

**American Bar Association  
Forum on Construction Law**

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**2015 Construction Arbitration Survey**  
**Inside the “Black Box”:  
The Preferences, Practices, and  
Rule Interpretations of Construction Arbitrators**

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Have you ever been asked by a client, “what’s arbitration like?” Of course you have, along with similar questions like, “what process should we expect, how do arbitrators interpret their Rules, how do they make their decisions?” If you were in litigation, you could refer to multi-volume procedural treatises and the Federal Rules Decisions and provide an answer based on reliable written precedent. But if you’re in arbitration, comparable resources are not available to you. Arbitrator rulings and awards are confidential and cannot be accessed by third parties. Instead, if you want to know what to expect, you have to rely on your own hard earned, but limited experience in arbitration or the anecdotes you might hear from other individual advocates or arbitrators. Otherwise, the process is something of an unknown “black box”.

To open that black box, the authors developed a survey to ask those who had actually served as a construction arbitrator how they act in regard to a variety of questions, issues, and situations. The results reported here should help advocates and their clients make more informed decisions about whether arbitration is an attractive option, whether it is delivering on its promise, what Rule revisions might be made to improve what actually is happening, and how to draft arbitration agreements to get the process you want.

To get a broad response, the survey was sent by email to Forum members, JAMS, the College of Commercial Arbitrators, the Mediate-Arbitrate listserv, and the American College of Construction Lawyers; all who had served as an arbitrator in a construction dispute were invited to reply. Given that most email is deleted as spam before reading, we were please to receive responses from around the country from 217 construction arbitrators. Their level of experience was extraordinary as they collectively reported to have participated as arbitrators in between 8,498 to 13,094+ construction arbitrations. The level of experience reflected in the responses should provide a useful resource to which both parties and their advocates can refer.

The first part of the survey inquired about the respondents' general background and experience. As most of the organizations from which responses were solicited were either groups of attorneys or largely populated by them, it is not surprising that over 88.5% of the respondents were attorneys. The following responses reflect more on their background.

**1. What is your primary professional background?**

Attorney-Litigation:	77.6%
Attorney-Transactional:	8.9%
Retired Judge:	2.3%
Owner/Developer:	0.5%
Contractor/Subcontractor:	2.8%
Design Professional:	2.3%
Other:	5.6%

**2. Approximately how many times have you served as an arbitrator in a construction case during your career?**

1-5:	8.0%
6-10:	11.7%
11-25:	22.5%
26-50:	20.2%
51-100:	19.2%
101-150:	9.4%
151+:	8.9%

Basic prehearing issues were also explored in Questions Nos. 3, 4, and 9, such as the type of arbitration Demand preferred, the factors influencing how arbitrators decide the locale of the arbitration, and what cost savings procedures arbitrators discuss with counsel at any opening administrative conference .

**3. What type of arbitration demand do you prefer?**

<b>A short statement of the claim and relief sought.</b>	<b>Court-styled notice pleadings.</b>	<b>Detailed fact-based pleadings with exhibits.</b>
<b>141</b> 66.50%	<b>25</b> 11.80%	<b>46</b> 21.70%

**4. In resolving disputes regarding locale, how often do you select a locale that is:**

	Always	Usually	Half the Time	Seldom	Never
a. Different from that specified in the contract?	<b>0</b> 0.00%	<b>2</b> .90%	<b>5</b> 2.40%	<b>122</b> 61.10%	<b>72</b> 35.50%
b. Different from the city closest to the project if no locale specified in the contract?	<b>0</b> 0.00%	<b>16</b> 7.70%	<b>53</b> 25.60%	<b>107</b> 51.70%	<b>31</b> 15.00%
c. Different from that suggested by the organization, if any, administering the arbitration?	<b>1</b> 0.50%	<b>6</b> 2.90%	<b>18</b> 8.70%	<b>123</b> 59.40%	<b>59</b> 28.50%
d. Different from a statute requiring the locale to be in the state in which the project was built?	<b>0</b> 0.00%	<b>2</b> 1.00%	<b>4</b> 1.90%	<b>36</b> 17.40%	<b>165</b> 79.70%

