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THE ARBITRATOR SURVEY – PRACTICES, PREFERENCES AND CHANGES ON THE HORIZON

*Edna Sussman**

Arbitration counsel want to win. Understanding how arbitrators think, what they favor, how they make decisions, and how they work together can guide counsel in devising their strategy and developing their presentations. For their part, arbitrators want to provide a fair hearing that meets the parties' needs. Knowing how other arbitrators handle various procedural aspects, what influences their thinking, and what they prefer can inform arbitrators in conducting their own arbitrations most effectively.

Several excellent works have been published in recent years which approach the subject of arbitrator decision-making from the perspective and mindset of many notable arbitration practitioners.¹ However, empirical data based on a pool of arbitrator responses is scarce. In order to inform the arbitration community and advance the knowledge base on arbitrator preferences and decision-making, I conducted a survey. The survey was distributed through various listservs both in the U.S. and to colleagues around the world and drew 401 responses.²

This article reports and comments on the survey responses, grouped into six sections: the constitution of the tribunal, fundamentals, narrowing the issues and preliminary views, deliberations, the award, and mediation. It is hoped that the discussion will aid counsel and arbitrators in the conduct of arbitrations and

* Edna Sussman, www.sussmanADR.com, is a full-time, independent arbitrator and mediator specializing in international and domestic commercial disputes and serves as the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions around the world and serves as the President of the College of Commercial Arbitrators, Chair of the Board of the AAA-ICDR Foundation, Vice-chair of the New York International Arbitration Center and on the board and the executive committee of the American Arbitration Association. She formerly chaired the Arbitration Committee of the American Bar Association's Section of International Law and the Dispute Resolution Section of the New York State Bar Association.

¹ See, e.g., *INSIDE THE BLACK BOX: HOW TRIBUNALS OPERATE AND REACH DECISIONS*, ASA SPECIAL SERIES NO. 42 (Bernhard Berger & Michael Schneider eds., 2014); UGO DRAETTA, *BEHIND THE SCENES IN INTERNATIONAL ARBITRATION* (2011).

² The survey was disseminated from October 2012 to February 2013 by e-mail to several arbitration listservs. Of the 401 respondents, 79% were from the United States, 12% were from Europe, 5% were from North America outside the United States, and the remainder were from Asia, Latin America and Africa. Over 55% of the respondents had served as an arbitrator in over 50 cases, while 20% had served as an arbitrator on between 21 and 50 cases. Seventy-eight percent of the respondents were male and 22% were female. Forty-two percent were born between 1941 and 1950, 20% were born in 1940 or before and the remainder were born after 1951. While this sample may not be completely representative of the overall population of arbitrators, this survey provides a useful benchmark for our review.

provoke consideration of ways to improve the process in the never-ending search for excellence in arbitration.

I. CONSTITUTION OF THE TRIBUNAL

Which do you prefer: sitting in a tribunal with three arbitrators or sitting as a sole arbitrator?

Sole 26.9%

Panel 73.1%

The vast majority of arbitrators prefer sitting with their colleagues. Sitting on a tribunal with others affords the arbitrators the opportunity to discuss difficult legal issues, consider collective reactions to the evidence, hear different insights and gain the benefit of different perspectives, cultural and legal backgrounds and experiences. While the literature on “group think” does not uniformly come to the conclusion that decisions by the group are better than decisions by the individual, noted commentators have concluded that three adjudicators are better than one and therefore “arbitration might yield more accurate determinations than bench trials.”³ So one could similarly conclude that a tribunal is more likely to provide a more accurate outcome than a single arbitrator. Thus, while it may be tempting to entrust a case to one arbitrator to reduce cost and time, and that may in many cases be the right choice, it is a choice to be made after careful consideration. Since the choice as to the number of arbitrators is commonly dictated by the arbitration agreement, care should be taken at the contract drafting stage to analyze the nature of the disputes that might arise, the likely size of any claim, the importance and complexity of the issues that might be decided, the need for different skill sets and expertise on the part of the decision-makers, and the desire for sensitivity to different legal and cultural perspectives.

If sitting on an arbitral panel do you prefer sitting as chair or as a co-arbitrator?

Chair 81.3%

Co-arbitrator 18.7%

Arbitrators are a self-assured lot. Serving as chair enables the arbitrator to exercise considerable control over the process and often to also have significant influence over the outcome. It is that increased control over the process and the ultimate decision that causes the overwhelming majority of arbitrators to state that they prefer to serve as chair (or president) of the tribunal. Arbitrators take the task entrusted to them by the parties seriously as the survey demonstrates, and prefer

³ Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 453 (2007); see also Richard C. Waites & James E. Lawrence, *Psychological Dynamics in International Arbitration*, in *THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION* 69, 116 (Doak Bishop & Edward G. Kehoe eds., 2010).

the role that increases their ability to ensure that the arbitration is conducted properly, as they would conduct it, and an outcome achieved that is in accordance with their view of the law and the facts. The survey response, with the overwhelming majority stating that they prefer to chair, suggests that arbitrators appreciate the responsibility with which they are being entrusted and are not looking for what for some may look like an easier ride, relying on the chair to do much of the heavy lifting.

II. FUNDAMENTALS

Do you regard yourself as influenced more by the facts or the law in making your decision?

