# Inside the "Black Box": The Preferences, Practices, and Rule Interpretations of Construction Arbitrators

*Dean B. Thomson and Jesse R. Orman*[*]

When parties and their counsel consider whether they want to arbitrate a construction dispute, the data on which they can draw to make an informed decision is surprisingly limited. If they were involved in litigation, they could refer to multi-volume procedural treatises and the Federal Rules Decisions, and know, based on written precedent, what processes to expect, how judges interpret the rules of civil procedure, and how and why judges make their decisions. If counsel and their clients are involved in or considering arbitration, however, comparable resources are not available to them.[1] Arbitrator hearings and awards typically are confidential and cannot be accessed freely by third parties.[2] If one wants to know what to expect, one must rely on personal, hard-earned, but limited, experience in arbitration or the anecdotes heard from other advocates or arbitrators.[3] Otherwise, the arbitration process resembles an unknown "black box."

To illuminate that box, the authors developed a survey to ask those who had actually served as construction arbitrators how they act regarding a variety of questions, issues, and situations (the "Arbitrator Survey"). At approximately the same time, the

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[*]Dean B. Thomson and Jesse R. Orman are shareholders in the Construction Law Department of Fabyanske, Westra, Hart & Thomson, P.A., in Minneapolis, Minnesota.

[1]*Compare, e.g.* the 83+ volume litigation treatise CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (3d ed. 2004) with the three volume arbitration treatise Larry E. Edmonson, DOMKE ON COMMERCIAL ARBITRATION (2016), one volume of which is forms.

[2]*E.g.* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015) ("AAA Rules"), R-26: "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." *See* COMMERCIAL ARBITRATION AT ITS BEST, § 6.2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

[3]*See e.g.* Adrian L. Bastianelli, III, John T. Blankenship & Judith B. Ittig, *From the Inside: What Arbitrators Think You Should Do* presented at the 2015 ABA Forum on Construction Law Fall Meeting "The Construction ADR Summit," which while full of useful anecdotal suggestions, necessarily reflects the views of only the three authors based on their individual experiences.

authors also obtained data from a survey conducted by the American Arbitration Association ("AAA"), which asked a set of questions very similar to those in the Arbitrator Survey, but was sent to attorneys who had acted as advocates in a construction arbitration (the "Advocate Survey"). The AAA also later surveyed a variety of industry representatives, such as design professionals, contractors, and owners, regarding their perceptions about arbitration (the "Industry Survey").

This article will compare conceptions about construction arbitration, gathered from the Industry and Advocate Surveys, to what construction arbitrators actually, do as shown by the Arbitrator Survey. The results reported here should help advocates and their clients make more informed decisions about whether arbitration is an attractive dispute resolution option, whether it delivers on its promise, what rule revisions might improve arbitration procedures, and how to draft arbitration agreements to get the process parties want.

Part I of the article discusses the background and experience of the construction arbitrators who responded to the Arbitrator Survey, the industry professionals who responded to the Industry Survey, and the attorneys who answered the Advocate Survey. Part II follows the progression of a typical arbitration and discusses: arbitrator selection and appointment; arbitration demands and other initial proceedings; discovery; pre-hearing motions; and, the hearing itself. Part III of the article focuses on the culmination of an arbitration—the award. Finally, Part IV concludes with observations about construction arbitration.

## I. The Participants in the Arbitrator, Industry, and Advocate Surveys.

**The Arbitrator Survey**. To get a broad response, the Arbitrator Survey was sent by email to members of the ABA Forum on Construction Law, JAMS, the College of Commercial Arbitrators, the Mediate-Arbitrate listserv, and the American College of Construction Lawyers; only those who actually had served as an arbitrator in a construction dispute were invited to reply. Given that most email requests are deleted as spam before reading, the authors were pleased to receive responses around the country from 231 construction arbitrators. Their level of experience was extraordinary as they collectively reported to have participated as arbitrators in a range of 9,437 to 14,551, or more, construction arbitrations. The experience reflected in the responses should provide a useful and authoritative resource for both parties and advocates.

The first part of the Arbitrator Survey inquired about the responding arbitrators' general background and experience. As most of the organizations from which responses were solicited

were either groups of attorneys or largely populated by them, it is not surprising that over 89.4%[4] of the respondents were lawyers. The following responses reflect more on their background:

**2. (Arbitrator Survey) What is your primary professional background?**

| Value | Percent | | Count |
|---|---|---|---|
| Attorney-Litigation | 77.6% | | 177 |
| Attorney—Transactional | 9.6% | | 22 |
| Retired Judge | 2.2% | | 5 |
| Owner/Developer | 0.4% | | 1 |
| Contractor/Subcontractor | 2.6% | | 6 |
| Design Professional | 2.2% | | 5 |
| | | Total | 228[5] |

**3. (Arbitrator Survey) Approximately how many times have you served as an arbitrator in a construction case during your career?**

| Value | Percent | | Count |
|---|---|---|---|
| 1–5 | 9.3% | | 21 |
| 6–10 | 11.0% | | 25 |
| 11–25 | 22.5% | | 51 |
| 26–50 | 19.8% | | 45 |
| 51–100 | 18.5% | | 42 |
| 101–150 | 9.7% | | 22 |
| 151+ | 9.3% | | 21 |
| | | Total | 227 |

**The Industry Survey**: Soon after the Arbitrator Survey was distributed, the AAA sent the Industry Survey to many industry organizations whose members frequently participate in construction arbitrations. The AAA Survey received 1,042 responses, but, although over 77% had more than 21 years of experience in the design and construction industry, only 40 respondents actually had participated in a construction arbitration as a party, witness,

[4]Throughout this article percentages have been rounded to a single decimal place; due to rounding, sometimes percentages will not equal exactly 100%.

[5]The occasional difference in either survey between the total number of respondents and the number of responses to any particular question is due to the fact that not every respondent answered each question.

or advocate.[6] The largest group of respondents were design professionals, who comprised 56.5% of the respondents,[7] followed by contractors/construction managers, owners, and attorneys.[8] A breakdown of their background follows:

**1. (Industry Survey) What is your primary professional background?**

| Value | Percent | | Count |
|---|---|---|---|
| Attorney-Litigation | 4.3% | | 53 |
| Attorney—Transactional | 5.2% | | 64 |
| Engineer | 4.6% | | 56 |
| Owner/Developer | 9.0% | | 110 |
| Subcontractor | 3.0% | | 37 |
| Contractor | 17.8% | | 216 |
| Architect | 43.6% | | 533 |
| Construction Manager | 7.0% | | 86 |
| Other | 5.5% | | 67 |
| | | Total | 1222 |

**2. (Industry Survey) How many years have you worked in the design or construction industry?**

| Value | Percent | Count |
|---|---|---|
| 1–5 Years | 2.6% | 27 |
| 6–10 Years | 4.8% | 50 |
| 11–20 Years | 15.2% | 158 |
| 21–30 Years | 25.0% | 260 |

[6]While 40 arbitration participants represents only a small sample, they report having participated in an extraordinarily large number of arbitrations (between 6,646 to 8,141+ cases) and a remarkable average of 61 to 86 arbitrations for each of the 40 respondents. The number of respondents who actually had participated in construction litigation as a party, witness, or advocate also was relatively low (83.5% of 424 respondents indicating they had never had any construction litigation experience). However, of the 70 who had, their combined experience ranged from 6,555 to 7,280+ construction litigations, or an average of 94 to 140 litigations per respondent.

[7]Of the 67 "other" responses comprising 5.5% of the total, approximately one third worked in various roles in the design profession.

[8]64 respondents, or 5.2%, were transactional attorneys and 53 respondents, or 4.3%, were litigation attorneys. Given that only 40 respondents reported actually participating in an arbitration as a party, witness, or advocate, many of those 40 probably were litigation attorneys serving as advocates, which would mean that the actual number respondents who had participated in arbitrations as a party or witness was even lower.

| Value | Percent | | Count |
|---|---|---|---|
| Over 30 Years | 52.5% | | 547 |
| | | Total | 1042 |

**5. (Industry Survey) Approximately how many times have you participated in a construction arbitration case during your career, as a party, witness or advocate?**

| Value | Percent | | Count |
|---|---|---|---|
| 1–5 | 0% | | 0 |
| 6–10 | 0% | | 0 |
| 11–25 | 0% | | 0 |
| 26–50 | 4.2% | | 21 |
| 51–100 | 1.8% | | 9 |
| 101–150 | 0.4% | | 2 |
| +151 | 1.6% | | 8 |
| Never | 92.0% | | 461 |
| | | Total | 501 |

Notwithstanding the low number of experienced arbitration participants responding to the Industry Survey, the *opinions* about arbitration expressed by the remaining 1,002 respondents (who have not participated in an arbitration) reveal several preconceptions about arbitrator, which then can be addressed with actual facts about arbitration practice which the Arbitrator Survey was designed to provide.

**The Advocate Survey.** The AAA also surveyed attorneys who had participated as advocates in a construction arbitration. To the extent possible, this Advocate Survey mirrored the questions the authors asked in the Arbitrator Survey, except the questions were framed to solicit that advocates' construction arbitration preferences, experiences, and opinions. Nine hundred and seventy (970) advocates replied, and not surprisingly, 886 or 91% of the respondents were litigation attorneys. Their collective experience in construction arbitrations ranged from 22,835 to 38,116, or more, cases.

**1. (Advocate Survey) What is your professional background?**

| Value | Percent | Count |
|---|---|---|
| Attorney-Litigation | 91.3% | 886 |
| Attorney-Transactional | 4.7% | 46 |
| Owner/Developer | 0.0% | 0 |

| Value | Percent | | Count |
|---|---|---|---|
| Contractor/Subcontractor | 1.9% | | 18 |
| Design Professional | 0.3% | | 3 |
| Undefined | 1.8% | | 17 |
| | | Total | 970 |

**2. (Advocate Survey) Approximately how many times have you participated in a construction arbitration case during your career?**

| Value | Percent | | Count |
|---|---|---|---|
| 1–5 | 23.2% | | 225 |
| 6–10 | 19.1% | | 185 |
| 11–25 | 24.1% | | 234 |
| 26–50 | 14.9% | | 144 |
| 51–100 | 10.7% | | 105 |
| 101–150 | 3.7% | | 36 |
| 151+ | 4.2% | | 41 |
| | | Total | 970 |

## II. The Arbitration Process

### *A. Preliminary Issues: Party-Appointed Arbitrators; Composition of Arbitration Panels; Arbitration Demands; Venue; and Improving Efficiency.*

#### *1. Party-Appointed Arbitrators.*

For attorneys and parties, the role played by any particular arbitrator in a three-party arbitration is naturally ambiguous and usually hidden "behind the curtain" of the panel's deliberations. When using party-appointed arbitrators, and a third, neutral arbitrator selected by both of them, however, it is often assumed that the party-appointed arbitrators are either favorably inclined toward or advocate for the party who appointed them (thereby each effectively neutralizing the other),[9] leaving the neutral arbitrator to tip the scales. However, is that assumption of bias accurate? The results from the Arbitrator Survey

[9] *See* COMMERCIAL ARBITRATION AT ITS BEST, § 3.7 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001). In response to this assumption, some arbitration service providers require party appointed arbitrators to be neutral. *E.g.* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-15(b). Nevertheless, the concern remains that one of the primary reasons a party appoints a particular arbitrator is the hope or expectation that the selected arbitrator will at least be sympathetic toward the party appointing him or her.

were surprising—43% of the arbitrator respondents reported that the party-appointed arbitrators were *usually* neutral in their behavior and decisions, and another 8% reported party-appointed arbitrators were always neutral. So 52% of the responses indicate party-appointed neutrals in fact are usually or always neutral. On the other hand, knowing that 43% of party-appointed arbitrators are only *usually* neutral may not comfort a party that always wants a neutral arbitrator. Perhaps more problematic is the finding that 48% of party-appointed arbitrators fall within the portion of the spectrum representing neutrality only half the time or never at all! Without more control over the process, the odds of getting a truly neutral, party-appointed arbitrator appear challenging.

