Carlos Portugal Gouvea and Helena Campos Refosco, for comprehensive view on the structure and history of the legal system in Brazil.

Exchange Commission of Brazil (CVM) is a party). On the one hand, shareholders can file derivative or direct claims against directors and officers. However, derivative claims are uncommon in Brazil due to legal obstacles imposed by Law of Corporations (Lei das S.A.).[35] According to its article 159, companies may bring an action for civil liability against an officer only if approved through a resolution passed in a shareholders' general meeting. Whenever such approval is denied, shareholders representing at least 5% of the company's capital may institute proceedings at their own initial costs, whereas recovery of damages must be transferred to the company, and reimbursement of incurred costs is capped at the value of the damages recovered.[36] Finally, class actions, or so-called public civil lawsuits, regulated by Law n. 7,913/1989 and Law n. 7,347/1985 (Law of Public Civil Action), are possible in the case of collective securities claims. In that case, the Public Prosecutor's Office has standing to file lawsuits.[37]

2.3 Solving Brazil's Deadlock

The foregoing discussion strongly suggests that an alternative shareholder dispute resolution system would have substantial beneficial effects. To be sure, using arbitration procedures to resolve intra-corporate disputes is not new to Brazil, although it has increased in popularity since 2016. Arbitration was introduced in Brazil as early as 1850 through a provision in the Commercial Code that provided for mandatory arbitration of all intra-corporate disputes. Although quite innovative, this provision was soon declared unconstitutional, and arbitration practically disappeared.[38] For the most part, the potential benefits of

[35] *See* Bruno M. Salama and Viviane Muller Prado, 'Legal Protection of Minority Shareholders of Listed Corporations in Brazil: Brief History, Legal Structure and Empirical Evidence' (2011) 4 *Journal of Civil Law Studies* 14.
[36] Law of Corporations, art. 159, paragraph 4.
[37] According to Law n. 9.307/96, article 1, the collective security claims can also be initiated by the Prosecutor's Office in case of a request by CVM. There is a divide in the literature regarding CVM's standing to file collective securities claims, as well as that of associations and the stock exchange. *See* Fernanda Vicentini and Vicente de Paula Marques Filho. 'COLLECTIVE PROTECTION FOR INVESTORS IN THE STOCK MARKET AND THE WARRANTY OF ACCESS TO JUSTICE', 18-19, <http://www.publicadireito.com.br/artigos/?cod=d79c6256b9bdac53 > accessed January 10, 2020.
[38] Christos A. Ravanides, 'Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields for Descent into Hades' (2008) 18 *American Review of International Arbitration* 437.

corporate arbitration were not widely known during the 19th and 20th centuries.[39] Thus, it is easy to understand why local businesses and legal professionals were never able to initiate the reforms needed to reintroduce arbitration agreements. Finally, in 1996, arbitration was reinstated through an Arbitration Act (Law n. 9.307/96),[40] and in 2001, the Law on Corporations (Lei das S.A.) was amended to allow companies to incorporate arbitration agreements into their bylaws or articles of association.[41] In 2002, Brazil ratified the New York Convention.[42] Nevertheless, some controversy remained over the need for the consent of all shareholders for arbitration to be binding.[43] Thus, in an attempt to put an end to such discussion, policymakers enacted Law n. 13.129/2015 to amend the Law of Corporations, clarifying in its article 136-A that the arbitration agreement, whenever included in the corporate bylaws after approval by shareholders representing at least one half of the voting shares, is binding on all shareholders.[44] The legislation also recognized the arbitrability of disputes between public administration and private parties in relation to contracts executed with governmental authorities.[45]

[39] Arbitration for intra-corporate dispute resolution was relegated to obscurity as of 1867, not only because it became discretionary, but also in view of significant obstacles to its implementation. As of Decree n. 3.900/1867, the arbitration clause included in bylaws and articles of association was no longer enforceable without the execution of an additional agreement between the parties at the time of the dispute, confirming the parties' intention to solve the dispute through arbitration (article 9). In addition, a requirement of arbitral award's ratification by a judge was introduced (article 59). These obstacles were overcome when Arbitration Act (Law n. 9.307/96) was enacted.