<i>Law</i>	3.5%
<i>Facts</i>	25.3%
<i>Both equally</i>	71.2%

The more heavily weighted reliance on the facts reflected by the survey responses confirms the emphasis given to the advice that counsel must develop a sympathetic “story” that will resonate with the arbitrators if they want to prevail. The literature on persuasion in the law is evolving from the traditional model based solely on informal or formal models of logic to incorporate the “deeper” logic of narrative structures⁴ and provides the theoretical underpinning for this advocacy advice. Narrative, the scholars say, is the “natural mode for understanding human experience,”⁵ thus recognizing the nature of the workings of all human minds. Humans are hardwired to think in story terms, making storytelling an effective type of narrative reasoning for legal argumentation.⁶ “The law always begins in story: usually in the story the client tells . . . It ends in story, too, with the decision by a court or jury . . . about what happened and what it means.”⁷

In recent years, the Applied Legal Storytelling movement has focused on how storytelling, or “narrative theory,” affects what lawyers and judges do in actual cases.⁸ Narrative reasoning presents the arguments that motivate the decision-maker to want to rule in the party’s favor. It is client-centered and fact-oriented. It

⁴ Christopher Rideout, *Storytelling, Narrative Rationality and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 60 (2008). See also Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMMUNICATION AND RHETORIC: JALWD 51 (Fall 2014).

⁵ Rideout, *supra* note 4, at 57.

⁶ Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMMUNICATION AND RHETORIC: JALWD 99, 102 (Fall 2012).

⁷ Rideout, *supra* note 4, at 53, quoting JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168 (1985).

⁸ Chestek, *supra* note 6, at 99.

is a motivating argument as opposed to a justifying argument.⁹ Scholars have described three features (or properties) of narratives that can be psychologically persuasive: narrative coherence (how well the parts of the story fit together, or narrative probability), narrative correspondence (what the decision-maker knows typically happens in the world and not contradicting that knowledge), and narrative fidelity (the perception that the story rings true with what the decision-maker knows to be true).¹⁰ Counsel would do well to devote considerable attention to the development of the “story” even if they believe they have a strong legal position and keep these three properties in mind in organizing the “story,” bearing in mind the particular background and life experiences of the arbitrators appointed in the case.

But the story must fit the legal theory. As Professor Chestek aptly summarized in his discussion of narrative reasoning: “[P]ersuasion is like a double helix: one strand of logos wound tightly with a strand of narrative reasoning. But for this technique to create a viable ‘DNA’ molecule, the two strands must complement each other in a natural way. If they don’t fit together well, the persuasion won’t work.”¹¹

<i>Which do you find more difficult to decide, liability or quantum of damages?</i>	
<i>Liability</i>	18.6%
<i>Damages</i>	43.7%
<i>Both the same</i>	37.7%

Most arbitrations are about damages. How much will the claimant or counterclaimant be awarded? As the survey response confirms, this central issue, the determination of damages, can be an enormously complicated process and arbitrators often find it more difficult to determine the quantum of damages than to determine that damages should be awarded. Forty-four percent of the arbitrators surveyed said that quantifying damages was more difficult than assessing liability. Only 19% found liability more difficult.

The decision on damages may require consideration of a host of issues.¹² What standard should be applied to the proof? Are there contractual limitations on the damages that may be awarded? Are damages limited by the applicable law?

⁹ *Id.* at 102.

¹⁰ See Rideout, *supra* note 4, for an extensive discussion of the three properties.

¹¹ Chestek, *supra* note 6, at 129.

¹² For discussions of damages in arbitration, see, e.g., Hilary Heilbron, *Assessing Damages in International Arbitration: Practical Considerations*, in THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 857 (Larry Newman & Richard Hill eds., 3d ed. 2014); MARK KANTOR, VALUATION IN ARBITRATION (2008); HERFRIED WÖSS, ADRIANA SAN ROMAN RIVERA, PABLO T. SPILLER & SANTIAGO DELLEPIANE, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS (2014). The need for more discussion of the damages issue led to the launching at the end of 2014 of a new *Journal of Damages in International Arbitration* devoted to the subject.

What law governs? Has the claimant demonstrated causation? Has the respondent mitigated sufficiently? If comparative negligence is applicable, how should damages be allocated? Has corruption defeated claimant's right to damages? If there are several respondents, who should be held responsible and for how much? Should there be an award of costs and if so how should it be allocated? What interest rate should be applied and on what basis? And all these and other questions may present themselves before one even considers the unique complexities presented by the damages question. The damages analysis often requires valuations and projections into the future with all of its uncertainties and the application of metrics that can be particularly difficult to assess. What is the most convincing vision of the "but-for" world? What discount rate should be applied? Which multiple is the right one to use? These and many other questions often lead to presentations of complex calculations and computer models with competing experts whose testimony and analysis must be assessed.

While having the experts confer in advance to narrow the issues and hot-tubbing (having them appear at the hearing at the same time) can be of great assistance to the tribunal, the fact remains that damages are often more difficult to assess than liability. Counsel should make every effort to make the presentation as straightforward as possible while still giving the tribunal all the building blocks it needs to understand the analysis. Counsel should invite the tribunal to ask questions and provide the tribunal with whatever tools are necessary to enable it to reach a sound result. The tribunal should make sure it understands all of the presentations and ask for whatever else it needs to make a well grounded decision. The tribunal may, *inter alia*, ask for additional explanations or analysis, request the parties to calculate damages based on specified factual findings or a variety of factual findings, or, in appropriate cases, retain a tribunal expert or request a computer model that can be manipulated by the tribunal.

Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum (rather than take the evidence and give it such weight as you deem appropriate)?

