NZIER
NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH

Evaluating the proposed Bilateral Arbitration Treaty

NZIER report to Victoria University of Wellington Law Faculty

25 February 2016

About NZIER

NZIER is a specialist consulting firm that uses applied economic research and analysis to provide a wide range of strategic advice to clients in the public and private sectors, throughout New Zealand and Australia, and further afield.

NZIER is also known for its long-established Quarterly Survey of Business Opinion and Quarterly Predictions.

Our aim is to be the premier centre of applied economic research in New Zealand. We pride ourselves on our reputation for independence and delivering quality analysis in the right form, and at the right time, for our clients. We ensure quality through teamwork on individual projects, critical review at internal seminars, and by peer review at various stages through a project by a senior staff member otherwise not involved in the project.

Each year NZIER devotes resources to undertake and make freely available economic research and thinking aimed at promoting a better understanding of New Zealand's important economic challenges.

NZIER was established in 1958.

Authorship

This paper was prepared at NZIER by Georgia Whelan.

It was quality approved by Chris Nixon and John Yeabsley.

The assistance of Victoria University of Wellington Law Faculty is gratefully acknowledged.

L13 Grant Thornton House, 215 Lambton Quay | PO Box 3479, Wellington 6140
Tel +64 4 472 1880 | econ@nzier.org.nz

Key points

The purpose of our research was to assess the impact of adopting a Bilateral Arbitration Treaty (BAT) on New Zealand firms through a survey. Our working hypothesis was that a BAT would affect exports by reducing risks associated with current practices.

Key results

The results from the survey showed that only 56.9% of firms are forming formal contracts for international transactions. Of these firms, 72% include a dispute resolution clause. These firms would be exempt from the application of a BAT whilst the remainder would fall within its scope.

Only 34.1% of firms answered that their preferred method of dispute resolution is dependent on the country with whom they are trading and a further 47.7% were unsure whether this is important. This is important as New Zealand's largest source of overseas income is Australia whose legal system is unlikely to cause unease. Outside of Australia, there is a greatly increased distance both literally and figuratively from potential export markets.

Firms without international dispute experience prefer negotiation as a means of dispute resolution. This was followed at a distance by NZ litigation and then mediation or expert determination. International arbitration was the least preferred method. Similar conclusions were drawn for firms with experience. This inexperience with arbitration was reflected in their answers as to the costs and benefits arising from default arbitration.

Costs and benefits

The respondents were wary of the implications of a BAT to their businesses. This is evinced by 70.5% believing that there would be at least a little cost to their firm. However, there was a broadly positive response by the firms in that 66.7% (excluding blank responses) preferred arbitration to litigation. The unsure results (30.8%) are symptomatic of the preference for negotiation over litigation or arbitration. Furthermore, 54.5% believe that there will be "a little" or "a lot" of benefit arising from default arbitration.

The main costs identified by the firms were: expense, management time, delay and unfamiliarity with procedure. The primary benefits selected were: independence of arbitrators, decreased negotiation costs, lowered costs of dispute resolution and the expertise of arbitrators.

Implications

There is massive heterogeneity in firm behaviour and prolific use of ad hoc arrangements which means the impact of a BAT cannot be generalised. This atmosphere of uncertainty is not insurmountable. Further research could better penetrate this and develop a clearer picture of the impact of a BAT.

Contents

Appendices

Tables

1. Purpose

The purpose of our research was to assess what would be the impact of adopting a Bilateral Arbitration Treaty (BAT) on New Zealand (NZ) exporters through a survey. The theoretical implications have already been thoroughly canvassed and therefore this report is intended to focus on the practical impacts of the treaty. Our working hypothesis was that a BAT would affect exports by reducing risks associated with current practices.

2. Context

Over the past five years, New Zealand's total exports have increased by 21% and the government is aiming for a 10% increase in the value of exports to the economy by 2025 (equivalent to 40% of GDP) (MBIE 2015, 1). Small to Medium Sized Enterprises (SMEs) account for 97.2% of firms in New Zealand and employ 30.2% of the workforce (MBIE 2013, 1). However, only 38% of SMEs export and the majority are not interested in generating overseas income (MBIE 2013, 2). In the preponderance of OECD countries, more than 50% of total exports are accounted for by enterprises with 250 employees or more (OECD 2012, 60). In NZ the story is the same: the level of international engagement is positively associated with firm size (MBIE 2014, 8).

SMEs face greater barriers to trade than larger enterprises. The most commonly cited barrier for NZ SMEs is limited experience (MBIE 2014, 47). This is similar to the OECD finding that increased internationalism for SMEs is hindered by limited information, lack of managerial time and lack of skills and knowledge (OECD 2009, 1). Part of this risk is international dispute resolution whereby firms are not confident that they will be provided with effective justice (Butler and Herbert 2014, 188). International contracts sometimes fail to include a dispute resolution clause and thus the disputes become subject to litigation, often in multiple jurisdictions (Butler and Herbert 2014, 188). A 2013 survey found that firms are wary of initiating proceedings as it might mean losing future business opportunities (Queen Mary University of London and PricewaterhouseCoopers 2013, 16).

2.1. Litigation vs. Arbitration

"*Without a neutral, efficient, and fair dispute resolution process that is legally enforceable, many businesses would not contract abroad for fear of foreign litigation*" (Fiske 2004, 459). The differences in customs, procedures and laws are sufficient to deter a firm with limited resources from considering international litigation. There is a risk of facing inexperienced or biased judges or juries (Fiske 2004, 457). Enforcing a foreign judgment on an unwilling party is extremely difficult and there is a possibility of re-litigation through appellate courts. Multiple judgments (where there is no agreed dispute resolution method) could result in conflicting decisions, none of which are directly enforceable.

Comparatively, arbitration is a "*process by which parties consensually submit a dispute to a non-governmental decision-maker, chosen by or for them, to render a binding resolution of that dispute in accordance with adjudicatory procedures affording the parties an opportunity to be heard*" (Born 2014, 291). The United States Supreme Court has stated that when parties choose arbitration over litigation they trade *"the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"* (Friedland 2007, 7). Nearly all decisions are enforceable through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the NYC).[1]

New Zealand has been receptive to international arbitration and maintains a progressive approach (Greenberg, Fitzgerald and Gehle 2015, §15.04). Whilst there has

[1] See: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

been relatively little international arbitration involving NZ parties, increasing trade and globalisation means that protection for SMEs looking to export is still vital.

The ability to enforce contracts is "*essential to support efficient allocation of resources and growth in an economy*" (Love 2011, 1). Therefore, default arbitration may increase trade. One such way to enforce this is through a BAT which aims to provide a more transparent approach to dispute resolution.

2.2. BAT Proposal

The premise of a BAT is relatively straightforward: it involves two states engaging in a treaty that provides that specified instances of commercial disputes between the nations will be resolved, as a default mechanism, by international commercial arbitration. Under a BAT, parties would be free to opt out of its terms by choosing an alternative dispute resolution mechanism in their contract, prescribing a different arbitration procedure or by expressly excluding the terms of the treaty (Wilmer Cutler Pickering Hale and Dorr LLP - International Arbitration Library 2014). Thus the freedom to contract and party autonomy remain intact (Victoria University of Wellington 2015). States would be free to select the rules and procedures to include and arbitral awards would be directly enforceable (Wilmer Cutler Pickering Hale and Dorr LLP - International Arbitration Library 2014). A regional treaty could also be formed as a Multilateral Arbitration Treaty (MAT) (Gary Born 2012, 7).