[40] Law n. 9.307/96 was declared constitutional in 2001 by the Brazilian Supreme Court in leading case Sentença Estrangeira 5.206.

[41] According to article 109 § 3, "the corporation's bylaws may establish that any disputes between the shareholders and the corporation, or between the majority and minority shareholders may be resolved by arbitration under the terms specified by it."

[42] On June 7, 2002, Brazil ratified the New York Convention, and it became effective on September 5, 2002. Due to a variety of political obstacles, Brazil delayed the approval and ratification of the New York Convention for 44 years.

[43] Although most Brazilian scholars argued that the arbitration clause approved by the majority of shareholders is mandatory, some scholars, such as Modesto Carvalhosa, indicated that the arbitration clause granted a discretionary right for shareholders to choose arbitration, so arbitration would be binding only in the case of express consent from any and all shareholders.

[44] According to article 136-A of Corporations Law, dissenting shareholders have the right to withdraw from the corporation and be reimbursed for the value of their shares.

[45] Law 13,129/2015, article 1, paragraph 1.

Recall that an arbitration procedure can be used only to solve disposable property rights disputes or conflicts of a pecuniary nature. According to prior studies, the number of arbitration procedures involving corporate disputes increased by 80%. A survey of arbitrations found that the number of new cases increased from 50 in 2013 to 90 in 2017.[46] It is, however, unfortunate that there are no data available on the exact amount involved in these claims. In 2017, the total amount involved in the 275 new cases—including not only claims involving corporate disputes, but all matters that involve disposable property rights or conflicts of a pecuniary nature--submitted to arbitration was R$ 26.3 billion (approximately US$ 6.5 billion),[47] while the average amount per case was US$ 23.6 million. It is likely that the emergence of the arbitration industry, coupled with growing investors' awareness, will lead to greater efficiencies and an increase in the use of the system. Unsurprisingly, the ICC Commission on Arbitration recently ranked Brazil the third largest user of arbitration as of 2018, after France and the United States.[48]

In sum, as the trust in the Brazilian judiciary continues to decline, arbitration for the resolution of corporate disputes has been experiencing a significant rise as of the enactment of the Arbitration Act in 1996 and the amendment of the Law on Corporations that allowed companies to incorporate arbitration agreements into their bylaws or articles of association.

3 Data Description

In this section, we describe the research design of our survey. We obtain our data for this chapter from two surveys. In the first survey, conducted between September and October 2017 ("the 2017 survey"), we asked

[46] Data made available by Selma Maria Ferreira Lemes to authors (March 21, 2019) (on file with authors).
[47] Ibid (1). Approximately 33% of new cases involved intra-corporate disputes in 2017.
[48] https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/, accessed June 20, 2019.

Brazilian law firms, corporations, limited liability companies and small and medium-sized companies about their choice of dispute resolution mechanism. We also conducted an additional survey between January and March 2019 ("the 2019 survey") to obtain information on the preferred method of dispute resolution of institutional investors with stakes in Brazilian companies.

3.1 Characterization of respondents

To gather information on how parties use arbitration procedures to settle disputes within a company, we designed the 2017 Survey with ten questions in three areas: (1) identifying and filtering the target group; (2) documenting the methods of intra-corporate dispute resolution; and (3) mandatory arbitration for intra-corporate dispute resolution. We designed the survey questions to test our hypotheses and phrased the questions to avoid financial jargon, except if the questions addressed specific intra-corporate disputes or procedure-related issues.

We created the 2017 survey in Word and solicited survey responses via email using the snowballing method. Our responses came from contacts with two law firms in Sao Paulo[49] and 50 of the authors' personal contacts who worked at different entities. The 2019 survey was designed in Qualtrics and solicited survey responses via LinkedIn and email. Using data from Anbima, FGV and the Central Bank of Brazil, we identified the largest banks and institutional investors in terms of assets and invited 957 of them to respond to our survey through e-mail in addition to 184 LinkedIn messages. We also distributed the survey to 57 of the authors' personal contacts who worked for different institutional investors. In total, we received 102 responses to our invitations, implying a response rate of 8.5%.