Often party-appointed arbitrators are not panel members of arbitration service providers ("ADR organizations"), and there is a concern that these arbitrators, not having received the training that ADR organizations provide, may not be as procedurally or substantively experienced as those who are members of such organizations. Somewhat surprisingly, the arbitrators serving with party-appointed arbitrators found them, more than half the time, to be equally as procedurally and substantively experienced as their counterparts in ADR organizations. Perhaps the reason is that party-appointed arbitrators are chosen for their experience and expertise, even if they do not serve as arbitrator members of ADR organizations.

Two key lessons for advocates emerge. First, the risk that party-appointed arbitrators may favor the party appointing them is real and substantial. Second, most party-appointed arbitrators, just like the neutral third arbitrator they are likely to select, should be treated as likely possessing substantive and procedural experience.

**6. (Arbitrator Survey) When you are serving as the third neutral arbitrator chosen by party-appointed arbitrators, do you find party-appointed arbitrators are:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Neutral in their behavior and decisions? | 17 | 85 | 54 | 39 | 1 |
| | 8.7% | 43.4% | 27.6% | 19.9% | 0.5% |
| b. As substantively experienced as arbitrators obtained from ADR organizations? | 20 | 103 | 46 | 27 | 1 |
| | 10.2% | 52.3% | 23.4% | 13.7% | 0.5% |

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| c. As procedurally experienced as arbitrators obtained from ADR organizations? | 12<br>6.1% | 82<br>41.6% | 65<br>33.0% | 36<br>18.3% | 2<br>1.0% |

### *2. Composition of Three Party Panels*

Advocates (and industry participants) often believe they can divine an arbitrator's biases, or at least his or her predisposition or proclivities, based on the arbitrator's professional background. The conventional wisdom is that contractors will favor contractors, that design professionals will favor design professionals, and that lawyers will be predisposed in favor of the sector of industry they represent most often.

Question 14 of the Industry Survey asked potential arbitration parties whether a preference existed for non-lawyers to be included on arbitration panels. The data expressed a marked preference for non-lawyers half the time or more.[10] Perhaps, this is not surprising given the composition of the Industry Survey was almost 90% non-lawyers and half of the lawyers were transactional, not litigation attorneys.

**14. (Industry Survey) Do you prefer that your arbitration panels include non-lawyers?**

| Value | Percent | | Count |
|---|---|---|---|
| Always | 28.0% | | 171 |
| Often | 20.1% | | 123 |
| Sometimes | 34.2% | | 209 |
| Rarely | 10.6% | | 65 |
| Never | 7.0% | | 43 |
| | | Total | 611 |

Notwithstanding the parties' apparent interest in obtaining a sympathetic industry ear on the panel, there is a concern that three member panels almost always consist of three lawyers, frustrating this goal. Rational behavior—or at least the rational use of stereotypes—easily could explain this result with the contractor party striking all the design professional arbitrator candidates and the design professional party striking all the

[10] Industry Survey, question no. 14.a: "Do you prefer that your arbitration panels include non-lawyers?"

Always: 27.99%; Often: 20.1%; Sometimes: 34.2%; Rarely: 10.6%; Never: 7.0%.

contractor arbitrator candidates, each apparently believing that other will be predisposed against it.[11] The result is that the remaining candidates are all lawyers.[12]

Question 18 of the Arbitrator Survey sought to find out arbitrators' actual experience. The data seem to support the concern expressed in the Industry Survey as the overwhelming majority of arbitrators on three arbitrator panels were lawyers. Indeed, according to the arbitrators, the weighted average of non-attorney participation on a panel ranges between approximately 1.5 and 5%.[13]

**18. (Arbitrator Survey) Approximately what percentage of your arbitration panels include non-lawyers?**

| Value | Percent | | Count |
|---|---|---|---|
| 0% | 9.4% | | 21 |
| 1–10% | 45.7% | | 102 |
| 11–25% | 24.2% | | 54 |
| 26–50% | 12.6% | | 28 |
| 51–100% | 8.1% | | 18 |
| | | Total | 223 |

### *3. Arbitration Demands*

Some might argue that as the Demand or Answering Statement is the first chance for a party to present its case, the

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[11] *See, e.g.,* James Arcet & Annette Davis Perrochet, CONSTRUCTION ARBITRATION HANDBOOK §§ 6:4, 7:3 (2017 ed. 2017). Another potential reason that attorneys select attorneys as arbitrators for arbitrator panels is that "like seeks like." In a survey of 686 attorneys members of the ABA Forum on the Construction Industry, 94.8% of the attorney respondents reported that they preferred to select another attorney experienced in mediation as their mediator rather than a lay person experienced in mediation. Dean B. Thomson, *A Disconnect of Supply and Demand: Survey of Forum Members' Mediation Preferences*. 21 THE CONSTRUCTION LAWYER, 17, 19 (Fall 2001).

[12] Many of the reasons for preferring a panel of three arbitrators over a single arbitrator, or *vice versa*, are discussed in Charles M. Sink, TYPES OF ARBITRATION IN CONSTRUCTION in CONSTRUCTION ADR 93–94 (Adrian L. Bastianelli & Charles M. Sink eds., 2014).

[13] The AAA keeps statistics of how many non-lawyers serve as arbitrators in construction arbitrations, but does not differentiate between the number serving as single arbitrators or on panels. For construction cases in 2016, attorneys were appointed on 79% of cases; attorneys with an industry professional degree (e.g. both an attorney and architect or engineer) were appointed on 12% of the cases, and construction industry professionals were appointed on 9% of the cases. Email from Rod Toben, Vice President, American Arbitration Association, to Dean Thomson (Oct. 18, 2017, 1:58 p.m. CST) (on file with Dean Thomson).

advocate should submit a detailed fact based pleading,[14] but as the response to question no. 4 of the Arbitrator Survey indicates, over two thirds of the arbitrators responding indicated they preferred a short statement of the claim and the relief sought.

**4. (Arbitrator Survey) What type of arbitration demand do you prefer?**

| Value | Percent | | Count |
|---|---|---|---|
| A short statement of the claim and relief sought. | 67.3% | | 152 |
| Court-styled notice pleadings. | 11.5% | | 26 |
| Detailed fact-based pleadings with exhibits. | 21.2% | | 48 |
| | | Total | 226[15] |

### *4. Early Exchange of Claim and Damage Information*

Arbitration, particularly in smaller cases, sometimes has a reputation of allowing late or even no disclosure of crucial information and allowing "trial by ambush."[16] However, is that perception reality when it comes to certain fundamental requirements that can help the parties and the arbitrator focus the dispute and avoid an ambush? We asked the pool of arbitrators in the Arbitrator Survey how often—even in small cases—the arbitrator requires detailed statements of claims and detailed statements of damages to be exchanged. Over 75% of the arbitrators surveyed either always or usually require this fundamental information to be disclosed by a particular date. This was expected. What was more surprising was that this was not universal. A significant minority of arbitrators (around 22–23%) confirmed that they do not require such submissions half the time or more!

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[14] *E.g.* Thomas Oehmke, CONSTRUCTION ARBITRATION, § 11.7 (1988) ("Where strong defenses exist, the answer is an ideal opportunity to elaborate, persuasively arguing the merits.").

[15] The results from the Advocate Survey were generally similar regarding the preferred method of pleading: short statement: 50.6%; notice pleading: 27.5%; and detailed fact-based pleadings: 22.9%.

[16] *See, e.g.,* Robert F. Cushman, John D. Carter, Douglas F. Coppi & Paul J. Gorman, CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR, 57 (3d ed. 2001).

**9. (Arbitrator Survey) In cases that are not considered large or complex, how often do you order:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. A date by which a very detailed statement of claims, counterclaims and defenses should be exchanged? | 82<br>36.3% | 94<br>41.6% | 22<br>9.7% | 24<br>10.6% | 4<br>1.8% |
| b. A date by which a detailed calculation of damages for claims and counterclaims should be exchanged? | 82<br>36.3% | 91<br>40.3% | 28<br>12.4% | 24<br>10.6% | 1<br>0.4% |

The arbitrators' practice in this regard does not match the advocates' strong preference for a date certain by which claims and damages will be stated in detail. According to the Advocate Survey, even in arbitrations in which the claims are below $1,000,000, advocates would prefer that the arbitrator order a date by which a detailed statement of claims, counterclaims, and defenses be exchanged "often" or "always" 89.4% of the time, and a detailed calculation of damages exchanged "often" or "always" 88% of the time.[17]

**3. (Advocate Survey) In cases that are <u>below</u> $1m or more in claims, do you prefer that the arbitrator order:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. A date by which a very detailed statement of claims, counterclaims and defenses should be exchanged? | 52.4%<br>506 | 36.9%<br>356 | 9.0%<br>87 | 1.4%<br>13 | 0.31%<br>3 |
| b. A date by which a detailed calculation of damages for claims and counterclaims should be exchanged? | 50.1%<br>479 | 38.0<br>364 | 9.5%<br>91 | 1.9%<br>18 | 0.5%<br>5 |

### *5. Venue*

Arbitration is a creature of contract, and if the contract requires that the venue of an arbitration should be determined in a certain way, presumably the arbitrators will follow the contract in determining the locale of the hearing. Predictably, this assump-

[17]Advocates' preferences are similar in cases above $1,000,000: 91.6% always or often prefer a date for a detailed disclosure of claims, counterclaims, and defenses, and 89.8% always or often prefer a date for an exchange of detailed damage calculations.

tion is largely confirmed by the arbitrators' responses in the Arbitrator Survey. What's interesting, however, is that arbitrators seem to like keeping some flexibility in their decisions about venue as the most predominant response was that they usually, but not always, chose the venue specified by the contract.

**5. (Arbitrator Survey) In resolving disputes regarding locale, how often do you select a locale that is:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Different from that specified in the contract? | 0<br>0.0% | 2<br>0.9% | 5<br>2.2% | 139<br>61.8% | 79<br>35.1% |
| b. Different from the city closest to the project if no locale specified in the contract? | 0<br>0.0% | 16<br>7.3% | 56<br>25.6% | 116<br>53.0% | 31<br>14.2% |
| c. Different from that suggested by the organization, if any administering the arbitration? | 1<br>0.5% | 6<br>2.7% | 20<br>9.1% | 130<br>59.1% | 63<br>28.6% |
| d. Different from a statute requiring the locale to be in the state in which the project was built? | 0<br>0.0% | 2<br>0.9% | 4<br>1.8% | 38<br>17.3% | 176<br>80.0% |

### *6. Efficiency*

Recent complaints about arbitration have raised the concern that it is getting as expensive as litigation and losing the efficiency which is supposed to be one of its benefits.[18] The Industry Survey focused on these concerns and directed several questions to whether the participants preferred arbitration to litigation and, if so, why. Although arbitration was the most preferred dispute resolution method at 44.1%, with litigation following at 30.1%, a significant number (25.8%) indicated their preference depended on the type of claim at issue.

**8. (Industry Survey) What form of binding dispute resolution process do you prefer/recommend in your design or construction contracts?**

| Value | Percent | Count |
|---|---|---|
| Arbitration | 44.12% | 424 |

[18] *E.g.* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), Introduction: "Arbitration has been proven to be an effective way to resolve disputes fairly, privately, promptly, and economically."

| Value | Percent | | Count |
|---|---|---|---|
| Litigation | 30.07% | | 289 |
| Arbitration and Litigation Depending on the type of claim | 25.81% | | 248 |
| | | Total | 961 |

For those that preferred arbitration, cost savings was far and away the most common reason for preferring arbitration (73.1%), but time savings (65.3%), a private forum (40.1%), finality (37.0%), and the subject-matter expertise of the decision maker (49.3%) were significant factors, as well. Conversely, those favoring litigation appeared to place greater weight on the right to appeal from an adverse decision (53.8%) and a simple preference for trial (38.3%), while cost savings only ranked for 22.8% of respondents.