A BAT aims to enhance trade through ensuring fair, efficient and effective resolution of disputes. It would offer companies the same safeguards investors receive through Bilateral Investment Treaties (BITs) (CDR 2014). This would mean less legal uncertainty for firms (New Zealand Law Society 2015). The treaty proposes a different default which is neutral, expert, efficient and enforceable (Wilmer Cutler Pickering Hale and Dorr LLP - International Arbitration Library 2014). To paraphrase the author of the treaty, providing a more effective default for dispute resolution could result in more international transactions (CDR 2014).

3. Our approach

Our survey was developed to determine the response of a sample of enterprises to the implementation of a BAT. It was aimed at discovering whether a BAT will yield economic benefits for SMEs by reducing risks associated with current dispute resolution practices. The results have been used to assess businesses' views on international dispute settlement processes by establishing current exporting practices and insights to firms' dispute resolution experience.

A two page survey mailed out to 145 businesses in December 2015. It was comprised solely of multiple choice questions (see Appendix A). By January 15 2016, 44 responses had been received. Of these, 37 firms did not have international dispute experience and seven did have some experience.

Some respondents did not, or could not, answer all questions. These have been identified in Appendix B by the inclusion of blank responses.

4. Evaluation

4.1. Comparator

It is assumed that if no new approach is implemented to assist firms they would continue the same processes they already have in place:

- some firms would successfully continue to trade the way they had always done;
- others would not enter the export game because the risks of non-payment would be too high;
- overall risk and uncertainty levels would remain the same.

This approach may have some benefits for firms if they have specific knowledge of a country's legal system which gives them the edge in that market but it does not necessarily encourage expansion. Additionally, under this "business as usual" model, firms involved in exporting are likely to pursue their own initiatives aimed at mitigating the risks associated with dispute resolution and will have to bear these costs. A lack of information means such actions are not identifiable.

The survey is somewhat helpful in identifying the status quo. The current default where firms have not provided for a dispute resolution method in their contracts is litigation. In the survey, 43.1% said they did not form contracts for their international transactions and of those who do form contracts, a further 28% fail to include a dispute resolution clause; thus these groups are subject to the default mechanism unless an agreement is reached.

4.2. Interpretation of the results

4.2.1. Exploring the costs

Question thirteen of the survey listed the potential costs of arbitration.[2] The primary costs identified by both groups were management time, unfamiliarity with procedure, and the expense of arbitral proceedings. This was to be expected given the lack of experience the respondents have with using arbitration, especially in conjunction with their preference for less adversarial methods of dispute resolution.[3] In relative terms, management time for SMEs is scarce and this is crucial to the efficiency of their business operations. A BAT could infringe on this time.

From our survey, it appears that the greatest barrier to the successful implementation of a BAT in New Zealand is the inexperience firms have with arbitration. The respondents were wary of the implications of a BAT to their businesses. This is evinced by 70.5% believing that there would be at least a little cost to their firm.

The risks identified by the firms were higher than we expected to see, however this is understandable given the respondents' inexperience. There is a marginal drop in the

[2] For a full discussion of these costs, see the outline of question 13 in Appendix B.

[3] See question eight in Appendix B.

risks when comparing the group with international dispute experience vis-à-vis the group without. What is required here is individual interviews with firms who either have international dispute experience or have used international arbitration to establish their risk profile and details of their firm strategy.

In retrospect, it is evident that these firms are using methods outside of alternative dispute resolution mechanisms to mitigate the risks they face with international trade. There are various business models available to them. For example, these firms may be monitoring transactions and their exposure to risk with each consignment rather than enforcing a contract for the entirety of the transactions. These ad hoc arrangements may be better suited for SMEs who wish to minimise potential losses.

4.2.2. Exploring the benefits

Question eleven of the survey outlined the potential benefits of default arbitration.[4] The principal benefits identified by the respondents were: confidentiality, independence of arbitrators, decreased costs, expertise and enforceability (not necessarily in that order). This was more what we expected as these are essentially the main benefits of arbitration vis-à-vis litigation. The combination of these benefits highlight arbitration as a fair, expedited dispute resolution process that produces enforceable and expert results. However, the benefits identified do not correspond with what the firms isolated as the most notable potential costs. Decreased costs were identified as a benefit, nevertheless firms also selected the expense of arbitration as a cost. This juxtaposition is characteristic of how unacquainted these firms are with international arbitration and how they struggle to understand how default arbitration would fit with their current business models.

The answers to question eleven elicited a clear distinction between the firms with international dispute experience and those without. The key benefits pinpointed by each group were somewhat dissimilar. The divergence of results between the two groups is indicative of the lack of confidence these firms have in their knowledge of arbitration. Without international dispute experience, the main benefits became the decreased negotiation costs, the expertise of arbitrators, the enforceability of arbitral awards, lowered dispute resolution costs, speed and the independence of arbitrators. However, the firms with experience identified the independence of arbitrators, the confidentiality of awards and proceedings, access to justice and certainty as the primary benefits to arise from default arbitration. A greater proportion of those without experience were unsure as to what the benefits would be whereas the firms with experience were more confident with identifying the possible advantages. This is distinctly related to the relative experiences these firms have with international dispute resolution.

Our earlier hypothesis was that a BAT would enhance international trade between NZ SMEs and the treaty partners, which would benefit businesses as sales increase, thereby benefiting the community through employment and the NZ economy. The survey resulted in what could be described as gentle support for a BAT. There was a broadly positive response by the firms in that 66.7% (excluding the blank responses) preferred arbitration to litigation. The unsure results (30.8%) are symptomatic of the

[4] For a full discussion of these benefits, see the outline of question 11 in Appendix B.

preference for negotiation over litigation or arbitration. Therefore there is confidence in arbitration as an alternative dispute resolution method.

4.2.3. Findings

Taking all of the above into consideration, there is a degree of uncertainty with the implications of a BAT and no firm conclusions to be made. The answers do seem to suggest that a BAT and the proposed benefits could function in NZ. There is, however, a knowledge gap that needs to be overcome as shown by the lack of convergence in answers provided and the interplay between the costs and benefits.

Table 1 Main costs and benefits identified by respondents

Primary costs	Primary benefits
Expense: the expense associated with arbitration includes the payment of arbitrators, payment for the venue and other associated costs. This is likely to be greater than the costs these firms have experienced with negotiation.	**Independence of arbitrators**: the arbitrators are either selected by the parties or an institution which means greater impartiality and fair awards.
Management time: the extra time needed to be spent on understanding and familiarising themselves with arbitration.	**Decreased negotiation costs**: an efficient default mechanism would reduce the need for thorough dispute resolution clauses.
Delay: whilst there is a limited basis for appealing arbitral awards, the length of the procedures and making of an award is greater than that of the less adversarial methods these firms prefer.	**Lowered costs** of dispute resolution: arbitration can be cheaper than litigation due to reduced rights to appeal and shorter hearings.
Unfamiliarity with procedure: these firms identified in question eight that they do not tend to (or would not) use litigation or arbitration to resolve their international disputes. Thus this unfamiliarity would create unease for these firms.	**Expertise of arbitrators**: the appointed arbitrators commonly have expert knowledge in the subject area of the dispute which expedites the process and ensures fair resolution of the dispute.

4.3. Implications

4.3.1. SMEs

There is no universal definition for SMEs and this can make comparisons problematic. In NZ, SMEs are defined as those with less than 20 employees (Ministry of Economic Development 2011, 10). However, the EU defines SMEs as encompassing firms with less than 250 employees and the US extends this to include all firms with less than 500 employees (European Commission 2014; United States International Trade Commission 2010, 8). Consequently, almost all firms in NZ are defined as small from a global standard. Arguably, due to our distance from global markets and the smaller nature of our firms we face more barriers to trade than the overseas studies suggest their SMEs face. The importance of accessibility to alternative dispute resolution mechanisms is perhaps more pertinent in a New Zealand context.

