Fellows Luncheon Presentation: Solutions to Challenges Facing Commercial Arbitration and Survey Results

Presented by:
Thomas J. Stipanowich

Presented at:
CCA 13th Annual Meeting
October 17-20, 2013
Santa Ana Pueblo, New Mexico

Thomas J. Stipanowich
Pepperdine University School of Law
Malibu, CA

Thomas Stipanowich holds the William H. Webster Chair in Dispute Resolution and is Professor of Law at Pepperdine University School of Law, as well as the Academic Director of the Straus Institute (ranked first by peers in the U.S. News ratings the last nine years in a row). In 2008 he received the D'Alemberte-Raven Award, the ABA Dispute Resolution Section's highest honor, for contributions to the field. He co-authored the much-cited five-volume FEDERAL ARBITRATION LAW (Best New Legal Book, Association of American Publishers), COMMERCIAL ARBITRATION AT ITS BEST (2001); and RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW (2d ed. 2010). He twice received the CPR Best Professional Article award, most recently (2010) for "Arbitration: The 'New Litigation'" and "Arbitration and Choice." He was editor-in-chief for the COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS TO REDUCE COST AND DELAY IN COMMERCIAL ARBITRATION (CPR Practical Achievement Award 2010, ABA Lawyer as Problem Solver Award, 2011).

Stipanowich came to Pepperdine in 2006 after serving for five years as the CEO of the International Institute for Conflict Prevention & Resolution (CPR Institute), a New York-based nonprofit think tank, and was previously a chaired law professor at the University of Kentucky and, before that, a lawyer specializing in construction and government contracts cases. He is currently an Advisor for the ALI's RESTATEMENT OF AMERICAN LAW OF INTERNATIONAL ARBITRATION and a member of the Academic Counsel of the Institute for Transnational Arbitration.

He is an experienced commercial arbitrator (with experience under the AAA, ICDR, ICC, CPR and JAMS Rules, as well as ad hoc proceedings), and is a founding member of College of Commercial Arbitrators as well as a Companion (the highest honor) of the Chartered Institute of Arbitrators. He holds an AV Rating from Martindale-Hubbell. He may be the only individual who has advised on modifications to all of the leading arbitration rules (AAA, CPR, JAMS) as well the Code of Ethics for Arbitrators in Commercial Dispute (2004) and the Revised Uniform Arbitration Act. He also was the primary drafter of the Consumer Due Process Protocol (1997).

A Report on the Future of Commercial Arbitration: Challenges and Opportunities

By

Thomas J. Stipanowich
William H. Webster Chair in Dispute Resolution
Professor of Law
Academic Director, Straus Institute for Dispute Resolution
Pepperdine University School of Law

NOTE:
This is a draft working paper.
Your constructive comments and suggestions are welcome.

The Future of Commercial Arbitration: Challenges and Opportunities

Thomas J. Stipanowich

Challenges		Opportunities
Prevailing Realities: **Many business users and counsel are generally comfortable with commercial arbitration, while others have expressed various concerns about arbitration or not used arbitration for other reasons. Presently, the supply of commercial arbitrators exceeds the demand.**		**General Principles to Guide Response:** **Commercial arbitration's great overriding advantage is that it affords users the ability to tailor their process to the circumstances. As a choice-based process, commercial arbitration offers many potential advantages to business users with different goals and priorities.**
A. Commonly Expressed User Concerns about Arbitration		**Possible Responses**

	1. Risk and Uncertainty of Arbitration ["Crap Shoot"]
	• **Absence of judicial scrutiny; difficulty of successful appeal**
	• **Arbitrators' lack of adherence to pertinent legal standards**
	• **Arbitrators' tendency to compromise**
		• **Educate business users and counsel regarding facts about arbitrator decision-making.**
		• **Develop and promote a CCA Arbitrator Commitment to follow pertinent legal standards.**
		• **Publish relevant arbitration "success stories."**
		• **Provide guidance regarding options for those who desire enhanced certainty.**
		  ○ **Arbitrators who know and apply pertinent legal standards**
		  ○ **A supporting rationale for the award**
		  ○ **Multi-member tribunals vs. sole arbitrators**
		  ○ **Bracketed arbitration; final offer arbitration**
		  ○ **Contractual provisions for expanded judicial scrutiny**
		  ○ **Appellate arbitration**

	2. Judicialization; loss of speed, efficiency
	• **Arbitration costs too much**
	• **Arbitration takes too long**
		• **Actively promote and put into practice the elements of the *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration*.**
		  ○ **Streamlined or expedited procedures**
		  ○ **Using a single arbitrator**
		  ○ **Active management of the arbitration process; tailoring of procedures**
		  ○ **Managing discovery**
		  ○ **Managing motion practice**
		  ○ **Managing hearings**
		  ○ **Arbitrators and settlement**
		• **Develop and promote a CCA Arbitrator**

		Commitment to efficiency and expedition in arbitration. • **Publish relevant arbitration success stories; Encourage arbitration providers to capture and publish statistics on use of streamlined processes, cost- and time-saving.**
	3. Quality of Arbitrators	• **Provide better information on neutrals of all kinds, direct to user; promote transparency.**
B. Habits and Attitudes of Business / Counsel		**Possible Responses**
	1. Risk aversion of business users; counsel's desire for maximum control **2. Lack of experience, or lack of positive experience, with arbitration; Bad press for arbitration** **3. Failure to take advantage of the choices inherent in arbitration:** ○ **Reliance on inappropriate or outdated contract language** ○ **Choosing the wrong attorneys, arbitrators** ○ **User "abdication," inattention; "plausible deniability"**	• **Work with law and business scholars to develop materials and videos on the benefits of *commercial* arbitration for companies, law firms, business schools, first-year contracts classes, and ADR survey courses.** • **Emphasize the value of arbitration as a ***choice-based*** process that may be tailored to specific business goals and priorities.** • **Provide specific guidance to business users and counsel regarding key choice points pre-dispute (drafting agreements) and post-dispute.** • **Educate business clients and in-house counsel regarding earmarks of successful advocacy in arbitration, in contrast to litigation.**
C. Other Pertinent Trends		**Possible Responses**
	1. Expanding use of mediation	• **Equip arbitrators to leverage the growing likelihood that cases will be settled prior to hearings by providing case management with an eye to helping facilitate settlement.** • **Arbitrators with appropriate orientation and skills may develop mediation practices.**
	2. Emphasis on early assessment approaches	• **Prepare arbitrators to employ their skills in early neutral evaluation or early case assessment for a single party or both parties.**
	3. Rapidly growing number of arbitrators, "professional neutrals"	• **Provide better information on neutrals of all kinds, direct to user; promote transparency.** • **Diversify practice.**

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Introduction

This summer I was asked by the incoming President of the College of Commercial Arbitrators, Tyrone Holt, to offer reflections on the future of commercial arbitration to the Board of the College at its fall retreat. He explained:

> *[M]any . . . believe that there are serious challenges confronting commercial arbitration. We feel that the College needs to be fully sensitized to the critical nature of these challenges, so that it can take a leadership role over the next few years in trying to address them. . . . I envision that you will share your observations about developments over the last 10-15 years in the declining use of commercial arbitration, your views about the future prospects for such use and what the College may do to address them.*[1]

In the course of preparing this presentation I've had occasion to reflect on the many and varied indicators that signify challenges as well as opportunities for commercial arbitration and arbitration practice.

At a time when a study co-sponsored by the American College of Trial Lawyers bemoans the costly and cumbersome "one-size-fits-all" template of U.S. litigation and calls for more careful tailoring of process to dispute,[2] arbitration, which is a choice-based, inherently flexible process, would appear to be the most obvious alternative. Many corporate counsel appreciate the opportunities afforded by the many kinds of process choices inherent in arbitration. As a participant in a recent ABA Dispute Resolution Section panel, I heard representatives of stakeholders in the health care industry speak enthusiastically about their role in creating a customized, streamlined payor-provider arbitration program tailored to the unique requirements of their relationship.[3]

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* Professor Stipanowich's professional career is focused on writing, teaching and training on arbitration. He arbitrates complex commercial /construction cases in the U.S. and internationally and is a founding member of the College of Commercial Arbitrators. He thanks the College of Commercial Arbitrators for the research grant that facilitated the design and implementation of the Survey described in this Report. He is indebted to Zachary Ulrich, Pepperdine J.D., M.D.R. (2013), who as Straus Institute Research Fellow played a significant role in the refinement and implementation of the CCA Survey. Thanks also go to Pepperdine Research Librarian Tiffani Willis as well as Jessica Tyndall and Hsuan Li, Pepperdine Law Class of 2014, for their excellent research support.

The recently-released findings from the second landmark survey of general counsel and senior counsel in Fortune 1,000 corporations indicate that arbitration remains one of the primary tools for resolution of business disputes. Roughly half of the responding corporate counsel in the Fortune 1,000 Survey indicated their company was likely to use arbitration for the resolution of commercial disputes in the future.[4]

And, given the particular advantages arbitration offers companies doing business across borders,[5] including "expertise of the decision maker," "neutrality," "confidentiality," "enforceability of awards" and "flexibility of procedure,"[6] corporations rely heavily on arbitration to resolve international disputes[7] and tend to be satisfied with the process.[8] The American Arbitration Association's international (International Centre for Dispute Resolution) caseload (including both arbitration and mediation) has grown dramatically over the past decade, from 646 cases in 2003 to 996 cases in 2012.[9] The breakdown for years 2008-2012 reflects the apparent recent growth trend for international arbitration (Table 1).

Table 1.
AAA International Caseload (2008-2012)[10]

International	2008	2009	2010	2011	2012
Arbitration	609	766	830	899	891
Mediation	94	70	58	95	105
Total	**703**	**836**	**888**	**994**	**996**

The International Chamber of Commerce (ICC) Court of Arbitration caseload grew from 529 arbitrations ongoing in 1999 to 759 in 2012;[11] the London Court of International Arbitration (LCIA) has also documented a significant growth in caseload in recent years.[12] Many international commercial arbitrations involve extremely large amounts in controversy: *The American Lawyer's* 2013 Arbitration Scorecard identified more than 120 pending arbitrations involving over $1 billion at issue.[13] This fall, my law school's expanded master's program offerings on international commercial arbitration (under the auspices of our Straus Institute) is drawing a record number of LL.M. students from around the world – a sign of more general trends captured in a *New York Times* article.[14] The survey co-sponsored by the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution in connection with this report indicates that the vast majority of leading U.S. arbitrators claim experience in international cases.[15] Thus, current prospects for international commercial arbitration appear relatively bright.

Yet there is another side of the picture, and another set of perspectives that are readily observable and impossible to ignore. Recently, at a meeting of the litigation department of a leading corporation, I heard the general counsel of a multinational company express his personal distaste for arbitration in U.S. cases. The next week at a program of the ABA Section of Business Law on trends in corporate dispute resolution, an associate general counsel for a hi-tech maker of semiconductors exclaimed, "I hate binding arbitration. I hate it!"[16] Another corporate counsel on the panel decried arbitration as "ballooning in terms of time and cost, like litigation, but at the end of the day you do not have appeal rights."[17] [Note international concerns.]

When the findings of the recent Fortune 1,000 corporate counsel survey are compared with similar data from its 1997 predecessor, there appears to be a significant drop in use of binding arbitration by leading businesses across a wide array of dispute types.[18] Perhaps even more troubling is a corresponding fall-off in the percentage of counsel who believe their companies are likely to turn to arbitration to resolve commercial disputes in the future.[19] Their concerns are reinforced by statistics from the 2009 and 2010 Fulbright & Jaworski surveys of U.S. corporate counsel that revealed a marked preference for litigation over arbitration with respect to choosing a forum for non-international disputes.[20]

Such concerns are not materially alleviated by the few statistics that may be obtained from U.S. provider organizations. JAMS does not publish data on its arbitration caseload;[21] the AAA data present a mixed picture. While eleven years of AAA caseload statistics show a drop-off from 2003 (when the AAA recorded 13,600 cases on file), over the last decade the caseload has fluctuated above and below 12,000 cases (Table 2).

Table 2.
AAA Commercial Caseload (2003-2012)[22]

ADR Process	03	04	05	06	07	08	09	10	11	12
Mediation	2,199	2,128	1,879	2,143	2,281	2,179	2,110	13,475	20,840	3,481
Arbitration	13,600	12,269	12,108	12,068	11,355	11,966	12,047	12,129	11,505	12,680
Total	**15,799**	**14,397**	**13,987**	**14,211**	**13,636**	**14,145**	**14,157**	**25,604**	**32,345**	**16,161**

The AAA's important construction caseload has dropped off dramatically in recent years (Table 3). This phenomenon is at least in part a reflection of the impact of the economic downturn on activity in the construction sector: hence, both the mediation and arbitration caseloads have been affected. However, while the number of mediations has decreased by nearly thirty percent between 2008 and 2012, the arbitration caseload dropped about 1.5 times as much (around 44%).[23]

Table 3.
AAA Construction Caseload (2008-2012)[24]

Construction	2008	2009	2010	2011	2012
Arbitration	3,075	2,805	2,322	1,817	1,733
Mediation	994	940	807	743	707
Total	**4,069**	**3,745**	**3,129**	**2,560**	**2,440**

This Report is intended as a mechanism for identifying and promoting conversation about the key challenges facing commercial arbitration and arbitration practice, and to stimulate discussion about ways of addressing these challenges. While the Report is addressed to the College of Commercial Arbitrators, its reflections and proposals will hopefully encourage conversation on a broader scale. In the preparation of the Report I drew on extant research, writings by knowledgeable and experienced persons, and anecdotal experiences (both my own and that of others). Even more importantly,

however, I obtained the cooperation of the leadership of the College in conducting an extensive survey of current practices and perspectives among College members.[25] In finalizing my draft survey I received helpful input from College leaders as well as our Straus Institute Research Fellow, Zachary Ulrich (who also was responsible for creating the online platform). In the event, 134 of the 212 current members of the College—almost two-thirds of the membership—responded to the survey.

The CCA / Straus Institute Survey yielded invaluable new information about the experiences, perspectives and concerns of leading commercial arbitrators. Some of their responses underlined the concerns spurring this Report. For example, around sixty percent of responding College members—all among the U.S.' most prominent commercial arbitrators—described themselves as having less arbitration work than they would like.[26]

The CCA / Straus Survey also revealed that many U.S. arbitrators are expanding their international commercial arbitration practice. The large majority of responding College members indicated some level of experience with international cases, and enhanced expectations for international work in the future.[27] Thus, although this Report is focused first and foremost on arbitration in the United States, it makes comparative observations about international commercial arbitration, noting distinctions as well as parallels.

Finally, the Survey provided much critical guidance on the actual practices of commercial arbitrators. As the Report suggests, these realities will be generally beneficial in effectively responding to commonly voiced concerns about arbitration and arbitrators.

This Report will discuss three categories of challenges confronting arbitration. First, it will summarize the most ***commonly expressed concerns of users regarding arbitration***. These include perceptions that arbitration is a risky, uncertain "crap shoot" in light of the relative absence of appeal, the possibility that arbitrators will fail to follow and properly apply the law, and the notion that arbitrators inappropriately "split the baby" in their awards. The Report will also spotlight concerns that arbitration is becoming too "judicialized," too expensive and too lengthy. Each of these areas of anxiety implicate underlying concerns about the quality of arbitrators.

Second, this Report will look beyond the most frequently expressed concerns about arbitration to examine the ***habits and behaviors of businesspersons and counsel***. These include (1) risk-aversion by business clients and counsel, coupled with counsel's desire for maximal control; (2) user inexperience, or lack of positive experience, with arbitration, coupled with recent "bad press" for arbitration; and (3) the failure of users to take advantage of the choices inherent in arbitration.

Third, this Report will explore ***other significant trends***, including (1) the expanding use of mediation; (2) the growing emphasis on early evaluation or early case assessment; and (3) the rapidly growing ranks of arbitrators and self-styled "professional neutrals."