Tables 2 and 3 provide summary statistics on the different respondent types in both the 2017 survey and the 2019 survey. In the 2017 survey, law firms made up around 38.5% of the sample; about a third of the

[49] Warde Advogados and Godke Advogados circulated the survey to their clients.

respondents were corporations (30%), and the remaining 31.5% consisted of limited liability companies (10.5%), SMEs (10.5%) and other (entrepreneurs, scholars, investment managers) (10.5%). In the 2019 survey, banks made up around 33.3% of the sample; about 20.6% of the respondents were funds/asset management companies, and the remaining 44.1% consisted of financial consultancy/advisory companies (7.8%), private equity funds (6.9%), pension funds (5.9%), insurance companies (5.9%), hedge funds (4.9%), mutual funds (2%), real estate funds (1%) and others.

Table 2: 2017 Survey Sample Characteristics

Target group	**N**	**%**
Law firms	22	38.5%
Corporations	17	30%
Limited liability companies	6	10.5%
SME	6	10.5%
Other (entrepreneurs, scholars, investment managers, etc.)	6	10.5%
Total	**57**	**100%**

Table 3: 2019 Survey Sample Characteristics

Target group	**N**	**%**
Banks	34	33.3%
Fund/asset management companies	21	20.6%

Financial consultancy/advisory companies	8	7.8%
Private equity funds	7	6.9%
Pension funds	6	5.9%
Insurance companies	6	5.9%
Hedge funds	5	4.9%
Mutual funds	2	2%
Real estate fund	1	1%
Other	10	9.8%
Non respondents	2	2%
Total	**102**	**100%**

The respondents to our 2019 survey tended to work in higher management positions, which is beneficial to our analysis of the selection of dispute resolution mechanism. Out of the 102 respondents, half identified themselves as CEOs or Officers, while 30% had senior management positions. In sum, this suggests that the bulk of our 2019 survey respondents held senior positions, with some influence on substantive levels of involvement when it came to issues such as intra-corporate arbitration.

3.2 Choice of Dispute Resolution Mechanism

Having supplied a general description of the characteristics of respondents in our sample, in the next section, we will provide an analysis of their preferences regarding intra-corporate dispute resolution.

The rise in the number of parties that include arbitration clauses in their contracts, such as corporate bylaws, statutes and articles of association, results partly from the view that mandatory arbitration in the corporate setting is a more efficient dispute resolution mechanism than litigation. This establishes a link between sophisticated parties and the inclusion of arbitration clauses. Much empirical research has documented the

frequency with which mandatory arbitration clauses are included in corporate bylaws.[50] Therefore, in our survey, we asked respondents several questions about their preferred method of dispute resolution.

Table 4: 2017 Survey Preferred Method and How Often is Arbitration Appropriate

This table reports the views of respondents to the 2017 Survey on their preferred method of dispute resolution.

Preferred Method (up to USD 12.5M)	**%**	**Count**
Arbitration	57.89%	33
Other (Mediation or Conciliation)	17.54%	10
Court Litigation	15.79%	9
I don't know	7.02%	4
No response to this question	1.75%	1
	100%	**57**

Preferred Method (higher than USD 12.5M)	**%**	**Count**
Arbitration	68.42%	39
Court Litigation	14.04%	8
Other (Mediation or Conciliation)	10.53%	6
I don't know	7.02%	4
	100%	**57**

How often is arbitration appropriate for intra-corporate dispute resolution	**%**	**Count**
Always	21.05%	12
Often	26.32%	15
Sometimes	36.84%	21
Rarely	10.53%	6
Never	3.51%	2
n/a	1.75%	1
Total	**100%**	**57**

[50] See, e.g., Peter Molk and Verity Winship, 'LLCs and the Private Ordering of Dispute Resolution' (2016) 41 *Journal of Corporation Law* 795; Ravanides (n 31).

Prior research has looked at the litigation versus arbitration trade-off without explaining the parties' preferences for different alternative dispute resolution mechanisms.[51] Similarly, Dari-Mattiacci (2007) shows that the important drivers of choice of method include the uncertainty of the law, the amount at stake and the costs of litigation.[52] We examine whether the amount at stake in a dispute influences respondents' preferred method of dispute resolution.