<i>Always</i>	1.0%
<i>Usually (i.e., around 75% of the time)</i>	5.1%
<i>Often (i.e., around 50% of the time)</i>	4.8%
<i>Sometimes (i.e., around 25% of the time)</i>	55.2%
<i>Never</i>	33.9%

Arbitrators tend not to exclude evidence. As the survey showed, 34% never excluded evidence that would otherwise be inadmissible in court and 55% excluded such evidence only 25% of the time. Since there is essentially no appeal, arbitrators have been especially careful to ensure that not only are the parties afforded a fair hearing but that the parties perceive it to be fair. In addition, arbitrators may feel that they could be jeopardizing the award and risking a

challenge for failure to afford a party a full and fair opportunity to present its case if they exclude evidence. While case law, at least in the United States, has confirmed awards that were challenged on this basis because they were found not to impair the “fundamental fairness” of the proceeding,¹³ if the evidence is not time-consuming and does not cause the parties to incur meaningful additional costs, admitting such evidence may well be viewed as creating no harm and averting a challenge, which in and of itself costs time and money. Arbitrators are also comfortable that they can appropriately weigh the evidence and discard evidence that is not trustworthy.

While the current practice may well be the right one, increasing awareness of unconscious influences may begin to shift counsel and arbitrator conduct somewhat.¹⁴ Persuasive studies have been conducted demonstrating that inadmissible evidence can unconsciously and significantly influence decision-making.¹⁵ Will this new awareness cause arbitrators to be more discriminating in what evidence they admit? Will counsel, as they become more cognizant of these influences, take additional steps to avoid the potential impact of such evidence? It seems likely that as arbitration conferences and arbitration publications heighten awareness of the impact of the unconscious,¹⁶ measures will be taken by both arbitrators and counsel to ensure that those impacts are taken into consideration in assessing the evidence.

¹³ See, e.g., *LJL 33rd Street Assocs. LLC v. Pitcairn Props. Inc.*, 725 F.3d 184 (2d Cir. 2013); *Doral Financial Corp. v. Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013).

¹⁴ For a discussion of the unconscious psychological influences in arbitration, see, e.g., Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 12 AM. REV. INT’L ARB. 487 (2013); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012).

¹⁵ Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1279-81 (2005). (For example, in one experiment half of the judges saw a document claimed to be protected by attorney-client privilege, which was devastating to plaintiff’s case. Seventy-five per cent of those judges ruled that the communication was privileged and excluded it. Half of the judges, who constituted the control group, did not see the document. Of the judges who did not see the document, 55% found in favor of plaintiff, while of the judges who saw the document and ruled that it was privileged, 29% found for the plaintiff.)

¹⁶ E.g., 27th Annual ITA workshop entitled *Subconscious Influences in International Arbitration*, sponsored by the Institute for Transnational Arbitration in June of 2015; the forthcoming interdisciplinary book edited by Tony Cole of Brunel Law School on *The Roles of Psychology in International Arbitration*, both of which follow a series of conferences and programs in recent years on the subject.

III. NARROWING THE ISSUES AND PRELIMINARY VIEWS

Apart from decisions on jurisdiction or damages, how many times have you ruled in favor of a moving party on a preliminary issue that has terminated the case or eliminated a significant claim or defense?

<i>Never</i>	21.4%
<i>0-5</i>	48.7%
<i>6-10</i>	21.7%
<i>11-20</i>	5.1%
<i>21-30</i>	2.3%
<i>31-40</i>	0.5%
<i>more than 40</i>	0.3%

The survey results reflect the historical reluctance to grant dispositive motions. Seventy percent of the respondents ruled in favor of the moving party on a preliminary issue that terminated the case or eliminated a significant claim or defense between 0 and 5 times. Notwithstanding the fact that paragraph 3 of the preamble to the IBA Rules on the Taking of Evidence provides that “each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate,” dispositive motions on claims and defenses have not traditionally found frequent favor with tribunals. Given the sophistication of the respondent pool, this appears to be an accurate reflection of arbitrator practice. In recent years, however, much attention has been devoted to time and cost in arbitration, users have sought greater utilization of such motions which serve to abbreviate proceedings, and commentators have called for an expanded use of dispositive motions.¹⁷

While U.S. courts have long recognized the arbitrator’s inherent authority to dismiss a claim based on a dispositive motion ruling,¹⁸ the most recent amendments to the American Arbitration Association Commercial Rules added Rule 33, which expressly grants authority to the arbitrator to make rulings on dispositive motions, albeit only if “the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” The rule strikes a balance between considering motions likely to be meritorious but not those which would result only in additional cost and time. Article 20(3) of the recently amended ICDR Rules provides that “the tribunal may direct the parties to focus their presentation on issues whose resolution could dispose of all or part of the case.” Time will tell whether the practice gains momentum, but the current pressures to make arbitration more efficient and more responsive to user preferences suggests that the same question posed five years from now may lead to a different result.

¹⁷ See, e.g., Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28 ARB INT’L 487 (2012).

¹⁸ Edna Sussman & Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4(1) N.Y. DISPUTE RESOL. LAWYER 28 (2011).

Do you confer with your co-arbitrators and advise the parties before the commencement of the hearing as what issues you would like them to be sure to address (or do this yourself if sitting as a sole arbitrator)?

<i>Always</i>	5.6%
<i>Usually (i.e., around 75% of the time)</i>	16.1%
<i>Often (i.e., around 50% of the time)</i>	19.4%
<i>Sometimes (i.e., around 25% of the time)</i>	39.8%
<i>Never</i>	19.1%

Only 6% always gave advice to the parties before the commencement of the hearing as to what they perceive to be the issues. Roughly 60% of the respondents provided such guidance 25% or less of the time. This, too, is an area that may be evolving.