The Report will then consider ways of addressing the identified challenges. In considering affirmative strategies for promoting more positive attitudes, more effective choices, and more satisfactory experiences with arbitration, a fundamental insight is the insufficiency of the efforts of individuals, by themselves, to effect meaningful change. The latter is possible only through concerted efforts by

"supply side" organizations such as arbitral institutions and leading professional organizations like the College of Commercial Arbitrators. Their success depends on engaging counterparts on the "demand side" within industries and trades as well as organizations of corporate counsel and partners in academies of law and business to accomplish the following proposed objectives:

(1) Educate business users and counsel about commercial arbitration.
(2) Capture and publish statistics as well as arbitration success stories.
(3) Develop and promote a CCA Arbitrator Commitment.
(4) Offer guidance on how key choices in arbitration can serve specific business goals.
(5) Publish more reliable and useful information about arbitrators and arbitral institutions.
(6) Reorient arbitrator practice to reflect current realities.
(7) Develop and present training programs on arbitration advocacy, emphasizing what arbitrators view as effective advocacy.

It is hoped that this Report will be a catalyst for discussion and debate among College members as well as practitioners, advocates and scholars here and abroad. I actively invite your thoughts and suggestions regarding the topics covered in this draft, and other pertinent topics.

II. The Challenges Facing Arbitration

A. Commonly Expressed Concerns about Arbitration

Respondents to the 2011 Cornell-Pepperdine/Straus Institute-CPR Survey of corporate counsel in Fortune 1,000 companies were asked to identify reasons why their companies did not use arbitration, just as respondents to an earlier Fortune 1,000 survey did in 1997 (Table 4).[28] Comparing the 2011 responses to the 1997 responses, relatively *fewer* counsel identified each of the reasons as a barrier to the use of arbitration (with the sole exception of "too costly").[29] However, the important concerns remained largely the same, and fall into three general categories: (1) concerns about the risks and uncertainty of arbitration; (2) concerns about "judicialization," excessive cost and duration; and (3) concerns about the quality and capability of arbitrators.

Table 4.

Reasons Companies Have Not Used Arbitration (by percent of companies)

Reason	2011 (Corporate/ Commercial)	1997
Difficult to appeal	**51.6%**	**54.3%**
Results in compromised outcomes	**47.0%**	**49.7%**
Unwillingness of opposing party	**44.9%**	**62.8%**
Not confined to legal rules	**44.1%**	**48.6%**
Lack of confidence in third party neutrals	**34.2%**	**48.3%**
No desire from senior management	**24.6%**	**35.0%**
Too costly	**22.9%**	**14.8%**
Lack of corporate experience	**11.9%**	**25.9%**
Lack of qualified third party neutrals	**11.0%**	**28.4%**
Too time consuming	**11.0%**	**[Not asked]**
Too complicated	**9.0%**	**9.9%**

Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* __, __ HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2221471.

1. Concerns about the Risks and Uncertainty of Arbitration (Arbitration as a "Crap Shoot")

When it comes to arbitration, many U.S. attorneys "harbor a lingering uncertainty about whether the ultimate result will resemble a courtroom determination—an up-or-down, win-or-lose, on-the-merits determination,"[30] a perspective reflected in many of the responses to the Fortune 1,000 Survey.

a. Difficulty of appeal

In the Fortune 1,000 Survey, the most frequently stated reason for not using arbitration is the difficulty of appeal of arbitration awards, cited by over half (51.6%) of those responding. While binding arbitration is founded on the premise that when parties agree to allocate responsibility for adjudication to an identified private third party, respect for party autonomy dictates that that decision should not ordinarily be disturbed or second-guessed in the absence of key procedural defects or awards that exceed the parties' grant of authority.[31] Thus, arbitrating parties can count on awards being accorded a relatively high degree of finality.[32] But many U.S. attorneys, far from focusing on the potential benefits of this arrangement, concentrate on what arbitration is *not*—litigation with *de novo* review appeal on errors of law and more limited review of factual errors. For them, the notion that a "legal" dispute might be submitted to a process that affords no second chance to rectify legal or factual errors is, to coin a phrase, "a crap shoot." This perspective is most understandable in the context of high-stakes cases, many of which now find their way into commercial arbitration.[33]

International commercial arbitration. There has also been discussion among international corporate counsel regarding the notion of expanded grounds for appeal of arbitration awards.[34] However, when confronted in 2006 with the question whether there should be some form of "appeal mechanism for awards" a resounding 91% of corporate respondents registered a "no."[35]

b. Concerns about arbitrators failing to follow or properly apply legal standards

Unease about the difficulty of appeal in commercial arbitration is closely intertwined with expressed fears that arbitrators might fail to follow, or to properly apply, pertinent legal standards. In the Fortune 1,000 Survey, about 44% of responding corporate counsel indicated that the fact that arbitration was perceived as "not confined to legal rules" was a barrier to its use by their companies.[36]

c. Concerns about arbitrators "splitting the baby": engaging in inappropriate compromise

Also feeding concerns about the difficulty of appeal in arbitration is the notion that arbitrators tend to "split the baby," or engage in inappropriate compromise, as a way of avoiding hard decisions or discouraging repeat business by arbitrating parties.[37] The source and factual basis of the perception that arbitrators tend to "compromise"[38] are little understood, and the American Arbitration Association has taken pains to attempt to rebut the notion.[39] In the Fortune 1,000 survey, however, almost half (47%) of the corporate respondents said that the perception that arbitration produces "compromised outcomes" discouraged its use by their companies.

International commercial arbitration. Although perhaps not as pronounced as in the U.S., concerns about inappropriate arbitrator compromise are also evident in international commercial arbitration.[40] In a 2012 study of international arbitration practices, responding in-house counsel and private practitioners indicated that arbitrators inappropriately "split the baby" in, on average, 18% and 20% of their cases, respectively.[41]

2. Concerns about Judicialization; Excessive Cost and Duration

There is a paradoxical flipside to complaints about the ways arbitration seemingly falls short of the litigation model, and that is expressed anxiety over arbitration taking on the trappings of court procedure. In recent years there has been a mounting chorus of concern over the excessive length and

cost of commercial arbitration in the United States[42] and internationally[43]--phenomena that have been linked to the increasing "judicialization" of arbitration.[44] Concerns about related costs were a barrier to arbitration use for a greater percentage of responding Fortune 1,000 companies in 2011 than in 1997.

What may be most striking about these developments is that until fairly recently, cost- and time-saving were often regarded as among the leading potential benefits of arbitration and a primary basis for distinguishing arbitration as an alternative to litigation.[45] The growing prominence of these elements as perceived negatives of arbitration is therefore particularly troubling.

In the U.S., the chief culprit is unquestionably pre-hearing discovery, which has mushroomed in cost and duration as counsel have imported court procedures into arbitration.[46] The advent of e-discovery dramatically enhances the potential for high costs and delays.[47] Other primary sources of higher cost and delay are motion practice and hearing-related delays.[48]

International commercial arbitration. Growing concerns about judicialization, costs and delays have also resonated in the world of international commercial arbitration,[49] and even inspired the creation of the Corporate Counsel International Arbitration Group (CCIAG).[50] A 2013 poll of international corporate counsel by (which focused on companies in the financial services, energy and construction sectors) took note of "intense debate surrounding cost and delay" having raised concerns among some of the largest corporate users of international arbitration.[51] When asked to rank several perceived benefits of arbitration in order of importance for their industry sector, corporate respondents regarded "expertise of the decision maker," "neutrality," "confidentiality," "enforceability" and "flexibility of procedure" far ahead of "speed" and "cost."[52] And among those respondents who classified arbitration as "not well suited" to their industry sector, the perceived costliness of arbitration and the relative length of arbitration headed the list of supporting reasons.[53] (The data indicated that at the time respondents make decisions about whether to initiate arbitration, anticipated related costs were among the most significant factors for about one-third of respondents.[54])

3. Concerns about the Quality and Capability of Arbitrators

All of the foregoing concerns implicate questions about the quality and capabilities of arbitrators, and many users appear to find them wanting in some respect. More than a third (34.2%) of responding corporate counsel in the Fortune 1,000 survey revealed "lack of confidence in third party neutrals" as a reason why their company eschewed the use of arbitration. Often concerns about the quality and capability of appointed arbitrators are associated with the relative lack of good information about arbitrators' experience, performance, and philosophy.[55]

International commercial arbitration. Similar concerns have been expressed in the international arena.[56] In a 2010 survey, only about two-thirds of responding corporate counsel said they had enough information to make informed choices about the appointment of arbitrators in international cases.[57]

B. Habits and Attitudes of Business Users / Counsel

Underlying expressed concerns about arbitration are a number of key habits and attitudes of businesses and legal counsel, the people who are the primary determinants of what commercial arbitration is or could be.

1. Risk Aversion, Desire for Control

Decision making by businesses regarding dispute resolution options is likely to reflect a degree of risk aversion – a desire to minimize the risk of loss, both from an organizational point of view and a personal perspective.[58] With regard to managing disputes, business executives depend heavily on the "safe" (read "conventional") option, which is to rely on the guidance of legal counsel. Counsel, in turn, will instinctively resort to approaches that they believe will ensure the greatest degree of control over process and result, and the least likelihood of a disastrous outcome.[59] As risk-averse individuals, moreover, they know that if the worst does happen, they need to be able to cover themselves by justifying the choices they made.

While many corporate counsel embrace arbitration as a valuable process tool for dealing with commercial disputes, others emphasize its risks and ignore its benefits, including opportunities for tailoring and control. The latter perspective may reflected limited knowledge of or experience with arbitration as well as failure to take advantage of the choices inherent in contract-based arbitration.

2. Lack of Knowledge of, or Lack of Positive Experience with, Arbitration; "Bad Press" for Arbitration.

Many business counsel have limited knowledge of or experience with arbitration.[60] Transactional lawyers who negotiate and draft contracts must usually rely on other sources for guidance on dispute resolution issues,[61] and litigators may or may not have a background that includes familiarity with arbitration. When users' experience with arbitration is limited, there is an enhanced danger that that experience, good or bad, will be generalized to produce sweeping conclusions about arbitration, without considering the options available to parties.[62]

These realities are reinforced by others. Today, attorneys emerging from most law schools are unlikely to have had a meaningful introduction to commercial arbitration. Even those who take upper level ADR survey courses may spend little or no time focused on arbitration since the emphasis of such courses is usually on negotiation and mediation.[63] Given current trends in law practice, moreover, young attorneys are also less likely than their older colleagues to have the opportunity to participate directly in adjudications of any kind.[64]

Outside the cadre of active commercial arbitrators and attorneys focused on commercial arbitration practice, arbitration is widely misunderstood and frequently caricatured in negative ways.[65] Such perspectives too often fill the vacuum created by the general absence of positive, informative material about the potential benefits of arbitration—including, most importantly, *choice*—in the hands of businesses and counsel seeking alternatives to court litigation. It is not just a matter of treatment in the media; the problem extends to law school casebooks for required courses such as first-year contracts[66]

and perhaps even the teaching of dispute resolution courses. These realities may affect perceptions and choices made by business clients and attorneys.

Much of the problem may be associated with the heated debate, played out in the press and legal scholarship, over the enforcement of binding arbitration provisions in consumer and employment contracts.[67] Most law students' sole acquaintance with arbitration will be in the context of a first year contracts course in which class time is devoted to discussing a case involving allegations of unconscionability and unfairness regarding an arbitration provision in a standardized consumer or employment contract.[68] Despite the vast differences between arbitration under "adhesion" contracts the broad realm of arbitration between consenting businesses, commercial arbitration has been negatively impacted in a variety of ways by what I have dubbed the "spillover effect"—broad-brush treatment of arbitration that fails to distinguish between arbitration in different settings and circumstances.[69] In short, arbitration has a big public relations problem.

International commercial arbitration. In this regard, international commercial arbitration may be distinguished from domestic arbitration in a couple of ways. First of all, arbitration is an established and increasingly important element of international commercial practice, and international commercial arbitration is now the focus of a number of graduate programs in law, including programs in the United States (such as our own recently expanded international commercial arbitration LL.M. option at Pepperdine). Moreover, although issues of fairness and transparency are sometimes raised in connection with arbitration of international investment disputes,[70] perspectives on international commercial arbitration are less likely to be clouded by such concerns since the public policies of many foreign states prohibit the enforcement of pre-dispute arbitration clauses in consumer and employment contracts.[71]

3. Failure to Take Advantage of the Choices Inherent in Arbitration

As evidenced by the national summit and dialogue preceding the publication of the College of Commercial Arbitrators' *Protocols for Expeditious, Cost-Effective Commercial Arbitration*,[72] businesses and counsel often fail to take the responsibility for making effective choices both before and after disputes arise.[73] They often devote little time or attention to negotiating and drafting pre-dispute contract language, and give insufficient attention to key decisions regarding the arbitration process.

a. Drafting priorities; reliance on inappropriate contract provisions

The *CCA Protocols* brought to light the unintended consequences associated with over-reliance on standard arbitration procedures, which too often have provided a lot of "wiggle room" for parties to engender delay and drive up costs in arbitration.[74] There are a number of dynamics contributing to this result, including lack of relevant knowledge or experience on the part of transactional attorneys, the relative absence of straightforward alternative templates and supporting experiential data from provider institutions,[75] and the relatively low priority typically assigned to dispute resolution provisions in contract negotiation and drafting.[76]

International commercial arbitration. As discussed below, low priority is also accorded dispute resolution provisions in international commercial contracts, as reflected in the responses of corporate

counsel to the QM / White & Case 2010 survey. Many of the interviewees alluded to the difficulties of having meaningful negotiations regarding arbitration clauses. Such clauses were often referred to as "2 a.m. clauses" which are brought into negotiations very late in the process, after commercial terms are settled, and therefore concluded with minimal negotiation.[77]

That said, it appears that when it comes to international transactions, concerns about the law governing the contract, the seat of arbitration, and the choice of institutional rules do tend to influence negotiation and drafting.[78] However, while elements in the arbitration clause may be traded off against each other, "in most circumstances the dispute resolution clause is considered to be of lesser importance than the main contract terms."[79]

b. Choosing the wrong attorneys and arbitrators

Once disputes arise, one of the most important decisions business users must make is the selection of outside counsel as counsel and advocate. Based on anecdotal evidence, it appears that in many cases business parties do not discern the need to select advocates with broad experience in arbitration, as opposed to conventional litigators.[80] Bringing the expectations and tactics associated with litigation into the arbitration process can have a decided impact—one that many arbitrators view as counterproductive.[81] Arbitrators sometimes bemoan the presence before them of advocates who do not appear to understand or avail themselves of the special advantages of commercial arbitration, but instead fall back on the procedures and formats of court litigation.[82] My own recent experience and that of others reinforces the impression that trial advocates without arbitration experience often fail to appreciate the differences between the processes or the expectations of arbitrators.[83]

Similarly, the choice of arbitrator might fall short. This could be because of a lack of background information on candidates,[84] or because outside counsel places too little emphasis on a client's goals and priorities.[85]

International commercial arbitration. Finding appropriate arbitrators is also a matter of concern in international commercial arbitration; as in the U.S., the search may be hampered by the lack of good background information. In a 2010 QM / White & Case survey, only about two-thirds of responding corporate counsel said they had enough information to make informed choices about the appointment of arbitrators in international cases.[86]

c. User "abdication," inattention; "Plausible deniability"

Of course, effectuating a business client's goals and priorities in commercial arbitration presumes some meaningful participation by the clients themselves.[87] Too often, business users largely or wholly abdicate to outside counsel their responsibility for helping to navigate their case through the arbitration process, and later rue their lack of participation. As one corporate general counsel memorably said,

> "Arbitration is often unsatisfactory because litigators have been given the keys to run the arbitration and they run it exactly like a piece of litigation. It's the corporate counsel's fault by simply turning over the keys to a matter."[88]

In some cases, of course, busy in-house counsel may decide that the time and attention required to play a key role in arbitration is simply too great a burden and leave the field to their outside counterparts. If,

at the end of the day, an unfavorable result is achieved, they may point the finger at their well-paid litigators.