**9. Please identify how often you may suggest or discuss with counsel or parties the use of any of the following procedures to reduce costs or increase efficiency of arbitration hearings, or list others if applicable:**

	Always	Usually	Half the Time	Seldom	Never
a. Chess clock division of hearing time between parties?	<b>13</b> 6.10%	<b>30</b> 14.20%	<b>35</b> 16.50%	<b>73</b> 34.40%	<b>61</b> 28.80%
b. Joint calling of witnesses?	<b>10</b> 4.70%	<b>38</b> 17.90%	<b>25</b> 11.80%	<b>100</b> 47.20%	<b>39</b> 18.40%
c. Joint calling (“hot tubbing”) of experts?	<b>12</b> 5.70%	<b>27</b> 12.90%	<b>35</b> 16.70%	<b>92</b> 43.80%	<b>44</b> 21.00%
d. Receipt of detailed summaries of witnesses testimony and exhibits subject to cross-examination?	<b>14</b> 6.70%	<b>32</b> 15.20%	<b>44</b> 21.00%	<b>86</b> 41.00%	<b>34</b> 16.20%
e. Submission of stipulated, undisputed facts?	<b>54</b> 25.70%	<b>65</b> 31.00%	<b>31</b> 14.80%	<b>49</b> 23.30%	<b>11</b> 5.20%
f. Submission of joint exhibits?	<b>107</b> 50.70%	<b>72</b> 34.10%	<b>19</b> 9.00%	<b>10</b> 4.70%	<b>3</b> 1.40%

	Always	Usually	Half the Time	Seldom	Never
g. Presentation of all exhibits via specified presentation software in electronic format (as opposed to hard copy)?	<b>26</b> 12.90%	<b>43</b> 21.30%	<b>37</b> 18.30%	<b>64</b> 31.70%	<b>32</b> 15.80%

A frequent concern in selecting arbitrators is whether it is useful to have each party appoint one arbitrator and then have the appointed two select a third. Of course, the concern is the neutrality and competence of the party appointed arbitrators, so question No. 5 directly sought the opinion of arbitrators about their fellow party-appointed arbitrators.

**5. When you are serving as the third neutral arbitrator chosen by party-appointed arbitrators, do you find party-appointed arbitrators are:**

	Always	Usually	Half the Time	Seldom	Never
a. Neutral in their behavior and decisions?	<b>17</b> 9.10%	<b>82</b> 43.90%	<b>51</b> 27.30%	<b>36</b> 19.30%	<b>1</b> 0.50%
b. As substantively experienced as arbitrators obtained from ADR organizations?	<b>18</b> 9.60%	<b>99</b> 52.70%	<b>44</b> 23.40%	<b>26</b> 13.80%	<b>1</b> 0.50%
c. As procedurally experienced as arbitrators obtained from ADR organizations?	<b>11</b> 5.90%	<b>78</b> 41.50%	<b>62</b> 33.00%	<b>35</b> 18.60%	<b>2</b> 1.10%

We are frequently reminded that arbitration is a “creature of contract” and that the agreement to arbitrate can be modified to get the type of arbitration you want. Question No. 7 was designed to determine how many times arbitrators are asked to administer arbitrations pursuant to agreements specially tailored by the parties or their counsel or whether most parties simply rely on standard “boilerplate” arbitration agreements.

**7. How often are you asked to conduct arbitrations:**

	Always	Usually	Half the Time	Seldom	Never
a. Pursuant to unmodified rules of ADR organizations?	<b>9</b> 4.20%	<b>138</b> 64.80%	<b>39</b> 18.30%	<b>21</b> 9.90%	<b>6</b> 2.80%
b. Pursuant to rules of ADR organizations that are modified by the parties' arbitration agreement?	<b>3</b> 1.40%	<b>28</b> 13.30%	<b>41</b> 19.40%	<b>129</b> 61.10%	<b>10</b> 4.70%
c. Pursuant only to statutory (e.g. FAA or RUAA) requirements?	<b>3</b> 1.40%	<b>9</b> 4.30%	<b>11</b> 5.30%	<b>122</b> 58.40%	<b>64</b> 30.60%

The amount of discovery that should or should not be allowed in arbitration has been an ongoing debate for decades. Several survey questions (Nos. 8 and 10 through 13) focused on what types of discovery arbitrators are prone to grant in regular or large and complex cases. The types of ESI discovery that arbitrators typically order to be exchanged was also explored in the questions below.