Recently, leading practitioners have suggested that there be earlier focused exchanges of views by the arbitrators. David Rivkin, speaking as both arbitrator and counsel, has advocated for such a process.¹⁹ Neil Kaplan has proposed the “Kaplan Opening,” calling for an oral presentation of the case by counsel after the first round of written submissions and witness statements but well before the hearing, and including perhaps even some expert testimony, enabling the tribunal to work with counsel to craft a bespoke streamlined process for the later submissions and the hearing.²⁰ Lucy Reed has proposed the “Reed Retreat.” This contemplates that a time be scheduled in the procedural timetable for the tribunal to meet in person to study the file well in advance of the hearing, with the goal of arriving together at targeted directions to the parties for the hearing.²¹

Whether counsel will welcome such interventions or view them as impinging on their ability to present their case in the way they believe would be most advantageous to their clients remains to be seen. But these measures, if they gain acceptance, offer the possibility of significant improvements to the arbitration process by ensuring well prepared arbitrators, providing guidance to the parties and narrowing the issues to be presented at the hearing.

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

<i>Always</i>	3.5%
<i>Usually (i.e. around 75% of the time)</i>	14.1%
<i>Often (i.e. around 50% of the time)</i>	19.3%
<i>Sometimes (i.e. around 25% of the time)</i>	50.8%
<i>Never</i>	12.3%

¹⁹ See remarks by David Rivkin in *INSIDE THE BLACK BOX*, *supra* note 1, at 21-25.

²⁰ Neil Kaplan, *If It Ain't Broke Don't Change It*, 80(2) *ARB.* 172-75 (2014).

²¹ Lucy Reed, *Arbitral Decision-Making: Art, Science or Sport?* 30(2) *J. INT'L ARB.* 85, 95-96 (2013).

In what percentage of your cases have you changed your mind and rendered an award that is at variance with your prehearing preliminary view if formed?

0 -10%	9.8%
11 -20%	20.5%
21 -30%	31.4%
31 - 40%	16.5%
41 -50%	13.8%
Over 50%	8.0%

All arbitrators say that they keep “an open mind” until the close of the hearing and surely arbitrators honestly believe that to be true. However, the psychological learning suggests that the unconscious often interferes with the ability to evaluate evidence in a truly open-minded fashion as it is received because of the influence of what has been labeled by the social scientists as “confirmation bias,” that is the filtering out of information that does not fit a story already believed to be the correct version.²² As Francis Bacon stated hundreds of years ago, “The first conclusion colors and brings into conformity with itself all that comes after.”²³ A similar conclusion was reached by Waites and Lawrence, noted social psychologists known for their decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators that “[a] typical arbitrator concludes the initial stage of the decision making process with a single dominant story in mind. . . . Arbitrators . . . will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed.” Waites and Lawrence conclude that “[o]nce a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified.”²⁴

Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions, while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their preliminary determination 30% or less of the time. Does this mean that in too many arbitrations a conclusion reached early is substantiated by later evidence as conflicting evidence is filtered out by the arbitrator’s unconscious? The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished not to talk about the case among themselves, to keep an open mind during the presentation of evidence and to form no conclusions until all the evidence has been presented and they have been instructed by the judge. It is not suggested that this be adopted in

²² See, e.g., Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2(2) REV. OF GENERAL PSYCHOLOGY 175 (1998).

²³ Francis Bacon, *Novum Organum*, XLVI (1620), available at <http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf> (1620).

²⁴ Waites & Lawrence, *supra* note 3, at 109-110.

arbitration, as the exchange of views by the arbitrators is invaluable. Without even being aware of this psychological driver arbitrators already take many steps to ensure that they have fully reviewed the evidence and the law from all perspectives. However, a heightened awareness of confirmation bias may lead them to be even more vigilant to override any such unconscious impact with reasoning and deliberation grounded in the facts and the law.²⁵

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after the prehearing submissions and before the hearing?

Yes 3.5%
No 72.2%
Sometimes 24.3%

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after all of the evidence has been presented?

Yes 8.0%
No 51.8%
Sometimes 40.2%

While the survey demonstrates that a very small number of arbitrators regularly deliver their preliminary views to the parties, the role of the arbitrator in facilitating settlement is another area of increasing interest. The delivery of preliminary views is an obvious driver to settlement. Structures and procedures are in place for the utilization of such a process which can be agreed to in the arbitration agreement or after the dispute has arisen. The Centre for Effective Dispute Resolution (“CEDR”), a leading London-based mediation and alternative dispute resolution body, issued its Rules for the Facilitation of Settlement in International Arbitration in 2009. Article 5 of those Rules provides, *inter alia*, that “the Arbitral Tribunal may, if it considers it helpful to do so . . . provide all Parties with the Arbitral Tribunal’s preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues; . . . provide all parties with preliminary non-binding findings on law or fact on key issues in the arbitration. . . .”

Increasing attention is also being given to the Germanic approach to see if there are lessons to be learned from that practice. The German arbitrator’s approach, following the practice of the German courts, calls for identifying the legal issues, establishing the burden and standard of proof, categorizing the facts that support each side’s position, and streamlining the presentation of the evidence for the hearing to the material disputed facts. Furthermore, preliminary views may

²⁵ For a discussion of confirmation bias and the steps that arbitrators can take to foster a more robust deliberative process which minimizes the impact of confirmation bias, see Sussman, *Arbitrator Decision-Making*, *supra* note 14, at 505-508.

be given either before or after the hearing if the parties agree to encourage settlement.²⁶

However, preliminary views expressed are likely to generate an even stronger confirmation bias than those that are kept to oneself. Thus, arbitrators need to be even more careful after they have expressed their preliminary view. But this concern should not in and of itself preclude the delivery of preliminary views where sought by the parties since it can, and often does, serve to foster a settlement that leads to greater party satisfaction.

IV. DELIBERATIONS

Which of the following practices do you believe is better?