**9. (Industry Survey) Please state why you prefer Arbitration. (select as many as apply)**

| Value | Percent | | Count |
|---|---|---|---|
| Private forum | 40.1% | | 208 |
| Cost savings | 73.1% | | 310 |
| Time Savings | 65.3% | | 277 |
| Finality | 37.0% | | 157 |
| Subject matter expertise of decision maker | 49.3% | | 209 |
| Other (please specify) | 6.1% | | 26 |
| | | Total | 1187 |

**10. (Industry Survey) Please state why you prefer litigation. (select as many as apply)**

| Value | Percent | | Count |
|---|---|---|---|
| Appeal Rights | 53.8% | | 156 |
| Cost savings | 22.8% | | 66 |
| Public Forum | 11.7% | | 34 |
| Prefer Jury or Bench Trial | 38.3% | | 111 |
| Familiarity with the Process | 21.0% | | 61 |
| Other (please specify) | 44.1% | | 128 |
| | | Total | 556 |

Given the relatively common and commonly-expressed concerns about arbitration becoming more expensive, the Arbitrator Survey asked whether arbitrators suggest or encourage cost-saving procedures. But, other than trying to encourage stipulations of uncontested facts and assembling joint exhibits, the respondents

do not frequently appear to raise other common suggestions for improving the efficiency of arbitrations.[19]

**10. (Arbitrator Survey) Please identify how often you may suggest or discuss with counsel or parties the use of any of the following procedures to reduce costs or increase efficiency of arbitration hearings, or list others if applicable:[20]**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Chess clock division of hearing time between parties? | 14<br>6.2% | 31<br>13.7% | 37<br>16.4% | 77<br>34.1% | 67<br>29.6% |
| b. Joint calling of witnesses? | 11<br>4.9% | 41<br>18.1% | 25<br>11.1% | 108<br>47.8% | 41<br>18.1% |
| c Joint calling ("hot tubbing") of experts? | 13<br>5.8% | 39<br>13.4% | 37<br>16.5% | 97<br>43.3% | 47<br>21.0% |
| d. Receipt of detailed summaries of witnesses testimony and exhibits subject to cross-examination? | 15<br>6.7% | 32<br>14.3% | 48<br>21.4% | 92<br>41.1% | 37<br>16.5% |
| e. Submission of stipulated, undisputed facts? | 56<br>25.0% | 67<br>29.9% | 34<br>15.2% | 55<br>24.6% | 12<br>5.4% |
| f. Submission of joint exhibits? | 112<br>49.8% | 79<br>35.1% | 20<br>8.9% | 11<br>4.9% | 3<br>1.3% |

[19]*See* ch. 17, *Unique Issues in Construction Arbitration*, § VII, A — D in THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (James M. Gaitis et al. eds., 4th ed., 2017) (discussing use of fact witness conferencing, expert witness conferencing (hot-tubbing or tandem experts), chess clocks, and witness statements to increase efficiency).

[20]Individual suggestions that were "always" or "usually" proposed for improving arbitration efficiency included: adherence to all interim and hearing schedules and dates; allocation of the total available hearing time by party in advance of the hearing (which sounds similar to the "chess clock" option); award determination based solely on written submissions; bifurcation of issues; follow what counsel agree on; pre-hearing briefs for substantive legal issues; require the parties to meet and confer to develop proposed discovery plan, subject to arbitrator approval; requirements for detailed expert reports; standby telephone availability for issues during depositions; time limits on opening and closing arguments; joint discovery plan; limits on time for the hearing; submission of exhibits to the arbitrator for review prior to the hearing.

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| g. Presentation of all exhibits via specified presentation software in electronic format (as opposed to hard copy)? | 28<br>13.0% | 45<br>20.9% | 42<br>19.5% | 65<br>30.2% | 35<br>16.3% |

Perhaps the reason arbitrators often do not explore utilizing these techniques is that advocates do not seem keen to employ or urge their use, either. In the Advocate Survey, counsel strongly supported the submission of joints exhibits (81.3% half or more of the time) and a statement of uncontested facts (85.2% half or more of the time), but beyond these unremarkable steps, procedural efficiency was not a paramount concern. The advocates were evenly split on whether to employ joint presentation software to present exhibits electronically, and 56.3% of the respondents rarely or never wanted to use a chess clock, with only 25.6% of them willing to use a chess clock half the time. There was also general lack of interest in the joint calling of witnesses; 43.4% of advocates would rarely or never prefer to do that, and 35.2% would be willing to consider it half the time, which leaves only 21.2% who would often or always employ that technique. The advocates feel more strongly about the joint calling of adverse experts with 58.6% indicating they would rarely or never prefer that and 26.7% stating they would consider it half the time, which means only 11.7% would often or always advocate the practice. The reluctance by advocates to "hot tub" their expert with the opposition's is understandable. After paying handsomely for an expert report, an advocate may not want to sacrifice what it hopes will be a polished and persuasive expert presentation on the altar of efficiency, even if the practice may be encouraged by the arbitrators.

**4. (Advocate Survey) Please identify which of the following procedures you prefer to utilize:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Chess clock division of hearing time between parties? | 3.5%<br>33 | 14.6%<br>138 | 25.6%<br>242 | 25.5%<br>241 | 30.8%<br>291 |
| b. Joint calling of witnesses? | 4.6%<br>44 | 16.7%<br>158 | 35.2%<br>334 | 25.5%<br>242 | 17.9%<br>170 |
| c. Joint calling ("hot-tubing") of experts? | 1.6%<br>15 | 10.1%<br>95 | 26.7%<br>280 | 28.8%<br>272 | 29.8%<br>281 |

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| d. Receipt of detailed summaries of witnesses testimony and exhibits subject to cross-examination? | 6.9%<br>65 | 16.8%<br>159 | 29.1%<br>281 | 28.3%<br>268 | 18.3%<br>173 |
| e. Submission of stipulated, undisputed facts? | 20.2%<br>506 | 37.6%<br>356 | 26.4%<br>87 | 11.3%<br>13 | 4.5%<br>3 |
| f. Submission of joint exhibits? | 29.1%<br>277 | 44.1%<br>420 | 19.1%<br>182 | 5.3%<br>50 | 2.4%<br>23 |
| g. Presentation of all exhibits via specified software in electronic format (as opposed to hard copy?) | 7.1%<br>68 | 23.8%<br>227 | 36.6%<br>350 | 19.6%<br>187 | 13.0%<br>124 |

### *B. Discovery*

There is a long-standing debate about how much discovery is appropriate in arbitration,[21] and various ADR organization Rules have attempted to establish some parameters for pre-hearing exchange of information, such as document exchange, interrogatories, and depositions. For example, the AAA Construction Industry Arbitration Rules prohibit discovery in Fast Track Arbitrations, except as ordered by the arbitrator in exceptional cases.[22] In its Regular Track Rules, the AAA attempts to lessen the burdens of document production by requiring the arbitrator to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of a dispute, while at the same time . . . safeguarding each party's opportunity to fairly present its claims and defenses."[23] Parties are not required to produce all relevant information, or at least as the Federal Rules of Evidence define "relevant"—i.e. information reasonably calculated to lead to the discovery of admissible evidence.[24] Instead, the AAA Rules allow the arbitrator to require parties to exchange documents in their possession "on which they intend to rely" and documents not in the requesting party's possession "reasonably believed by the

[21] *See* Thomson, Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators, 23 Hofstra L. Rev. 137, fn. 25 (1994).

[22] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), F-9.

[23] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-24(a).

[24] *See* Fed. R. Civ. P. 26.

party seeking the documents to exist and to be relevant and material to the outcome of the disputed issue."[25]

The arbitrators' answers to questions about discovery in the Arbitrator Survey indicate a wide variety of practices according to any standard of disclosure that is applied. The majority of arbitrators (52.5%) seldom or never simply require each party to exchange its entire project file with the other, but a substantial minority (28.5%) usually or always do; 19% require such an exchange about half the time. Some arbitrators (37.2%) take on the task of limiting or targeting production as determined by them in their judgment, while 38.1% seldom or never do; about 24.8% do that approximately half the time.

When asked whether they apply the new standard of production created by AAA Rule, R-24(b)(i)—i.e. production of only documents "on which you intend to rely"—68.1% of arbitrators indicated that they seldom or never order production using this standard; only 19.2% usually or always do, while 12.8% do that half the time.

The Arbitrator Survey also sought to compare the use of another new standard of production—i.e. production of documents considered "relevant and material to the outcome"—to the definition of relevance used by the Federal Rules of Civil Procedure—i.e. production of documents reasonably calculated to lead to the discovery of admissible evidence. The results indicate that a majority of arbitrators (56.1%) seldom or never use the new standard as opposed to the old, while 29.1% usually or always do; about 14.8% use the new definition about half the time. Arbitrators usually or always use the old definition of relevance found in the Federal Rules to determine the scope of production 46.1% of the time, with 16% using the Federal Rules definition about half the time. The Federal Rules have a system of required disclosure, not only of documents but also other case-related information, at the very start of a case, which the federal judiciary and bar find useful. When asked if they require disclosures consistent with Federal Rule of Civil Procedure 26, 57.9% indicated they seldom or never do so, 28.7% said they usually or always do so, and 13.4% reported they did so half the time.

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[25]American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-24(b)(i) and (ii).

**11. (Arbitrator Survey) In regard to the scope of document exchange, how often do you order:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Entire project file, including all project related paper hard copies and all project related electronically Stored Information (ESI)? | 9<br>4.1% | 54<br>24.4% | 42<br>19.0% | 65<br>29.4% | 51<br>23.1% |
| b. Targeted/limited scope production as determined by arbitrator of project files and/or related ESI communications (based on manual or technology assisted review). | 5<br>2.3% | 76<br>34.9% | 54<br>24.8% | 61<br>28.0% | 22<br>10.1% |
| c. Only documents on which parties intend to rely? | 11<br>5.0% | 31<br>14.2% | 28<br>12.8% | 81<br>37.0% | 68<br>31.1% |
| d. Only documents that are considered "relevant and material to the outcome" as opposed to reasonably calculated to lead to the discovery of admissible evidence? | 13<br>5.8% | 52<br>23.3% | 33<br>14.8% | 76<br>34.1% | 49<br>22.0% |
| e. Documents that are reasonably calculated to lead to the discovery of admissible evidence? | 20<br>9.1% | 81<br>37.0% | 35<br>16.0% | 56<br>25.6% | 27<br>12.3% |
| f. Disclosures consistent with FRCP Rule 26? | 8<br>3.7% | 54<br>25.0% | 29<br>13.4% | 62<br>28.7% | 63<br>29.2% |

The preferences stated by counsel in Advocate Survey generally agree with the scope or discovery allowed by arbitrators, except that advocates usually prefer a broader scope of discovery, by between 5 to 10% across all options in the categories of "always," "often" and "sometimes."

**5. (Advocate Survey) In regard to the scope of document exchange, do you prefer that the arbitrator order:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Entire project file, including all project related paper hard copies and all project related electronically stored information (ESI)? | 14.9%<br>141 | 28.5%<br>269 | 29.1%<br>275 | 21.3%<br>201 | 6.2%<br>59 |

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| b. Targeted/limited scope production as determined by arbitrator of project files and/or related ESI communications [based on manual or technology assisted review]. | 6.1%<br>58 | 40.6%<br>379 | 34.1%<br>318 | 13.0%<br>121 | 6.2%<br>58 |
| c. Only documents on which parties intend to rely. | 8.0%<br>75 | 16.8%<br>158 | 19.55%<br>184 | 30.0%<br>282 | 25.7%<br>242 |
| d. Only documents that are considered 'relevant and material to the outcome' as opposed to reasonably calculated to lead to the discovery of admissible evidence. | 6.8%<br>63 | 18.8%<br>175 | 23.0%<br>214 | 29.2%<br>272 | 22.2%<br>207 |
| e. Documents that are reasonably calculated to lead to the discovery of admissible evidence? | 20.8%<br>195 | 35.0%<br>328 | 24.6%<br>230 | 15.1%<br>141 | 4.5%<br>42 |
| f. Disclosures consistent with FRCP 26? | 13.0%<br>121 | 29.6%<br>276 | 27.5%<br>257 | 19.5%<br>182 | 10.5%<br>98 |

One of the more common discovery disputes in any case (litigated or arbitrated) is whether and, if so, what kind of electronically stored information (ESI) will be produced. The Arbitrator Survey polled arbitrators regarding the specific nature of production required in cases where the parties could not agree. The arbitrators were given the common production methods of paper only, native format ESI, non-native ESI such as PDF or TIFF, and ESI with metadata or in OCR/extracted text format.