**8. In cases that are not considered large or complex, how often do you order:**

	Always	Usually	Half the Time	Seldom	Never
a. A date by which a very detailed statement of claims, counterclaims and defenses should be exchanged?	<b>79</b> 37.30%	<b>85</b> 40.10%	<b>21</b> 9.90%	<b>23</b> 10.80%	<b>4</b> 1.90%
b. A date by which a detailed calculation of damages for claims and counterclaims should be exchanged?	<b>78</b> 36.80%	<b>82</b> 38.70%	<b>28</b> 13.20%	<b>23</b> 10.80%	<b>1</b> 0.50%

**10. In regard to the scope of document exchange, how often do you order:**

	Always	Usually	Half the Time	Seldom	Never
a. Entire project file, including all project related paper hard copies and all project related Electronically Stored Information (ESI)?	<b>9</b> 4.30%	<b>51</b> 24.40%	<b>38</b> 18.20%	<b>63</b> 30.10%	<b>48</b> 23.00%
b. Targeted/limited scope production as determined by arbitrator of project files and/or related ESI communications [based on manual or technology assisted review].	<b>5</b> 2.40%	<b>74</b> 35.90%	<b>48</b> 23.30%	<b>57</b> 27.70%	<b>22</b> 10.70%
c. Only documents on which parties intend to rely?	<b>10</b> 4.90%	<b>28</b> 13.70%	<b>26</b> 12.70%	<b>79</b> 38.50%	<b>62</b> 30.30%
d. Only documents that are considered "relevant and material to the outcome" as opposed to reasonably calculated to lead to the discovery of admissible evidence?	<b>12</b> 5.70%	<b>50</b> 23.90%	<b>29</b> 13.90%	<b>74</b> 35.40%	<b>44</b> 21.10%
e. Documents that are reasonably calculated to lead to the discovery of admissible evidence?	<b>20</b> 9.70%	<b>77</b> 37.40%	<b>30</b> 14.60%	<b>52</b> 25.20%	<b>27</b> 13.10%
f. Disclosures consistent with FRCP Rule 26?	<b>8</b> 4.00%	<b>53</b> 26.20%	<b>26</b> 12.90%	<b>57</b> 28.20%	<b>58</b> 28.70%

**11. If the parties cannot agree on the type of ESI to be exchanged, how often do you require exchange of:**

	Always	Usually	Half the Time	Seldom	Never
a. Documents in Paper format only (no ESI)?	<b>2</b> 1.00%	<b>27</b> 13.60%	<b>28</b> 14.10%	<b>89</b> 44.70%	<b>53</b> 26.60%
b. ESI documents in Native format?	<b>9</b> 4.60%	<b>61</b> 31.40%	<b>50</b> 25.80%	<b>56</b> 28.90%	<b>18</b> 9.30%

	Always	Usually	Half the Time	Seldom	Never
c. ESI documents in Non-Native format, e.g. PDF or TIFF?	<b>4</b> 2.10%	<b>42</b> 21.50%	<b>51</b> 26.20%	<b>72</b> 36.90%	<b>26</b> 13.30%
d. ESI documents with OCR/Extracted Text and/or Metadata?	<b>1</b> 0.50%	<b>24</b> 12.40%	<b>27</b> 14.00%	<b>83</b> 43.00%	<b>58</b> 30.10%