Share views early in the process and discuss reactions to the merits throughout the proceeding 63.3%

Wait until all the evidence is in before discussions among the arbitrators about the merits of the case 26.9%

No opinion 9.8%

A majority favor an ongoing discussion of the case within the tribunal, but a significant number took the minority view. Since discussions should generally be held with all arbitrators present, the unwillingness of one arbitrator to engage in such discussions often precludes substantive conversations between the others as well.

Ongoing discussions are often said to be favored because they (a) allow the tribunal members to identify issues in advance of the hearing and help them focus on what is important and advise counsel as to where attention should be devoted; (b) enable the tribunal members to discuss pieces of evidence or issues of law that they find significant, troubling, or puzzling as the case evolves; and (c) are more likely to lead to a unanimous award. When party-appointed arbitrators are interviewing prospective tribunal chairs, it may be useful to ask about the prospective chair's preference in this regard. Some arbitrators find it frustrating to sit with a colleague who is not willing to engage in discussions about the case until after the final submissions or argument.

²⁶ Klaus Peter Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective*, 25 ARB. INT'L 217 (2009); Jan K. Schäfer, *Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method*, B-ARBITRA 333 (No. 2, 2013).

Do you review the evidentiary record before you prepare the award?

<i>Always</i>	70.1%
<i>Usually (i.e. around 75% of the time)</i>	17.7%
<i>Often (i.e. around 50% of the time)</i>	7.2%
<i>Sometimes (i.e. around 25% of the time)</i>	5%
<i>Never</i>	0%

When you deliberate as a panel, how often do you review the evidence in favor of what you have preliminarily assessed to be the losing side?

<i>Always</i>	31.5%
<i>Usually (i.e. around 75% of the time)</i>	22.6%
<i>Often (i.e. around 50% of the time)</i>	21.0%
<i>Sometimes (i.e. around 25% of the time)</i>	19.2%
<i>Never</i>	5.7%

While the response to the first question suggests that arbitrators generally check the record to make sure that the evidence they are relying on is as they remember it and supportive of their conclusions, the response to the second question suggests that perhaps arbitrators are not religiously reviewing the record for the evidence that might drive them to a different conclusion. The learning on confirmation bias suggests that the better practice would be to review the evidence from both perspectives before the issuance of the award to ensure that the correct conclusion has been achieved. The institution of party-appointed arbitrators does serve to ensure that all perspectives are reviewed at all stages and particularly at the time of the final deliberations. However, it should not be necessary to use the unilateral appointment process to ensure that appropriate consideration is given to all arguments. As unconscious influences on decision-making become better known, all arbitrators may pause and rethink the case from other perspectives before coming to their final conclusion.

When you deliberate in the tribunal, how often is a straw poll taken at the outset of the deliberation to determine preliminary views?

<i>Always</i>	4.7%
<i>Usually (i.e. around 75% of the time)</i>	17.5%
<i>Often (i.e. around 50% of the time)</i>	20.4%
<i>Sometimes (i.e. around 25% of the time)</i>	26.2%
<i>Never</i>	31.2%

It appears from the survey that it is a slightly less common practice to ask as a preliminary matter what ultimate conclusions each arbitrator has reached at the beginning of the deliberation. This would appear to be the better practice as it would foster a comprehensive review of the disputed material facts and of the applicable questions of law in the most open and collegial manner without anyone feeling like he or she has to defend a position taken. On the other hand, it may be that the response reflects the fact that the continuing discussions during the

hearing have already brought the tribunal to a common preliminary view, subject to reconsideration based on further discussion and review of the evidence and the law and that no such straw poll is necessary.

In what percentage of the cases have you found yourself persuaded to change your views after discussion with your co-arbitrators?

0 - 5%	16.7%
6 - 15%	26.4%
15 - 30%	36.9%
31 - 50%	15.9%
over 50%	4.1%

When sitting on an arbitral tribunal how often do you find the final decision heavily influenced by one arbitrator with very strong views?

0 - 10% (of the time)	42.5%
11 - 20% (of the time)	26.1%
21 - 40% (of the time)	18.4%
41 - 60% (of the time)	10.2%
Over 60% (of the time)	2.8%

The survey results suggest that in most cases each arbitrator comes independently to the same view of the case. Perhaps many cases aren't as close a call as the losing party thinks or a common view was developed through continuous discussions so the occasion for persuading a fellow arbitrator does not arise. However, the survey results suggest that the arbitrators are listening to one another and can be persuaded that they have come to the wrong conclusion. Arbitrators may change their mind based on a presentation of a factual perspective that they had not considered or a deeper and different analysis of the law. The survey suggests that cogently presented sound positions grounded in the facts and the law can serve to persuade others on the tribunal. They will listen.

In what percentage of your cases have you relied on the burden of proof to resolve a close case?

0 - 5%	12.3%
6 - 15%	24.2%
15 - 30%	30.5%
31 - 50%	17.4%
Over 50%	15.6%

At the International Council for Commercial Arbitration (“ICCA”) conference in 2014 there was a plea for greater precision in several areas including significantly in the area of proof. That discussion centered on the standard of proof to be applied in assessing whether a party has met its burden of proof, in other words what degree of confidence must the tribunal have in the accuracy of its decisions. The standard of proof is expressed differently in different

jurisdictions and the meaning attributed to even the same or a similarly stated standard differs from jurisdiction to jurisdiction.²⁷ In common-law jurisdictions the standard of proof is typically stated as (a) a preponderance of the evidence for the ordinary civil claim; (b) clear and convincing or cogent evidence for a more serious claim such as an allegation of fraud; and (c) beyond a reasonable doubt for criminal charges. Civil-law jurisdictions, if they speak to a standard at all, refer to *l'intime conviction du juge* or free assessment.²⁸