C. Other Significant Trends

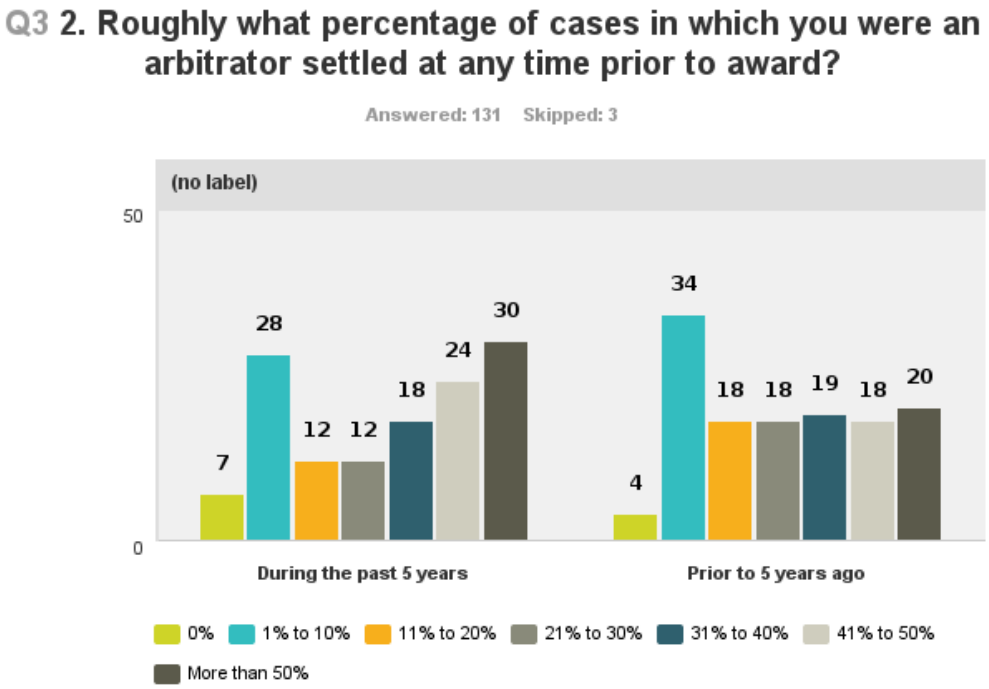
Commercial arbitration has also felt the impact of several other important trends, including the expanding use of mediation, the growing emphasis on early assessment or evaluation processes, the migration of court litigators into arbitration, the burgeoning of the ranks of self-described "professional neutrals," and the "bad press" accorded arbitration in the United States.

1. Expanding Use of Mediation

Sixty percent (60%) of respondents to the just-completed CCA / Straus Institute Survey observed that the growth of "mediation and other conflict management approaches" was having a significant or moderate impact on their arbitration practice.[89] Nearly all respondents (96%) expected the use of mediation to increase in the future. [90]

Just as mediation has played an important role in the dramatic drop-off in the rate of trial in federal and state courts,[91] it is very likely to be having an impact on the usage of arbitration. For one thing, mediation may be contributing to the increased percentage of cases in arbitration that are settled prior to the rendition of an award, as reflected in the results of the CCA / Straus Survey (Table 5).

Table 5.
Settlement Prior to Award



	Settlement Before Award							
	0%	1% to 10%	11% to 20%	21% to 30%	31% to 40%	41% to 50%	More than 50%	Total
During the past 5 years	5.34% 7	21.37% 28	9.16% 12	9.16% 12	13.74% 18	18.32% 24	22.90% 30	131
Prior to 5 years ago	3.05% 4	25.95% 34	13.74% 18	13.74% 18	14.50% 19	13.74% 18	15.27% 20	131

The experience of the construction industry suggests that in some cases, the advent of mediation may be associated with more dramatic consequences for the use of arbitration. Three decades ago mediation began to be used in the resolution of U.S. construction cases, and by the mid-1990s it was playing an important role in the resolution of construction disputes and some other commercial controversies. By 1997 mediation was enshrined as a part of a tiered dispute resolution process, as a step prior to binding arbitration, in the leading family of standard construction contract documents. A decade later, mediation was still part of the tiered system, but binding arbitration was not.[92] (As discussed above, a comparison of AAA caseload statistics suggests that although both mediation and arbitration usage have been negatively impacted by the dropoff in construction, arbitration has experienced a steeper decline.[93]) This sequence of events reflects not only the popularity of mediation as a flexible device for the resolution of conflict, but its potential impact on user attitudes toward binding arbitration.

Comparisons by corporate counsel of mediation and arbitration frequently emphasize the high degree of control they maintain over process and result in mediation, and contrast their experiences in binding arbitration.[94] It appears that many business counsel now view mediation as their third-party-intervention strategy of choice; for many, the preferred adjudicative "backdrop" is not arbitration but litigation.[95]

International commercial disputes. Mediation and other forms of ADR are also now part of the landscape of international commercial disputes, and are often employed prior to arbitration (perhaps through the mechanism of multi-tiered dispute resolution provisions).[96] However, they are not as widely used as in the U.S.[97] In the 2013 Queen Mary survey of selected international corporate counsel in the financial services, energy and construction arenas, mediation actually ranked below arbitration, court litigation, and adjudication/expert determination as a preferred dispute resolution mechanism.[98] However, this picture may be somewhat misleading from the standpoint that in some countries or cultures conciliation is a feature of arbitration, with arbitrators sometimes making active efforts to spur settlement.[99]

That said, many international disputes are resolved by negotiated settlement. In the 2013 Queen Mary survey of selected international corporate counsel in the financial services, energy and construction arenas, respondents indicated that they were able to settle an average of approximately 57% of international disputes prior to engaging in litigation, arbitration, or other formal proceedings. Of disputes that were not settled amicably, only 32% were pursued through formal proceedings; the other 68% were not.[100] Moreover, a significant number of arbitrated cases are settled prior to the rendition of an award.[101] It will be interesting to see whether and to what extent mediation assumes a broader role in the resolution of international commercial disputes, and, if so, how perspectives on binding arbitration are affected.

2. Growing Emphasis on Early Assessment[102]

The Fortune 1,000 Survey drew attention to many corporations' current use of early neutral evaluation and early assessment processes.[103] These approaches are frequently engaged in the early stages of litigation or private dispute resolution, and may involve assessments by neutrals retained by or for both parties, or by consultants to individual parties.[104] Assessments may be part of a systematic process or *ad hoc*.[105] Sometimes they are driven by the demands of e-discovery.[106]

Whatever their nature, these developments bespeak an increased emphasis on taking a prospective look at conflict at a relatively early stage, with emphasis on prospects for negotiated resolution or at least on strategic planning for effective case management.[107] In many of these situations, the evaluative skills of third parties are brought to bear well in advance of arbitration hearings—perhaps obviating the need for arbitration or any form of adjudication.

International commercial disputes. In the 2013 Queen Mary survey of selected international corporate counsel in the financial services, energy and construction arenas, "adjudication/expert determination" ranked above as a preferred dispute resolution mechanism.[108] "Adjudication" may refer to a short and sharp format for resolving disputes that produces a preliminarily binding decision; although parties may resort to arbitration or court litigation after an adjudicated decision, they do not often do so. [109]

3. Growing Numbers of Arbitrators, "Professional Neutrals"

As one experienced advocate recently noted, "Nobody retires anymore. Everyone becomes an arbitrator-slash-mediator."[110] Indeed, it sometimes appears that an entire generation of legal advocates, judges and corporate counsel are pursuing second careers as mediators and/or arbitrators.

Table 6 illustrates the collective responses of College members to the CCA / Straus Survey when asked, "What percent of your work time is currently devoted to practice as an arbitrator?" Although responses vary widely, about two-thirds of respondents claimed to spend at least fifty percent of their working hours as arbitrators.

Table 6.
Percentage of Working Hours as Arbitrator

Q: What percent of your work time is currently devoted to practice as an arbitrator?

Percentage	Number of Respondents	% of Respondents
0%	3	2.38%
1% to 25%	17	13.49%
26% to 49%	22	17.46%
50%	20	15.87%
51% to 75%	26	20.63%
76% to 89%	12	9.52%
90%+	25	19.84%
Don't Know, Other, N/A	1	0.79%

TOTAL	**126**	**100.00%**

With more and more individuals actively pursuing neutral roles in the U.S. and international marketplace, it is unlikely that all will be actively employed in satisfying case assignments. Given the mushrooming of the supply side, the apparent shrinkage in the U.S. arbitration caseload is undoubtedly more keenly felt.

Although many would-be arbitrators claim extensive experience with the arbitration, others have moved laterally into the arbitration provider market. While some mediators have eschewed the opportunity to expand their toolbox to include arbitration, anecdotal evidence suggests that a growing number of professional mediators expanded their practice to include arbitration. This includes, for some, the practice of offering themselves as arbitrators to resolve disputes arising under agreements resulting from negotiations they've mediated.[111]

As illustrated in Table 7, about fifty-nine percent (59%) of respondents to the CCA / Straus Institute survey indicated that they have less arbitration work than they would like. Even if one assumes these data exaggerate to some extent the experience and perspectives of the entire membership of the College of Commercial Arbitrators, it must give us pause. If more than half of the nation's leading arbitrators would like more arbitration work, what does this say about the field as a whole?

Table 7.
Amount of Arbitration Work

Q: Which of the following must accurately describes the current quantity of your arbitration work?

More work than I would like	**5.56% 7**
A sufficient amount of work	**34.92% 44**
Somewhat less work than I would like	**42.06% 53**
A lot less work than I would like	**15.08% 19**
No work at all	**2.38% 3**
Total	**126**

III. Opportunities

In confronting the several challenges facing commercial arbitration and arbitration practice—frequently expressed anxieties about arbitration, engrained habits and attitudes of business users and counsel, and the growth of mediation and other significant trends—the efforts of individuals are likely to be of little avail. Collective, strategic initiative is essential to alter these realities and create new opportunities for arbitration and arbitrators.

As the leading organization of arbitration professionals in the dispute resolution field, the College of Commercial Arbitrators is in a uniquely favorable position to effect important change in the current landscape. Through "soft-law" initiatives like its *Guide to Best Practices in Commercial Arbitration*[112] and its *Protocols for Expeditious, Cost-Effective Commercial Arbitration*,[113] the College has already demonstrated its ability to change attitudes toward commercial arbitration while enhancing the quality of arbitration practice. The College has sought to engage with other "supply side" organizations such as arbitral provider institutions as well as key individuals and bodies on the "demand side," including representatives of different industries and trades as well as organizations of corporate counsel. All of these stakeholders are essential players in addressing present concerns.

Through such processes of engagement, the College may build on its recent work to spur initiatives to drive fundamental change. A broad statement of action items would include the following:

- Educate business users and counsel about commercial arbitration.
- Capture and publish statistics as well as arbitration success stories.
- Offer guidance on how key process choices in arbitration can serve specific business goals.
- Publish more reliable and useful information about commercial arbitrators and arbitral institutions.
- Reorient arbitrator practice to reflect current realities.
- Develop and promote approaches to address the challenges and opportunities associated with information technology.
- Develop and present training programs on arbitration advocacy, emphasizing what arbitrators view as effective advocacy.

In responding to concerns about arbitration or improve arbitration, our motto should be, "First, do no harm." While taking steps to improve user perceptions of and experiences with arbitration and to address other issues, we must always strive to maintain the single most important advantage of arbitration—the ability to tailor process to the circumstances.[114]

A. Addressing Commonly Expressed User Concerns about Arbitration

Experienced arbitrators tend to be well aware that commonly expressed concerns about arbitration are usually misplaced or overstated. In any event, such concerns can be effectively addressed in different ways. The answer, in short, is better informed users who are equipped with more effective tools for achieving business goals.

1. Addressing Concerns Regarding the Risk and Uncertainty of Arbitration

As discussed in Part II, concerns about perceived risks and uncertainties of arbitration are the leading reasons for business users and counsel to avoid arbitration. They worry about the absence of judicial scrutiny, the difficulty of a successful appeal from a "wrong" award, arbitrators' potential lack of adherence to pertinent legal standards, and arbitrators' tendency to compromise. A short list of responsive action items might include the following:

- Educate business users and counsel regarding the realities of arbitrator decision-making.
- Promote a *CCA Arbitrator Commitment* to follow pertinent legal standards
- Publish arbitration success stories.
- Provide guidance regarding options for those who desire enhanced certainty:
  - Arbitrators who know and apply pertinent legal standards
  - Publication of a supporting rationale
  - Multi-member tribunal / sole arbitrator
  - Final-offer arbitration, bracketed arbitration
  - Contractual provisions for expanded judicial scrutiny
  - Appellate arbitration

Let's discuss each of these in turn...

a. Educate business users and counsel regarding facts about arbitrator decision-making.

If there is one clear insight to be garnered from the CCA / Straus Institute Survey, it is that leading arbitrators are serious about their perceived obligation to render an award in accordance with applicable law. As illustrated by Table 8, nearly all always or usually "do [their] best to ascertain and follow applicable law" in the absence of a contrary agreement between the parties, and "carefully read and reflect upon legal arguments and briefs presented by counsel." Many encourage briefing on legal issues. Less than a quarter of the respondents indicate they will "sometimes" give vent to their "own sense of equity and fairness" in making an award. These insights should be conveyed to users.

Table 8.
Rendering Arbitration Awards

Q: As an arbitrator, how often do you do the following in rendering a final award?

	Always	Usually	About 1/2 the time	Sometimes	Never	Total
In the absence of a contrary agreement between the parties, I do my best to ascertain and follow applicable law in rendering an award.	86.72% 111	11.72% 15	0% 0	1.56% 2	0% 0	128
I feel free to follow my own sense of equity and fairness in rendering an award even if the result would be contrary to applicable law.	0.78% 1	0% 0	0% 0	25% 32	74.22% 95	128
I invite counsel to brief legal issues in the case.	54.69% 70	35.16% 45	3.91% 5	6.25% 8	0% 0	128
I carefully read and reflect upon legal arguments and briefs presented by counsel.	97.66% 125	2.34% 3	0% 0	0% 0	0% 0	128

Perhaps not surprisingly, moreover, the vast majority of respondents to the CCA / Straus Survey—all but two people—had a legal background. They claimed experience as litigation attorneys (82%), transactional attorneys (28%), and/or judges (9%).[115] While many respondents also recognized the potential benefits of complimentary professional expertise in a multi-disciplinary tribunal in certain situations,[116] the Survey makes clear that where legal issues are in play leading arbitrators tend to be very conscientious in attempting to address them.

b. Develop and promote a CCA Arbitrator Commitment to follow pertinent legal standards.

Given the strong emphasis among College members on addressing pertinent legal standards, it might be possible for the College to craft and promote an Arbitrator Commitment or "Pledge" that could be joined in by individual arbitrators and posted on the web with the names of those who accepted the terms of the Commitment. This could offer a highly visible way of lending assurance to business users about the role of law in arbitration, just as many professional arbitrators and mediators post statements of their philosophy or guiding principles of their practice online.

In order to help imagine what an Arbitrator Commitment or "Pledge" might look like, I sought the assistance of my co-editors on the *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration*, Curt von Kann and Deborah Rothman. The three of us developed the draft proposal at Appendix A, which we offer as food for thought and, potentially, the starting point for discussion and debate on the efficacy of a Commitment. Even if the College did not ultimately officially sponsor or endorse a specific Commitment, it might provide a valuable template for individual arbitrators who wish to post statements of philosophy or guiding principles for their practice.

c. Publish relevant arbitration "success stories."