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

	Always	Usually	Half the Time	Seldom	Never
a. Allow limited interrogatories?	<b>9</b> 4.30%	<b>33</b> 15.60%	<b>20</b> 9.50%	<b>94</b> 44.50%	<b>55</b> 26.10%
b. Allow limited requests for admissions?	<b>9</b> 4.30%	<b>24</b> 11.40%	<b>15</b> 7.10%	<b>96</b> 45.50%	<b>67</b> 31.80%
c. Allow limited depositions of parties?	<b>15</b> 7.10%	<b>96</b> 45.30%	<b>34</b> 16.00%	<b>58</b> 27.40%	<b>9</b> 4.20%
d. Allow limited depositions of third-party witnesses if requested and the other party does not object?	<b>23</b> 11.00%	<b>102</b> 48.60%	<b>34</b> 16.20%	<b>40</b> 19.00%	<b>11</b> 5.20%
e. Allow limited depositions of experts?	<b>32</b> 15.10%	<b>91</b> 42.90%	<b>34</b> 16.00%	<b>43</b> 20.30%	<b>12</b> 5.70%
f. Allow limited pre-hearing subpoenas?	<b>28</b> 13.30%	<b>83</b> 42.20%	<b>40</b> 19.90%	<b>40</b> 19.90%	<b>10</b> 4.70%

**13. For discovery in "large or complex" arbitrations, how often do you:**

	Always	Usually	Half the Time	Seldom	Never
a. Allow limited interrogatories?	<b>22</b> 10.40%	<b>55</b> 26.10%	<b>22</b> 10.40%	<b>65</b> 30.80%	<b>47</b> 22.30%
b. Allow limited requests for admissions?	<b>19</b> 9.00%	<b>40</b> 19.00%	<b>25</b> 11.90%	<b>71</b> 33.80%	<b>55</b> 26.20%
c. Allow limited depositions of parties?	<b>59</b> 28.10%	<b>99</b> 47.10%	<b>28</b> 13.30%	<b>23</b> 11.00%	<b>1</b> 0.50%



	Always	Usually	Half the Time	Seldom	Never
d. Allow limited depositions of third-party witnesses if requested and the other party does not object?	<b>62</b> 29.50%	<b>100</b> 47.60%	<b>22</b> 10.50%	<b>21</b> 10.00%	<b>5</b> 2.40%
e. Allow limited depositions of experts?	<b>73</b> 34.60%	<b>86</b> 40.80%	<b>23</b> 10.90%	<b>24</b> 11.40%	<b>5</b> 2.40%
f. Allow limited pre-hearing subpoenas?	<b>57</b> 27.00%	<b>101</b> 47.90%	<b>23</b> 10.90%	<b>20</b> 9.50%	<b>10</b> 4.70%

Complaints have been made that lawyers have “hijacked” arbitration and imported costly litigation procedures into the process such as summary judgment motions that are of no value and are rarely granted. Questions Nos. 14 to 16 attempted to solicit the arbitrators’ actual views of dispositive motions and whether they organized the hearings to take advantage of their potential to streamline or efficiently dispose of a dispute.

**14. As part of planning for the conduct of the hearing, how often do you consider issues such as:**

	Always	Usually	Half the Time	Seldom	Never
a. Bifurcating the hearings between entitlement and quantum?	<b>16</b> 7.60%	<b>38</b> 18.10%	<b>50</b> 23.80%	<b>90</b> 42.90%	<b>16</b> 7.60%
b. Encouraging parties to focus their presentation first on issues the decision of which could dispose of all or part of the case?	<b>22</b> 10.50%	<b>84</b> 40.20%	<b>34</b> 16.30%	<b>64</b> 30.60%	<b>5</b> 2.40%

**15. In considering summary dispositive motions, how often do you:**

	Always	Usually	Half the Time	Seldom	Never
a. Freely entertain such motions by all parties?	<b>25</b> 11.90%	<b>68</b> 32.40%	<b>37</b> 17.60%	<b>69</b> 32.90%	<b>11</b> 5.20%
b. Discourage such motions unless the parties stipulate that no material facts are in dispute?	<b>15</b> 7.20%	<b>72</b> 34.80%	<b>21</b> 10.10%	<b>62</b> 30.00%	<b>37</b> 17.90%
c. Require that a party seek the arbitrator's approval to bring such a motion after making a showing that the motion is likely to succeed, dispose of, or narrow the issues in a case?	<b>25</b> 12.10%	<b>52</b> 25.10%	<b>14</b> 6.80%	<b>47</b> 22.70%	<b>69</b> 33.30%
d. Decline or reserve ruling on such motions until after the close of the hearing?	<b>6</b> 2.90%	<b>42</b> 20.30%	<b>35</b> 16.90%	<b>72</b> 34.80%	<b>52</b> 25.10%