4.3.2. Independence of arbitrators

The academic belief that international arbitration is the better method to resolve international commercial disputes was upheld by the firms who responded to the survey. The most promising benefit identified by firms without international dispute experience was the independence of arbitrators. There are various methods to appointing arbitrators, depending on the rules or institutions applicable to the dispute. An arbitral tribunal commonly consists of one or three arbitrators. In ad hoc arbitration proceedings, which the draft BAT proposes using, parties normally each nominate one arbitrator and these two arbitrators then select an additional arbitrator as chairman of the tribunal to ensure neutrality (unless a sole arbitrator has been agreed on). Institutional proceedings appoint arbitrators under the supervision of professional bodies (e.g. the London Court of International Arbitration or the Permanent Court of Arbitration). The various procedures result in a neutral tribunal whereas, in litigation, judges are perceived to favour the domestic party and have a parochial outlook on international disputes. This is a substantial benefit that a BAT could provide and supports the preference for default arbitration over litigation.

4.3.3. Contract formation

Question three of the survey asked if a formal contract was formed between parties to international transactions. The results showed that 43.1% did not normally form contracts.[5] Of those who did form contracts, 72% stated that they do include a dispute resolution clause.[6] These firms would fall out of the scope of a BAT. However, the firms who are exporting without contracts or without dispute resolution clauses would be within the confines of a BAT should a dispute arise. The current default for these firms is international litigation in a number of courts. Therefore, as they have previously identified that arbitration is the better method, a BAT is potentially of benefit to these firms.

4.3.4. Dispute experience

Three questions of the survey were divided into two columns to separate the answers of those with international dispute experience and those without. This resulted in a number of interesting features. Firstly, both groups were clear in their preference for negotiation and other less adversarial means of dispute resolution over litigation and arbitration. Those firms with prior experience were more authoritative with their answers. For example, following a dispute, firms were twice as likely to include a dispute resolution clause in their contracts. Additionally, 57.1% of those with international dispute experience believed that the country was important in choosing the appropriate method of dispute resolution compared to only 29.8% of those without.

The firms with no experience were more sceptical towards default arbitration. Firms with experience, on the whole, were more familiar with the proposed costs and benefits. Confidentiality is a guaranteed benefit default arbitration to those who wish to keep their disputes private. However, only 17.9% of those without experience

[5] See table 4 in Appendix B

[6] See table 6 in Appendix B

thought it would be a benefit compared to 57.1% of firms with experience. This could be indicative of their preference for public hearings and publication of decisions but this is unlikely given their preference for negotiation. Accordingly it should be attributed to the variations in familiarity with arbitration.

Together, the groups believe that there will be at least a little cost of default arbitration to their business. The highest costs would arise from management time used to understand arbitration given their lack of familiarity with the procedures. The firms' preference for negotiation explains their agreement with the expense of arbitral proceedings being a potential cost to them. It would be interesting to further compare the responses of exporting firms and those with no trade experience.

4.3.5. Familiarity with legal systems

MBIE has identified that a barrier to trade for SMEs is the unfamiliarity of operating in a different country (MBIE 2014, 8). Avoiding specific legal systems is a benefit arising from international arbitration (Queen Mary University of London and White & Case 2015, 2). In the survey, however, only 34.1% of firms stated that their preferred method of dispute resolution is dependent on the country with whom they are trading and 47.7% were unsure of their answer. The remaining 11.4% considered the country irrelevant. This is perhaps indicative of a lack of familiarity with the differences between various legal systems as New Zealand's largest source of overseas income is Australia (MBIE 2013, 2). Due to the proximity and similarities between the two economies, SMEs may be lulled into a false sense of security and think all jurisdictions are alike.

This complacent attitude has developed through our extensive trade agreements with Australia. The NZ-Australia Closer Economic Relations (CER) first came into force in 1983 and now comprises more than 80 treaties, protocols and arrangements (Ministry of Foreign Affairs and Trade 2016). It was initiated to achieve free trade and unification of policy, laws and regulatory regimes across NZ and Australia; thereby creating a single economic market (SEM). The Trans-Tasman Mutual Recognition Arrangement (TTMRA) goes further towards creating a SEM by lowering business costs, increasing cooperation on regulatory controls and standardising occupational registration (MBIE 2016). The Trans-Tasman Proceedings Act helps streamline enforcement of judgments across the two jurisdictions.[7]

Outside of Australia, there is a greatly increased distance both literally and figuratively from potential export markets. If SMEs, who may not have sufficient access to key information about potential export markets, enter trade agreements without any knowledge of the local legal system, then a BAT could protect the naïve from potentially disastrous dispute resolution. This is particularly pertinent given nearly half of the sample do not form formal contracts for international transactions.

4.3.6. Further research

Following the survey, there are a number of potential avenues for further research. A follow-up interview could be conducted with the respondents to ascertain the particular legal systems they are or are not wary of and why. It would be useful to

[7] See http://www.legislation.govt.nz/act/public/2010/0108/latest/whole.html#DLM2576223

collect data on their current export markets and compare how responses vary based on export destinations.

As previously identified, the potential costs of a BAT require more work as the unfamiliarity these firms have with arbitration prevented a sound analysis of the actual costs arising from default arbitration. This was shown by conflicting responses and a high proportion of unsure answers.

The strengths and weaknesses of each alternative dispute resolution method in a New Zealand context based on the experiences of New Zealand firms could be a useful study. Further research comparing the domestic and international situation would be beneficial. Additionally, whilst arbitrations are private and confidential, if data on the number of arbitrations in NZ and the amount of NZ litigation of foreign disputes could be established, it would go a long way to determining the proliferation of arbitration in NZ. This would thereby help discern whether our sample represents the population.

5. Conclusion

In theory, a BAT still remains a useful and sensible idea for NZ exporters and SMEs in particular. However there is a prevailing atmosphere of uncertainty. Further research, as outlined above, would better penetrate this uncertainty and help further develop a clearer picture of the actual implications of a BAT.

The risks that these firms in the survey perceived are not insurmountable, as seen by the mitigation of costs by some of the benefits. If a BAT were agreed upon by NZ and our trade partners, there would be greater growth in collective experience over and above the individual experience. Overcoming institutional arrangements in countries by standardising the default process for dispute resolution could substantially decrease the potential risks to new exporters.

6. References

Born, Gary. 2010. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing.* Netherlands: Kluwer Law International.

Born, Gary. 2012. "BITs, BATs and Buts: Reflections on International Dispute Resolution." Kiev Arbitration Days 2012, Kiev, November 15-16.

Born, Gary. 2014. *International Commercial Arbitration.* Leiden: Kluwer Law International.

Butler, Petra and Campbell Herbert. 2014. "Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case For a Bilateral Arbitration Treaty." *New Zealand Universities Law Review* 26: 186-221.

CDR. "Born's BAT gets set to fly." 2 January, 2014. http://www.cdr-news.com/categories/arbitration-and-adr/4659-borna?newslettercrmid=54aa4be6-16ad-de11-8dc8-001e0be858ee.

European Commission. "What Is an SME?" Accessed February 8, 2016. http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm.

Fiske, William. 2004-2005. "Should Small and Medium-Size American Businesses "Going Global" Use International Commercial Arbitration?" *Transnat'l Law* 18: 455.

Friedland, Paul. 2007. *Arbitration Clauses for International Contracts.* New York: Juris Publishing.

Greenberg, Simon, Sally Fitzgerald and Bjorn Gehle. 2015. "International Arbitration in New Zealand." In *International Commercial Arbitration: 21st Century Perspectives,* edited by Horacio Grigera Naon and Paul Mason, §15.04. USA: LexisNexis. http://www.lexisnexis.com.helicon.vuw.ac.nz/ap/auth/default.asp?customer=vuw.