We report the responses separately for disputes up to US$12.5 million and higher than US$ 12.5 million. Table 4 confirms that most respondents in our 2017 survey sample preferred arbitration over other forms of dispute resolution, and that preference increased as much as 10.53% whenever disputes involve values higher than US$ 12.5 million. These results suggest that Brazil is a sophisticated country with respect to arbitration practice and experience and that arbitration costs play a role in the choice of a method for intra-corporate dispute resolution. To be sure, the PWC/QM survey on choice in arbitration reports that usage of arbitration remains popular in some industries, such as Energy and Construction.[53] We have thus found support for the literature that views arbitration as the preferred method of dispute resolution.

We next turn to how often respondents saw arbitration as the preferred method of dispute resolution. Table 4 shows that only 14.04% of the respondents believed that arbitration is rarely or never appropriate for intra-corporate dispute resolution, while 47.37% of the respondents believed that arbitration is always or often appropriate. Overall our respondents' views are consistent with those reported by PWC/QM, which show that most respondents rank arbitration as the preferred method of dispute resolution across industries.[54]

---

[51] A number of scholars have pointed to the shortcomings of this approach, *Cf.* Deborah R. Hensler, 'Court-Ordered Arbitration: An Alternative View' (1990) *The University of Chicago Law Forum* 399.
[52] Giuseppe, Dari-Mattiacci, 'Arbitration versus Litigation' (2007) *Revue Economique*, Vol. 58, Issue 6, 1291.
[53] PWC/QM, (2013) 'Corporate Choices in International Arbitration: Industry perspectives' < http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf >.
[54] PWC/QM (n 53).

As discussed earlier, the 2019 survey was conducted with institutional investors, and the threshold was lowered to USD 2.5 million to better understand how preferences vary according to the settlement value involved in the dispute.

Table 5: Institutional Investors' Preferred Method

This table reports the views of respondents to the 2019 Survey on their preferred method of dispute resolution.

Preferred Method (up to USD 2.5M)	**Mean**	**Variance**	**Std. deviation**	**Count**
Mediation or Conciliation	2.644	0.395	0.628	87
Arbitration	1.874	0.507	0.712	87
Court Litigation	1.483	0.415	0.645	87

Preferred Method (higher than USD 2.5M)	**Mean**	**Variance**	**Std. deviation**	**Count**
Mediation or Conciliation	2.244	1.488	1.220	86
Arbitration	2.198	0.560	0.749	86
Court Litigation	1.558	0.626	0.791	86

Important factors when choosing a DR Method	**Mean**	**Variance**	**Std. deviation**	**Count**
Quality of the decision	5.500	3.387	1.840	98
Time to resolution	5.092	2.765	1.663	98
Costs	4.010	3.021	1.738	98
Predictability	3.929	3.593	1.895	98
Confidentiality	3.469	2.705	1.645	98
Preserving a good relationship among the parties involved	3.367	4.503	2.122	98
Possibility of challenge to decision	2.633	2.255	1.502	98

Table 5 documents that most investors in our sample prefer mediation or conciliation[55]over arbitration for disputes involving up to US$ 2.5 million. However, respondents chose mediation or conciliation and arbitration almost equally for disputes involving values higher than US$ 2.5 million. Overall, our results provide support for the literature that mediation or conciliation are low cost and effective mechanisms to settle a dispute.[56]

These results seem to confirm our hypotheses that the parties' preferences vary according to the dispute value, and that mediation or conciliation is the preferred method of intra-corporate dispute resolution when the values involved are lower than US$ 2.5 million. There was an almost equal preference among institutional investors for mediation or conciliation and arbitration to solve intra-corporate disputes involving values higher than US$ 2.5 million.

Furthermore, Table 5 shows that most investors in our sample prefer arbitration over court litigation for intra-corporate dispute resolution. These findings are consistent with those reported by Rick Porter, which show that most respondents rank arbitration as the preferred method of dispute resolution across industries when compared to court litigation.[57]

In addition, we also look at the reasons for choosing a dispute resolution method. To further dissect our hypothesis, we asked respondents about the important factors when choosing a dispute resolution method. Table 5 shows that quality of the decision and time to resolution are the most important reasons when assessing the selection of dispute resolution methods, and that costs are the third factor in order of

[55] Note that mediation is a dispute resolution mechanism that relies on an independent third-party mediator who attempts to find points of agreement in order to reach a settlement. Similarly, conciliation involves reaching a settlement based on concessions.
[56] Thomas Stipanowich and J Ryan Lamare, 'Living with "ADR": Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations' [2013] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471>.
[57] Rick Porter (n 16).