Most practitioners would acknowledge that a paper-only production with no ESI is uncommon even in small cases. The Arbitrator Survey bore this out: most arbitrators (43.6%) seldom required a paper-only production and a significant number (26.1%) *never* require a paper-only production. But, there was a small, but significant, number of arbitrators (14.7%) who usually required paper-only production with no ESI. Thus, while practitioners can now expect ESI to be produced in most cases, the Arbitrator Survey shows this is not universal.

Receiving ESI in PDF or TIFF is not very helpful because it cannot easily be searched by optical character recognition software and there is no assurance that the PDF or TIFF copy has not been altered from the original native format of the ESI.

Nevertheless, 22.7% of arbitrators always or usually order ESI to be produced in PDF or TIFF, while 49.2% seldom or never do, and 28% do so half the time. There is a slight improvement in the number of arbitrators who order ESI produced in its native format so its original format can be verified and it can be searched with OCR software: 35% always or usually ordered ESI production in native format; 36.4% seldom or never did; and 28.6% did so half the time. The most useful, but also the most expensive, production of ESI is with OCR/Extracted Text and/or Metadata, but the respondents indicated this is not often ordered, with 12.2% always or usually ordering it, 73.1% seldom or never ordering it, and 14.6% ordering it half the time.

The varying practice of how ESI is handled by arbitrators suggests that more ESI training for arbitrators would be useful for the parties to increase the utility and consistency of ESI production.

**12. (Arbitrator Survey) If the parties cannot agree on the type of ESI to be exchanged, how often do you require exchange of:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Documents in Paper format only (no ESI)? | 2<br>0.9% | 31<br>14.7% | 31<br>14.7% | 92<br>43.6% | 55<br>26.1% |
| b. ESI documents in Native format? | 9<br>4.4% | 63<br>30.6% | 59<br>28.6% | 56<br>27.2% | 19<br>9.2% |
| c. ESI documents in Non-Native format, e.g. PDF or TIFF? | 4<br>1.9% | 43<br>20.8% | 58<br>28.0 | 74<br>35.7% | 28<br>13.5% |
| d. ESI documents with OCR/ Extracted Text and/or Metadata? | 1<br>0.5% | 24<br>11.7% | 30<br>14.6% | 88<br>42.9% | 62<br>30.2% |

In addition to concerns about the mounting cost of arbitration, there also is increasing anxiety about whether arbitration is becoming too much like litigation and allowing litigation-like discovery as a matter of course.[26] The AAA Rules discussed above do not encourage litigation-like discovery in Regular Track cases,

[26] PHILIP J. BRUNER & PATRICK J. O'CONNOR, BRUNER & O'CONNOR ON CONSTRUCTION LAW, § 21:3 (2014 ed.) ("Arbitrations all too frequently assumed the trappings of unwanted judicial proceedings, characterized by over-lawyering, unlimited discovery, extensive motion practice, liberal hearing "due process," repeated pre-hearing and hearing delays, extensive post-award disputes over confirmation of binding awards, heavy expense, and long delay in resolution.").

and even though types of discovery are to be discussed under the Procedures for Large, Complex Construction Disputes, the arbitrators are required to "take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Construction Dispute."[27] Even in a Large, Complex Construction Dispute, however, the arbitrator may order depositions only in "exceptional cases, at the discretion of the arbitrator, [and] upon good cause shown and consistent with the expedited nature of arbitration . . ."[28]

The Arbitrator Survey inquired about the scope of discovery the respondents usually allowed in regular (i.e. not large) arbitrations and large, complex arbitrations. Surprisingly, there were some, but not very significant, differences between the discovery allowed in a regular arbitration and a large, complex one. If the answers of "always," "usually," and "half the time" are averaged together, there is about a 10–15% difference between the discovery allowed between regular and complex arbitrations. For example, in a regular arbitration, the average amount that interrogatories are allowed is 28% in the range between "always" and "half the time," whereas in complex cases within the same range, the average is 45.4%. The difference between the allowance for requests for admissions between regular and complex cases within the same range of answers is 20.8% and 38.6%.

The same range of difference appears in how often depositions are allowed. The average frequency that depositions of parties are allowed is 68.5% in regular cases and 88.9% in large, complex ones. These percentages would be surprising if the arbitrators were conducting their cases pursuant to the AAA Rules because the ability or option of ordering depositions is not discussed in the Regular Track Rules[29] and in the Procedures for Large, Complex Construction Disputes, depositions are to be allowed only in exceptional cases.[30] The amount of depositions allowed of third parties is comparable to the results for depositions of parties, but the gap between regular and complex cases begins to narrow—i.e. an average of 75.9% in regular cases and 88.0% in complex cases. Expert depositions are allowed more frequently in large, complex cases than in regular ones, by an average differ-

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[27] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), L-4(a).

[28] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), L-4(f).

[29] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-4, P-1.

[30] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), L-4(f).

ence of 22.3% across the categories of "always," "usually" and "half the time," but the gap is actually larger because the number of "always" responses is higher in complex, as opposed to regular, cases by 18.8%. Prehearing subpoenas are more frequently allowed in complex cases (within the same range of answers) by an average of 75% to 85.7%, although the actual difference is higher as the number of "always" answers for complex cases is greater than the number in regular ones by 13.4%.[31]

Granted, the actual number of times discovery has been allowed is lower than the above averages indicate because the categories of "always," "usually" and "half the time" have been averaged together for illustrative, comparative purposes. Nevertheless, if we assume that "always" equals 100% of the time, "usually" 75%, and "half the time" 50%, the actual number of times discovery is allowed still is significant; for example, using these equivalents, depositions of parties occurs 48.8% of the time in regular cases and 70% in complex ones.

**13. (Arbitrator Survey) For discovery in "regular" arbitrations (not large or complex), how often do you:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Allow limited interrogatories? | 9 | 34 | 20 | 102 | 60 |
| | 4.0% | 15.1% | 8.9% | 45.3% | 26.7% |
| b. Allow limited requests for admissions? | 9 | 25 | 15 | 102 | 74 |
| | 4.0% | 11.1% | 6.7% | 45.3% | 32.9% |
| c. Allow limited depositions of parties? | 15 | 102 | 38 | 62 | 9 |
| | 6.6% | 45.1% | 16.8% | 27.4% | 4.0% |
| d. Allow limited depositions of third-party witnesses? | 25 | 108 | 37 | 43 | 11 |
| | 11.2% | 48.2% | 16.5% | 19.2% | 4.9% |
| e. Allow limited depositions of experts? | 32 | 100 | 36 | 46 | 12 |
| | 14.2% | 44.2% | 15.9% | 20.4% | 5.3% |
| f. Allow limited pre-hearing subpoenas? | 29 | 96 | 43 | 46 | 10 |

[31]The use of pre-hearing subpoenas is important because they are often used as a means of effectively allowing depositions that may not otherwise expressly be allowed under the rules of the arbitration in question.

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| | 12.9% | 42.9% | 19.2% | 20.5% | 4.5% |

**14. (Arbitrator Survey) For discovery in "large or complex" arbitrations, how often do you:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Allow limited interrogatories? | 22 | 56 | 24 | 73 | 50 |
| | 9.8% | 24.9% | 10.7% | 32.4% | 22.2% |
| b. Allow limited requests for admissions? | 19 | 41 | 27 | 79 | 58 |
| | 8.5% | 18.3% | 12.1% | 35.3% | 25.9% |
| c. Allow limited depositions of parties? | 60 | 107 | 32 | 24 | 1 |
| | 26.8% | 47.8% | 14.3% | 10.7% | 0.4% |
| d. Allow limited depositions of third-party witnesses? | 64 | 108 | 25 | 22 | 5 |
| | 28.6% | 48.2% | 11.2% | 9.8% | 2.2% |
| e. Allow limited depositions of experts? | 74 | 96 | 24 | 25 | 5 |
| | 33.0% | 42.9% | 10.7% | 11.2% | 2.2% |
| f. Allow limited pre-hearing subpoenas? | 59 | 109 | 24 | 21 | 11 |
| | 26.3% | 48.7% | 10.7% | 9.4% | 4.9% |

Results from the Advocate Survey reveal that advocates prefer more discovery than arbitrators are allowing in regular cases in which claims are below $1 million. On average, counsel "always" prefer approximately 10% more of all types of discovery,[32] and approximately 14% more discovery about "half the time." On large, complex cases above $1 million in dispute, advocates on average "always" prefer all types of discovery 7.7% more than typically allowed by arbitrators, but surprisingly, arbitrators on average "usually" ordered a 7.6% of all types of discovery more often than

[32]Arbitrators in regular cases "usually" allow all types of discovery approximately 2% more often than advocates prefer, but that is presumably due to the fact that advocates "always" prefer all types of discovery 10% more often than arbitrators allow.

usually preferred by counsel,[33] and the amount of all types of discovery preferred by attorneys and allowed by arbitrators "half the time" varied only by 0.7%.

**6. (Advocate Survey) For discovery in arbitrations with claims <u>below</u> $1 million, do you prefer that the arbitrator:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Allow limited interrogatories? | 16.5% | 22.7% | 25.0% | 19.3% | 16.7% |
| | 159 | 219 | 241 | 186 | 161 |
| b. Allow limited requests for admissions? | 14.6% | 20.3% | 23.1% | 21.8% | 20.2% |
| | 140 | 195 | 222 | 209 | 194 |
| c. Allow limited depositions of parties? | 20.3% | 33.6% | 26.0% | 13.6% | 6.5% |
| | 196 | 325 | 251 | 131 | 63 |
| d. Allow limited deposition of third-party witnesses if requested and the other party does not object? | 18.9% | 32.2% | 29.6% | 13.2% | 6.0% |
| | 182 | 310 | 285 | 127 | 58 |
| e. Allow limited depositions of experts? | 22.2% | 31.5% | 24.9% | 13.8% | 7.7% |
| | 213 | 302 | 239 | 132 | 74 |
| f. Allow limited pre-hearing subpoenas? | 20.3% | 32.4% | 30.8% | 12.2% | 4.3% |
| | 193 | 308 | 293 | 116 | 41 |

**7. (Advocate Survey) For discovery in arbitrations with claims <u>above</u> $1 million, do you prefer that the arbitrator:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Allow limited interrogatories? | 23.6% | 24.9% | 20.4% | 17.1% | 14.0% |
| | 228 | 240 | 197 | 165 | 135 |
| b. Allow limited requests for admissions? | 22.0% | 21.0% | 21.0% | 17.6% | 18.4% |
| | 210 | 201 | 201 | 168 | 176 |

[33]Perhaps most significantly, arbitrators on large, complex cases "usually" allowed depositions of parties, third parties, and experts on average 13.5% more often than usually preferred by advocates.

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| c. Allow limited depositions of parties? | 34.5% | 31.5% | 19.5% | 9.2% | 5.3% |
| | 332 | 303 | 188 | 88 | 51 |
| d. Allow limited deposition of third-party witnesses if requested and the other party does not object? | 32.6% | 28.8% | 23.7% | 9.6% | 5.3% |
| | 312 | 276 | 227 | 92 | 51 |
| e. Allow limited depositions of experts? | 34.6% | 29.2% | 19.7% | 9.8% | 6.8% |
| | 331 | 279 | 188 | 94 | 65 |
| f. Allow limited pre-hearing subpoenas? | 31.6% | 32.8% | 21.2% | 9.1% | 5.4% |
| | 301 | 313 | 202 | 87 | 51 |

### *C. Prehearing Motions*

One motion that can increase efficiency is to bifurcate between entitlement and quantum determinations, and another is to order the hearing so that proof focuses first on issues that may dispose of all or part of the case, to possibly avoid a much longer arbitration.

Bifurcation between entitlement and quantum is common in proceedings before federal boards of contract appeals, the idea being that the Board should not bother with hearing often complicated quantum evidence if there is no entitlement to damages.[34] From the responses to the Arbitrator Survey, a majority of 50.5% of arbitrators "seldom" or "never" consider this possibility, 25% do so "half the time," and only 24.5% do "usually" or "always." Given the concern for the mounting cost of arbitration, perhaps this is an opportunity that should be explored more often. Slightly more arbitrators encourage parties to focus their presentations first on issues that could dispose of all or part of the case: "always": 9.9%; "usually" 39.5%; "half the time" 17%; but a substantial minority or 30.5% "seldom" and 3.1% "never" do.