Love, Inessa. *Settling Out of Court: How Effective Is Alternative Dispute Resolution?* 2011. https://wdronline.worldbank.com/handle/10986/11055.

Ministry of Business, Innovation and Employment (MBIE). *Small Businesses in New Zealand: How do they compare with larger firms?* Report. March 2013. http://www.mbie.govt.nz/info-services/business/business-growth-and-internationalisation/documents-image-library/Small-business-stats-factsheet.pdf.

Ministry of Business, Innovation and Employment (MBIE). *The Business Growth Agenda: Building Export Markets.* Report. September 2015. http://www.mbie.govt.nz/info-services/business/business-growth-agenda/pdf-and-image-library/towards-2025/mb13078-1139-bga-report-01-export-markets-09sept-v17-fa-web.PDF.

Ministry of Business, Innovation and Employment (MBIE). *The Small Business Sector Report 2014.* Report. 2014. http://www.mbie.govt.nz/info-services/business/business-growth-agenda/pdf-and-image-library/2014/The%20Small%20Business%20Sector%20Report%202014%20-PDF%208.8%20MB-1.pdf.

Ministry of Business, Innovation and Employment. 'Trans-Tasman Mutual Recognition Arrangement'. Accessed February 8, 2016. http://www.mbie.govt.nz/info-services/business/trade-tariffs/trade-environment/economic-relationship-with-australia/trans-tasman-mutual-recognition-arrangement/?searchterm=TTMRA%2A.

Ministry of Economic Development. *SMEs in New Zealand: Structure and Dynamics 2011.* Report. September 2011. http://www.mbie.govt.nz/info-services/business/business-growth-and-internationalisation/documents-image-library/Structure-and-Dynamics-2011.pdf.

New Zealand Law Society. "Arbitration Treaties Could Help Settle International Disputes." Accessed 24 November, 2015. https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-865/arbitration-treaties-could-help-settle-international-disputes.

New Zealand Ministry of Foreign Affairs and Trade. "NZ-Australia Closer Economic Relations (CER)." Accessed February 8, 2016. https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-australia-closer-economic-relations-cer/.

New Zealand Trade and Enterprise. "Disputes." Accessed 18 November, 2015. https://www.nzte.govt.nz/en/export/growing-your-exports/growing-your-strategy/disputes/.

OECD. 2012. *Entrepreneurship at a Glance 2012*. Paris: OECD Publishing. http://dx.doi.org/10.1787/entrepreneur_aag-2012-en.

OECD. *Top Barriers and Drivers to SME Internationalism.* Report by the Working Party on SMEs and Entrepreneurship. Paris: OECD Publishing, 2009. http://www.oecd.org/cfe/smes/43357832.pdf.

Queen Mary University of London and PricewaterhouseCoopers. *2010 International Arbitration Survey: Choices in International Arbitration*. Report. 2010. http://www.arbitration.qmul.ac.uk/docs/123290.pdf.

Queen Mary University of London and PricewaterhouseCoopers. *Corporate Choices in International Arbitration: Industry Perspectives*. Report. 2013. http://www.arbitration.qmul.ac.uk/docs/123282.pdf.

Queen Mary University of London and PricewaterhouseCoopers. *International Arbitration: Corporate attitudes and practices.* Report. 2008. http://www.arbitration.qmul.ac.uk/docs/123294.pdf.

Queen Mary University of London and White & Case. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration.* Report. 2015. http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

Statistics New Zealand. "New Zealand Business Demography Statistics: At February 2015". February 2015. http://www.stats.govt.nz/browse_for_stats/businesses/business_characteristics/BusinessDemographyStatistics_HOTPFeb15.aspx.

The RMLNLU Law Review Blog. "The Bilateral Arbitration Treaty Regime: Some "Buts" For Thought." Accessed November 23, 2015. https://rmlnlulawreview.wordpress.com/2015/09/30/the-bilateral-arbitration-treaty-regime-some-buts-for-thought/.

United States International Trade Commission. *Small and Medium-Sized Enterprises: Overview of Participation in US Exports.* Report. 2010. http://www.strtrade.com/media/publication/2434_2010-January-20-pub4125.pdf.

Van der Horst, Rob, Renate de Vree and Paul van der Zeijden. *SME access to Alternative Dispute Resolution Systems.* EIM, 2006. Print.

Victoria University of Wellington. *Gary Born - Bilateral Arbitration Treaty Regime*. 2015. https://www.youtube.com/watch?v=qXIYlExG_D0.

Walton, John. 2014. "International Arbitration: Are we a seat or are we just sitting?" Paper presented at the AMINZ Conference, Queenstown, 2014.

Wilmer Cutler Pickering Hale and Dorr LLP - International Arbitration Library. *BITS, BATs and Buts - Reflections on International Arbitration*. 2014. https://www.youtube.com/watch?v=kFHN1ulJlMk.

Appendix A Survey

NZIER

COMPANY ID:
RESPOND BY: 15/01/2016

CONFIDENTIAL SURVEY OF OPINION ON A BILATERAL ARBITRATION TREATY

Please choose one answer for each question. Email responses to: georgia.whelan@nzier.org.nz

Like this: ● Not like this: ✓ ✗ /

How many employees does the business employ?

1 - 10	11 - 19	20 - 49	50+
①	②	③	④

Which one of the following classifications most closely descibes your firm's exports?

Agriculture, forestry & fishing	Accommod-ation & food services	Retail trade	Manufacture	Construction	Scientific & technical services	Electricity, gas, water & waste services	Wholesale trade	Health care & social assistance
①	②	③	④	⑤	⑥	⑦	⑧	⑨
Education & training	**Transport, postal & warehousing**	**Admin & support services**	**Rental, hiring & real estate services**	**Arts & recreation services**	**Financial & insurance services**	**Information, media & telecommu-nications**	**Mining**	**Other**
⑩	⑪	⑫	⑬	⑭	⑮	⑯	⑰	⑱

When involved in international transactions, is a formal contract usually created between the business and other parties?

Yes	No
①	②

If yes, does the contract usually contain a dispute resolution clause?

Yes	No	N/A
①	②	③

Has your business been through an international business-to-business dispute?

Yes	No
①	②

Of the international disputes your business has encountered, have these been fully resolved?

Mostly	Sometimes	Never	N/A
①	②	③	④

Does your preferred dispute resolution mechanism depend on the country you are involved with?

Yes	No	Unsure
①	②	③

Dispute resolution mechanisms

If you do not have international dispute experience, which mechanisms would you use?				If your business does have international dispute experience, which mechanisms have you used?		
Mostly	Sometimes	Never		Mostly	Sometimes	Never
①	②	③	NZ litigation	①	②	③
①	②	③	Litigation in other party's country	①	②	③
①	②	③	Litigation in third country	①	②	③
①	②	③	International arbitration	①	②	③
①	②	③	Negotiation	①	②	③
①	②	③	Mediation	①	②	③
①	②	③	Expert Determination	①	②	③
①	②	③	Other	①	②	③

NZIER

COMPANY ID:
RESPOND BY: 15/01/2016

Do you believe that arbitration is a better dispute resolution mechanism for international business-to-business disputes than litigation?

Yes	No	Unsure
①	②	③

How beneficial do you believe default arbitration could be to your business?

A lot	A little	None
①	②	③

What do you believe this value to your business could be?

With no international dispute experience:				With international dispute experience:		
Agree	Disagree	Unsure		Agree	Disagree	Unsure
①	②	③	Increased trade	①	②	③
①	②	③	Decreased negotiation costs	①	②	③
①	②	③	Expertise of arbitrators	①	②	③
①	②	③	Enforceability of award	①	②	③
①	②	③	Lowered costs	①	②	③
①	②	③	Speed	①	②	③
①	②	③	Independence of arbitrators	①	②	③
①	②	③	Flexibility of procedure	①	②	③
①	②	③	Favourable outcome	①	②	③
①	②	③	Confidentiality	①	②	③
①	②	③	Access to justice	①	②	③
①	②	③	Certainty	①	②	③
①	②	③	Relationship building	①	②	③
①	②	③	Other	①	②	③

Do you believe that there would be costs to your business with default arbitration?