There is no clear consensus as to whether the substantive law governing the merits of the arbitration, or the law of the seat, or an overriding international norm controls which standard is applicable.²⁹ There is also no agreement as to whether it makes a significant difference or whether in fact how arbitrators actually assess cases is the same regardless of the stated standard.³⁰ However, some studies based on empirical psychological research support the view that there may be considerable differences in outcome when people are asked to apply different standards of proof.³¹

Thus the question of burden and standard of proof merits attention. It appears from the survey results that arbitrators generally decide cases without specific reliance on the burden of proof. Many cases are simply not so close that reliance on whether the burden of proof is met, whatever the standard applied, as the basis for the decision is necessary. One side or the other is clearly overwhelmingly right. However, the survey results suggest that the burden of proof is relied on with sufficient frequency to make the question of who bears the burden of proof and what standard of proof is required an important one which should be given due consideration by counsel and arbitrators. As has been suggested, arbitrators should consider raising the issue of the applicable standard of proof along with other substantive and procedural issues that must be addressed and counsel should raise the issue and urge the adoption of the standard that they believe is applicable and most advantageous for their position.³²

²⁷ See discussion in Michael Bond, *The Standard of Proof in International Commercial Arbitration*, 77 ARB. 304 (2011).

²⁸ *Id.*

²⁹ See discussion in Jennifer Smith & Sara Nadeau-Seguin, *The Illusive Standard of Proof in International Commercial Arbitration*, in LEGITIMACY : MYTHS, REALITIES, CHALLENGES, ICCA CONGRESS SERIES NO. 18 at 134 (Miami 2014) (Albert Jan van den Berg ed., 2015). See also, Abhinav Bhushan, *Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line*, 25 AM. REV. INT'L ARB. 601 (2014).

³⁰ Smith & Nadeau-Seguin, *supra* note 29.

³¹ Andreas Glockner & Christoph Engel, *Can We Trust Intuitive Jurors: Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10(2) J. OF EMPIRICAL LEGAL STUDIES 2030 (June 2013).

³² Smith & Nadeau-Seguin, *supra* note 29, at 155.

V. THE AWARD

What do you believe is important to accomplish in drafting the award?

Check off all that apply.

<i>Getting the award out promptly</i>	82.8%
<i>Making sure the award is not subject to a successful challenge</i>	79.1%
<i>Making it clear that all arguments are understood</i>	85.0%
<i>Clearly setting out the rationale for your decision</i>	94.5%
<i>Making a good impression on your fellow arbitrators and counsel (And others, if the award is likely to be viewed by those outside the process)</i>	25.2%
<i>Making sure all procedural issues or rulings are mentioned</i>	47.6%
<i>Creating a clear basis for the allocation of costs/attorneys fees</i>	62.6%
<i>In investor-state arbitration, establishing precedents that you believe are correct and may influence later arbitrations</i>	9.2%

The objectives identified most frequently by the arbitrators appropriately look to accomplishing not only the objective of prompt resolution and finality, but also fall into a category that could be classified as making sure that the parties feel heard and understood and that the outcome was rational and based on the evidence. Many who added comments to this question said that they also wanted “to show respect for the parties and their arguments.” Several stated that they take great pride in drafting the award and will spend the time necessary, regardless of whether or not they are remunerated for that time. A significant number specifically added that they “write the award for the loser.” Writing the award with the loser in mind and seeking especially to have the loser understand the reasons for the result is important, as these arbitrators recognized, so that all feel that they received a fair hearing. This likely has the ancillary benefit of causing the loser to be less inclined to challenge the award. In the words of Aeschylus in the fifth century BC: “the word pacifies the anger.”³³

Do you believe an arbitrator may properly issue an award believed to be in accordance with equity even if that outcome cannot be justified with the application of the law to the facts?

Yes 21.9%

No 78.1%

This question is often debated as a hypothetical, and strong views have been expressed. The diverging views on the question are reflected in this survey result. However, research has shown that while arbitrators may like to differ in theoretical conversations on the subject, in fact they follow the law in rendering their awards. A study of publicly available reasoned awards in the United States

³³ Quoted in Teresa Giovannini, *Philosophy Can Help Tribunals Draft Awards that Parties Will Accept as Legitimate*, DISPUTE RESOLUTION J. 78, 90 (May-July 2011).

reflects extensive citation by the arbitrators to legal authority in their decisions. Legal citation was used by the author as a proxy for determining if the awards were based on the application of law. The author concluded based on his study that “the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of decision-making or opinion writing.”³⁴

Arbitrators understand that businesses need predictability in the conduct of their business and in the resolution of their disputes. The application of the law specified to govern the contract provides that predictability and the contract governs the arbitrator’s scope of authority. That does not mean that arbitrators cannot do justice. The law has been crafted over the years to do justice and to guide the decision-maker to a just result. Thus the application of the law to the facts achieves a just result in virtually every case. As Justice Scalia pointed out, quoting Chancellor James Kent who said, “I most always found [legal] principles suited to my views of the case.”³⁵ As quoted above, Waites and Lawrence, concluded that “once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified,” another way of saying that arbitrators will base their final resolution on the principles of law.³⁶

In what percentage of your cases did you feel like you had a “Eureka” moment, when all of the various factual and legal arguments fell into place neatly?

<i>0 to 5%</i>	<i>25.1%</i>
<i>6 to 15%</i>	<i>24.3%</i>
<i>16 to 30%</i>	<i>27.6%</i>
<i>31 to 50%</i>	<i>13.3%</i>
<i>Over 50%</i>	<i>9.7%</i>

This question flowed from the judicial writing on the moment of closure as the decision is reached, described here as a “Eureka” moment, when all the pieces fall into place and the logic of the conclusion becomes clear. Justice Cardozo explained the process most eloquently: “Then suddenly the fog has lifted. I have reached a stage of mental peace . . . the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally

³⁴ Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90(4) N. C. L. REV. 1091 (2012).