A further step to overcome the trepidations and native caution of business users and counsel would be the publication of arbitration "success stories"—summaries of circumstances where one or both parties

had an experience that met their business goals, including avoiding the courthouse, achieving a reasonable resolution, etc. Ideally, such summaries would include quotes from parties or counsel. Arbitration provider institutions would probably be in a position to obtain and publish such information, along with more general statistics on arbitrated cases. Although privacy and confidentiality concerns must be considered, it ought to be possible to publish summaries omitting the names of parties and counsel. Alternatively, such summaries might be developed through cooperation between other organizations such College and the Association of Corporate Counsel.

d. Provide guidance regarding options for those who desire enhanced certainty:

(1) Arbitrators who know and apply pertinent legal standards.

As discussed above, responses to the CCA / Straus Survey offer strong support for the notion that leading arbitrators strive to address pertinent legal standards,[117] and a potential CCA Arbitrator Commitment would offer straightforward assurance of an individual arbitrator's intentions in this regard.[118]

(2) A supporting rationale for the award.

For many years in the U.S. it was customary for arbitrators to render awards without an accompanying rationale.[119] Because parties were given no explanation of the logic supporting the award, parties disappointed with an award might be drawn to the conclusion that arbitrators relied on their intuitive judgments instead of making deliberate, rational decisions in accordance with appropriate legal standards. The lack of a rationale might also feed into notions that arbitrators sometimes compromise, or "split the baby,"[120] influencing the perceptions of a large percentage of corporate counsel[121] and causing parties to ban provisions for binding arbitration of disputes from their contracts.[122]

Just because an arbitration award is in the middle of the range between parties' positions, one should not assume that undue compromise has occurred; the result may be perfectly justifiable under law and logic. For example, the author and other construction arbitrators used to handling numerous claims and controversies in a single arbitration recognize that although one side's positions may prevail more often than the other, the results will typically be mixed. Moreover, arbitrators may have good reasons for awarding only a portion of amounts claimed.[123] Unless the parties are offered a statement of reasons in support of the arbitrators' logic, however, they may have no clue as the reason for the result and fall back on their worst suspicions.

Looking beyond perceptions, the lack of a published rationale (coupled with the lack of judicial oversight of awards) might actually enhance the likelihood that the arbitrators' award was reflexive rather than reflective. It's also reasonable to assume that arbitrators, like their judicial counterparts, are sometimes prone to making decisions based on intuition rather than deliberation.[124] In the case of judges, there is empirical support for the idea that judges' intuitive judgments may be overridden by more deliberative approaches.[125] The act of deliberating upon and setting forth a published rationale may provide critical discipline for arbitrators in overcoming their initial tendencies. (Of course, there is reason to believe that if a panel's award is to be accompanied and supported by a rationale, the drafter of that document may have an outsize role in determining the tribunal's ultimate decision.[126])

(3) Multi-member tribunals vs. sole arbitrators.

The use of a multi-member tribunal is sometimes promoted as insurance against irrationality in arbitral award-making. It makes logical sense that group dynamics may "rein in" the tendencies of an individual arbitrator toward an extreme, illogical or purely intuitive result.

This may be perfectly fine, although tripartite panels entail considerable additional cost and enhance the likelihood of delay.[127] Users should also be aware of form of compromise that often comes into play among multiple decision makers.[128] When all is said and done, the desire to obtain a consensus may be an important motivation. Arbitrators may consciously or unconsciously apply a "norm of consensus" in order to speak authoritatively and lesson the likelihood of a successful motion to vacate their award. No matter what kind of deliberation and analysis may have occurred beforehand, a damages award may be the result of and eleventh hour effort to strike a happy medium between or among disparate positions. (Note, this "mutual adjustment" approach also affects other decisions arbitration panels may make.) In this process of mutual adjustment, what's known in politics as the median voter theorem— the notion that in a voting system based on majority rule, the system will produce an outcome most preferred by the median voter—may come into play.[129]

The phenomenon of negotiation among members of a tribunal during deliberations leading to award is reflected in the results from the CCA / Straus Institute survey. As shown in Table 9, nearly nine-tenths of arbitrators (90%) negotiate quantum at least some of the time, and more than forty percent usually do.

Table 9.
Negotiation during Award Deliberations

	Always	Usually	About 1/2 the time	Sometimes	Never	Total
I negotiate with other arbitrators (when serving on multi-member tribunals) regarding the quantum of damages to be awarded.	**26.56% 34**	**17.97% 23**	**7.03% 9**	**38.28% 49**	**10.16% 13**	**128**

The "bargaining" element in tribunal deliberations may be enhanced by differences in arbitrator perspectives or biases. This may be especially likely in the case of a "tripartite" panel in which each party selects a "wing" arbitrator, and the two party appointees select a third arbitrator who typically functions as the chair of the tribunal.[130] Under U.S. practice, the party appointees may be expected to function as independent and impartial adjudicators or as party advocates, depending on the terms of the parties' agreement.[131] Even where independence is the expectation, however, an arbitrator's awareness that (s)he serves at the behest of a particular party may engender some level of predisposition in that individual.[132]

Another important insight from the CCA / Straus Institute Survey is although so-called "tripartite panels" are generally perceived as working fairly well, respondents do recognize that arbitrators appointed by individual parties may "lean" in various ways (Table 10). Respondents with relevant experience

indicated that even in the face of contrary arbitration rules or ethical strictures, arbitrators selected unilaterally by a party may be predisposed, or at least perceived to be predisposed, toward the party that appointed them. Such arbitrators may also decide close questions in favor of the party that appointed them.

Table 10.
Tripartite Panels with Arbitrators Appointed by Individual Parties

Q: Based on your experience with tripartite panels, please indicate how often each of the following occurs.

	Always	Usually	About half the time	Sometimes	Never	Total
Tripartite tribunals work very well.	10.26% 12	66.67% 78	6.84% 8	16.24% 19	0% 0	117
Arbitrators appointed by individual parties are predisposed toward the party that appointed them even when the applicable procedures require them to be independent and impartial.	0% 0	16.24% 19	11.11% 13	61.54% 72	11.11% 13	117
Tripartite tribunals work together as cooperatively as tribunals in which all arbitrators are jointly selected.	8.55% 10	70.09% 82	4.27% 5	16.24% 19	0.85% 1	117
Arbitrators appointed by individual parties act independently and impartially.	9.40% 11	53.85% 63	9.40% 11	25.64% 30	1.71% 2	117
Arbitrators appointed by individual parties decide close questions in favor of the party that appointed them even when the applicable procedures require them to be independent and impartial.	0.85% 1	14.53% 17	11.97% 14	59.83% 70	12.82% 15	117

Where wing arbitrators are subtly or determinedly predisposed toward the parties that appointed them, the role of the independent chair takes on special significance in final deliberations.[133] In such cases it is reasonable to assume that the chair will be the median or middle "voter," and also reasonable to expect that they will take the lead in drafting the panel's final award.[134] The chair is also likely to be the primary driver for consensus.[135] While there is always the possibility of the chair joining with one of the other arbitrators to produce a majority award,[136] the desire to avoid a published dissent and produce a consensus award may drive a negotiated settlement.[137] The chair may play the role of mediator between the wing arbitrators in an effort to present a united front, failing which there is the option of joining one of the panelists to produce a majority award.

The responses in Table 10 suggest the need for further exploration of the dynamics of unilateral appointment and predisposition, both in U.S.-based and international arbitration.

(4) Bracketed arbitration; final offer arbitration;

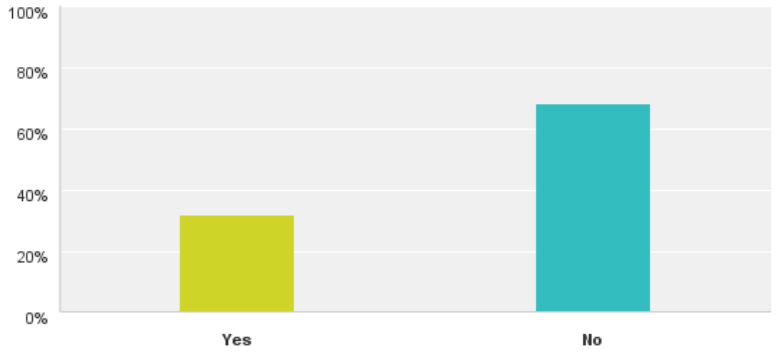
An agreement to "bracket," or to put upper and lower monetary limits on an arbitrator's authority to make awards is often viewed as a method of constraining arbitrator discretion in the granting of awards. Final offer or "baseball arbitration accomplishes the same goal while theoretically eliminating the possibility of compromise by requiring the arbitrator to make an award based upon one or the other of the final offers made by the parties.[138] As reflected in Table 11, about 1/3 of respondents

(32%) to the CCA / Straus Survey claimed experience with final-offer arbitration. A smaller percentage of respondents (about 14%) are aware of making awards limited by "brackets" (Table 12).

Table 11.
Experience with Baseball or Final Offer Arbitration

Q7 5. Have you served as an arbitrator in a case under "baseball" or "final offer" procedures, where you were called upon to render an award of an amount equal to one or the other parties' final offers?

Answered: 131 Skipped: 3

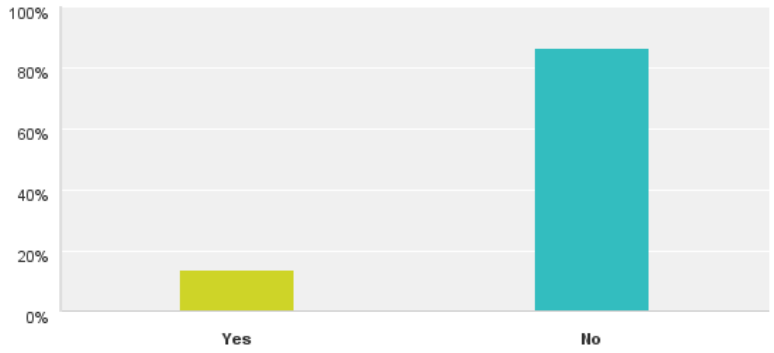


Yes	32.06% 42
No	67.94% 89
Total	131

Table 12.
Experience with "Bracketed Awards"

Q8 6. Have you served as an arbitrator in a case in which you were required to render an award within a certain dollar range (such as, for example, $500,000 to $1 million)?

Answered: 131 Skipped: 3



Yes	13.74% 18
No	86.26% 113
Total	131

Final offer arbitration may indeed avoid compromise, although it is possible that arbitrators may arrive at their award by employing standards that are themselves a kind of compromise.[139] An example may be found in arbitration of salary disputes between baseball teams and players with three to six years' experience who are not yet free agents but are eligible to seek arbitration.[140] Here, studies suggest that although arbitrators are required make an award equal to the final offer of the baseball club or that of the player, their selection appears to be based on which offer most closely approximates an appropriate balance between the salaries of players in their first three years who must bargain with a single team, and those of free agents.[141] In this way, arbitrators' preferred awards tend to reflect a compromise between the bargaining perspectives of management and players.[142] Put another way, although arbitrators in final offer arbitration may not be able to "split the baby" between final offers, the very standard they use to assess those offers may itself represent a compromise between the perceived preferences and perspectives of the parties.

(5) Contractual provisions for expanded judicial scrutiny.

In the years before and after *Hall Street Associates v. Mattel*,[143] much ink has been spilled on the subject of contractual provisions for enhanced judicial scrutiny of arbitration awards. Although such agreements are problematic within the realm of the Federal Arbitration Act,[144] they are permissible under some laws; state courts in California[145] and Texas[146] have stepped through the door left ajar by the Supreme Court in *Mattel* by interpreting their state laws to permit contractually expanded review.

That said, many experienced arbitrators and advocates have expressed serious misgivings about the practical realities of such arrangements, which produce a "hybridized" form of justice which, while potentially wedding benefits of the private and public spheres, might actually undermine the respective advantages of both systems.[147]

International commercial arbitration. There has also been discussion among international corporate counsel regarding the notion of expanded grounds for judicial appeal of arbitration awards. However, when confronted with the question whether there should be some form of "appeal mechanism for awards" a resounding 91% of respondents registered a "no."[148]

(6) Appellate arbitration.

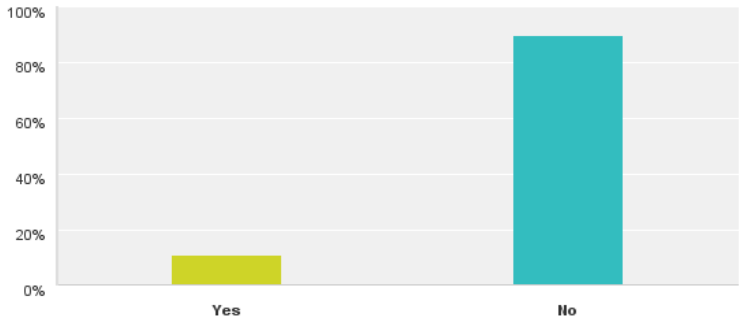
A less precarious approach that offers many of the key benefits of contractually-enhanced judicial review is appellate arbitration. Two main commercial alternatives are available under the appellate arbitration procedures promulgated by JAMS and the International Institute for Conflict Prevention & Resolution (CPR).[149] Although these programs exhibit different features, both appear to offer viable, straightforward and relatively expeditious mechanisms for review of arbitration awards on the merits. As shown in Table 13, only about one in ten respondents to the CCA / Straus Institute Survey has served

as an appellate arbitrator. This is not surprising, as the programs do not appear to be used extensively. However, for parties that want to arbitrate but desire a potential "second look," they are arguably a highly superior alternative to enhanced judicial review.

Table 13.
Experience as Appellate Arbitrators

Q10 8. Have you served as an arbitrator under appellate arbitration rules (such as, for example, those published by JAMS or CPR)?

Answered: 131 Skipped: 3



Yes	10.69% 14
No	89.31% 117
Total	131

2. Addressing Concerns Regarding Judicialization, Loss of Speed, Efficiency

The much-discussed concerns of recent years regarding the importation of a civil trial "mentality" into arbitration, with consequences for its costs and duration, have been the subject of numerous initiatives, including the *College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration* and innovations in the just-released new *American Arbitration Association Commercial Arbitration Rules*.[150] That said, much more can be done to inform users about ways of promoting cost-effective, efficient arbitration, presented here as four action items:

- Actively promote and put into practice the elements of the *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration*.
- Develop and promote a CCA Arbitrator Commitment to efficiency in arbitration.
- Encourage arbitration providers to capture and publish statistics on use of streamlined processes, cost- and time-saving; publish relevant arbitration success stories.

Let's consider each of these in turn…

a. Actively promote and put into practice the elements of the CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration.

Among a wide range of recent efforts to address perceived issues with excessive cost and delay in arbitration, the *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration* occupy a unique place. Their development was the occasion for a major national symposium involving key stakeholders, including corporate counsel, outside counsel, arbitrators and representatives of leading arbitration provider organizations. The resulting *Protocols* are the only effort to treat the issues of cost and delay in arbitration as a shared problem of all these stakeholders, and to offer separate action steps for each group. The *Protocols* appear to be employed by arbitrators in the conduct of arbitrations (with some arbitrators even distributing the *Protocols* to counsel during hearings). The General Counsel of DuPont, Thomas Sager mailed a copy of the *Protocols* to every Fortune 1,000 general counsel. Given the prominence of the national summit and resulting *Protocols* in the national conversation over costs and delays in commercial arbitration and the active participation of leading provider institutions (AAA, JAMS, CPR) in that process, it is reasonable to assume that both were influential in encouraging the promulgation of new procedures and guidelines by the providers.[151] Such steps were specifically envisioned by the *Protocols,* which called upon providers to "[o]ffer business users clear options to fit their priorities." [152]

(1) Streamlined or expedited procedures

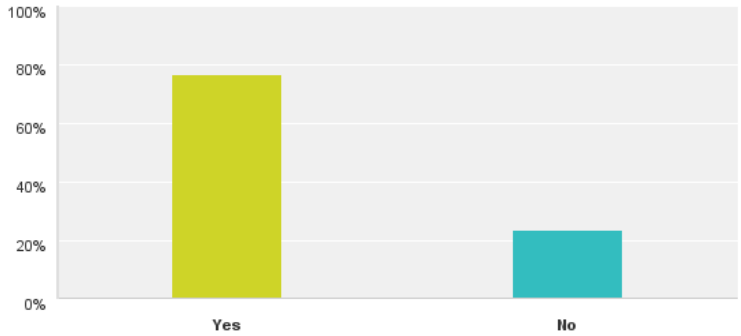
Among the bolder steps the *Protocols* encouraged business users to consider were "sett[ing] specific time limits on arbitration and mak[ing] sure they are enforced," [153] and "us[ing] 'fast-track [expedited or streamlined] arbitration' in appropriate cases."[154] Today, the leading providers offer various kinds of expedited procedures as alternatives to standard arbitration rules.[155] If such procedures are to have a significant impact on cost and delay in commercial arbitration, however, business users will need to be encouraged to use them more widely in cases involving significant amounts of money.