[34] *See also*, ch. 7, *Motions*, § III. G. 3, in THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (James M. Gaitis et al. eds., 4th ed., 2017).

**15. (Arbitrator Survey) As part of planning for the conduct of the hearing, how often do you consider issues such as:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Bifurcating the hearings between entitlement and quantum? | 16<br>7.1% | 39<br>17.4% | 56<br>25.0% | 94<br>42.0% | 19<br>8.5% |
| b. Encouraging parties to focus their presentation first on issues the decision of which could dispose of all or part of the case? | 22<br>9.9% | 88<br>39.5% | 38<br>17.0% | 68<br>30.5% | 7<br>3.1% |

By comparison, advocates do not favor bifurcation as often as arbitrators, but 38.5% of them would prefer "half the time" that arbitrators request presentations that focus first on issues which could dispose of all or part of the case, but only 17% of the arbitrators follow that practice "half the time."

**8. (Advocate Survey) As part of the arbitration process, do you prefer:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Bifurcating the hearings entitlement and quantum? | 1.4%<br>13 | 10.6%<br>101 | 37.3%<br>356 | 36.4%<br>348 | 14.4%<br>137 |
| b. Focusing your presentation first on issues the decision of which could dispose of all or part of the case? | 11.4%<br>109 | 35.5%<br>340 | 38.5%<br>369 | 11.3%<br>108 | 3.3%<br>32 |

The increasing use of pre-hearing summary judgment motions has come under criticism for increasing the cost of arbitration, without the corresponding benefit of reducing the issues to be arbitrated.[35] Indeed, this concern led the AAA to modify its Commercial Arbitration Rules to require a preliminary showing to the arbitrator of probable success before such motions could be filed.[36] The AAA has not followed suit in its Construction Industry Arbitration Rules, and parties are able to file dispositive motions upon written application to and approval by the arbitrator. The

[35]Phillip L. Bruner, INTRODUCTION TO CONSTRUCTION ADR, l-li (Adrian L. Bastianelli & Charles M. Sink eds., 2014) (discussing growing dissatisfaction with the "judicialization" of arbitration).

[36]*See* the American Arbitration Association Commercial Arbitration Rules (October 1, 2013), R-33.

Arbitration survey sought to determine whether arbitrators considered the utility of dispositive motions to be as bleak as sometimes portrayed.

Question 16 of the Arbitrator Survey explored how open construction arbitrators were to summary judgment motions and whether they imposed conditions on them before allowing them to be filed. First, about an equal number (42.2%) of arbitrators either always or usually freely entertain such motions, while 38% seldom or never do, with the remaining 17.1% freely allow them about half the time. 48% seldom or never discourage such motions, unless the parties stipulate that no material facts are in dispute, while 41.5% usually or always do so. The survey also asked if the construction arbitrators impose the same condition that the AAA Commercial Rules impose on summary judgment motions—i.e. seek the arbitrator's approval after making a showing the motion is likely to succeed, dispose of, or narrow the issues in the case. Only 37.1% reported always or usually doing so, while 55.7% seldom or never did so. The expected efficiency of bringing such motions was questioned by asking whether, despite the filing of a summary judgment motion, arbitrators nevertheless declined or reserved ruling on such motions until after the close of the hearing. It turns out 23.2% always or usually defer their decision, but 59.1% do not, while 17.7% do so half the time. It seems pointless to allow a summary judgment motion to be brought, however, if the arbitrator intends to defer or decline to rule until the hearing is closed.

**16. (Arbitrator Survey) In considering summary dispositive motions, how often do you:**

| | **Always** | **Usually** | **Half the Time** | **Seldom** | **Never** |
|---|---|---|---|---|---|
| a. Freely entertain such motions by all parties? | 27<br>12.2% | 71<br>32% | 38<br>17.1% | 75<br>33.8% | 11<br>5.0% |
| b Discourage such motions unless the parties stipulate that no material facts are in dispute? | 16<br>7.3% | 75<br>34.2% | 23<br>10.5% | 67<br>30.6% | 38<br>17.4% |
| c. Require that a party seek the arbitrator's approval to bring such a motion after making a showing that the motion is likely to succeed, dispose of, or narrow the issues in a case? | 27<br>12.2% | 55<br>24.9% | 16<br>7.2% | 49<br>22.2% | 74<br>33.5% |

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| d. Decline or reserve ruling on such motions until after the close of the hearing? | 7<br>3.2% | 44<br>20.0% | 39<br>17.7% | 74<br>33.6% | 56<br>25.5% |

Predictably, advocates wanted slightly less restriction on dispositive motions and rulings on them more quickly than they typically get from arbitrators, but they were more evenly split and less polarized than arbitrators regarding the requirement of a preliminary motion on the likelihood of success on the merits before being allowed to bring a summary judgment motion.

**9. (Advocate Survey) In regard to summary dispositive motions, do you prefer that the arbitrator:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Freely entertain such motions by all parties? | 18.7%<br>179 | 30.0%<br>287 | 26.2%<br>251 | 19.4%<br>186 | 5.6%<br>54 |
| b. Discourage such motions unless the parties stipulate that no material facts are in dispute? | 7.4%<br>70 | 25.4%<br>239 | 24.0%<br>226 | 26.1%<br>246 | 17.1%<br>161 |
| c. Require that a party seek the arbitrator's approval to bring such a motion after making a showing that the motion is likely to succeed, dispose of, or narrow the issues in a case? | 10.2%<br>97 | 25.6%<br>244 | 25.3%<br>241 | 23.6%<br>225 | 15.3%<br>146 |
| d. Decline or reserve ruling on such motions until after the close of the hearing? | 3.0%<br>28 | 11.1%<br>105 | 23.1%<br>218 | 31.3%<br>296 | 31.5%<br>298 |

A more fundamental inquiry is whether the arbitrators found summary judgment useful and worthwhile. Arbitrator Survey question 17 asked if a dispositive motion was useful to the arbitrator's preparation for the hearing even if the motion was unsuccessful, and the answers were equally split: 35.9% said they were always or usually useful, 27.8% said they were half the time, and 36.3% said they were seldom or never helpful. The same approximate distribution of answers was provided in response to the question of whether such motions were useful to extract or establish specific facts necessary for the resolution of the case: 33.5% said always or usually; 29% said half the time; and 36.3% said seldom or never. In response to the criticism that summary judgment motions are over-used by counsel and not

helpful to the arbitrators, 41.3% said always or usually, 26.1% reported half the time, and 32.6% said seldom or never. The takeaway from the data is that summary judgment motions in construction arbitrations perhaps have been over-criticized. If a healthy majority of 63.7% of arbitrators found they were useful half the time or more even if unsuccessful, it is hard to argue their use should be constrained. Similarly, if 58.7% of the arbitrators think that half the time or more they are not over-used or unhelpful, then the AAA Construction Rules should remain as they are and not mirror the Commercial Rules.

**17. (Arbitrator Survey) How often do you find that dispositive motions in construction cases:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Are useful to your preparation for the hearing even if the motion is unsuccessful? | 8<br>3.6% | 72<br>32.3.% | 62<br>27.8 | 73<br>32.7% | 8<br>3.6% |
| b. Are useful to extract or establish specific facts necessary for the resolution of the case? | 5<br>2.3% | 69<br>31.2% | 64<br>29.0% | 77<br>34.8% | 6<br>2.7% |
| c. Are over used by counsel for the parties and not helpful to you as the arbitrator? | 5<br>2.3% | 85<br>39.0% | 57<br>26.1% | 63<br>28.9% | 8<br>3.7% |

The Advocate Survey shows very similar attitudes to those of the arbitrators toward the utility of dispositive motions, but lawyers believe these motions are over used by counsel about 10% less than arbitrators do, which is understandable as the advocates are the ones that choose to bring them.

**10. (Advocate Survey) How often do you find that dispositive motions in construction cases:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Are useful to your presentation for the hearing even if the motion is unsuccessful? | 7.7%<br>74 | 34.2%<br>329 | 32.1%<br>308 | 22.1%<br>212 | 4.0%<br>38 |
| b. Are useful to extract or establish specific facts necessary for the resolution of the case? | 6.4%<br>61 | 34.4%<br>328 | 34.7%<br>331 | 20.7%<br>198 | 3.9%<br>37 |
| c. Are over-used by counsel for the parties? | 5.1%<br>49 | 28.5%<br>274 | 39.0%<br>374 | 24.4%<br>234 | 3.2%<br>29 |

### *D. Hearing*

One of the hallmarks of arbitration is a more informal and flexible approach to the hearing itself, in contrast to the formal nature of trial constrained by the rules of civil procedure, rules of evidence, and centuries of custom and practice. The Arbitrator Survey asked a series of questions designed to illuminate the extent of those differences, or whether litigation procedures gradually are being adopted in the actual practice of arbitrators.

With respect to evidentiary issues, the Arbitrator Survey began with relatively high-level, fundamental questions about whether and how arbitrators might enforce the rules of evidence. First, the survey asked the arbitrators to consider two different scenarios: a proceeding in which the applicable arbitration rules require the arbitrator to enforce the rules of evidence; and a proceeding in which the applicable arbitration rules do not. It will reassure the drafters of arbitration agreements that when the arbitration rules do require application of the rules of evidence, arbitrators consistently apply them, with a combined "always" and "usually" response of 83.2%. On the other hand, it is difficult to explain why 13.1% either "seldom" or "never" apply those rules of evidence, even if the arbitration agreement requires it. Similarly, when the applicable arbitration rules do not require the arbitrators to apply the rules of evidence, by and large the arbitrators do not apply them—the combined "seldom" and "never" answers comprise 75% of the respondents. A similar number of arbitrators buck that trend: 14.3% of arbitrators "usually" or "always" apply the rules of evidence, even when the arbitration does not require it!

**19. (Arbitrator Survey) How often do you enforce state or federal rules of evidence:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. If the arbitration rules governing the dispute require their use? | 113<br>51.1% | 71<br>32.1% | 8<br>3.6% | 21<br>9.5% | 8<br>3.6% |
| b. If the arbitration rules governing the dispute do not require their use? | 2<br>0.9% | 30<br>13.4% | 24<br>10.7% | 93<br>41.5% | 75<br>33.5% |

Attorney respondents to the Advocate Survey had slightly less preference to apply the rules of evidence, even if the arbitration agreement required it, perhaps because they select or prefer arbitration due to its evidentiary informality, but a substantial group of advocates still preferred application of the rules of evidence even if the applicable arbitration rules did not require

their use. Here the explanation might be that trial court litigators want to use in arbitration the trial court methods with which they are most familiar.

**11. (Advocate Survey) Should the arbitrator(s) follow and enforce state or federal rules of evidence:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. If the arbitration rules governing the dispute require their use? | 50.0%<br>483 | 25.3%<br>244 | 15.0%<br>145 | 6.83%<br>66 | 2.9%<br>28 |
| b. If the arbitration rules governing the dispute do not require their use? | 12.1%<br>115 | 18.5%<br>176 | 30.4%<br>289 | 23.5%<br>224 | 15.6%<br>148 |

Even if the rules of evidence do not apply to an arbitration, advocates often still make evidentiary objections during the hearing, and the Arbitrator Survey sought to determine whether evidentiary objections have any impact on the arbitrators' view of the evidence or their deliberations, regardless of whether evidentiary rules applied. The Arbitrator Survey results indicate that a surprisingly large percentage of arbitrators—55.4%—confirm that even in proceedings where the rules of evidence do not apply, evidentiary objections still have an impact on their deliberations or view of the evidence. Presumably, even if they are not required to apply the rules of evidence and exclude triple hearsay, knowing that the evidence presented is problematic from an evidentiary standpoint is useful to arbitrators in evaluating the evidence they are receiving.