importance. Overall, these results show support for the literature on the factors influencing the selection of a dispute resolution method.[58]

3.3 Mandatory Arbitration

We have established so far that the 2017 Survey's respondents expressed a clear preference for arbitration for intra-corporate dispute resolution and that the preference became stronger as the value under discussion increased. But note that there was no comparable support for arbitration among the 2019 survey's respondents. First, institutional investors tended to prefer mediation or conciliation to resolve intra-corporate disputes that involved amounts of up to US$ 2.5 million. Second, we see that they equally preferred arbitration and mediation or conciliation in cases involving amounts higher than US$ 2.5 million.

The inclusion of arbitration in corporate documents as a mandatory form of corporate dispute resolution has triggered academic debate about the enforceability of such mandatory provisions. To contribute to this debate, we asked respondents whether arbitration should be mandatory when included in shareholders' agreements.

Table 6: 2017 Survey Responses on Mandatory Arbitration
This table reports the respondents' assessment of whether arbitration should be mandatory when it is included in shareholders' agreements about dispute resolution.

Should arbitration be mandatory when included in shareholders' agreements for dispute resolution?	**N**	**%**
Yes, and should also be binding on minority shareholders	28	49.12%
Yes, but should not be binding on minority shareholders	10	17.54%
No, should not be mandatory	12	21.05%
Other	6	10.53%
No answer	1	1.75%

[58] White & Case/Queen Mary, (2018) '2018 International Arbitration Survey: The Evolution of International Arbitration'< https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>. *See also* Rick Porter (n 16).

Total	**57**	**100%**

Top 2 main reasons why arbitration should be mandatory	**N**	**%**
Arbitrator's expertise	20	71.43%
Speed	16	47.14%
Neutrality	8	28.57%
Secrecy	1	3.57%
Costs	1	3.57%
Reduces litigation burden	1	3.57%
Whenever included in the statutes	1	3.57%
Solution ends up being negotiated with external mediation	1	3.57%
No answer	1	3.57%
Total	**50**	

Top 2 main reasons why arbitration should not be mandatory	**N**	**%**
High costs	13	59.09%
Lack of trust	7	31.82%
Lack of publicity	2	9.09%
Speed	1	4.55%
No answer	5	22.73%
Total	**28**	

Table 6 indicates that 28 of the respondents believed that mandatory arbitration should be binding when included in shareholders' agreements about dispute resolution (49.12%). These 28 respondents were asked to select the top main reasons why arbitration should be mandatory in the particular situation. Out of the 50 valid responses, 71.43% of respondents included arbitrator's expertise in their two top reasons that arbitration should be binding, while 47.14% chose speed. Table 6 also shows that 22 respondents (38.60%) believed that mandatory arbitration, even when included in shareholders' agreements, should not be binding either to minority shareholders or to both minority and majority shareholders. The evidence suggest that

respondents were divided on whether mandatory arbitration clauses should be included in shareholders' agreements.

When asked why mandatory arbitration should not be binding, the 22 respondents (38.59%) were given five alternatives: (i) speed; (ii) lack of publicity; (iii) lack of trust; (iv) high costs; and (v) others. There were 28 valid responses. Among the 22 respondents who believed that mandatory arbitration should not be binding either to minority shareholders or to both minority and majority shareholders, 13 chose high costs (59,09%) as their top two reasons, whereas seven chose lack of trust (31,82%).

Among the five minority shareholders who answered the survey, one respondent indicated that mandatory arbitration, even when included in shareholders' agreements, should not be binding to minority shareholders, and two believed that it should not be binding to either minority or majority shareholders. Only two minority shareholders believed that it should be binding to minority shareholders. Six of the nine majority shareholders who answered the survey believed that mandatory arbitration should always be binding when included in shareholders' agreements, while two believed that it should not be binding to majority and minority shareholders, and one had no opinion.

Table 7: 2019 Survey's Responses on Mandatory Arbitration
This table reports the respondents' assessment of whether arbitration should be mandatory when included in corporate documents for dispute resolution.