As illustrated in Table 14, more than three quarters of respondents to the CCA / Straus Survey (76.34%) claim to have had experience with fast track procedures.

Table 14.
Experience with Streamlined or "Fast Track" Procedures

Q5 4. Have you served as an arbitrator in a case under "streamlined" or "fast track" arbitration procedures?

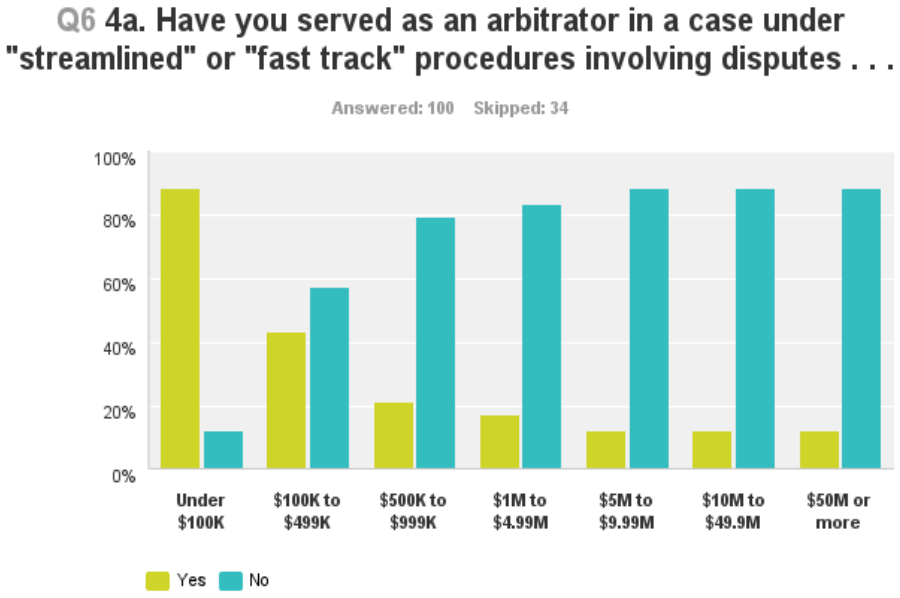
Answered: 131 Skipped: 3



Yes	76.34% 100
No	23.66% 31
Total	131

Among respondents, experience with streamlined processes drops off considerably as amounts in controversy increase, as revealed in Table 15. Of those with "fast-track" experience, only forty-three percent have used such rules in cases involving more than $100,000. Only seventeen percent have done so for cases above $1 million. The data in Table 15 probably reflect the fact that until fairly recently, the primary model for fast-track arbitration, AAA's Expedited Procedures, were aimed at claims involving no more than $75,000.[156] The concept of streamline rules for bigger cases has only recently taken root.

Table 15.
Experience with Streamlined or "Fast Track" Procedures:
Amounts in Dispute



	Yes –	No –	Total –
Under $100K	88% 88	12% 12	100
$100K to $499K	43% 43	57.00% 57	100
$500K to $999K	21% 21	79% 79	100
$1M to $4.99M	17% 17	83% 83	100
$5M to $9.99M	12% 12	88% 88	100
$10M to $49.9M	12% 12	88% 88	100
$50M or more	12% 12	88% 88	100

International commercial arbitration. In a 2012 study of international arbitration practices by in-house counsel, private practitioners and arbitrators, about 40% of those responding reported some experience with fast track arbitration (most often as the result of provisions in the arbitration clause or "expedited rules.")[157] Thirty-five percent of those with experience expressed generally positive views of fast-track arbitration as compared to "regular" arbitration; another 40% indicated that the appropriateness of fast track approaches depends on the case (working well for simple cases but inappropriate for "complex" arbitrations).[158] Fifty-nine percent of respondents said that fast-track time limits were "generally

complied with" while another 34% indicated they were "complied with sometimes."[159] Around 2/3 of the entire respondent group said they would consider fast track clauses for future contracts.[160]

(2) Using a single arbitrator

The *Protocols* also encourage business users to "[u]se a single arbitrator in appropriate circumstances," observing that "[s]ome in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator."[161] Here, the results of the CCA / Straus Survey offer important encouragement to those who would entrust cases to a single arbitrator in lieu of a panel. As reflected in Table 16, the great majority of arbitrators responding to the Survey have experience as sole arbitrators, and for many that experience extends to high-dollar-value cases. *Almost ninety percent* (89.31%) have singlehandedly handled claims in excess of $1 million; *almost one third (32.06%) claim to have done so with claims exceeding $50 million*!

Table 16.
Experience as Sole Arbitrator

Q4 3. Have you ever served as a sole arbitrator in a case involving disputes . . .

Answered: 131 Skipped: 3

	Yes	No	Total
Under $100K	86.26% 113	13.74% 18	131
$100K to $499K	91.60% 120	8.40% 11	131
$500K to $999K	89.31% 117	10.69% 14	131
$1M to $4.99M	87.79% 115	12.21% 16	131
$5M to $9.99M	64.12% 84	35.88% 47	131
$10M to $49.9M	49.62% 65	50.38% 66	131

	Yes	No	Total
$50M or more	32.06% 42	67.94% 89	131

These figures suggest that much more emphasis should be placed on drawing upon and learning from the apparent rich body of experience with single-arbitrator approaches. If business users can become more comfortable relying on a single arbitrator in lieu of three, this is one very simple way of addressing some of the sources of concern about expedition and economy in commercial arbitration.

(3) Active management of the arbitration process; tailoring of procedures

The *Protocols* also emphasize the importance of proactive efforts by arbitrators, who are called upon to "[a]ctively manage and shape the arbitration process [and] enforce contractual guidelines and timetables," to "conduct a thorough preliminary conference and issue comprehensive case management orders."[162] Thirty years ago, when Judith Resnik wrote an influential article on different ways judges actively managed and shaped litigation, binding commercial arbitration processes tended to be structured very differently from litigation. There was little or no prehearing discovery,[163] although information exchange might occur at various stages during the process, in between hearings.[164] Dispositive motions were relatively rare.[165] Since arbitration hearings often commenced shortly after the appointment of arbitrators,[166] there might be no opportunity or perceived need to conduct a preliminary conference for the purpose of scheduling and planning.

Since then things have changed dramatically. For a number of reasons arbitration processes under standard commercial arbitration procedures tend to conform more closely to models familiar to litigators in public forums.[167] In the United States commercial arbitration hearings are often preceded by weeks or months of prehearing discovery.[168] Motion practice is common,[169] although arbitrators' receptiveness may vary considerably. As in the litigation setting, these developments are major potential contributors to complexity, cost and cycle time in arbitration.[170]

In the face of these realities many arbitrators have embraced a more proactive managerial approach. Their efforts bring them into active engagement with advocates and parties throughout the prehearing process. They may find themselves refereeing and participating in informal discussions with advocates and parties, encouraging cooperative or collaborative solutions to procedural problems, and eliciting or evaluating key information regarding parties' needs and expectations about discovery and procedures.[171]

These activities normally begin with an initial prehearing conference[172] (sometimes called a preliminary hearing[173]). Under standard commercial arbitration rules this event is an opportunity to address the full range of procedural issues pertinent to the process, to craft a timetable for the proceeding and the eventual resolution of substantive issues.

Prior to prehearing conference, many experienced arbitrators now routinely send out a series of queries to counsel seeking their parties' needs and expectations regarding many different aspects of the arbitration proceeding, often with the admonition to counsel to collaborate in crafting a response and to seek areas of common ground. This is but a foretaste of what for many arbitrators is a consistent *modus*

operandi during the prehearing process—the facilitation of a cooperative approach to resolving procedural questions, the default backstop being a decision by the arbitrator.[174]

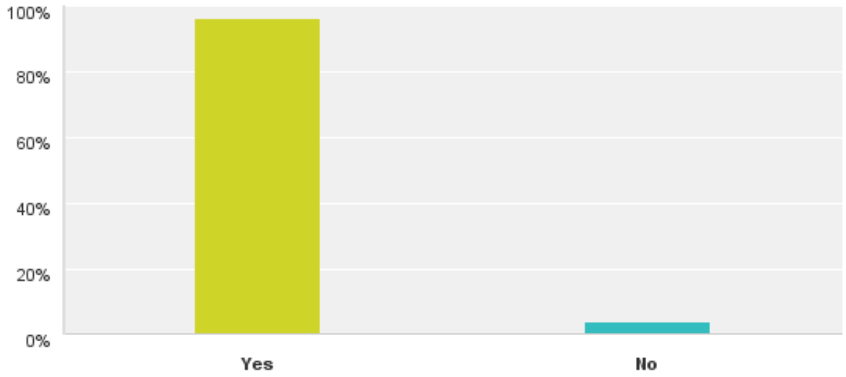
This is a common template for the prehearing conference—a telephonic or in-person joint discussion of key process issues, including, ultimately, the timetable—all of which will be incorporated into a procedural order by the arbitrator.[175] During the course of this exercise arbitrators are typically far from passive; they probe, cajole, comment, and, perhaps, informally evaluate, all in the cause of getting a workable agreement, failing which they rule. Take, for example, a hypothetical (but realistic) scenario in which the parties' dispute resolution agreement calls for the arbitrator to promote "efficient, expeditious proceedings" but at the same time provides that discovery shall be conducted in accordance with the Federal Rules for Civil Procedure.[176] Under such circumstances, an alert, experienced arbitrator would likely feel compelled to point out and attempt to resolve the obvious tension between these disparate provisions at the prehearing conference, perhaps going so far as to require the attendance of principals of the parties along with counsel.[177] The arbitrator might initiate active discussion of the reasons for inclusion of each of the terms, the relevant needs and concerns of the parties, and methods for accommodating those concerns—including more attenuated discovery.[178] Often, such discussions are effective in promoting a cooperative solution that accomplishes the parties' central concerns; if nothing else, they may provide a suitable foundation for an appropriate arbitrator directive.

As reflected in Table 17, respondents to the CCA / Straus Survey nearly all have experience working with parties to tailor arbitration procedures to better suit the needs of parties and the specific circumstances. Such approaches illustrate one of the important potential benefits of arbitration as a "choice-based" process.

Table 17.
Tailoring Arbitration Procedures

Q21 14. As an arbitrator, have you worked with parties to tailor arbitration procedures to better suit the needs of the parties and the nature of the dispute (such as, for example, modifying discovery procedures, or adjusting deadlines)?

Answered: 129 Skipped: 5



Yes	96.12% 124
No	3.88% 5
Total	129

International commercial arbitration. The 2010 Queen Mary / White & Case survey of corporate counsel revealed that more than forty percent of respondents were influenced by the "overall cost of service" in selecting an arbitral institution.[179] The survey indicated a decided preference for arbitrators with a "pro-active case management style," with 43% of respondents preferring this style to a "deferential or reactive" style (21%).[180] Among the top ten reasons for disappointment with arbitrator performance: failure to control the arbitral process, arbitrator-caused delays, and tardiness in rendering awards.[181] The survey asked in-house counsel, private practitioners and arbitrators to rate various methods for their effectiveness in expediting arbitrations in the past five years. The results are reported in the study.[182]

(4) Managing discovery

During the national summit leading to the development of the *Protocols*, participants overwhelmingly pointed to discovery as the primary source of costs and added cycle time in commercial arbitration.[183] Discovery is usually the central concern of proactive commercial arbitrators during the months leading up to the hearing.[184] Particularly in contentious proceedings, arbitrators may find it necessary to actively monitor discovery through periodic conference calls and to call for an "early warning" system in the form of a notice to all participants by email or letter of the appearance of an apparent dispute over discovery.[185] Again, the active arbitrator may take the opportunity to facilitate a telephonic discussion with the intent of bringing about a cooperative resolution before ruling on the matter.[186]

Appropriately, the *Protocols* devote considerable attention to discovery and offer pertinent guidelines for all stakeholder groups. For example, arbitrators are encouraged to "make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances." They are advised to "actively supervise the pre-hearing process . . . [and to] keep a close eye on the progress of discovery . . . [,] and to promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions).[187]

The CCA / Straus Survey provides extensive data on leading arbitrators' handling of discovery issues, as shown in Table 18. Although arbitrator practices vary (suggesting a basis for discriminating among candidates during the arbitrator selection process), many arbitrators embrace approaches along the lines envisioned by the *Protocols*.

Table 18.
Managing Discovery

Q: As an arbitrator, how often do you do the following with respect to discovery in arbitration?

–	Always –	Usually –	About half the time –	Sometimes –	Never –	Total –
I do not involve myself in discovery unless one or both parties request my involvement.	10.94% 14	43.75% 56	7.81% 10	20.31% 26	17.19% 22	128
I point out to parties the costs of using court-like discovery in arbitration.	42.97% 55	35.94% 46	4.69% 6	12.50% 16	3.91% 5	128
I encourage parties to place limits on the scope of discovery.	64.06% 82	29.69% 38	2.34% 3	3.91% 5	0% 0	128
I try to discourage arbitrating parties from basing their discovery on the Federal Rules of Civil Procedure or similar procedures.	44.53% 57	30.47% 39	3.13% 4	17.19% 22	4.69% 6	128
I work with counsel to limit or streamline discovery.	59.38% 76	31.25% 40	6.25% 8	3.13% 4	0% 0	128
I respond promptly to party motions regarding discovery.	84.38% 108	14.06% 18	0.78% 1	0.78% 1	0% 0	128
I actively monitor discovery and remain attuned to potential discovery issues.	37.50% 48	26.56% 34	7.81% 10	23.44% 30	4.69% 6	128
When discovery issues arise, I first try to address the issues informally (such as, for example, through a conference call in which the parties' positions are explored).	49.22% 63	36.72% 47	3.91% 5	9.38% 12	0.78% 1	128
I attempt to "mediate" disputes over discovery before rendering orders regarding discovery.	24.22% 31	36.72% 47	2.34% 3	29.69% 38	7.03% 9	128

Some respondents tended to get involved with discovery issues only when requested to do so by one or both parties, while others were more likely to engage themselves in discovery even without a "prompt." However, strong majorities of respondents usually (if not always) discuss discovery with the parties, discourage resort to court-type procedures, and encourage limits on the scope of discovery. More than ninety percent usually (if not always) "work with counsel to limit or streamline discovery."

Nearly all respondents claim to "respond promptly to party motions regarding discovery." Nearly two-thirds (64%) usually (if not always) "actively monitor discovery and remain attuned to potential discovery issues." The great majority (86%) usually (or always) "first try to address [discovery issues] informally," and over sixty percent (61%) usually (or always) attempt to "mediate" discovery disputes before making orders on discovery.