**20. (Arbitrator Survey) If the arbitration rules do not require application of rules of evidence, do evidentiary objections have any impact on your view of the evidence or your deliberations?**

| Value | Percent | | Count |
|---|---|---|---|
| Yes | 55.4% | | 124 |
| No | 44.6% | | 100 |
| | | Total | 224 |

Question 26 of the Arbitrator Survey drilled down into even more specific situations to understand how certain commonly-encountered hearing issues play out. First, the Arbitrator Survey asked whether the arbitrators would refuse to accept cumulative, unreliable, unnecessary evidence or evidence of slight value. Unsurprisingly, 63.9% either "seldom" or "never" refused to accept such evidence. Perhaps this reflects a concern that one of the

few grounds upon which an award can be vacated pursuant to the Federal Arbitration Act is for "refusing to hear evidence pertinent and material to the controversy."[37] A still significant percentage of arbitrators will exclude such evidence: 19.2% "half the time," 26.3% will "usually" do so, but only 1.8% will "always." This alternative line of responses probably reflects the arbitrators' desire, encouraged by several ADR service organizations, to keep the hearing efficient and economical.[38] By contrast to the practices reflected in Arbitrator Survey, arbitration advocates would prefer arbitrators to exclude cumulative evidence much more often: "always" 12.3%; "usually" 36.6%; "half the time" 31.2%, "seldom" 17.2%; and "never" 2.7%.

Second, the Arbitrator Survey asked whether arbitrators would refuse to accept evidence of settlement negotiations on the grounds that such discussions may fall within Rule 408 of the Rules of Evidence or would otherwise be privileged. The arbitrators overwhelmingly confirmed they would refuse to accept such evidence: 88.4% combined "always" or "usually."[39] Curiously, there are still 9.3% of arbitrators who "seldom" or "never" refuse to accept such evidence. When making a settlement offer, therefore, it would be prudent to get the other party's agreement in advance that it is inadmissible in any subsequent arbitration hearing.[40]

In regard to subpoena use, 85.8% of arbitrators either "always"

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[37] *See* 9 U.S.C.A. § 10.3; *but see, e.g.*, Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) ("Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review. In making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts. However, although not required to hear all the evidence proffered by a party, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.") (internal quotation marks and citations omitted).

[38] *E.g.* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-33 states, "The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute . . ."

[39] *See* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), R-35 prohibiting arbitrators from admitting privileged communications; it is arguable, however, that an offer of settlement is an exclusionary rule based on policy considerations and not on privilege. MCCORMICK ON EVIDENCE, § 277 (West 3rd Ed.); *see also*, COMMERCIAL ARBITRATION AT ITS BEST, § 6.3.2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) (discussing maintaining the confidentiality of settlement offers).

[40] The arbitration advocates' answers to the same question were similar: "always" 60.4%; "usually" 23.9%; "half the time" 10.2%; "rarely" 2.6%; and "never" 1.8%. Again, if 14.7% of advocates think that settlement offers should be admissible half the time or more, then getting agreement on the inadmissibility of such offers is important before they are exchanged.

or "usually" grant subpoenas to produce witnesses and documents at the hearing. In the Advocate Survey, attorneys reflected almost the same preference percentage of 84%. These results appear to indicate that—should practitioners want live testimony—arbitrators will enforce that request.

Acknowledging that arbitration is not constrained to receive evidence only through witness testimony, the Arbitrator Survey also asked a series of questions regarding live testimony versus submission of evidence through affidavit or declaration. A significant percentage of arbitrators still will receive and consider testimony and evidence through affidavits and/or declarations. Nearly half (46.5%) either "always" or "usually" accept such evidence; about a quarter of the responses (24.1%) do so "half the time"; and another quarter (29.5%) only "seldom" or "never" do so. According to the Advocates Survey responses, however, advocates' preferences for this practice are not as strong: approximately a third (35%) either "always" or "usually" prefer this approach; 40.9% do so "half the time"; and close to a quarter (23.9%) "seldom" or "never" do.

The more important question—for those who proffer affidavits and declarations—is whether arbitrators give them equal weight to live testimony. There is a marked preference for live testimony. Only approximately a quarter of the arbitrators (28.2%) "usually" or "always" give equal weight; 20.3% acknowledge giving equal weight "half the time." However, a full half of the arbitrators (51.3%) "seldom" or "never" give equal weight to such evidence. The lesson here is that while most arbitrators will accept evidence in affidavit or declaration form, practitioners should be cautious about relying on the persuasive effect of that evidence, as most arbitrators will discount its value.[41]

Finally, site inspections can and do occur in construction arbitrations, either as part of discovery, the hearing, or both.[42] Do arbitrators find site inspections as part of the hearing to be helpful? The Arbitrator Survey asked arbitrators and the results were mixed. A not insubstantial 10.3% "always" found them helpful; nearly half (43.9%) "usually" did; but many arbitrators (34.1%) found them helpful only half the time and a significant 11.7% "seldom" found them helpful. No arbitrators reported they were "never" helpful. As seen below in the answers to the Advocate

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[41]Based on the Advocate Survey, attorneys seem to sense the same and favor live testimony. When asked if they prefer that arbitrators give equal weight to evidence submitted by affidavit as they do to live testimony, they responded that 17% usually or always would, 31.5% would do that half the time, and 49.5% seldom or never would.

[42]*E.g.* American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015) R-37.

Survey, the attorneys' perception of the usefulness of a site visit generally matched those of the arbitrators.

**26. (Arbitrator Survey) In construction arbitrations, how often do you:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Refuse to accept evidence deemed cumulative, unreliable, unnecessary, or of slight value? | 4<br>1.8% | 59<br>26.3% | 43<br>19.2% | 108<br>48.2% | 10<br>4.5% |
| b. Refuse to accept evidence of settlement negotiations on the grounds that they are privileged? | 127<br>56.7% | 71<br>31.7% | 5<br>2.2% | 18<br>8.0% | 3<br>1.3% |
| c. Grant subpoenas to produce witnesses and documents at the hearing? | 87<br>38.7% | 106<br>47.1% | 20<br>8.9% | 12<br>5.3% | 0<br>0.0% |
| d. Receive and consider evidence of witnesses by declaration and affidavit? | 23<br>10.3% | 81<br>36.2% | 54<br>24.1% | 64<br>28.6% | 2<br>0.9% |
| e. Give evidence submitted by affidavit equal weight to live testimony? | 7<br>3.2% | 56<br>25.2% | 45<br>20.3% | 88<br>39.6% | 26<br>11.7% |
| f. Do you find a site inspection to be helpful? | 23<br>10.3% | 98<br>43.9% | 76<br>34.1% | 26<br>11.7% | 0<br>0.0% |

As discussed above, the responses from the Advocate Survey follow:

**12. (Advocate Survey) Do you prefer that an arbitrator:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Refuse to accept evidence deemed cumulative, unreliable, unnecessary, or of slight value? | 12.3%<br>119 | 36.6%<br>354 | 31.2%<br>302 | 17.2%<br>166 | 2.7%<br>26 |
| b. Refuse to accept evidence of settlement negotiations on the grounds that they are privileged? | 60.4%<br>583 | 23.9%<br>231 | 10.2%<br>98 | 3.9%<br>38 | 1.7%<br>16 |
| c. Grant subpoenas to produce witnesses and documents at the hearing? | 48.1%<br>461 | 36.2%<br>347 | 12.5%<br>120 | 2.5%<br>24 | 0.7%<br>7 |

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| d. Receive and consider evidence of witnesses by declaration and affidavit? | 8.52%<br>82 | 26.69%<br>257 | 40.91%<br>394 | 19.42%<br>187 | 4.47%<br>43 |
| e. Give evidence submitted by affidavit equal weight to live testimony? | 4.1%<br>39 | 12.9%<br>124 | 33.5%<br>322 | 34.2%<br>329 | 15.3%<br>147 |
| f. Grant site visit requests? | 15.5%<br>149 | 41.1%<br>396 | 36.3%<br>350 | 6.5%<br>63 | 0.6%<br>6 |

## III. AWARD

The most common criticism and fear about arbitration is that arbitrators supposedly simply "split the baby" and render compromise awards in an amount apparently somewhere between the parties' conflicting claims, without much regard to the respective merits of the claims.[43] Even though they actually have not had much experience in construction arbitrations, the Industry Survey participants had the same preconception about arbitration. When asked how often arbitrators sometimes "split-the-baby" or rendered a compromise award, 12.4% indicated it "always" happened, 24.5% reported it "often" occurred, 28.8% stated it happened "sometimes," 17% replied it "rarely" occurred, and 17% stated it "never" occurred. Indicating a belief that arbitrators sometimes went on an analytical "frolic and detour," the Industry Survey respondents also reported arbitrators rendered awards on a basis other than the claim/defense theories presented by the parties in the following percentages: "always": 4.1%, "often": 14.3%; "sometimes": 30.7%; "rarely": 25.6%, and "never": 25.3%.

A similar perception was expressed by the supposedly more informed respondents in the Advocate Survey; when asked if arbitrators rendered comprise awards based on the amounts of the claims asserted, 1.5% thought they "always" did; 20.5% thought they "often" did so; a whopping 45.3% thought they did so "half the time"; 24.2% thought they did so "rarely"; and only 8.6% thought they "never" did so.[44] Given the seriousness of these concerns, the Arbitrator Survey sought to determine how often

[43] AMERICAN ARBITRATION ASSOCIATION, HANDBOOK ON CONSTRUCTION ARBITRATION & ADR 63 (2d ed. 2010).

[44] To test this perception, the advocates were later asked how often they thought the arbitrator(s) "rendered a compromise award in close cases rather than what might be awarded based on a strict view of the proof and law?" The

arbitrators actually issue unprincipled compromise awards and whether arbitrators render decisions not tied to the theories or facts presented to them.

The first inquiry in the Arbitrator Survey asked a series of questions regarding the above-described view that arbitrators often "split the baby" or render a compromise award. The first question asked whether arbitrators rendered an award based only on the law and facts presented, and the Arbitrator Survey reported that 62.7% of arbitrators "always" follow the law and facts presented; 33.3% "usually" do; 0.9% do that only "half the time"; 2.7% "seldom" do so; and 0.4% "never" do so. Thus, rather than rendering compromise awards or decisions not based on the law and facts presented, the Arbitrator Survey arbitrators stated they always or usually did the opposite 96% of the time. Similarly, the arbitrators flatly rejected the perception that they rendered compromise awards based on the amounts of the claims asserted: 1.1% said they did so "always," 2.5% reported they "usually" did; 1.3% did so "half the time"; 26.9% seldom did so, and 69.5% "never" did so; thus, 96.4% of the time arbitrators seldom or never rendered merely compromise, split-the-baby awards.

In an attempt to gauge whether parties might do better or worse in court compared to arbitration, the vast majority of arbitrators (94.5%) reported that claimants always or usually would not do better in arbitration than they would in court, and a comparable percentage (90.3%) believed that parties would not do any worse in arbitration than they would in court. Finally, just as a check on the first question, the Arbitrator Survey asked whether in close cases they might render a compromise award rather than what might be rendered according to a strict view of the proof and law. Consistent with their answer to the first question, 93.3% of arbitrators would seldom or never render a compromise award in such circumstances. Based on these survey results, the often heard fear of compromise, split-the-baby awards in construction arbitrations is not borne out by the experience of actual arbitrators.

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range of answers were similar, but in close cases, the advocates thought a compromise award was slightly more likely: "always": 1.9%; "often": 21.5%; "sometimes" 46.3%; "rarely": 22.8%; and "never": 8.0%.