A lot	A little	None
①	②	③

What do you believe this cost to your business could be?

With no international dispute experience:				With international dispute experience:		
Agree	Disagree	Unsure		Agree	Disagree	Unsure
①	②	③	Expense	①	②	③
①	②	③	Management time	①	②	③
①	②	③	Delay	①	②	③
①	②	③	Denial of right to access the courts	①	②	③
①	②	③	Unfavourable outcome	①	②	③
①	②	③	Unfamiliarity with procedure	①	②	③
①	②	③	Enforceability	①	②	③
①	②	③	Lack of right to appeal	①	②	③
①	②	③	The risk of compromise awards	①	②	③
①	②	③	Other	①	②	③

Additional comments or clarification:

Appendix B Summary of survey responses

B.1 Part One

The first six questions of the survey were aimed at establishing the characteristics of the firms and their current trade practices/experiences. We chose not to be selective in only surveying SMEs to discern whether there is a difference in the practices of varyingly sized businesses.

One firm did not select an option for question one, therefore when separated into firm size only 43 firms are compared.

Question 1: How many employees does the business employ?

Based on the table below, 23% of businesses surveyed are categorised as SMEs.

Table 1 Number of employees

Category	Frequency
1-10 employees	7
11-19 employees	3
20-49 employees	12
50+ employees	21
Blank response	1
Total	**44**

Question 2: Which one of the following classifications most closely describes your firm's exports?

New Zealand's balance of enterprises at February 2015 shows enterprises are concentrated in agriculture, forestry and fishing, as well as rental, hiring, and real estate services (Statistics New Zealand 2015). The respondents for this survey were concentrated in the manufacturing industry (57.1%) which is a distortion of the real spread of industries in New Zealand. No data on the industry spread of exporting firms was available.

For NZ SMEs, the most common source of overseas income is the sale of goods for use by other businesses; i.e. business to business transactions which is the relationship the BAT is solely focused on (MBIE 2014, 8). The respondents to this survey are reflective of this. Of the firms surveyed, approximately 77% could be classified as producing intermediate or final goods and services rather than primary goods.

Table 2 Categorisation of exports

Exports	Frequency
1: Agriculture, forestry and fishing	4
2: Accommodation and food services	1
4: Manufacturing	25
5: Construction	1
8: Wholesale trade	5
11: Transport, postal & warehousing	1
16: Information, media & telecommunications	1
18: Other	5
Blank response	1
Total	**44**

A third of SMEs surveyed are manufacturers compared to two thirds of larger firms.

Table 3 Categorisation of exports split by firm size

Export category	SMEs	20+ employees
1: Agriculture, forestry and fishing	1	2
2: Accommodation and food services	0	1
4: Manufacturing	3	22
5: Construction	0	1
8: Wholesale trade	2	3
11: Transport, postal & warehousing	1	0
16: Information, media & telecommunications	0	1
18: Other	3	2
Blank response	0	1
Total	**10**	**33**

Question 3: When involved in international transactions, is a formal contract usually created between the business and other parties?

Whilst it is difficult to define what a formal contract is, it is assumed that businesses would interpret this as a complete written document intending to contain all the terms of the agreement. Of the respondents, 56.9% said they do form contracts for

international transactions, whilst the remaining 43.1% said they do not. Thus there is no definitive answer to this question.

Table 4 Contract formation for international transactions

Contract	Frequency
1: Yes	25
2: No	19
Total	**44**

When the above table is split into firm size, a different picture is formed. SMEs are more likely to not form formal contracts. Comparatively, firms with 50+ employees were more in favour of forming a contract. This could be indicative of the larger nature of their exporting practices compared to SMEs or because they have more income to spend on negotiating contracts and need not worry about protecting burgeoning trade relationships. There was an even split in the 20-49 category, reflecting the varying practices of firms in relation to contract formation.

Table 5 Contract formation by firm size

Contract	1-10	11-19	20-49	50+
1: Yes	2	2	6	14
2: No	5	1	6	7
Total	**7**	**3**	**12**	**21**

Question 4: If yes, does the contract usually contain a dispute resolution clause?

In the 2010 international arbitration survey, 68% of the corporations stated that they have a dispute resolution policy (Queen Mary University of London and White & Case 2010, 2). This was found to be dependent on the nature of the contract and the relative bargaining position of the parties. SMEs are unlikely to hold much power in their trade relationships. The respondents in the 2010 survey considered the dispute resolution clause to be of less importance than the main commercial terms (Queen Mary University of London and White & Case 2012, 8).

In this survey, of those who do conclude a formal contract with trade partners (18 out of the 25 who selected “yes” for the previous question), 72% responded that they do include a dispute resolution clause. Including all firms in the survey, 40.1% include dispute resolution clauses. This suggests that if firms are willing to negotiate contracts they will usually include a dispute resolution clause in the final document.

Table 6 Dispute resolution clause

Dispute Resolution Clause	Frequency
1: Yes	18
2: No	6
3: Not applicable	15
Blank response	5
Total	**44**

When separated into firm size it is possible to observe that overall, regardless of size, firms prefer to include dispute resolution clauses.

Table 7 Dispute clauses by firm size

Clause	1-10	11-19	20-49	50+
1: Yes	1	1	5	10
2: No	1	1	1	3
3: Not applicable	2	1	6	6
Blank response	3	0	0	2
Total	**7**	**3**	**12**	**21**

Another way to segregate this question is whether international dispute experience changes firms' perceptions. Again, regardless of experience, firms prefer to include dispute resolution clauses in their contracts. Those with no international dispute experience are roughly twice as likely to include a dispute resolution clause than not and this increases to four times as likely for those with international dispute experience.

Table 8 Dispute clauses by dispute experience

Clause	Dispute experience	No dispute experience
1: Yes	4	13
2: No	1	6
3: Not applicable	2	13
Blank response	0	5
Total	**7**	**37**

Question 5: Has your business been through an international business-to-business dispute?

This question was aimed at determining the experience of those surveyed and to be used in segregating responses to other questions to see if practices changed. There was not an even spread of experienced/not experienced in the firms surveyed, with 84.1% responding that they do not have international dispute experience.

Table 9 International dispute experience

Dispute	Frequency
1: Yes	7
2: No	37
Total	**44**

Question 6: Of the international disputes your business has encountered, have these been fully resolved?

This question was included to evince whether there is a tendency for SMEs to avoid prolonged and costly dispute settlements. Of those who have been through an international dispute, it is clear that most firms make an effort to ensure that there is a resolution to the issue. Those without experience should have selected number four, however, an excess of firms have chosen an alternate answer. Selecting the seven firms who said they do have international dispute experience, four selected one ("mostly") and the remaining three chose two ("sometimes"). Hence there is a proclivity to ensuring resolution of disputes.

Table 10 Full resolution of disputes

Resolution	Frequency
1: Mostly	7
2: Sometimes	3
3: Never	1
4: Not applicable	31
Blank response	2
Total	**44**

When this is broken down into firm size, the same conclusion as above applies.

Table 11 Full resolution by firm size

Resolution	1-10	11-19	20-49	50+
1: Mostly	1	0	3	3
2: Sometimes	0	0	1	2
3: Never	0	0	1	0
4: Not applicable	4	3	7	16
Blank response	2	0	0	0
Total	**7**	**3**	**12**	**21**

Question 7: Does your preferred dispute resolution mechanism depend on the country you are involved with?

