Kluwer Arbitration Blog

A Recent Survey of Experienced U.S. Arbitrators Highlights Areas for Further International Study and Discussion

Thomas J. Stipanowich (Pepperdine University School of Law) · Friday, February 6th, 2015 · Institute for Transnational Arbitration (ITA), Academic Council

In 2013, an extensive survey of experienced commercial arbitrators in the U.S. was conducted by the Straus Institute for Dispute Resolution with the cooperation of the College of Commercial Arbitrators (CCA), an organization of more than two hundred of the most experienced arbitrators in the U.S. The Survey provides considerable new data on arbitrators' experiences, practices and perspectives.

Of course, canvasses of personal attitudes and experiences must be regarded with appropriate circumspection. Respondents may exaggerate levels of experience and skew answers to embrace norms perceived as "correct." Lack of time or multi-tasking may undercut the accuracy or thoughtfulness of their responses. What arbitrators assert they are doing may be perceived very differently by parties and legal advocates. Moreover, we cannot conclusively state that the data from this Survey reflect the backgrounds, experiences, behaviors and views of arbitrators generally, or even the broad run of arbitrators in the U.S. Nevertheless, the Survey may be the most extensive study of arbitrators yet undertaken, and the resulting data are likely to provide helpful clues in discerning the evolving practices and perspectives of commercial arbitrators. Some insights should prove beneficial in effectively responding to commonly voiced concerns about arbitration and arbitrators in the U.S. and, perhaps, internationally. Some responses underline the need for further inquiry and discussion.

1. The old boys' club. Over 84% of respondents to the CCA/Straus Institute Survey were men, reflecting the makeup of the CCA and reinforcing other studies that show the ranks of prominent and experienced arbitrators in the U.S. and internationally are dominated by older men. The relatively small number of women in the ranks of perceived "elite" U.S. arbitrators may be explained in large part by traditional barriers to the admission of women to the legal profession. There are, however, indications that women are increasingly establishing successful careers as arbitrators and dispute resolution professionals alongside their male colleagues.

2. Lawyer hegemony. Survey respondents were nearly all lawyers, mainly veterans of litigation – a reality that undoubtedly reflects (and may reinforce) the "legalized" or "judicialized" nature of mainstream commercial arbitration. Survey responses indicate that the use of multidisciplinary tribunals has waned in recent years. It is understandable that business parties usually want attorneys on their commercial arbitration tribunal, but it is appropriate to consider what is given up by eschewing a panel with individuals of complementary backgrounds. While attorneys have the

edge when it comes to applying principles of law, for example, they may be lacking when it comes to evaluating certain kinds of factual or technical issues in, for example, engineering and construction cases. A conversation about the roles of non-lawyer arbitrators and multidisciplinary panels is long overdue.

3. The growing "professional crunch." Almost sixty percent of Survey respondents had less arbitration work than they would like. Many retiring lawyers envision appointments as an arbitrator and dispute resolution professional as a way of making money and deriving other benefits during active retirement, putting them in competition with full-time practitioners. Both groups were represented in the Survey, and a majority of both groups was somewhat short of business. Such results must give us pause. If many of the most experienced and prominent arbitrators in the U.S. feel they do not have sufficient arbitration work, what does this say about the field as a whole? Other Survey data suggest growth areas for at least some qualified arbitrators. For example, international cases are becoming a greater portion of the caseload of experienced U.S. arbitrators, and most respondents expected this trend to continue. In addition, experienced arbitrators are branching out to embrace other roles in the resolution of disputes, serving as non-binding / advisory arbitrators, early neutral evaluators, and participants in early case assessment. Many also act as mediators.

4. Variants of arbitrator practice. The Survey indicates that many experienced commercial arbitrators have extensive experience with tripartite arbitration, streamlined or fast-track processes, ad hoc arbitration, and arbitration under non-administered rules, and some have arbitrated under final-offer, appellate, and emergency procedures. Some of these activities, such as the experience of many arbitrators as the sole decision-maker in cases involving high stakes, have important implications for parties concerned with the relative cost, length and efficiency of arbitration.

5. Pre-hearing process management. One of the most important developments in commercial arbitration is the increased emphasis on pre-hearing process, particularly information exchange (or, in U.S. parlance, discovery) and motion practice. This enhanced focus on the pre-hearing stage has presented new challenges for arbitrators as process managers; hence, the Survey placed considerable emphasis on subjects' process management efforts. Nearly all respondents indicated they "worked with parties to tailor arbitration procedure to better suit the needs of the parties and the nature of the dispute." Large majorities usually or always "encourage parties to place limits on the scope of discovery" and work with counsel to limit or streamline discovery. The Survey data also suggest that most experienced arbitrators are making efforts to effectively manage motion practice and to come to grips with opportunities to resolve all or part of the case in a summary fashion, early on. Many arbitrators also appear to be taking steps to avoid abuse in the filing of motions by requiring moving parties to show there will be a net savings in arbitration time, cost, or both.