**24. (Arbitrator Survey) Regarding an often-heard sentiment that arbitrators often "split the baby" or render a compromise award, how often do you?**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Render an award based only on the law and facts presented? | 141<br>62.7% | 75<br>33.3% | 2<br>0.9% | 6<br>2.7% | 1<br>0.4% |
| b. Render compromise awards based on the amounts of the claims asserted? | 0<br>1.1% | 5<br>2.2% | 3<br>1.3% | 60<br>26.9% | 155<br>69.5% |
| c. Award an amount in arbitration greater than you would expect in court because you are often not bound by rules of evidence and procedure? | 1<br>0.5% | 1<br>0.5% | 10<br>4.5% | 60<br>27.1% | 149<br>67.4% |
| d. Award an amount in arbitration lower than you would expect in court? | 0<br>0.0% | 2<br>0.9% | 19<br>8.7% | 72<br>33.0% | 125<br>57.3% |
| e. Render a compromise award in close cases rather than what might be awarded based on a strict view of the proof and law? | 1<br>0.5% | 4<br>1.8% | 10<br>4.5% | 77<br>34.7% | 130<br>58.6% |

Another related concern sometimes heard is that arbitrators do not always enforce the parties' contracts because arbitrators are not always bound to follow the law, or even if they are, there are no effective appeal rights to ensure they have done so.[45] The Arbitrator Survey explored this concern in several ways, first by simply asking to what extent they enforce the parties' contract in strict accordance with its terms, and 90.2% reported that they "always" or "usually" do. A majority of 60% responded that their enforcement of the parties' contract was seldom or never dependent on whether the contract required the arbitrators to do so. As for not being bound by the law in their awards, 87% reported they "always" or "usually" resolved disputes strictly in accordance with applicable law or statutes. In response to a reciprocal question, only 10% reported that they always or usually apply their own sense of justice and industry standards in formulating their awards even if contrary to what the contract or applicable

[45] *See* David Co. v. Jim W. Miller Const., Inc., 444 N.W.2d 836, 837 (Minn. 1989) (upholding arbitration award even though arbitrators did not follow law in calculating damage award).

law may require, but 82% stated that they "seldom" or "never" did so.[46]

These responses should give parties and counsel considerable comfort that construction arbitrators will enforce contracts as written and apply the law to the proven facts. On the other hand, some still may feel uncomfortable that a small percentage of arbitrators do not always apply the law, sometimes render compromise awards, and occasionally apply their own sense of justice to resolve a case. Perhaps the only way to evaluate the validity of this concern is to consider the alternative. To believe that judges always correctly apply the law to the proven facts ignores the frequent reversals of trial court decisions by state appellate courts, and appellate court decisions by state supreme courts.[47] And while trial by jury may be "the glory of the English Law,"[48] those who have tried or been involved in a jury case cannot believe that juries of six or 12 lay people do not occasionally reach compromise verdicts on questions of entitlement or quantum or that juries always apply or fully understand the law they are instructed to follow.

**23. (Arbitrator Survey) In reaching your decision and rendering your award, how often do you:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Enforce the parties' contract in strict accordance with its terms? | 51<br>22.9% | 150<br>67.3% | 20<br>9.0% | 2<br>0.9% | 0<br>0.0% |

[46]The occasional resort to equitable or industry standards by arbitral decision-makers is sometimes considered one of the advantages of arbitration and perhaps the genesis of its use. As Aristotle observed, "It is equitable . . . to prefer arbitration to the law court, for the arbitrator keeps equity in view whereas the [court] looks only to the law, and the reason why arbitrators were appointed was that equity might prevail." Harter-Uibopuu, Ancient Greek Approaches Toward Alternative Dispute Resolution, 10 Willamette J. Int'l L. & Disp. Resol. 47, 55 (2002) *cited in* Phillip L. Bruner, INTRODUCTION TO CONSTRUCTION ADR, xlii–xlii (Adrian L. Bastianelli & Charles M. Sink eds., 2014).

[47]Nat'l Ctr. for State Courts, 2015 Outcome of Appeals Decided on the Merits by Court Type, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro (last visited Oct. 24, 2017) (finding that of 1,405 cases decided on the merits in 2015, the Minnesota Court of Appeals reversed either in whole or in part the trial court in 22% of cases. Of the 99 cases decided on the merits by the Minnesota Supreme Court in 2015, 27% were reversed either in whole or in part).

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| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| b. Only enforce the parties' contract in strict accordance with its terms if the contract requires the arbitrator to do so? | 26<br>12.4% | 50<br>23.8% | 8<br>3.8% | 62<br>29.5% | 64<br>30.5% |
| c. Resolve disputes strictly in accord with applicable law or statutes? | 60<br>26.9% | 134<br>60.1% | 20<br>9.0% | 8<br>3.6% | 1<br>0.4% |
| d. Apply your own sense of justice and industry standards in formulating your awards even if it is contrary to what the contract or applicable law may require? | 3<br>1.4% | 19<br>8.6% | 18<br>8.1% | 89<br>40.1% | 93<br>41.9% |

It is an unfortunate reality in arbitration, as in litigation, that some parties violate an arbitrator's interim award or orders, engage in discovery misconduct and abuses, assert frivolous claims or defenses, or engage in behavior that would warrant sanctions under Rule 11 of the Federal Rules of Civil Procedure—all of which would generally warrant an award of fees and expenses to the other party in court. The Arbitrator Survey asked how often arbitrators will award fees and expenses in such circumstances.

With one exception, discussed below, the frequency of an award of fees and expenses for misconduct was generally the same across the board. The clear majority or approximately two-thirds of arbitrators either "seldom" or "never" award fees and expenses for violation of interim awards and orders (63.9%), discovery abuses (65%), or other conduct that would violate Rule 11 (62.7%). A fifth of the time, arbitrators will "usually" make an award of fees and expenses for violation of interim awards and orders (20.1%), discovery abuses (18.6%), and Rule 11 misconduct (19.8%), and a smaller minority will about "half the time" (12.3%, 14.5%, and 12.4%, respectively).

The exception is how construction arbitrators deal with the assertion of frivolous claims and defenses. The data indicate a significantly greater reluctance on the part of arbitrators to sanction that conduct: a combined 73.6% either "seldom" or "never" do so, with a full 30% answering "never." Only 10% do so "half of the time," and 14.5% saying they will "usually" make such an award.

If bad conduct by counsel or their clients or frivolous claims are delaying hearings, extending their length, and making them more expensive, then the arbitrators' reluctance to impose sanctions to enforce their interim orders and discourage bad faith conduct is

puzzling. This is especially true when the arbitrators' reticence to impose sanctions is not shared by advocates, who uniformly prefer that sanctions be imposed more frequently (by approximately 15% — 20% in response to various types of bad conduct).

**25. (Arbitrator Survey) How often do you award fees and expenses against a party for:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Violation of interim awards and orders? | 8 | 44 | 27 | 99 | 41 |
| | 3.7% | 20.1% | 12.3% | 45.2% | 18.7% |
| b. Discovery abuses? | 4 | 41 | 32 | 103 | 40 |
| | 1.8% | 18.6% | 14.5% | 46.8% | 18.2% |
| c. Assertion of frivolous claims or defenses? | 4 | 32 | 22 | 96 | 66 |
| | 1.8% | 14.5% | 10.0% | 43.6% | 30.0% |
| d. Conduct that would violate a standard similar to Rule 11? | 11 | 43 | 27 | 87 | 49 |
| | 5.1% | 19.8% | 12.4% | 40.1% | 22.6% |

**14. (Advocate Survey) Do you prefer that the arbitrator award fees and expenses against a party for:**

| | Always | Often | Sometimes | Rarely | Never |
|---|---|---|---|---|---|
| a. Violation of interim awards and orders? | 16.5% | 32.3% | 36.5% | 13.1% | 1.7% |
| | 159 | 311 | 351 | 126 | 16 |
| b. Discovery abuses? | 17.3% | 33.2% | 35.6% | 12.2% | 1.7% |
| | 167 | 321 | 344 | 118 | 16 |
| c. Assertion of frivolous claims or defenses? | 19.1% | 30.7% | 29.9% | 17.7% | 2.6% |
| | 184 | 295 | 288 | 170 | 25 |
| d. Conduct equivalent to a Rule 11 violation? | 25.6% | 31.8% | 26.0% | 12.8% | 3.9% |
| | 245 | 305 | 249 | 123 | 37 |

Construction disputes often involve relatively-straight forward claims seeking money damages for breach of contract. However, parties to an arbitration occasionally seek relief that is more equitable in nature, such as an injunction or specific performance of a contract. Effectively, arbitrators are freed from many of the

substantive and procedural constraints imposed on the courts when considering equitable relief, so the Arbitrator Survey included a series of questions regarding whether that freedom translated into a greater likelihood that an arbitrator will award equitable relief.

Initially, the survey asked whether arbitrators were *less* likely to grant equitable relief than a court. The results indicate that arbitrators generally are not less likely to award equitable relief: 52% consider themselves "seldom" or "never" less likely to award equitable relief than a court; 19.1% are less likely "half of the time"; and 29% are either "usually" or "always" less likely.

Nevertheless, the overwhelming majority of arbitrators indicated they would apply the same standards as a court when considering whether to issue equitable relief—26.6% report they always do, 62.6% "usually" do, with only 5.6% doing so "half the time," and a negligible 2.5% "seldom" and 1.9% "never" applying those standards. Practitioners therefore are well advised to approach any request for equitable relief with the same analysis as they would expect to present in court.

The Arbitrator Survey also drilled deeper into a few commonly-encountered requests for equitable relief, including how often they require a bond to accompany an injunction, whether they are open to ordering specific performance, and whether they would issue an award for unjust enrichment even if there was a valid contract in place and an available remedy at law.

With respect to bonds, courts often require a bond or other security to be posted as a condition of granting an injunction,[49] generating legal wrangling about whether a bond or alternative security should be posted and, if so, how much. The survey results indicate a preference not to require similar security. More than half of the arbitrators either never (24.1%) or seldom (31.3%) require a bond. Only 13.8% do so half the time. Nevertheless, a significant percentage of arbitrators usually (23.6%) or always (7.2%) require a bond.

With respect to the remedy of specific performance, which legally is available only in a few specific situations, arbitrators nevertheless still indicated they were very open to considering and ordering it. Nearly a quarter of arbitrators will always consider it (23.0%), nearly half (48.8%) usually consider it, with small fractions only considering it half the time (8.9%) and never (1.9%) considering it. However, a significant number (17.4%) indicated they would only seldom consider or order specific performance.

Unjust enrichment generally is considered an unavailable rem-

[49] *See* Fed. R. Civ. P. 65.

edy when there is a valid and binding contract between the parties and/or another remedy available at law—*e.g.,* a mechanic's lien.[50] The survey results indicate that most arbitrators would not be willing to ignore these common legal principles and award unjust enrichment when it would not be available in court—54.2% seldom do so, 24.5% never do, with the remaining few arbitrators indicating always (0.9%), usually (10.8%), or half the time (9.4%). Again, this would appear to reinforce arbitrators' general willingness and tendency to apply the law, but there remains the possibility that an arbitrator would be persuaded to ignore those generally-applicable principles and "do equity," regardless. Of course, courts also apply equity in appropriate circumstances, even in the presence of a contract between the parties,[51] so the question of whether courts or arbitrators are more inclined to do so remains debatable.

**27. (Arbitrator Survey) In considering claims for interim or permanent equitable relief in construction cases:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Are you generally less likely to grant equitable relief than a court? | 5<br>2.5% | 54<br>26.5% | 39<br>19.1% | 78<br>38.2% | 28<br>13.7% |
| b. Do you apply the same applicable judicial standards as you think a court would for such claims? | 57<br>26.6% | 136<br>63.6% | 12<br>5.6% | 5<br>2.3% | 4<br>1.9% |
| c. Do you require bonds or other security similar to courts when issuing temporary injunctions? | 14<br>7.2% | 46<br>23.6% | 27<br>13.8% | 61<br>31.3% | 47<br>24.1% |
| d. Are you open to consider and order specific performance? | 49<br>23.0% | 104<br>48.8% | 19<br>8.9% | 37<br>17.4% | 4<br>1.9% |

[50] *See, e.g.*, Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 441 (Minn. Ct. App. 2004).

[51] *See, e.g.*, Jackson v. Allstate Ins. Co., 785 F.3d 1193, 1201 (8th Cir. 2015) (holding that while "a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery" in equity, "when an enforceable written contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice.").