In the 2014 Small Business Sector Report, MBIE identified that a barrier to trade for SMEs was the unfamiliarity of operating in a different country (MBIE 2014, 8). The purpose of this question was to ascertain whether NZ firms are wary of certain trading partners and their legal systems and whether, as an extension of this, they thus avoid foreign litigation as a means of dispute resolution. The 2015 international arbitration survey found that avoiding specific legal systems is one of the benefits of arbitration (Queen Mary University of London and White & Case 2015, 2). However, it is unlikely that our largest source of overseas income, Australia, has a legal system that causes concern for NZ firms (MBIE 2013, 2). Of the respondents, 34.1% answered that their preferred method of dispute resolution is dependent on the country with whom they are trading. Only 11.4% considered the country irrelevant. A further 47.7% were unsure whether this is important. This could indicate lack of familiarity with the differences between national legal systems.

Table 12 Dispute resolution method and country

Country dependent	Frequency
1: Yes	15
2: No	5
3: Unsure	21
Blank response	3
Total	**44**

The above pattern is not altered when this data is broken down into firm size. Firms are mostly uncertain as to whether this matters. Further research could determine what attitude this reflects: do firms lack sufficient knowledge of alternate legal systems or do they not see the differences as a detriment to sufficient dispute resolution?

Table 13 Dispute resolution method, country and firm size

Country	1-10	11-19	20-49	50+
1: Yes	1	0	6	7
2: No	2	0	2	1
3: Unsure	2	3	4	12
Blank response	2	0	0	1
Total	**7**	**3**	**12**	**21**

The answer varies when the data is segregated into the firms with international dispute experience and those without. The 57.1% of those with experience said that country does matter whereas only 29.8% of those without the same experience said it is important.

Table 14 Dispute Resolution method, country and experience

Country	Dispute experience	No dispute experience
1	4	11
2	0	5
3	3	18
Blank response	0	3
Total	**7**	**37**

B.2 Part Two

The second half of the survey was focused on establishing the potential costs and benefits of a BAT to New Zealand exporters. The survey was divided into two columns to attest to whether opinions differed between those with international dispute experience and those firms who did not; i.e. whether, for example, familiarity with using these mechanisms caused a change in view as to the efficacy of litigation. It was also possible to break this down into firm size to see if opinions were divided.

Question 8: Dispute resolution mechanisms

Key:

Acronym	Meaning
NZL	New Zealand Litigation
OL	Litigation in other party's country
TPL	Litigation in third country
A	International arbitration
N	Negotiation
M	Mediation
ED	Expert determination
O	Other

This question endeavoured to gather what preferences firms have for certain methods of dispute resolution. It helps discern whether firms are familiar with international arbitration and litigation – the current method the BAT is trying to replace. A European study found that the most common ways of solving disputes for SMEs was through informal negotiation, court proceedings and alternative dispute resolution (Van der Horst, de Vree and van der Zeijden 2006, 28).

The results are similar to the EU study but differ to the 2008 international arbitration survey London where 88% of participants had used arbitration (Queen Mary University of London and PricewaterhouseCoopers 2008, 28). In the 2015 survey, 90% of respondents preferred international arbitration, either as a stand-alone method or together with other forms of dispute resolution (56% and 34% respectively) (Queen Mary University of London and White & Case 2015, 2). Comparatively, New Zealand firms do not appear to be as familiar with international arbitration.

a) *If you do not have international dispute experience, which mechanisms would you use?*

Firms without international dispute experience clearly prefer negotiation as a means of dispute resolution. This was followed at a distance by NZ litigation, perhaps indicative of preference for the familiar and then mediation or expert determination. International arbitration was the least preferred method. It can be extrapolated that NZ firms prefer familiar and less adversarial methods of dispute resolution.

Six firms have been excluded from this table as they did not provide any answer to the question. Some firms did not select a response for all questions, suggesting that they have no experience with the relevant method.

Table 15 Dispute resolution mechanisms with no experience

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	6	1	1	0	18	4	4	1
2: Sometimes	10	9	0	7	7	13	12	2
3: Never	12	15	24	18	5	11	12	19
Blank response	3	6	6	6	1	3	3	9
Total	**31**	**31**	**31**	**31**	**31**	**31**	**31**	**31**

b) *If your business does have international dispute experience, which mechanisms have you used?*

The same conclusions that were drawn for firms without international dispute experience hold here. International arbitration is not commonly used by NZ firms for international disputes. Negotiation and NZ litigation or litigation in the other party's country stand out as the most commonly used methods. Third country litigation and arbitration are the least utilised.

Table 16 Dispute resolution mechanisms with experience

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	1	0	0	0	3	0	0	1
2: Sometimes	4	4	1	2	4	2	3	1
3: Never	2	2	5	4	0	4	2	3
Blank response	0	1	1	1	0	1	2	2
Total	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**

When this is broken down into firm size, again the same conclusions hold true. Negotiation is the most preferred and used method for international dispute resolution. For firms with employees between 1 and 10 or over 50, negotiation is markedly preferred to all other forms of dispute resolution.

Table 17 1-10 preferred dispute resolution mechanisms

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	1	0	1	0	4	1	2	0
2: Sometimes	1	0	0	2	1	2	1	0
3: Never	2	4	3	3	1	2	2	4
Blank response	3	3	3	3	1	2	2	3
Total	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**

Table 18 11-19 preferred dispute resolution mechanisms

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	0	0	0	0	0	0	0	0
2: Sometimes	1	1	0	1	1	1	1	1
3: Never	1	1	2	1	1	1	1	1
Blank response	1	1	1	1	1	1	1	1
Total	**3**	**3**	**3**	**3**	**3**	**3**	**3**	**3**

Table 19 20-49 preferred dispute resolution mechanisms

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	2	0	0	0	5	2	1	0
2: Sometimes	4	4	1	2	3	3	5	2
3: Never	5	5	8	7	2	6	5	6
Blank response	1	3	3	3	2	1	1	4
Total	**12**	**12**	**12**	**12**	**12**	**12**	**12**	**12**

Table 20 50+ preferred dispute resolution mechanisms

	NZL	OL	TPL	A	N	M	ED	O
1: Mostly	4	0	0	0	11	1	1	2
2: Sometimes	7	8	0	4	6	8	7	1
3: Never	6	7	15	11	1	6	6	10
Blank response	4	6	6	6	3	6	7	8
Total	**21**	**21**	**21**	**21**	**21**	**21**	**21**	**21**

Question 9: Do you believe that arbitration is a better dispute resolution mechanism for international business-to-business disputes than litigation?

Of the respondents, 59.1% believe that arbitration is a better dispute resolution mechanism than litigation. Whilst the previous question and the responses suggested that international arbitration is not often used by firms compared to litigation,

arbitration is still the preferred method. With 27.3% respondents returning an "unsure" answer, this solidifies the inference that unfamiliarity is the first barrier to the increased use of international arbitration.

Table 21 Choice between arbitration and litigation

Preference	Frequency
1: Yes	26
2: No	1
3: Unsure	12
Blank response	5
Total	**44**

When broken down into firm size, each group postulates that arbitration is a better method of international dispute resolution than litigation. There is insignificant variation between the groups and their preferences.

Table 22 Comparing choice within firm size

Preference	1-10	11-19	20-49	50+
1: Yes	4	2	6	13
2: No	0	0	1	0
3: Unsure	2	1	2	7
Blank response	1	0	3	1
Total	**7**	**3**	**12**	**21**

Question 10: How beneficial do you believe default arbitration could be to your business?

This question was aimed at itemising whether firms believe that there would be significant, little, or no benefits arising from the implementation of default arbitration for international commercial disputes through a BAT. Just over half of the respondents, 54.5%, believe there will be "a little" or "a lot" of benefit arising from default arbitration. A third of respondents, 31.8%, believe that there would be no benefit to their business.