³⁵ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 27 (2008). Whether or not an arbitrator can introduce legal theories not raised by the parties, even assuming he or she brings them to the parties’ attention for comment, is a subject beyond the scope of this article, and may be subject to differing views.

³⁶ Waites & Lawrence, *supra* note 3, at 114.

extinguished, in the calmness of conviction.”³⁷ Judge Friendly spoke of the decisional conclusion as “flashes before the shaving mirror in the morning.”³⁸ The survey results suggest that in most cases there is no such moment; and it is only in the occasional case where arbitrators have to wrestle with facts that just won’t fit together or legal questions that are so difficult to resolve that such a moment is felt. But when such a moment does occur, the jurists have described it well.

In what percentage of your cases has the chair written the first draft of the entire award?

90 - 100%	45.0%
80 -89%	19.9%
70-79%	13.4%
40 - 60%	11.9%
less than 40%	9.8%

As can be seen from the survey result, the chair of the tribunal generally takes on the task of doing the first draft of the entire award. The writing of an award by a single individual facilitates the writing of the award in a consistent single voice and can often lead to a more expeditious finalization of the award. The draft should not be written until after the deliberations by the full tribunal so that it reflects the views of all, or at least the majority. There are occasions, especially in complex multi-faceted cases, in which the chair assigns discrete factual or legal issues to the co-arbitrators to prepare the first draft. Or there may be occasions where the chair finds himself or herself too busy to prepare the award in a timely manner and so delegates most or all of the task of preparing the first draft. Or the tribunal may find it impossible to come to a consensus based on its discussions and concludes that the only way to make further progress is to have the differing views written out as a draft of the award and then reconsider which view should prevail. But as the survey shows these are less frequent occurrences.

In approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 to 10%	55.7%
11 to 20%	28.2%
21 to 35%	10.1%
36 to 50%	5.7%
More than 50%	0.3%

It doesn’t happen often, but it does happen. As they say, “it’s not over until it’s over.” Sometimes the award just doesn’t write or the evidence doesn’t stack

³⁷ Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, in THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

³⁸ Judge Henry J. Friendly, *Reactions of a Lawyer - Newly Become Judge*, 71 YALE L. J. 218, 230 (1961).

up on review as it is remembered or a deeper analysis of the applicable law dictates a different outcome. The fact that arbitrators do change their views even in the course of writing the award evidences that they continue to keep an open mind and continue to assess the facts and the law in their efforts to arrive at the right conclusion.

Do you write out for yourself the reason for an award (even in outline form) if you are issuing a standard/bare award with no reasons.

Yes 42.6%

No 30.8%

Sometimes 26.6%

While unreasoned or bare awards are rare in international arbitration and are not enforceable in some jurisdictions, there are jurisdictions in which they suffice. Occasionally parties seek an unreasoned award for such reasons as protection of trade secrets, the prevention of any possibility of preclusive consequences or just to save on the fees. As shown in the prior question, decisions can change in the writing of the award, as in the writing the arbitrator discovers the error of his or her initial conclusion. That possibility suggests that it is best for arbitrators to prepare at least an outline of their reasoning in order to verify and confirm the accuracy of the decision reached even in the issuance of an unreasoned or bare award.

On a scale of 1 to 10 with 10 being the most certain, how certain are you that you have reached the correct result by the time you signed the award?

1 0.3%

2 0%

3 0.3%

4 0%

5 0.3%

6 0.3%

7 3.3%

8 16.3%

9 52.2%

10 27%

As one arbitrator said when he heard the statistic, if you are not at least at a 9 in terms of certainty, you should continue to think about the case until you achieve that level of certainty. Indeed, that is excellent advice. The parties deserve to have the arbitrators continue their deliberations and their personal reviews until they reach a very high degree of certainty as to the correctness of the outcome. The survey reflects that arbitrators are careful in their decision-making and will continue to work through the issues and think about how to reconcile the facts and how to resolve difficult questions of law until they achieve a high degree of

certainty. The process follows the psychological model which examines the shift from conflict to closure.

During the course of deciding a case the judge's or arbitrator's view of the dispute gradually moves towards a state of coherence so that the arguments that support one result are endorsed and the opposing arguments are rejected. By the end of this process one view of the case emerges as the winning position.³⁹ Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached. Justice Holmes stated, "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."⁴⁰ As Judge Posner similarly remarked, "People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."⁴¹ What is necessary here is that arbitrators continue to work through the case until they arrive at certainty. The survey reflects that they do so.

In how many cases have you dissented?

0	64.7%
1	19.3%
2- 5	16.0%
6 or more	0 %

The respondents, virtually all of whom I suspect deal with commercial and not investor-state cases, almost never dissent. Much has been written on the subject of whether or not dissents are appropriate in commercial cases. Strong views have been expressed that except in the rare case, they are detrimental to the process in commercial arbitration. Dissents have been said to stifle deliberations, encourage challenges to the award, and provide a roadmap for how to attack it.⁴² Whether motivated by these concerns, or simply the result of a consensus typically being achieved among the members of a tribunal after careful and reasoned deliberation, the survey results support the general perception that dissents are indeed rare and further supports the conclusion that party-appointed arbitrators are independent.

³⁹ Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1, 20 (1998).

⁴⁰ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV L. REV. 457, 465 (1897).

⁴¹ Judge Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 873 (1988).