International commercial arbitration. Respondents to the 2010 Queen Mary (QM) / White & Case survey of corporate counsel indicated that the disclosure of documents was the leading contributor to delay in international arbitration proceedings.[188]

A 2012 study of international arbitration practices by in-house counsel, private practitioners and arbitrators found that the IBA Rules on the Taking of Evidence in International Arbitration were being used in about 60% of arbitrations, mainly for guidance purposes rather than binding rules.[189] Eighty-five percent of respondents confirmed their utility,[190] and about 70% believed that Article 3 of the IBA Rules

should be the applicable standard for document production in international arbitration.[191] (Perhaps not surprisingly, 20% of civil lawyers wanted a more restrictive standard, compared to 5% of common lawyers.[192])

(5) Managing motion practice

National summit participants also identified motion practice as an important source of added cost and delay in commercial arbitration.[193] A salient feature of many commercial arbitration proceedings today,[194] motion practice is a particularly challenging aspect of prehearing process for arbitrators.[195] Today, there is much discussion of the "art" of managing dispositive motions,[196] and of methods for parsing those motions which hold the promise of permitting a straightforward teeing-up of arguments from those better postponed until a hearing on the merits.[197]

The *Protocols* attempt to promote a balanced but straightforward approach to the handling of dispositive motions.[198] The *Protocol for Arbitrators* states, "Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those." Arbitrators are encouraged to "establish procedures to avoid the filing of unproductive and inappropriate motions" and "generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs." The *Protocol* states, further, that "arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process."[199]

As reflected in Table 19, a large majority (83%) of respondents to the CCA / Straus Survey claim that they usually (or always) "readily and promptly rule on motions for summary disposition." More than seventy percent assert that they usually (or always) "entertain motions . . . only where they present a realistic possibility of shortening, streamlining or focusing the arbitration," but fewer than half typically require some kind of showing, prior to the filing of a motion, that the motion is reasonably like to be granted, or that it will produce a net benefit in terms of time or cost savings. The handling of motions remains a topic of considerable importance, and one that should be explored further.

Table 19.

Handling Dispositive Motions

Q: As an arbitrator, how often do you do the following in handling motions for summary disposition?

	Always –	Usually –	About half the time –	Sometimes –	Never –	Total –
I readily and promptly rule on motions for summary disposition of issues.	43.75% 56	28.91% 37	4.69% 6	18.75% 24	3.91% 5	128
I decline to rule on motions for summary disposition of issues, deferring such matters until a hearing on the merits of the case.	0.78% 1	14.06% 18	2.34% 3	47.66% 61	35.16% 45	128
I require, before the filing of any motion for summary disposition of issues, a showing by the moving party that	17.97% 23	26.56% 34	6.25% 8	16.41% 21	32.81% 42	128

	Always –	Usually –	About half the time –	Sometimes –	Never –	Total –
the motion has a reasonable likelihood of being granted.						
I require, before the filing of any motion for summary disposition of issues, a showing by the moving party that the result will be a net savings in arbitration time and/or costs.	17.97% 23	17.97% 23	3.91% 5	21.09% 27	39.06% 50	128
I entertain motions for summary disposition of issues only where they present a realistic possibility of shortening, streamlining or focusing the arbitration.	28.91% 37	42.19% 54	4.69% 6	13.28% 17	10.94% 14	128

(6) Managing hearings

Participants in the national summit leading to the *Protocols* identified too-lengthy arbitration hearings as a third major source of added costs and delays in commercial arbitration.[200] Consequently, the *Protocols* advanced a number of approaches to promote efficiency in the conduct of hearings. For example, arbitrators were encouraged to "[c]onduct fair but expeditious hearings."[201] The accompanying commentary listed a variety of "major steps" that might be taken toward an efficient arbitration hearing. That list was source of a series of queries in the CCA / Straus Survey, leading to the responses reflected in Table 20 below.

The data reflect that certain of the listed practices appear to predominate among leading arbitrators. Most respondents usually (or always):

- Work with counsel to establish an appropriate order of proof (65%);
- Make sure that, well prior to the hearing, counsel work out logistical arrangements (95%);
- Require parties to submit a joint bundle of core exhibits (77%)
- Require the submission of tabbed, indexed exhibits prior to hearing, admitted en masse (84%)
- Require parties to show demonstrative exhibits to each other a reasonable time before the hearing (78%);
- Urge counsel to focus on the probativeness of evidence rather than its admissibility (66%);
- Discourage traditional objections (hearsay, etc.) (75%);
- Try to limit the presentation of duplicative or cumulative testimony (89%);
- Accept affidavits or pre-recorded testimony regarding less critical matters (63%);
- Establish and maintain a realistic daily hearing schedule (97%);
- Have a daily discussion with counsel on administrative matters that need attention (94%);
- At the close of each hearing day, confirm plans and expectations for the following day(s) (95%);
- Tell counsel when a point has been understood and they can move on, or when it was not understood and requires clarification (85%);
- Take witnesses out of order when necessary (97%).

Table 20.
Managing Hearings

Q: As an arbitrator, how often do you do the following with respect to arbitration hearings?

–	Always –	Usually –	About half the time –	Sometimes –	Never –	Total –
I urge counsel to focus on the probativeness of evidence and not its admissibility.	25.78% 33	39.84% 51	6.25% 8	19.53% 25	8.59% 11	128
I receive virtually all non-privileged evidence, and discourage traditional objections (hearsay, foundation, etc.)	26.56% 34	48.44% 62	6.25% 8	15.63% 20	3.13% 4	128
I work with counsel to establish an order of proof that is most appropriate for that particular case.	25% 32	39.84% 51	4.69% 6	21.88% 28	8.59% 11	128
I require parties to submit a joint collection of core exhibits.	39.06% 50	37.50% 48	7.81% 10	9.38% 12	6.25% 8	128
I require parties to submit tabbed, indexed exhibits in advance of the hearing, and advise counsel that all such exhibits will be received en masse at the start of the hearing unless privileged or genuinely challenged as to authenticity.	53.13% 68	31.25% 40	2.34% 3	7.81% 10	5.47% 7	128
I require that parties show demonstrative exhibits to each other (e.g., PowerPoint slides) a reasonable time before their use in hearing.	46.88% 60	31.25% 40	6.25% 8	10.94% 14	4.69% 6	128
I ask counsel to consider the use of written direct testimony for witnesses.	13.28% 17	28.13% 36	8.59% 11	35.16% 45	14.84% 19	128
I establish procedures to narrow and highlight matters on which opposing experts disagree.	10.94% 14	38.28% 49	11.72% 15	28.91% 37	10.16% 13	128
I require experts to confer before the hearing and provide arbitrators with lists of the points on which they agree or disagree.	1.56% 2	8.59% 11	10.94% 14	40.63% 52	38.28% 49	128
I try to limit the presentation of duplicative or cumulative testimony.	47.66% 61	41.41% 53	2.34% 3	7.81% 10	0.78% 1	128
I accept affidavits or pre-recorded testimony regarding less critical matters.	22.66% 29	39.84% 51	4.69% 6	29.69% 38	3.13% 4	128
I establish and maintain a realistic daily schedule for the hearing.	75% 96	21.88% 28	1.56% 2	0.78% 1	0.78% 1	128
I encourage parties to employ a "chess clock" that limits the total number of hours available to counsel for examination and argumentation.	4.69% 6	17.97% 23	7.81% 10	39.84% 51	29.69% 38	128
At some point during each hearing day, I discuss with counsel any administrative matters that need attention.	61.72% 79	32.03% 41	2.34% 3	3.13% 4	0.78% 1	128
At the close of each hearing day, I confirm plans and explanations for the following day(s).	66.41% 85	28.91% 37	2.34% 3	2.34% 3	0% 0	128
I tell counsel when a point has been understood and they can move on, or when a point was not understood and requires clarification.	39.06% 50	46.09% 59	5.47% 7	9.38% 12	0% 0	128
I make sure that, well prior to the hearing, counsel work out all logistical arrangements (such as, for example, transcripts, shared projection equipment, etc.)	70.31% 90	24.22% 31	2.34% 3	3.13% 4	0% 0	128
I take witnesses out of turn when necessary.	70.31% 90	26.56% 34	2.34% 3	0.78% 1	0% 0	128
I tell parties that they are prohibited from running out of witnesses on any given day.	7.03% 9	25.78% 33	4.69% 6	21.09% 27	41.41% 53	128

However, as indicated in Table 20, a number of practices received more mixed reactions in the CCA / Straus Survey. For example, while about forty-one percent of respondents usually or always ask counsel to consider the use of written direct testimony in lieu of oral testimony, a practice common in international arbitration,[202] about fifteen percent never even raise the possibility and another thirty-five percent only do so "sometimes." Of course, practitioners and arbitrators accustomed to American practice have mixed feelings about this international practice,[203] which puts a premium on pre-hearing reading of often voluminous lawyer-prepared written statements. Moreover, if the opposing party will forego cross-examination, a tribunal may end up with little or no opportunity to see and hear a witness testify. The use of witness statements should be high on the agenda of topics for further investigation.

Another example is the handling of expert witnesses. While about half (49%) of respondents usually (or always) establish procedures to narrow and highlight areas of disagreement among experts, almost forty percent (39%) do so only "sometimes"—or never. Moreover, only about ten percent of respondents usually or always require experts to confer before the hearing and identify areas of agreement and disagreement; about four in ten respondents (41%) only do so sometimes, and almost as many (38%) *never* do so. This disparity in practice points up the need for further discussion and investigation.

Another such topic is the use of chess clocks in arbitration, which some arbitrators and parties have found to be quite effective in promoting efficiency in presentations.[204] About forty percent of respondents only encourage their use sometimes, and about thirty percent never do so.

International commercial arbitration. In the 2012 Queen Mary / White & Case survey, respondents reported that on average, more than two-thirds of their arbitration hearings were subject to specific time limits on oral submissions or examination of witnesses, either by the application of a "chess clock" method in which each party has a given amount of time that it may use as it pleases, or the allocation of time limits for different stages of the hearing.

Reflecting another apparent trend that offers potential time-savings as well as other advantages, more than 60% of respondents in the 2012 QM / White & Case survey believed witness conferencing or "hot-tubbing," in which opposing expert witnesses are jointly put under oath together, sit at the same table, and give evidence in each other's presence.[205]

Ninety-six percent of respondents, an "overwhelming majority," indicated that improper conduct should be considered when arbitrators allocate costs.[206]

(7) Arbitrators and settlement

As with litigation in court, the arbitrator's management of the prehearing and hearing stages is juxtaposed against not one but two potential eventualities: although the parties are on the road to adjudication, there is always the possibility—even the probability—of a negotiated settlement.[207] [See table above]. As explained in the *Protocols*, "[r]esolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications."[208] Today, arbitrators (like judges) must be constantly attuned to the possibility that the arbitrator's managerial

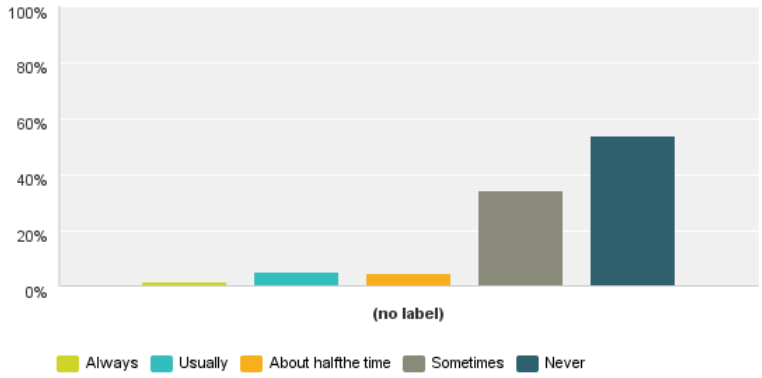
activities will not only create opportunities for settlement, but may leverage the settlement posture of one or the other of the parties.

This appears to be an area in which leading arbitrators apparently embrace different philosophies and, therefore, different approaches. As reflected in Table 21, more than half of respondents to the CCA / Straus Survey indicated that they never had concerns about informal settlement of cases in which they were serving as arbitrator.

Table 21.
Concern with Informal Settlement

Q31 19. How often, if ever, are you concerned with informal settlement of the cases before you as an arbitrator?

Answered: 128 Skipped: 6



Always	Usually	About half the time	Sometimes	Never	Total	Average Rating
1.56% 2	5.47% 7	4.69% 6	34.38% 44	53.91% 69	128	0.66

Those respondents that indicated at least occasional concern about informal settlement of cases were asked questions about ways in which their management of the arbitration process might encourage settlement. Their responses reveal that at least sometimes, their management of the prehearing process, their summary disposition of issues, or their rulings on discovery do promote settlement of the case before them.

Table 22.
Informal Settlement

Q: As an arbitrator, how often do you do each of the following with respect to informal settlement of the cases before you?

	Always	Usually	About half the time	Sometimes	Never	Total
Through my management of the pre-hearing process, I play an important role in helping to settle	**0%** 0	**20.34%** 12	**5.08%** 3	**57.63%** 34	**16.95%** 10	59

	Always	Usually	About half the time	Sometimes	Never	Total
the case prior to hearing.						
My summary disposition of issues prompts informal settlement of the entire case.	**0%** 0	**6.78%** 4	**16.95%** 10	**66.10%** 39	**10.17%** 6	59
My rulings on discovery matters prompt informal settlement of the entire case.	**0%** 0	**3.39%** 2	**3.39%** 2	**72.88%** 43	**20.34%** 12	59

b. Develop and promote a CCA Arbitrator Commitment to efficiency and expedition in arbitration.

As noted above,[209] there may be value in promoting generally accepted practices among leading arbitrators through a CCA Arbitrator Commitment or "CCA Pledge." Such a Commitment might include principles aimed at promoting efficient, cost-effective arbitration. A proposed draft of such a document, which I developed in company with Curt von Kann and Deborah Rothman, my co-editors on the Protocols, is attached at Appendix A. It is offered as a basis for further discussion.

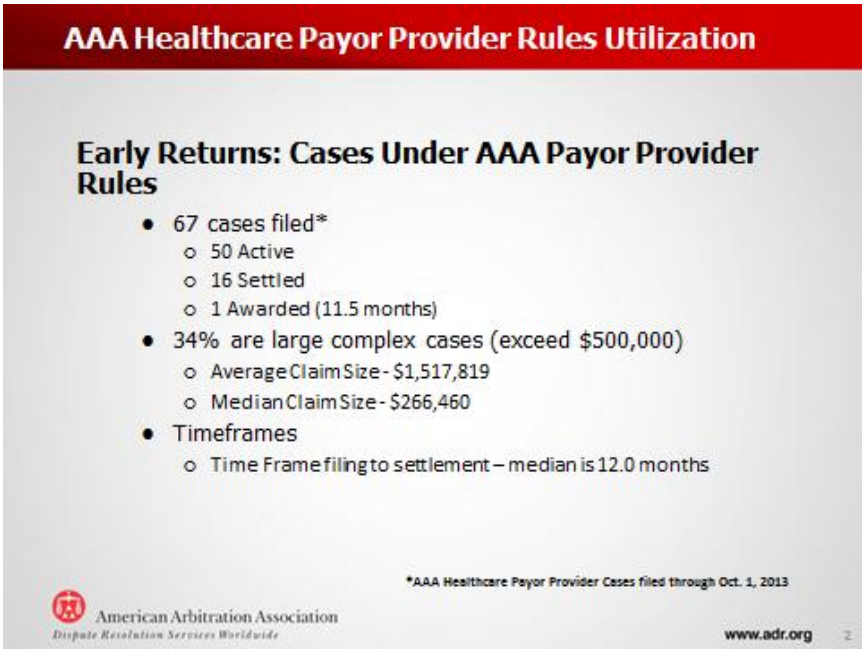
c. Publish relevant arbitration success stories; encourage arbitration providers to capture and publish statistics on use of streamlined processes, cost- and time-saving.

In order to encourage business users to embrace new approaches, there is no substitute for evidence that other commercial parties have successfully used these approaches. As discussed above, the College might collaborate with other organizations (such as the Association of Corporate Counsel) on capturing examples of "success stories."

Of course, arbitration provider institutions are in a unique position to capture and publish relevant information. This is especially true with respect to information with respect to the timeframe of arbitrations and other data of interest to business users. Such information may be uniquely persuasive to users, and is a critical compliment to the publication of new rules and procedures. Providers should be sensitive to these realities as a matter of fundamental marketing strategy!