Table 23 Benefit of default arbitration

Benefit	Frequency
1: A lot	4
2: A little	20
3: None	14
Blank response	6
Total	**44**

Breaking this question down into responses by firm size varies the story a little. SMEs are more sceptical about the proposed benefits of default arbitration for their businesses. This could be indicative of their unfamiliarity with international arbitration or due to a stronger domestic focus for their firms. Comparatively, larger firms have a more positive attitude to default arbitration.

Table 24 Benefit of default arbitration by firm size

Benefit	1-10	11-19	20-49	50+
1: A lot	0	0	1	3
2: A little	3	1	4	11
3: None	3	2	4	5
Blank response	1	0	3	2
Total	**7**	**3**	**12**	**21**

When the data is split by firms with and without international dispute experience, again there is little differentiation in the conclusions to be drawn. Whilst both groups are leaning towards there being some benefit, there is no overwhelming indication that there would be a large benefit to either group. Firms without international dispute experience are more sceptical about the potential benefits of default arbitration, perhaps because of their unfamiliarity with international dispute resolution in general.

Table 25 Benefit to firms with dispute experience

Benefit	Firms with international dispute experience	Firms without international dispute experience
1: A lot	1	3
2: A little	4	16
3: None	2	12
Blank response	0	6
Total	**7**	**37**

Question 11: What do you believe this value to your business could be?

Key:

Acronym	Meaning
IT	Increased trade
N$	Decreased negotiation costs
EX	Expertise of arbitrators
ENF	Enforceability of award
LC	Lowered costs
S	Speed
I	Independence of arbitrators
FLEX	Flexibility of procedure
FAVE	Favourable outcome
CO	Confidentiality
ATJ	Access to justice
CERT	Certainty
R	Relationship building
O	Other

Following on from the previous question, a list of proposed benefits were itemised by the respondents. This identifies whether the common benefits were accepted or whether firms' perspectives differed.

Some of the benefits chosen, such as increased trade or decreased negotiation costs, were intuitive as they form part of the aims of default arbitration. The remainder were the product of external research. All of the benefits use international litigation as the comparator. In both the 2008 and 2015 international arbitration surveys, the main benefits of arbitration were the enforceability of awards and flexibility of procedure (Queen Mary University of London and PricewaterhouseCoopers 2008, 12; Queen Mary University of London and White & Case 2015, 2). Additionally, in the 2015 version, 33% of respondents selected confidentiality and privacy as one of their three most valuable characteristics of international arbitration (Queen Mary University of London and White & Case 2015, 6). Further benefits are the enforceability of awards, neutrality, flexibility of procedure, confidentiality and expertise (Born 2010, 10-11; Friedland 2007, 9). Technical specialisation and independence of arbitrators and quality and cost effectiveness of outcomes are also benefits to be gained (Walton 2014, 2; New Zealand Trade & Enterprise 2015). It is disputed whether cost and time are now benefits or costs so they were added as both.

This question was split to discern whether there were any variations in benefit selection and whether this could be explained by firms' different experiences. Nevertheless, there were similarities across the two groups. Firstly, the high percentage of answers in the unsure category is indicative of the inexperience this group of respondents has with arbitration. The benefit 'favourable outcome' was added in to test perceptions of the awards arbitrators make and whether firms believe

that using arbitration will result in more awards made in their favour. Both sets of respondents clearly believed that this was not one of the benefits they would receive through default arbitration thus, whilst unfamiliar with it, the respondents perceive it to be unbiased.

One of the aims of a BAT is to increase economic integration, thus it would be hoped that a BAT could promote trade by reducing one risk of exporting for SMEs in particular. However, neither group of respondents had an overwhelmingly positive response for increased trade as one of the potential benefits. This could be because all the firms surveyed are current exporters and thus comfortable in their current practices. Of firms with no experience, 39.2% disagreed that this would be a benefit. Only 3.6% of firms with no international dispute experience and 14.3% in the alternative group agreed that this would be a benefit. This is not reflective of whether firms who do not export would be inclined to start trading with a BAT covering the risk of potential disputes.

A further interesting comparison is the variation in whether confidentiality will be one of the benefits. Article 4(2) of the draft BAT includes a confidentiality clause whereby, "unless otherwise agreed in writing", any arbitration pursuant to the treaty shall be confidential and all the documents/materials and awards relating to the arbitration shall remain confidential subject to exceptions as required by law. Of those without international dispute experience, only 17.9% agreed that confidentiality would be a benefit of default arbitration. Comparatively, 57.1% of the firms with international dispute experience agreed that confidentiality would be a benefit. This divergence in results ostensibly arises from experience.

a) With no international dispute experience

Table 26 is based on those who have not been through an international dispute and attempted to answer some or all aspects of the question. The results show that firms with no international dispute experience find the independence of arbitrators is the most promising benefit. This is closely followed by decreased negotiation costs in forming a contract and lowered costs in general, arising perhaps from what they perceive as a cheaper form of dispute resolution (vis-à-vis litigation). However, there was also a division of opinion with these last two as whilst 35.7% agreed that these would be benefits, 25% and 21.4% respectively disagreed that these would be benefits.

These firms also believe that there would be a benefit arising from the expertise of arbitrators; where parties to a dispute can elect an arbitrator with experience or knowledge pertaining to their particular issue. The enforceability of the award, as protected by Article 6 of the draft BAT, was a further benefit particular identified by this group. International arbitral awards are, at this point in time, easier to enforce than foreign judgments.

Overall, this data shows there is no general consensus amongst firms without international dispute experience as to the particular benefits arising from default arbitration.

Table 26 Benefits to firms with no international dispute experience

	IT	N$	EX	EN	LC	S	I	FLEX	FAVE	CO	ATJ	CERT	R	O
1: Agree	1	10	9	9	10	8	11	7	3	5	8	8	4	0
2: Disagree	11	7	1	2	6	4	4	2	3	3	2	4	4	0
3: Unsure	15	11	17	17	12	15	13	18	21	19	18	15	18	21
Blank	1	0	1	0	0	1	0	1	1	1	0	1	2	7
Total	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**

b) With international dispute experience

The firms with international dispute experience appear to be more in agreement about the applicability of these benefits. They perhaps possess more knowledge about the various advantages and disadvantages of dispute resolution methods. They were less likely to disagree with the proposed benefits than their counterparts. Over half of the firms, 57.1%, agreed that the independence of arbitrators, confidentiality, access to justice and certainty would be benefits arising from default arbitration. The independence of arbitrators was also highlighted by the other group of respondents as arbitrators are not tied to governmental appointments or accountable to citizens. Access to justice is linked to this in that the results or awards made are likely to be more easily accepted by parties if they believe the dispute was resolved fairly. The same may not be achieved in a foreign court who favours the domestic party. Certainty should be a guaranteed benefit for parties as a BAT organises the process where there is no agreement between the parties.

Interestingly, firms were unsure as to whether enforceability would be a benefit of default arbitration. If the firms surveyed were more familiar with arbitration, there would have been easy agreement with this proposed benefit. The respondents were also unsure of whether increased trade, flexibility of procedure, favourable outcomes and relationship building would be benefits of default arbitration with 71.4% selecting unsure for these questions. Interestingly, flexibility is commonly declared to be one of the main benefits of arbitration (Queen Mary University of London and PricewaterhouseCoopers 2008, 2). Thus, this response may again be explained by a lack of familiarity. Relationship building ties in with the desired economic integration, however, for firms who already are exporting this seems less pertinent and therefore their unsure response is reasonable.