6. Arbitrators and settlement. Early settlement of a dispute can be a uniquely effective way of minimizing cost and cycle time in dispute resolution, but the role of arbitrators in setting the stage for or facilitating settlement has not been given significant attention in places like the U.S. Survey responses indicate that settlement during the course of arbitration, prior to award, is becoming increasingly prevalent, yet respondents offered widely varying estimates of the frequency of settlement of their cases, and expressed contrasting views of the scope of their role, if any, in the settlement of disputes. While some perceived a connection between their pre-hearing management activities and settlement, and a few have even switched roles (from arbitrator to mediator, or vice versa) in a particular case, many do not view settlement as having anything to do with their arbitral

role.

7. Arbitrators and the law. The Survey data indicate that where legal issues are in play, experienced arbitrators tend to be conscientious in paying heed to them and addressing them in a manner consistent with applicable law. All respondents claimed, usually or always, to "carefully read and reflect upon legal arguments and briefs presented by counsel." Nearly all asserted that, in the absence of an agreement to the contrary, they "do [their] best to ascertain and follow applicable law in rendering an award." On the other hand, more than a quarter of respondents "feel free to follow [their] own sense of equity and fairness in rendering an award even if the result would be contrary to applicable law," at least some of the time. Moreover, nearly nine-tenths of respondents acknowledged that, at least sometimes, they "negotiate with other members of a tribunal respecting the quantum of damages to be awarded." In order to understand the precise import of these responses and their implications for users, further investigation and discussion is appropriate.

8. Party-appointees on tripartite panels. Although most experienced arbitrators believe tripartite panels – in which wing arbitrators are appointed unilaterally by a party – generally work well. However, group responses to some other queries tend to reinforce some of the concerns that have been expressed regarding wing arbitrators appointed unilaterally by individual parties on tripartite panels. Almost nine-tenths of Survey respondents believed that at least sometimes, party-appointees "are predisposed toward the party that appointed them even when the applicable procedures require them to be independent and impartial." A similar number perceived that party-appointees at least sometimes decide close questions in favor of the party that appointed them even when the applicable procedures require them to be independent and impartial. These data offer ample bases for a thoroughgoing re-examination of the dynamics of tripartite panels and party-appointed arbitrators.

Although we may still perceive the realities of commercial arbitration "as through a glass, darkly," the CCA/Straus Institute Survey is an important step toward lifting the veil and illuminating this continuously evolving sphere of activity.

Those interested in reading more about the Survey and accompanying analysis may access the following articles:

Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals, __ COLUMBIA AMERICAN JOURNAL ON INTERNATIONAL ARBITRATION __ (forthcoming 2015)

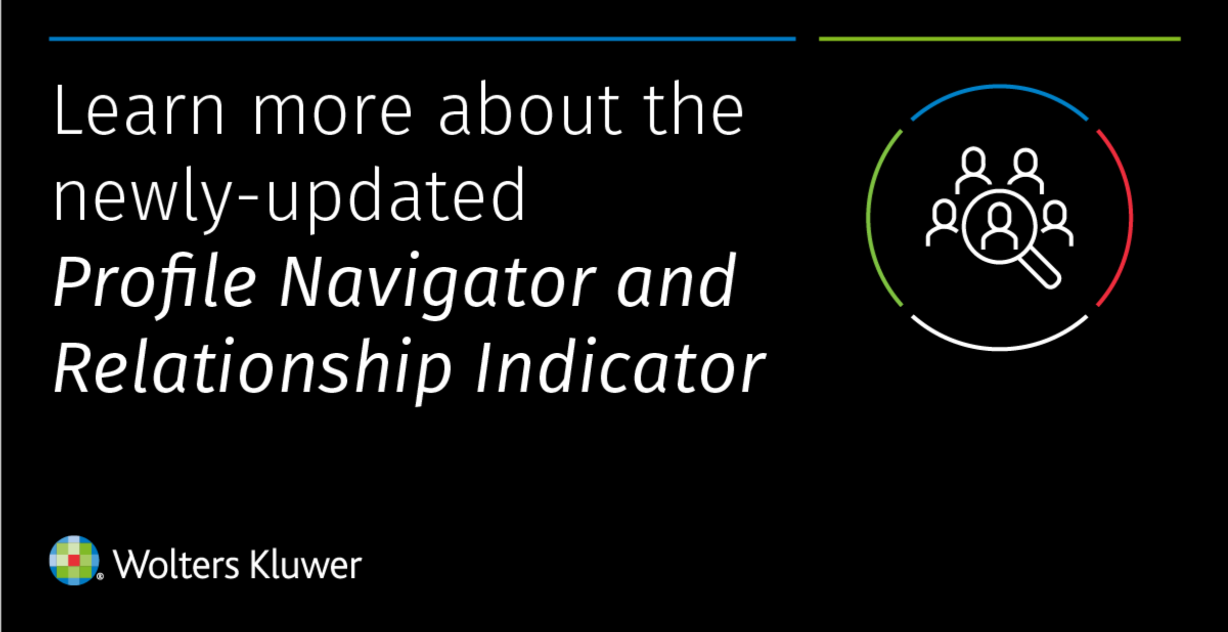
Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play, 6 YEARBOOK ON ARBITRATION AND MEDIATION 1 (with Zachary P. Ulrich) (2014)

A general summary of the Survey data is provided in Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators (with Zachary P. Ulrich), __ COLUMBIA AMERICAN J. ON INT'L ARB. __ (forthcoming 2015)

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



This entry was posted on Friday, February 6th, 2015 at 6:30 am and is filed under Arbitration, Arbitrators, Surveys
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.