A recent example of such an approach is the American Arbitration Association's new AAA Healthcare Payor Provider Rules. The AAA's promotion of these relatively new rules is enhanced by current data which includes information about the size and range of claims, the disposition of cases, and the timeframe for resolution (Figure A).

Figure A.



3. Addressing Concerns about the Quality of Arbitrators

a. Provide better information on neutrals of all kinds, direct to user; promote transparency.

In recent years there has been considerable discussion (both internationally and within the U.S.) about the possibility of creating a robust template for assessment of arbitrator performance that would greatly enhance the transparency of the system for many participants and, perhaps, enhance overall satisfaction with the process.[210] Such a template might contain information provided by the arbitrators themselves (including detailed information on breadth and depth of experience, case management philosophy, and list of previous arbitrations without the name of the parties), information provided by arbitral institutions for whom the arbitrator conducted cases (including resolution times, arbitration costs, and the role of the arbitrator), and feedback by parties regarding the arbitrator's performance.[211] The subject of public evaluations is a highly controversial one, and there are some thorny issues (including the problem of conflicts of interest, real or alleged/imagined, springing out of public evaluations of adjudicators by users and counsel, and the question of what kind of organizational clearinghouse(s) should develop and implement such a program).[212] Nevertheless, the many potential benefits of such a system augur in favor of continued exploration and development.

International commercial arbitration. In a 2010 Queen Mary / White & Case survey, only about two-thirds of responding corporate counsel said they had enough information to make informed choices about the appointment of arbitrators in international cases.[213]

In a 2012 study of international arbitration practices by in-house counsel, private practitioners and arbitrators, the vast majority (86%) of respondents indicated that pre-appointment interviews appropriate at least some of the time; follow-up interviews indicated that "most private practitioners and in-house counsel . . . find pre-appointment interviews useful as they assist in providing a clearer picture of the candidate's availability, personality and knowledge or experience."[214]

In a 2010 QM / White & Case survey of corporate counsel, most indicated that they would like to be able to provide assessments of arbitrators through reports to arbitral institutions (76%); a minority would be willing to provide publicly available reviews (30%) or report evaluations directly to arbitrators (27%).[215]

B. Addressing User/Counsel Habits and Attitudes

Underlying the commonly expressed concerns of business users regarding arbitration are habits and attitudes that must be considered in enhancing the utility and usage of commercial arbitration. As discussed above, these include the tendency of counsel to seek maximum control over dispute resolution processes; users' lack of experience with arbitration, and perceptions colored by "bad press"; and the failure of many to take proper advantage of the choices inherent in arbitration through one or more of the following: (a) reliance on inappropriate or outdated contract language; (b) choosing the wrong attorneys and arbitrators; (c) lack of attention or "abdication"; and (d) "plausible deniability" by in-house counsel (i.e., I always rely on outside counsel when it comes to decisions about adjudication).

The College and other organizations and individuals have already made strides in the direction of addressing these realities, but much more needs to be done. A proposed set of action steps follows:

- Working with law and business scholars, develop materials and videos on the benefits of *commercial* arbitration for companies, law firms, business schools, first-year contracts classes, and ADR survey courses.
- Emphasize the value of arbitration as a *choice-based* process that may be tailored to specific business goals and priorities.
- Provide specific guidance to business users and counsel regarding key choice points pre-dispute (drafting agreements) and post-dispute.
- Educate business clients and in-house counsel regarding earmarks of successful advocacy in arbitration, in contrast to litigation.

Let's very briefly consider each of these steps…

a. Work with law and business scholars to develop materials and videos on the benefits of commercial arbitration for companies, law firms, business schools, first-year contracts classes, and ADR survey courses.

There remains a need for clear, concise and readily accessible educational materials depicting arbitration processes and emphasizing ways of achieving business goals through commercial arbitration. Such materials should be available online as well as in other formats.

The intended audience for these materials would include current business executives and counsel as well as students in schools of business and law. In light of the confusion and negative perceptions engendered by the "spillover" of the policy debate over consumer and employment arbitration into the commercial realm, great care should be taken to distinguish the broad run of business-to-business arbitration from processes that are developed by companies for mass contracts involving consumers or individual employees.[216] An example of one approach is our law school coursebook and materials entitled RESOLVING DISPUTES: THEORY, PRACTICE & LAW,[217] which takes students through the full "chronology" of commercial arbitration (from choices in the drafting of an agreement through the rendition of an award) and the usual roles of courts in arbitration *before* exploring the special fairness issues that typically arise in the context of adhesion contracts.

b. Promote the value of arbitration as a choice-based process that may be tailored to specific business goals and priorities; Provide specific guidance to business users and counsel regarding key choice points pre-dispute (drafting agreements) and post-dispute.

Arbitration is what many would like to reform court litigation to be: a choice-based, flexible process that permits users to tailor procedures to their business needs in specific circumstances. As explained in *Arbitration and Choice: Taking Charge of the "New Litigation,"*[218] it is this opportunity for choice that is the one overriding value of arbitration, enabling arbitration to take many different forms and respond to many different needs and circumstances.

When lawyers choose to litigate rather than arbitrate, they often stress the theme of *control*—by which they presumably mean the sort of control that comes with the stages of litigation as framed by federal and state court procedures.[219] At the pre-hearing stage, this includes extremely broad information gathering subject to the rules governing discovery, a hearing governed by an array of evidentiary rules, and, of course, the opportunity to appeal not just on procedural grounds, but also on the merits.

But knowledgeable business users and counsel understand that arbitration can provide virtually all of these elements—and these days, as discussed in Part II, often ends up resembling litigation in court.[220] Appellate arbitration rules even permit a surrogate form of appeal on the merits.[221] Court-like procedures may or may not be what they want in a particular case, but they theoretically have the choice whether their arbitration will look like a private version of litigation or something quite different.

What's more, arbitration affords a host of choice-based advantages that are not typically available in litigation. These include:

- choice of decision-maker(s) (permitting the selection of persons with specific substantive knowledge or experience, professional qualifications, or process management skills);
- choice of process, from federal-court-like procedures to streamlined/expedited approaches;
- choice of standards by which decisions made (legal, trade, technical, or, perhaps,"equitable");
- Choice regarding degree of privacy of the hearing room, and the confidentiality of arbitration-related information.
- choice of venue, and of the law governing the arbitration process;
- choice regarding level of supporting administration services.

What choices are important, and what choices they make, depend on the goals and priorities of users. For some, this could mean a procedure tailored to "getting it right" in a litigation sense, with full-blown court-like due process. But for other businesses the important part of justice may be getting the dispute over with and getting on with business, or having a clear and final decision as a foundation for forward planning.[222] In other words, justice is about speed, economy, and finality. Arbitration can also accommodate and facilitate these goals.

Then there is what for many companies, particularly those who are concerned about disputes involving core assets in the form of intellectual property, is paramount: privacy and confidentiality in dispute resolution. Arbitration under appropriate procedures generally offers much greater protection for confidential information than litigation in a public forum.[223]

Until recently, it seems that little attention was paid to choice-making in arbitration. All too often, arbitration experiences have been tainted by hastily inserted contractual boilerplate or ill-considered add-ons.

But awareness of the possibility of choice is insufficient to give business users real, practical choices. Given the realities of commercial contract-making, it is wholly unrealistic to leave these issues to drafters in *ad hoc*, transaction-based choice making.[224] Rather, standard models offering key process options need to be promulgated at a higher level, like commercial rules of leading providers. Ideally, a few important choices (streamlined vs. standard, heightened confidentiality v. standard privacy, etc.) must be enshrined in contractual templates that are developed by experienced arbitrators and advocates working with specific professional and industry groups, which was a common AAA practice during the period of its hegemony as the single national provider of arbitration services and remains a superior model for rulemaking in commercial arbitration.

The interest in promoting effective nuanced tailoring of arbitration procedures has also inspired creative alternatives such as *Guided Choice*, in which a third party facilitates post-dispute discussion and development of an appropriate dispute resolution process.[225]

International commercial arbitration. Although relatively little information is available on the subject, a recent study indicates that some level of attention is given to at least some elements of arbitration agreements in international commercial contracts. A 2010 Queen Mary / White & Case survey of corporate counsel indicated that most corporations enter negotiations on international contracts with some policy respecting positions to be taken regarding arbitration and dispute resolution, including the choice of forum (arbitration or litigation), the preferred seat of arbitration, preferred arbitral institution/rules, the law governing the substance of the dispute, the language, confidentiality, and extent of disclosure/discovery/document production.[226] In some cases these positions are non-negotiable, and others are negotiable to varying degrees. At least half the time, general counsel and the corporate board are involved in decisions about the arbitration/dispute resolution clause.[227] Back in 2006, a Queen Mary / PriceWaterhouseCoopers survey of corporate counsel, 86% of respondents stated that "a dispute resolution policy produces savings either through effective management of the dispute process or by helping to minimize the risk of dispute resolution."[228]

The same 2010 survey of corporate counsel indicated that nearly all respondents accorded a measure of importance to confidentiality in international arbitration, with over half regarding it as "very important."[229]

c. Educate business clients and in-house counsel regarding earmarks of successful advocacy in arbitration, in contrast to litigation.

The best-laid plans for arbitration may founder in the hands of inexperienced advocates, and arbitrators often share concerns over the reflexive, inappropriate use of court trial techniques by advocates in arbitration. The College has been among the leaders in attempting to promote effective arbitration advocacy, and should continue to reach out to business users and their counsel to emphasize the importance of advocacy that recognizes and takes constructive advantage of the singular benefits of arbitration, including the opportunity to craft appropriate procedures, expertise in decision makers, and greater informality.

International commercial arbitration. In the Queen Mary survey of corporate counsel, published in 2013 (emphasizing financial services, energy and construction sectors), 55% of respondents said that expertise in the arbitral process was more important than technical knowledge of the industry sector.[230] Follow-up interviews confirmed that most in-house counsel "prefer their outside counsel to be arbitration experts rather than industry or technical experts."[231]

In a 2006 survey on international arbitration, 75% of responding corporate counsel indicated that they "retain[ed] specialist arbitration firms or firms with a substantial international arbitration practice."[232]

C. Responding to Other Trends

1. Addressing the Expanding Use of Mediation, Emphasis on Settlement

The current and growing emphasis on mediation reflects (and perhaps reinforces) a growing emphasis on settlement of commercial disputes. Among possible action steps are the following:

- Equip arbitrators to leverage the growing likelihood that cases will be settled prior to hearings by providing case management with an eye to helping facilitate settlement.
- Arbitrators with appropriate orientation and skills may develop mediation practices.

We will briefly discuss each in turn.

a. Equip arbitrators to leverage the growing likelihood that cases will be settled prior to hearings by providing case management with an eye to helping facilitate settlement.

Arbitrators may leverage the growing likelihood that cases will be settled prior to hearings by providing case management with an eye to helping facilitate settlement.

In the U.S., arbitrators have in various ways been discouraged from overtly encouraging settlement.[233] But as arbitration processes have come to resemble litigation with its extensive emphasis on prehearing process and arbitrators have become more actively involved in case management, it is only natural that

advocates and arbitrators reflect on the role arbitrators might play in creating an environment for settlement. Today, cases in the arbitration process very often settle at the prehearing stage, usually at one of the key decision points when counsel must open the file and make choices regarding disposition of the case.[234] These tendencies were dramatically reinforced by the growth of mediation as an alternative, first in the context of court proceedings[235] and more recently through the mechanism of contractual dispute resolution provisions, including multi-step provisions.[236]

Experienced arbitrators know that in certain circumstances the very act of engaging the parties in preliminary discussions at or immediately prior to the prehearing conference may promote settlement.[237] The setting of a timetable for hearing and award, the establishment of boundaries for discovery and the enforcement of discovery orders, and rulings on dispositive motions are all potential triggers for settlement discussions between the parties.[238] In some cases, moreover, the timetable for arbitration specifically anticipates and makes provision for the opportunity to negotiate (often with the assistance of a mediator).[239]

Although the data in Table 21 above suggests that many leading arbitrators do not reflect much on their potential role in setting the stage for settlement of disputes, Table 22 indicates the potential impact of arbitral management of hearings, including rulings on dispositive motions and discovery issues, on the settlement of cases.

International commercial arbitration and dispute resolution. CEDR, the well-known the London-based mediation and mediation training organization, sponsored a commission whose goal was to establish a broad-based international consensus on the role of international arbitrators in facilitating settlement. The resulting CEDR Rules for Facilitation of Settlement in International Arbitration were published in 2009.[240] The CEDR Rules represent a stark contrast to predominating U.S. attitudes toward "multi-modal" activity by arbitrators in regards to settlement. In the absence of a contrary written agreement, the CEDR Rules contemplate that arbitrators may take any of the following measures for the purpose of facilitating settlement:

> 1.1. provide all [p]arties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each [p]arty in order to prevail on those issues;
>
> 1.2. provide all [p]arties with preliminary non-binding findings on law or fact on key issues in the arbitration;
>
> 1.3. where requested by the [p]arties in writing, offer suggested terms of settlement as a basis for further negotiation;
>
> 1.4 where requested by the [p]arties in writing, chair one or more settlement meetings attended by representatives of the [p]arties at which possible terms of settlement may be negotiated.[241]

The Rules also require arbitrators to "insert a [m]ediation [w]indow in the arbitral proceedings when requested to do so by all [p]arties in order to enable settlement discussions," and, moreover, to "adjourn the arbitral proceedings for a specified period so as to enable mediation to take place" in

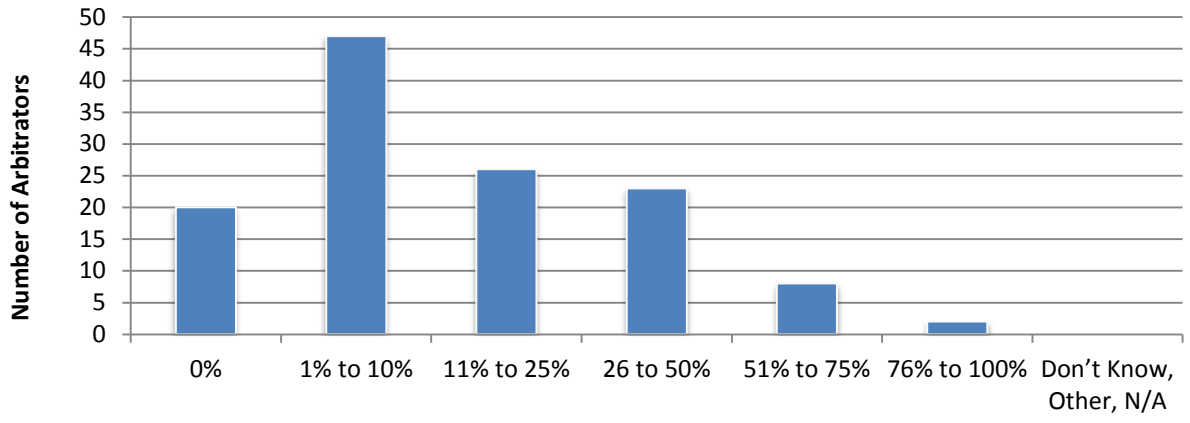
certain circumstances.[242] The only significant limitation imposed by the CEDR Rules on arbitrators facilitating settlement is a prohibition on the use of caucuses and the sharing of information *ex parte*.[243]

Of course, attitudes toward arbitrators acting as mediators are heavily colored by culture and legal system, and U.S. attorneys remain generally uncomfortable with arbitrators doubling as mediators in a particular matter.[244]

b. Arbitrators with appropriate orientation and skills may develop mediation practices.

Today it is not uncommon for neutrals to render services as arbitrators and also to mediate cases. Table 23 indicates that although twenty percent of arbitrators responding to the CCA /Straus Survey do no mediation, about seventy percent mediate at least occasionally (with the percentage of the work time devoted to mediation ranging between 1% and 25%). Around ten percent of respondents appear to depend mainly on mediation work.