⁴² Mark Baker & Lucy Greenwood, *Dissent – But Only if You Really Feel You Must*, 7(1) DISPUTE RESOL. INT'L 31 (2013).

VI. MEDIATION

Do you think it is appropriate for an arbitral tribunal to discuss or suggest mediation?

Yes 24.8%

No 23.4%

Sometimes 51.8%

Mediation continues to gain attention and increased utilization around the world. A few examples: UNCITRAL's Working Group II is exploring the development of a convention for the cross-border enforcement of mediated settlement agreements.⁴³ The EU is working to foster the greater adoption of mediation pursuant to the EU Mediation Directive.⁴⁴ Pursuant to the most recent amendments in 2013, Rule 9 of the American Arbitration Association Commercial Rules now provides that the parties who have filed an arbitration "shall mediate their dispute" although any party may unilaterally opt out of the rule. Singapore has taken steps to make it easier to mediate and obtain an arbitral award recording the settlement agreement pursuant to the SIAC-SIMC Arb-Med-Arb Protocol.⁴⁵ In June of 2015, Brazil passed its first mediation law.⁴⁶

With the growing acceptance of mediation it would not seem inappropriate for arbitrators to suggest mediation. Many arbitrators now inquire at the first procedural hearing whether the parties wish to include a mediation window in the arbitration scheduling order to establish a date on which the parties will discuss whether or not they wish to have a mediation and so eliminate the fear of many counsel that suggesting mediation will be viewed as a sign of weakness. There are some that harbor lingering concerns that having arbitrators raise mediation might intimate in some way how the tribunal is leaning, particularly if the matter is raised later in the process and not at the first conference with the parties. That concern may well fade as having more open discussions with the parties about the issues earlier in the proceeding gains as an emerging best practice. The 23% of the arbitrators who stated that it was never appropriate for the tribunal to discuss or suggest settlement or mediation may well change their views in the coming years.

⁴³ See UNCITRAL Working Group II documents collected at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html; See also Edna Sussman, *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements*, TRANSNAT'L DISPUTE MANAGEMENT (March 2015).

⁴⁴ See European Parliament, Directorate General for Internal Policies, Policy Dept. C, Citizens' Rights and Constitutional Affairs, "Rebooting" the Mediation Directive: *Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (2014).

⁴⁵ SIAC-SIMC Arb-Med-Arb Protocol is available at <http://simc.com.sg/siac-simc-arb-med-arb-protocol>.

⁴⁶ Law No. 13,140, the Brazilian Mediation Law, enacted on June 29, 2015.

Would you be willing to mediate a case in which you are sitting as an arbitrator if the parties give you informed consent?

Yes 51.9%

No 48.1%

The ICC in its promotional material for a conference held in Hong Kong in October 2015 entitled *The Use of Med-Arb in the Resolution of Cross-Border Disputes* describes med-arb as a “particularly hot topic” in the international arbitration sphere. Med-arb has been discussed for decades but has, as the ICC notes, become a subject of considerable conversation and debate in recent years as users seek more efficient dispute resolution processes and the perceived practices of the Far East and their mixing of roles have become more influential with the expansion of East-West trade. While the general perception has been that arbitrators schooled in common law and Western traditions are less inclined to view acting as both arbitrator and mediator in the same matter with favor, the survey results demonstrate that over 50% of the arbitrators would be willing to engage in such an exercise if the parties elect it and provide informed consent. Moreover, a study conducted in 2011 comparing Eastern and Western arbitrators on the subject suggests that the common perception is inaccurate and that there is in fact little difference in the willingness of arbitrators across nations to engage in med-arb. In that study, 58% of both Eastern and Western arbitration practitioners stated that it was appropriate for the arbitrator to actively engage in settlement negotiations at both parties’ request.⁴⁷

The surveys suggest that the use of med-arb may well finally be on the ascendancy. Indeed, additional empirical research suggests that this process design is being used a great deal more than is suspected.⁴⁸ Like all processes, it raises its own unique set of issues and the advantages and disadvantages of utilizing this mixed process must be considered carefully by the parties. Process issues such as, *inter alia*, whether caucus sessions during which the neutral meets separately with the parties should be conducted, whether the parties should be required to reconfirm continuation with the same neutral as he or she switches hats, the enforceability of any resulting resolution, and what is required to constitute informed consent, must all be reviewed with care.⁴⁹

⁴⁷ Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and the West*, 16 HARV. NEG. L. REV. 1 (2011).

⁴⁸ Thomas Stipanowich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN STATE Y.B. OF ARB. AND MEDIATION 1, 25-28 (2014) (survey responses by mediators showed that 61.3% had some experience in mixed roles).

⁴⁹ For a discussion of these issues, see Edna Sussman, *Developing an Effective Med-arb/Arb-med Process*, 2(1) N.Y. DISPUTE RESOL. LAWYER 71-74 (2009); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARB. MED. REV. 421 (2013).

The world may well be moving towards a much more nuanced perspective on process design for the resolution of disputes outside the courts. To advance informed choices by parties as to the multiplicity of options available to them, the College of Commercial Arbitrators in cooperation with the International Mediation Institute and the Straus Institute has embarked upon a project to explore the many modalities for dispute resolution facilitated by a third-party outside the courts, and how those various modalities can be combined to maximize party satisfaction.

CONCLUSION

How arbitrators decide and the nature of their internal processes has been described by those who seek to explore them as going “inside the black box” or “behind the curtain.” This article has hopefully shed some light on how arbitrators operate and provided some useful guidance to both arbitrators and counsel. The exploration of current practices has also suggested areas in which some changes and refinements may be coming in the future. The continuing evolution of arbitration practices in the coming years will prove or disprove the predicted emergence of some of the trends identified.