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| e. Would you consider making an award for unjust enrichment even if there is a contract between the parties and another available remedy at law? | 2<br>0.9% | 23<br>10.8% | 20<br>9.4% | 115<br>54.2% | 52<br>24.5% |

Panels of three arbitrators often are appointed to handle large, complex construction arbitrations.[52] Such panels are expensive, however, so the Arbitrator Survey sought to determine whether an award by a panel of three was likely to differ materially from one rendered by a solo arbitrator. The initial self-assessment of the arbitrators was that their decisions as a panel arbitrator usually would have been the same if they had acted alone: always—2.3%; usually—64.7%; 24.8%—half the time; and only 7.3% thought this would seldom be the case. However, this assessment was challenged by the results of two other questions. One asked whether the input of the other two arbitrators has an impact on their view of entitlement and quantum, and a strong majority thought the other arbitrators did: always—22.4%; usually—50.7%; half the time—19:6%; and seldom—7.3%. The other inquired whether the arbitrator compromised his or her view of entitlement or quantum based on the input of the other two panel members, and the results showed a relatively equal distribution of responses: always—3.7%; usually—30.3%; half the time—33%; seldom—29.4%, and never—3.7%. Despite their initial assessment regarding whether their decisions would be the same as a panel or solo arbitrator, the combined results of these two other questions show the leavening influence of a panel of arbitrators on the award process.

**28. (Arbitrator Survey) In construction arbitrations in which you have served on a panel of three arbitrators, how often:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Do you find the input of the other 2 arbitrators to have had an impact on your view of entitlement or quantum? | 49<br>22.4% | 111<br>50.7% | 43<br>19.6% | 16<br>7.3% | 0<br>0.0% |

[52] American Arbitration Association Construction Industry Arbitration Rules (July 1, 2015), L-1 – L-5.

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| b. Do you compromise on your view of entitlement and quantum based on the input of the other two panel members? | 8<br>3.7% | 66<br>30.3% | 72<br>33.0 | 64<br>29.4% | 8<br>3.7% |
| c. Do you think your award decision would have been the same if you had been a solo arbitrator? | 5<br>2.3% | 141<br>64.7% | 54<br>24.8% | 16<br>7.3% | 2<br>0.9% |
| d. Have you been part of a split decision among the panel? | 2<br>0.9% | 2<br>0.9% | 11<br>5.0% | 104<br>47.5% | 100<br>45.7% |

Unlike court costs in litigation, which typically entail relatively minor filing fees, arbitration requires paying the arbitrators their fees and expenses, as well as the possibility of substantial administrative fees to an organization, such as JAMS, administering the process. Those arbitration fees and expenses often are subject to (re)allocation between the parties by the arbitrator as part of the final award. Rules R-56 and R-57 of the AAA Construction Rules, for example, initially apportion those fees equally among the parties, subject to reallocation in the final award. The Arbitrator Survey asked arbitrators whether—in situations without a "prevailing party" clause that explicitly addresses the issue—the arbitrators allocate their fees and costs equally between the parties, against one party more than the other, or entirely against one party. The results indicate a marked predisposition by arbitrators to have the parties bear the costs of arbitration equally between them—6.8% "always" do so, 52.3% "usually" do, with the remainder of 21% awarding an equal distribution "half the time," 17.6% "seldom," and only 2.3% saying they "never" order arbitration costs to be borne equally. The arbitrators' answers to the third part of the question were consistent with the first. Significantly more than half of the arbitrators either "seldom" (58.1%) or "never" (12.2%) award the arbitration costs against only one party. Only 16.7% of arbitrators indicate they would award against one party even "half the time." 12.6% say they would "usually" do so, and a mere one-half percent "always" do so. The arbitrators gave similar answers to whether they would award the costs to be borne more by one party than another: 10% "never" do; 54.5% "seldom" do; 20.5% do so "half the time"; 14.5% will "usually"; and only half a percent say they will "always" make such an award.

**29. (Arbitrator Survey) Without a "prevailing party" clause, how often do you award administrative fees and the expenses and compensation of the arbitrator:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. To be borne equally between the parties? | 15 | 116 | 47 | 39 | 5 |
| | 6.8% | 52.3% | 21.2% | 17.6% | 2.3% |
| b. To be borne more by one party than the other? | 1 | 32 | 45 | 120 | 22 |
| | 0.5% | 14.5% | 20.5% | 54.5% | 10.0% |
| c. To be borne entirely by one party only? | 1 | 28 | 37 | 129 | 27 |
| | 0.5% | 12.6% | 16.7% | 58.1% | 12.2% |

Although clauses awarding attorneys' fees and costs to the prevailing party in an arbitration are relatively common, application of those provisions is often fraught with conflict, particularly when there is no definition of "prevailing party" or the definition does not account for the various potential outcomes of an arbitration. The Arbitrator Survey asked the arbitrators how often they applied different rationales to determine whether a party "prevailed."

Is simply being awarded *any* amount on a claim sufficient to qualify as the prevailing party? Most arbitrators say no, with a combined 52.3% "seldom" or "never" making that determination. About a quarter of arbitrators either "usually" (24.1%) or "always" (1.8%) consider any recovery to be prevailing. And another 21% make that determination "half the time."

What about when there are competing claims and counterclaims, often with significantly different dollar amounts, and an argument is made that the higher percentage recovery relative to each claim, rather than dollar amount, should be the deciding factor? The results are fairly evenly split, with 32.9% of arbitrators "usually" accepting that argument, 26.9% doing so "half the time," and 31% "seldom" doing so.

Similarly, an argument can be made that if a respondent significantly decreases the amount of the claimant's claim, the amount of the reduction also should be part of the calculus of determining the amount of fees awarded to the claimant. Most arbitrators agreed. More than half either "always" or "usually" accepted that argument (8.7% and 49.5%, respectively), only 17.4% reporting they would "half the time," and 19.7% saying they "seldom" consider that factor, with 4.6% "never" considering it.

Finally, there is always the risk of "a plague o' both your houses,"[53] with an arbitrator refusing to find either party was prevailing. It does not happen very often, with more than half of the arbitrators (51.8%) reporting this as a "seldom" occurrence. However, significant numbers of arbitrators will "usually" (10.4%) or "half of the time" (31.1%) consider neither party to be prevailing.

**30. (Arbitrator Survey) For the purposes of awarding costs and fees pursuant to a "prevailing party" clause, how often:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Do you consider the claimant to have prevailed if it is awarded any amount on its claim? | 4<br>1.8% | 53<br>24.1% | 48<br>21.8% | 89<br>40.5% | 26<br>11.8% |
| b. In cases where there are claims and counter-claims, do you find that the party who is awarded the highest percentage of its claim, as opposed to the largest dollar amount, to be the prevailing party? | 1<br>0.5% | 71<br>32.9% | 58<br>26.9% | 67<br>31.0% | 19<br>8.8% |
| c. Do you consider how much the respondent's defenses decreased the amount of claimant's claims in determining which party prevailed? | 19<br>8.7% | 108<br>49.5% | 38<br>17.4% | 43<br>19.7% | 10<br>4.6% |
| d. Do you find that neither party was the "prevailing party"? | 0<br>0.0% | 23<br>10.4% | 69<br>31.1% | 115<br>51.8% | 15<br>6.8% |

## IV. Conclusion

Perceptions matter. The Industry Survey revealed that even though few had actually participated in an arbitration as a party, advocate, or witness, the industry respondents nevertheless believed that arbitrators "split the baby" in their awards more than 50% of the time. The same general perception is held by the advocates, who report compromise verdicts based on the claims asserted "sometimes" 45% of the time. The effect of these preconceptions cannot be overlooked as 80.9% the Industry Survey respondents report having "significant involvement" or being "always involved" in the "drafting or reviewing design or

[53] Romeo and Juliet, Act III, Sc. 1.

construction contracts for use by you, your firm, or your clients,"[54] and these opinions no doubt influence whether these parties contractually choose litigation or arbitration to resolve their disputes. Indeed, when asked "what form of binding dispute resolution process do you prefer/recommend in your design or construction contracts," the Industry Survey respondents answered: Arbitration: 44.2%; Litigation: 30.1%; Arbitration and Litigation depending on the type of claim: 25.8%.

It is axiomatic that arbitration is a creature of contract, and parties can modify and tailor their arbitration agreements to address their concerns and suit their needs, including what (if any) procedural and substantive rules will apply to the proceedings. Parties also have the ability to further modify those rules to suit the circumstances of the business relationship or the particular dispute. For example, to address concerns that discovery may not be available in an arbitration, the agreement can modify standard ADR organization forms to ensure discovery rights; similarly, if keeping the costs of arbitration down is a concern, the right to discovery or dispositive motions can be limited. When asked why they may prefer litigation, the AAA respondents' most common reason was appeal rights,[55] but even effective appeal rights and procedures can be part of an agreement to arbitrate.[56]

When asked how they would customize the arbitration process, a variety of industry responses were given:

**13. (Industry Survey) In what ways would you customize the arbitration process required in your/your client's design or construction contracts? (select as many as apply)**

| Value | Percent | Count |
|---|---|---|
| a. Selection of Arbitrator(s) | 66.5% | 455 |
| b. Conditions Precedent to Arbitration | 52.5% | 359 |

[54]Industry Survey, question no. 6: "How would you describe your involvement in drafting or reviewing design or construction contracts for use by you, your firm, or your clients?" Never: 2.8%, Very Little Involvement: 4.9%; Moderate: 11.3%; Significant Involvement: 29.7%; Always Involved: 51.3%.

[55]Industry Survey, question no. 10: "Please state why you prefer litigation. (select as many as apply): Appeal rights: 53.8%; Prefer Jury or Bench Trial: 38.3%; Cost Savings: 22.8%; Familiarity with the Process: 21.0%; Public Forum: 11.7%. Other individual reasons were also provided, the most common ones being i) concerns about compromise "split the baby" awards in arbitration, ii) advice of counsel and insurers to use litigation, and iii) reliable procedural rules found in litigation.

[56]*See*, COMMERCIAL ARBITRATION AT ITS BEST, §§ 7.7 and 7.8 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

| Value | Percent | | Count |
|---|---|---|---|
| c. Locale Provisions | 46.0% | | 315 |
| d. Assessment of Attorneys' Fees | 45.9% | | 314 |
| e. Governing Law | 43.3% | | 296 |
| f. Awards and Remedies | 41.7% | | 285 |
| g. Discovery | 39.8% | | 272 |
| h. Duration of Arbitration Proceeding | 39.5% | | 270 |
| i. Confidentiality | 37.3% | | 255 |
| j. Appeal of Construction Arbitration | 34.4% | | 235 |
| k. Form and Scope of the Award | 30.9% | | 211 |
| l. Consolidation/Joinder | 17.5% | | 120 |
| | | Total | 3,387 |

If arbitration is to reach its full potential, however, the parties actually must use the opportunity to craft an arbitration agreement that meets their needs. To gauge the extent to which that theoretical opportunity was put into practice, the Arbitrator Survey inquired how many times arbitrators found the parties modified standard industry arbitration agreements or procedural rules. The survey results indicate the most common method of "tailoring" an arbitration agreement is simply to incorporate a standard, unmodified set of rules from an ADR organization, such as the AAA. Beyond incorporating a standard set of rules, however, the survey results show that parties seldom (60.4%) or never (4.9%) take advantage of the opportunity to further customize those rules.

**8. (Arbitrator Survey) How often are you asked to conduct arbitrations:**

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| a. Pursuant to unmodified rules of ADR organizations? | 11 | 146 | 41 | 22 | 6 |
| | 4.9% | 64.6% | 18.1% | 9.7% | 2.7% |
| b. Pursuant to the rules of ADR organizations that are modified by the parties' arbitration agreement? | 4 | 30 | 44 | 136 | 11 |
| | 1.8% | 13.3% | 19.6% | 60.4% | 4.9% |

| | Always | Usually | Half the Time | Seldom | Never |
|---|---|---|---|---|---|
| c. Pursuant only to statutory (e.g. FAA or RUAA) requirement? | 68<br>1.4% | 3<br>4.1% | 9<br>13 | 13<br>58.1% | 129<br>30.6% |

The purpose of the Arbitrator Survey was to help those involved in a construction arbitration better understand what to expect during the pre-hearing, hearing, and award phases. While the Advocate and Industry Surveys reveal parties' concerns about arbitration, the Arbitrator Survey showed those concerns were largely not supported by the actual practices of construction arbitrators. If perceptions matter, so do facts, and advocates and parties should rely on data from the arbitrators themselves and not stereotypical, unsupported assumptions, when deciding whether to arbitrate or litigate. In addition, a comparison between the concerns raised in the Advocate and Industry Surveys and the actual practices of arbitrators reflected in the Arbitrator Survey should help parties and their counsel draft arbitration clauses to better ensure arbitration's intended benefits.