Table 23.
Percentage of Work Time Dedicated to Mediation Practice



Clearly, not all arbitrators want to be mediators and some are not particularly well suited to the role (just as some skilled mediators are unable to function effectively as arbitrators). For a good number of arbitrators, however, mediation may be an important compliment to their arbitration work. In those cases where they are unable to fully resolve disputes, mediators with arbitration experience should be particularly adept at helping to facilitate agreement on the details of an arbitration process tailored to the needs of the dispute(s).

2. Addressing the Emphasis on Early Assessment Approaches

a. Prepare arbitrators to employ their skills in early neutral evaluation or early case assessment for a single party or both parties.

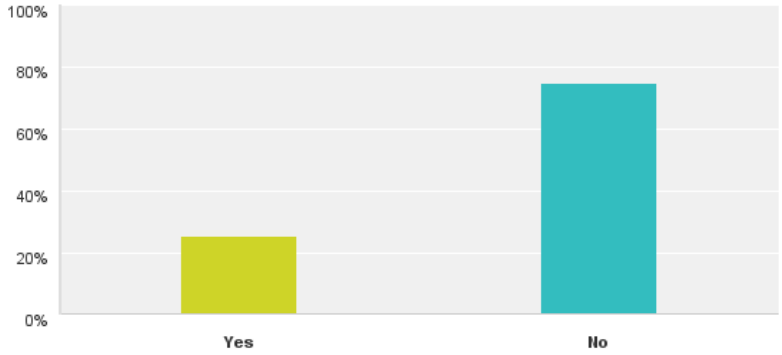
The Cornell – Pepperdine / Straus – CPR Survey of Fortune 1,000 Corporate Counsel revealed that many companies are employing forms of early neutral evaluation (ENE) and/or early case assessment (ECA).[245] Because the adjudicative skills of arbitrators may be brought to bear in these settings, ENE and ECA are likely to provide new areas of opportunity for experienced arbitrators.

As shown in Table 24, about one-quarter of the respondents to the CCA / Straus Survey have experience as arbitrators offering nonbinding or advisory opinions. The data in Table 25 reveal that an even larger number of respondents have offered decisions or recommendations in early neutral evaluations or early case assessments.

Table 24.
Nonbinding or Advisory Arbitration

Q11 9. Have you rendered an arbitration award that the parties had previously agreed would be non-binding or advisory?

Answered: 131 Skipped: 3

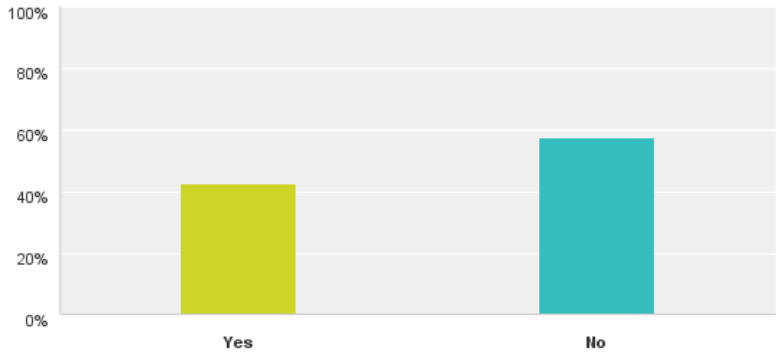


Yes	25.19% 33
No	74.81% 98
Total	131

Table 25.
Early Neutral Evaluation, Early Case Assessment

Q12 10. Have you participated as an "early neutral evaluator" of a case, or made a formal assessment or evaluation of the likely outcome of a case, as part of an early case assessment?

Answered: 131 Skipped: 3



Yes	42.75% 56
No	57.25% 75
Total	131

3. Addressing the Rapidly Growing Number of Arbitrators, "Professional Neutrals"

A generation ago there was no profession of commercial arbitrators or mediators. The situation has dramatically changed, and the number of individuals trying or expecting to make neutral practice a second—or first—career appears to be increasing.

As revealed in Table 7 above, nearly sixty percent of respondents to the CCA / Straus Survey asserted that they had less arbitration work than they would like. If this is the state of practice for a group of the leading commercial arbitrators in the U.S., then the present supply of arbitrators must greatly exceed present demand.

a. Provide better information on neutrals of all kinds, direct to user; promote transparency.

If better, more complete information about the capabilities and skills of arbitrators is made broadly available to potential users, one presumes that those whose skills have been honed by experience will be advantaged. As discussed in III.A.3. above, there should be active discussion about ways of providing much better information about arbitrators, including some form of evaluations from users, including information about substantive and process skills, including (potentially) the individual's skills in managing discovery, motion practice, and hearings; their availability for hearings; and their adherence to pertinent legal standards or other standards.

b. Diversify practice.

As discussed in III. C.1. and C.2, there will also be opportunities for some arbitrators to branch out into other forms of intervention, including mediation and early neutral evaluation or early case assessment.

Many U.S. arbitrators are also engaged in or attempting to develop practices as international arbitrators, as revealed by responses to the CCA / Straus Survey. A comparison of Table 26 and 27 shows that in the last five years, a slightly greater number of respondents had international arbitration experience than in earlier years. Interestingly, the number of individuals with an occasional or incidental international arbitration practice (that is, between 1 and 10 percent of their practice) remained about the same—around 45%. However, an even greater number of individuals appear to have noticeably increased the relative size of the international caseload. Table 27 suggests that more than thirty percent of respondents now have caseloads which consistent mainly of international cases.

Table 26.
International Cases Arbitrated as Percent of Practice (Prior to 5 Years Ago)

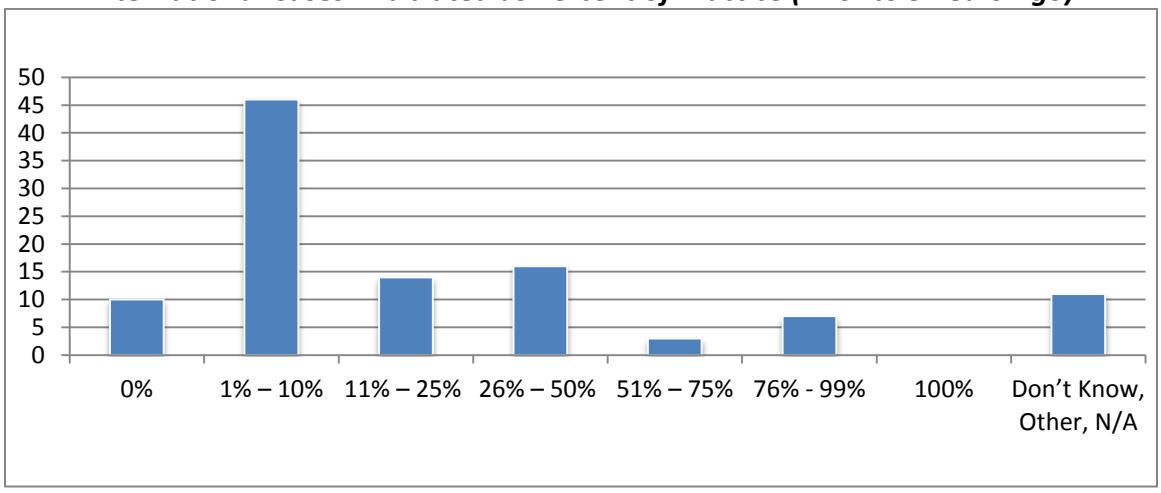
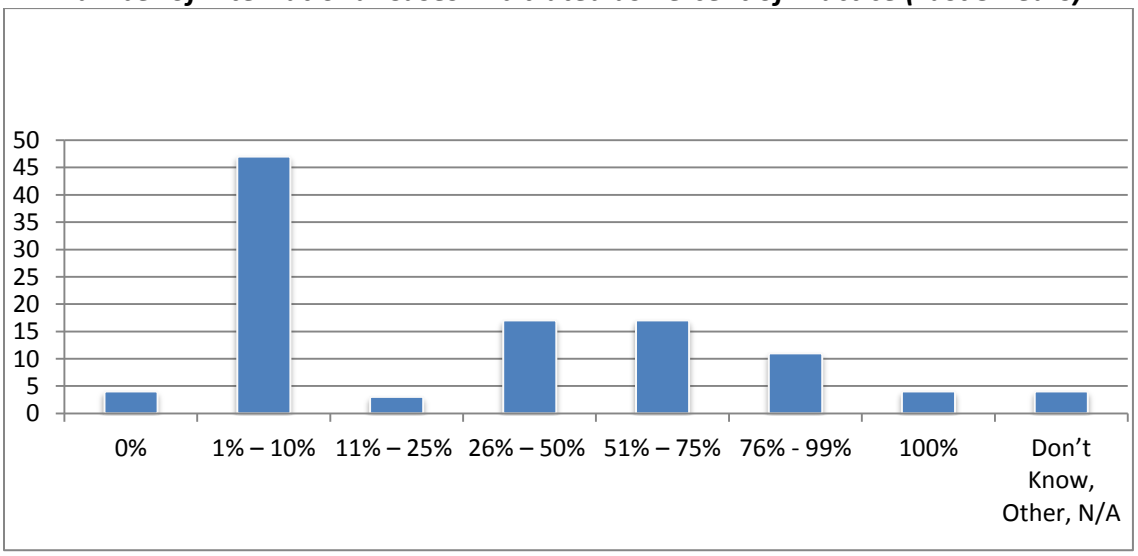


Table 27.
Number of International Cases Arbitrated as Percent of Practice (Last 5 Years)



Appendix A

A Proposal for a College of Commercial Arbitrators Arbitrator Commitment ("Arbitrator Pledge")

Draft Proposal
[With contributions by:
Thomas J. Stipanowich, Deborah Rothman and Curt von Kann]

In the absence of a clear agreement to the contrary between the parties, I commit:

…not to accept an appointment as arbitrator unless I am certain I have sufficient time to do an effective job of managing the arbitration process and to render a timely award.

…to work with counsel as early as possible to create an effective and binding framework and timetable for the arbitration process as well as to address any dysfunctional aspects of the agreement to arbitrate

…to conduct thorough preliminary conferences as frequently as the case merits, to issue detailed case management orders, and to enforce agreements reached and orders made concerning the scheduling and conduct of the proceeding;

…where the case is large enough to warrant it, to strongly encourage senior representatives of each party to attend and participate in in-person preliminary conferences, particularly the first one;

…to actively manage the arbitration process in order to promote expeditious and cost-effective resolution of disputes;

…to actively manage and streamline discovery (consistent with the size and complexity of the case) by

- **requiring counsel to confer prior to serving discovery in order to narrow the scope of discovery to documents or categories of documents for which there is a specific, demonstrable need; to consider voluntary exchange of basic discovery; and to identify the universe of relevant documents and their custodians;**
- **making myself available on short notice to informally manage and resolve discovery disputes through conference calls without the need for formal motions,**

with the understanding that I will be prepared to rule on short notice on discovery disputes where matters cannot be resolved informally;

- **[limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;**
- **strongly discouraging requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;**
- **strongly discouraging form interrogatories and limiting the number of interrogatories;**
- **limiting the number and/or length of depositions;**
- **considering, when awarding fees and costs, where permitted by statute, agreement, or rule, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, particularly those that cause delays to the proceeding or additional costs to other parties.**

…to entertain and rule on motions for early disposition of issues where the realistic likelihood of streamlining the arbitration is not outweighed by the cost and delay associated with addressing a dispositive motion;

…to conduct fair, expeditious hearings and to schedule consecutive hearing days whenever possible;

…to be readily available to counsel when my assistance is needed to keep the case on track;

…to insist on professionalism and cooperation among all arbitration participants, and to exhibit the same behavior myself;

… to do my best to render awards that are consistent with the evidence and applicable legal standards that are brought to my attention by the parties, and not to substitute my own notions of fairness and equity unless specifically requested to do so by the parties or their legal representatives,

…to comply with the canons of the *Code of Ethics for Arbitrators in Commercial Disputes* (as approved by the American Bar Association House of Delegates, 2004) [to be linked or attached as an appendix]

[The contributors also discussed the possibility of a commentary to the Commitment.]

Endnotes

[1] Email of Tyrone Holt to author, May 10, 2013.
[2] FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4 (2009), *available at* http://www.actl.com/Content/NavigationMenu/Publications/AllPublications/default.htm.
[3] "ADR: Streamlining the Arbitration Process—New Health Care Payor-Provider Arbitration Rules," ABA Section on Dispute Resolution Annual Meeting, Chicago, IL, Apr. 5, 2013.
[4] Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* __, __ HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2221471.
[5] NIGEL BLACKABY, ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31-34 (5th ed. 2009).
[6] *Id*. at 8.
[7] Queen Mary University of London & PwC, International Arbitration: Corporate attitudes and trends 2008 5 (44% of respondents said they used international arbitration to resolve international disputes more than litigation, mediation or other ADR mechanisms).
[8] *Id.* at 5 (86% of respondents in 2008 study said they are satisfied with international arbitration).
[9] E-mail from Ryan Boyle, Vice President – Statistics and In-House Research, American Arbitration Association, to Tiffani Willis, Aug. 27, 2013.
[10] Email from Ryan Boyle, Vice President - Statistics and In-House Research, American Arbitration Association, to author (Sept. 6, 2013).
[11] *See* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Aug. 28, 2013).
[12] *See* LCIA Registrar's Report (2012), available at http://www.lcia.org/LCIA/Casework_Report.aspx (last visited Aug. 29, 2013).
[13] *Arbitration Scorecard 2013*, THE AM. LAW., (Jun. 24, 2013), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202608198051&Arbitration_Scorecard_2013&slreturn=20130811112317
[14] Elizabeth Olson, *New York Times DealBook: Growth in Global Disputes Drives Spike in Law Firm Overseas Offices, Law School Arbitration Enrollments*, N.Y. TIMES, Aug. 29, 2013.
[15]
[16] Remarks of Mary Fuller, Associate General Counsel, Maxim Integrated Products, "Trends in Corporate Use of ADR," 2013 Business Law Section Annual Meeting, San Francisco, CA, Aug. 10, 2013.
[17] *Id*., Remarks of Karen Petrulakis, Chief Deputy General Counsel and Deputy General Counsel, Litigation, University of California Office of the President.
[18] Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* __, __ HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2221471.
[19] *Id*. at ____ .
[20] *See* Fulbright & Jaworski L.L.P., Fulbright's 7th Annual Litigation Trends Survey Report 19 (2010).
[21] Although a request was made by the author to JAMS to provide data for this report, no response has yet been forthcoming.
[22] Email from Ryan Boyle, Vice President - Statistics and In-House Research, American Arbitration Association, to author (Sept. 5, 2013).
[23] For a discussion of the recent evolution of dispute resolution provisions in standard construction contracts, see Thomas J. Stipanowich, *Arbitration: The "New Litigation," "*, 2010 U. ILL. L. REV. 1, ___ (2010).
[24] Email from Ryan Boyle, Vice President - Statistics and In-House Research, American Arbitration Association, to author (Sept. 6, 2013).

[25] COLLEGE OF COMMERCIAL ARBITRATORS / STRAUS INSTITUTE FOR DISPUTE RESOLUTION SURVEY ON ARBITRATION PRACTICE (on file with author).

[26]

[27]

[28] Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* __, __ HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2221471.

[29] Some of the differences between the two data sets are probably a result of the fact that the 1997 survey did not distinguish between commercial arbitration and employment or consumer arbitration; the 2011 did so.

[30] Gregory P. Joseph, *We Need to Do Something about Arbitration*, 39 LITIGATION 1 (No. 3, Summer 2013).

[31] Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) ("It has long been considered axiomatic in arbitration that parties who agree to submit their disputes to arbitrators engage in a sort of quid pro quo: in exchange for reduced costs and speedier resolution, parties agree to limit their right to appeal. Consistent with this philosophy, judicial review of arbitration awards has been extremely limited.").

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