Should arbitration be mandatory when included in corporate documents for dispute resolution?	**N**	**%**
Yes, and it should also be binding on minority shareholders	44	43.14%
Yes, but it should not be binding on minority shareholders	27	26.47%
No, it should not be mandatory	30	29.41%
No response	1	0.98%
Total	**102**	**100%**

Top reasons for choosing arbitration as a method of intra-corporate dispute resolution	Mean	Variance	Std. deviation	Count
Time to resolution	6.357	2.418	1.555	98
Quality of the decision	6.061	3.419	1.849	98
Selection of arbitrator	5.082	3.065	1.751	98
Confidentiality	4.520	4.438	2.107	98
Predictability	4.337	4.040	2.010	98
Preserving good relationships	3.551	4.497	2.121	98
Lower costs if compared with judicial claims	3.398	5.809	2.410	98
Enabling choice for specific listing segment in Brazil	2.694	2.998	1.732	98

Top impediments to choosing arbitration as a method of intra-corporate dispute resolution	Mean	Variance	Std. deviation	Count
High costs	5.224	4.939	2.222	98
Limited number of arbitrators	4.429	3.691	1.921	98
Lack of expertise of arbitrator	4.173	3.382	1.839	98
Lack of neutrality	4.051	3.822	1.955	98
Excessive bureaucracy	3.541	2.808	1.676	98
Lack of transparency	3.449	3.075	1.753	98
Time to resolution	3.133	3.560	1.887	98

Table 7 indicates that 44 of the respondents believed that arbitration should be mandatory when included in corporate documents regarding dispute resolution (43.14%). The respondents were further asked to select the top reasons for choosing arbitration as a method of intra-corporate dispute resolution. Most investors indicated time to resolution, quality of the decision, and selection of arbitrator as the top reasons for choosing arbitration for intra-corporate dispute resolution. Institutional investors' response of time to resolution as the most important factor for choosing arbitration contrasts with prior literature[59], and it probably derives from the lack of trust in the Brazilian judiciary. What other factors are also likely to

[59] PWC/QM (n 53).

influence the arbitration decision? Confidentiality and predictability also appear to be important drivers. When asked about the impediments for choosing arbitration as a method of intra-corporate dispute resolution, most investors identified high costs, limited number of arbitrators, and lack of expertise of arbitrator. In sum, these results, with the exception of time to resolution, are consistent with the literature's findings about the factors influencing the selection of a dispute resolution mechanism. [60]

Finally, Table 7 reports that a total of 57 respondents (55.88%) indicated that mandatory arbitration, even when included in shareholders' agreements, should not be binding either to minority shareholders or to both minority and majority shareholders. Again, there seems to be evidence of a divide among institutional investors regarding the inclusion of a mandatory arbitration provision in shareholders' agreements.

3.4 Law Firms' Advice and Expenses

We have established that a majority of institutions are likely to increase their use of arbitration to resolve intra-corporate disputes activity particularly for disputes involving values higher than US$ 2.5 million. Public mixed views over the role of lawyers and their impact on the resolution of corporate arbitration disputes[61] has triggered both policy and academic debates about whether investors should increase (or decrease) their reliance on lawyers. To contribute to this debate, we asked questions about whether institutional investors expect advice from law firms to add value or play an important role in arbitration procedures.

Table 8: Law Firms' Advice

[60] Rick Porter (n 16). *See also* White & Case/Queen Mary, (2018) '2018 International Arbitration Survey: The Evolution of International Arbitration'< https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.

[61] White & Case/QM, (2018) '2018 International Arbitration Survey: The Evolution of International Arbitration' 36/37< https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.

This table reports the respondents' assessment of the importance of law firms' advice in the choice of a dispute resolution method.

Importance of Law Firms' Advice	**N**	**%**
Extremely important	34	33.33%
Very important	53	51.96%
Moderately important	9	8.82%
Slightly important	5	4.90%
Not important at all	1	0.98%
Total	**102**	**100%**

Table 8 indicates that most institutional investors, when faced with intra-corporate disputes, regard lawyers' advice as extremely or very important for the choice of a dispute resolution method. Prior evidence shows that the most important legal advice tends to involve technical industry knowledge and expertise in the arbitral process.[62] As noted above, there are also good business reasons that some institutional investors seek to rely on lawyers' advice. For example, literature suggests that the parties benefit from elite law firms assisting parties in large transactions and lowering information asymmetry due to their market knowledge.[63] Conversely, relying more on outside counsel for their expertise and reputation raises the possibility of increased agency costs and conflicts with other parties, such as officers.