Table 27 Benefits to firms with international dispute experience

	IT	N$	EX	EN	LC	S	I	FLEX	FAVE	CO	ATJ	CERT	R	O
1: Agree	1	3	3	2	3	3	4	2	2	4	4	4	1	0
2: Disagree	1	1	0	0	1	1	0	0	0	1	0	0	1	0
3: Unsure	5	3	4	5	3	3	3	5	5	2	3	2	5	5
Blank	0	0	0	0	0	0	0	0	0	0	0	1	0	2
Total	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**

Question 12: Do you believe that there would be costs to your business with default arbitration?

This question was aimed at itemising whether firms believe that there would be significant, little or no cost arising from the implementation of default arbitration for international commercial disputes through a BAT. A majority of firms, 70.5%, believe that there will be "a little" or "a lot" of cost to their business with default arbitration. Only 11.4% believed that there would be no cost to their business. If those who did not respond are excluded, 86.1% believe there will be some cost to their business and 13.9% believe that there will be no cost.

Compared to question nine, where there was a slight majority for a benefit to firms, it is clear that a strong majority of firms believe that there would be costs to their business with default arbitration.

Table 28 Costs of default arbitration

Cost	Frequency
1: A lot	9
2: A little	22
3: None	5
Blank response	8
Total	**44**

When broken down into firm size, there is no real change in the conclusion. Businesses with 20-49 employees are more pessimistic about default arbitration than any other group whilst the firms with 50+ employees are marginally more positive in believing that there will only be "a little" cost to their business with default arbitration. Firms with 1-10 employees are the most positive, 42.9% believe that there will be no cost to their business with default arbitration.

Table 29 Costs of default arbitration by firm size

Cost	1-10	11-19	20-49	50+
1: A lot	2	0	5	2
2: A little	1	1	3	16
3: None	3	0	1	1
Blank response	1	2	3	2
Total	**7**	**3**	**12**	**21**

This question can also be broken down into firms with international dispute experience and those without. There are no striking distinctions between the responses of each group. Both suggest that there is at least a little cost to their business of default arbitration.

Table 30 Costs with international dispute experience

Cost	Firms with international dispute experience	Firms without international dispute experience
1: A lot	2	7
2: A little	5	17
3: None	0	5
Blank response	0	8
Total	**7**	**37**

Question 13: What do you believe this cost to your business could be?

Key:

Acronym	Meaning
E	Expense
T	Management time
D	Delay
DOR	Denial of right to access the courts
UF	Unfavourable outcome
UNF	Unfamiliarity with procedure
ENF	Enforceability
LOA	Lack of right to appeal
CR	The risk of compromise awards
O	Other

This question itemises what the potential costs are perceived to be. It reveals whether NZ firms identify the same costs that overseas research has previously indicated may apply.

Time and cost are disputed aspects of arbitration, the 2008 Queen Mary survey found that these were more typically perceived as disadvantages (Queen Mary University of London and PricewaterhouseCoopers 2008, 2; Born 2010, 7). Whilst international arbitration can be expensive and delayed, this is countered by the appellate nature of litigation (Born 2010, 7). There is a potential risk of compromise awards where arbitrators are reluctant to make awards in favour of one party (Born 2010, 9; Friedland 2007, 17). This was corroborated in the 2015 international arbitration survey which found there is a "growing concern" that tribunals are reluctant to act decisively in certain situations for fear of the award being challenged (Queen Mary University of London and White & Case 2015, 5). Another commentator on the BAT suggested that the exclusion of the ordinary remedies in national courts by the state could be a pitfall of default arbitration (The RMLNLU Law Review Blog 2015).

This question was split into those with and without international dispute experience to evaluate whether there were any variations in the costs the two groups foresaw and whether this could be explained by their experiences. There were similarities across

the two groups. The responses seem to suggest that each group used their own preferred dispute resolution mechanisms (such as negotiation) as the comparator.

Both groups found that the highest costs would arise from the management time that would need to be dedicated to understanding default arbitration (78.6% without experience, 85.7% with). This is understandable given the lack of experience the respondents have with arbitration, which ties in with their agreement that unfamiliarity with procedure will be a cost to their business (42.9% and 57.1% for each group respectively). It appears that the greatest barrier to the successful implementation of a BAT in NZ with another trade partner is the inexperience firms have with arbitration.

Another interesting outcome was that 64.3% of firms with no experience and 71.4% of those who do agreed that the expense of arbitration would be a cost to their business. Given that these firms are more accustomed to less adversarial means of dispute resolution, this result is to be expected as arbitration and litigation are comparatively more expensive means of resolving a dispute.

One variation in the responses between the two groups was that 50% of firms with no international dispute experience felt that delay would be a cost to their business whereas only 28.6% of those with the experience felt the same way. Whilst there can be delays in the arbitral process, it is more likely that the first group of respondents were coming from a viewpoint of relatively less protracted forms of dispute resolution.

a) With no international dispute experience

Table 31 is based on those who have not been through an international dispute and attempted to answer some or all aspects of the question. There was less disagreement with the costs here than there was to the proposed benefits. Only 42.9% of the respondents for this category felt that the unfamiliarity of procedure would be a cost to their business. Given that none of these firms said that they would "mostly" use arbitration to resolve international disputes, one would have expected the agreement with this cost to be higher to reflect this. This inexperience is reflected in the column to the right whereby 25% of respondents agreed that the enforceability of awards would be a cost and 75% were unsure whether this would be an issue. As aforementioned, arbitral awards made under a BAT will be enforceable.[8]

Another interesting response was that only 17.9% agreed that the denial of the right to access the courts would be a cost. European studies have found that their SMEs prefer to have "their day in court" (Van der Horst, de Vree and van der Zeijden 2006, 44). The right to choose litigation would not be terminated by a BAT as parties would remain free to adopt their own dispute resolution clauses. A further 75% were unsure as to whether this would be a cost. Again, because these parties have a penchant for choosing more cooperative methods of dispute resolution this may not affect them.

Additionally, 71.4% were unsure whether the lack of a right to appeal would be a cost and 25% believed it would be. This is again symptomatic of their preference for non-adversarial methods of dispute resolution. Arbitration does limit the right to appeal a decision.[9] However, this is solely in comparison to decisions arising from a court judgment.

[8] See the contracting states at http://www.newyorkconvention.org/countries – as at May 2015 there were 156 signatories.

[9] See Article 7 of the Draft BAT for exceptions to the limits on appeal.

Table 31 Costs to firms with no international dispute experience

	EXP	T	D	DOR	UF	UNF	ENF	LOA	CR	O
1: Agree	18	22	14	5	5	12	7	7	7	0
2: Disagree	0	0	3	2	2	1	0	1	0	0
3: Unsure	9	6	10	21	20	15	21	20	21	18
Blank	1	0	1	0	1	0	0	0	0	10
Total	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**	**28**

b) With international dispute experience

The first standout feature of the responses grouped in table 32 is that none of the firms disagreed that these costs would apply to them.

Interestingly, 71.4% of respondents agreed that the risk of compromise awards would be a cost of default arbitration. A further 57.1% of firms believed the lack of the right to appeal would be a cost and the remaining 42.9% were unsure as to whether this would apply. This is interesting as the first group were more ambivalent towards this potential cost.

The final intriguing feature of this table is that 57.1% were unsure as to whether delays, the denial of the right to access the courts and unfavourable outcomes would be costs for their businesses. The fact that these firms did not identify the above as costs can be interpreted as support for arbitration as a fair, non-partisan means of resolving international commercial disputes.

Table 32 Costs to firms with international dispute experience

	EXP	T	D	DOR	UF	UNF	ENF	LOA	CR	O
1: Agree	5	6	2	3	2	4	4	4	5	0
2: Disagree	0	0	0	0	0	0	0	0	0	0
3: Unsure	1	0	4	4	4	2	2	3	2	4
Blank	1	1	1	0	1	1	1	0	0	3
Total	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**	**7**