As predicted, we report in Table 9 that institutional investors find that legal fees and expenses are the most significant expenses in intra-corporate arbitration procedures. Finally, we find that institutional investors apparently do not find that experts' fees and expenses are significant expenses in an arbitral proceeding.

Table 9: Most Significant Expenses in Intra-Corporate Arbitration

This table reports the views of institutional investors about the most significant expenses in ICA

[62] PWC/QM (n 53).

[63] Elisabeth de Fontenay, 'Law Firm Selection and the Value of Transactional Lawyering' [2015] Journal of Corporation Law, Forthcoming; Duke Law School Public Law Legal Theory Series No. 2015-39 <file:///C:/Users/u286384/Downloads/SSRN-id2642299.pdf>.

Most Significant Expenses in ICA	Mean	Variance	Std. deviation	Count
Legal counsel fees and expenses	3.022	1.386	1.177	45
Arbitrators' fees	2.667	1	1	45
Institutional costs paid to organizations that administer the arbitration procedure	2.200	1.300	1.140	45
Expert's fees and expenses	2.111	0.874	0.935	45

4. Conclusion

In this chapter, we analyzed new datasets based on two surveys: a 2017 survey with 57 Brazilian respondents— including corporations, limited liability companies, small and medium-sized enterprises, law firms and others—regarding their preferences about various aspects of mandatory intra-corporate dispute resolution; and a 2019 survey representing 102 institutional investors with a stake in Brazilian companies. We chose to use surveys in order to understand both companies' and investors' views about (i) the preferred method of intra-corporate dispute resolution; (ii) the appropriateness of arbitration as a method of dispute resolution for intra-corporate disputes; (iii) the factors influencing the choice of a dispute resolution method; (iv) the reasons and impediments for choosing arbitration as a method for intra-corporate dispute resolution; (v) whether arbitration should be mandatory when included in shareholders' agreements for dispute resolution; and (vi) the significance of legal fees and advice in the arbitration process.

We find that the most significant factors that institutional investors take when choosing a dispute resolution method for solving intra-corporate disputes are quality of the decision, time to resolution and costs.

In line with the literature, we find that a majority of respondents to both surveys preferred arbitration over court litigation as a method of intra-corporate dispute resolution. We also find that corporations are likely

to rely more heavily on arbitrators' expertise (71.43%) in support of mandatory arbitration, followed by speed (47.14%) and neutrality (28.57%). While these figures are indicative of perceived support for mandatory arbitration, these respondents also regard high costs (59.09%) and lack of trust' (31.82%) as barriers to the adoption of mandatory arbitration provisions.

Interestingly, less than half of the institutional investors (43.13%) thought that arbitration should be mandatory. Similarly, less than half of respondents of the 2017 survey (49.12%) supported mandatory arbitration. Our empirical investigation also looked at the features that institutional investors identified as supporting their decision to choose arbitration. Respondents clearly identified time to resolution and quality of the decision as factors likely to influence the intention to choose arbitration, whereas high costs were the main impediment. It is worth noting that the respondents preferred to use mediation or conciliation to resolve their intra-corporate disputes whenever the values involved were up to US$ 2.5 million. But note that they showed equal preference for arbitration and mediation or conciliation whenever the values involved were higher than US$ 2.5 million.

Furthermore, most institutional investors consider legal advice as extremely or very important for the choice of a dispute resolution method, and report that legal fees and expenses are the most significant expenses in intra-corporate arbitration procedures.

To conclude, our analysis sheds light on the importance of the increasing popularity of mandatory intra-corporate arbitration. This paper contributes to the growing literature on arbitration's role in encouraging an effective redress for shareholders and reducing shareholder litigation. Finally, our study recognizes that arbitration is perceived as an effective procedure in Brazil for intra-corporate dispute resolution and offers increased benefits to parties enforcing arbitration provisions.

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

ECGI Working Paper Series in Law

https://ecgi.global/content/working-papers

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html