**16. How often do you find that dispositive motions in construction cases:**

	Always	Usually	Half the Time	Seldom	Never
a. Are useful to your preparation for the hearing even if the motion is unsuccessful?	<b>7</b> 3.30%	<b>70</b> 33.20%	<b>56</b> 26.50%	<b>70</b> 33.20%	<b>8</b> 3.80%
b. Are useful to extract or establish specific facts necessary for the resolution of the case?	<b>4</b> 1.90%	<b>67</b> 32.10%	<b>62</b> 29.70%	<b>70</b> 33.50%	<b>6</b> 2.90%
c. Are over-used by counsel for the parties and not helpful to you as the arbitrator?	<b>5</b> 2.40%	<b>80</b> 38.60%	<b>55</b> 26.60%	<b>59</b> 28.50%	<b>8</b> 3.90%

Arbitration is often touted as a process that allows, and some would say encourages, arbitrators to apply their own sense of “justice” and “equity” rather than hew closer to the strict application of the law required by the courts. Question Nos. 17 – 19, 23 – 25 were designed to explore this both indirectly and head-on. Question No. 17, for example, explores the composition of the arbitrator pool to determine how many non-lawyers (who may be more likely to base their decision on industry practice and not the law) are part of the pool of arbitrators than lawyers (who may be more likely to follow the law). Question Nos. 18, 19, and 24 – 25 approach the issue from a more procedural perspective including whether and how evidentiary rules are applied. Question 26 addresses the potential for injunctive relief. Question No. 22 approaches the issue most directly with specific questions about strict interpretation of contracts vs. application of an arbitrator’s own “sense of justice”. Finally, Question No. 23 was designed to test the conventional wisdom that arbitrators often soften the otherwise harsh result that strict application of the law may require by rendering a “split the baby” award.

**17. Approximately what percentage of your arbitration panels include non-lawyers?**

	Always	Usually	Half the Time	Seldom	Never
Approximately what percentage of your arbitration panels include non-lawyers?	<b>20</b> 9.60%	<b>96</b> 45.90%	<b>50</b> 23.90%	<b>26</b> 12.40%	<b>17</b> 8.10%

**18. How often do you enforce state or federal rules of evidence:**

	Always	Usually	Half the Time	Seldom	Never
a. If the arbitration rules governing the dispute require their use?	<b>107</b> 51.40%	<b>66</b> 31.70%	<b>7</b> 3.40%	<b>21</b> 10.10%	<b>7</b> 3.40%
b. If the arbitration rules governing the dispute do not require their use?	<b>2</b> 1.00%	<b>29</b> 13.80%	<b>23</b> 11.00%	<b>85</b> 40.50%	<b>71</b> 33.80%

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

Yes: 54.8%  
No: 45.2%

**24. How often do you award fees and expenses against a party for:**

	Always	Usually	Half the Time	Seldom	Never
a. Violation of interim awards and orders?	<b>8</b> 3.90%	<b>42</b> 20.50%	<b>25</b> 12.20%	<b>93</b> 45.40%	<b>37</b> 18.00%
b. Discovery abuses?	<b>4</b> 1.90%	<b>40</b> 19.40%	<b>29</b> 14.10%	<b>98</b> 47.60%	<b>35</b> 17.00%
c. Assertion of frivolous claims or defenses?	<b>4</b> 1.90%	<b>30</b> 14.60%	<b>21</b> 10.20%	<b>90</b> 43.70%	<b>61</b> 29.60%
d. Conduct that would violate a standard similar to Rule 11?	<b>11</b> 5.40%	<b>40</b> 19.70%	<b>26</b> 12.80%	<b>81</b> 39.90%	<b>45</b> 22.20%

**25. In construction arbitrations, how often do you:**

	Always	Usually	Half the Time	Seldom	Never
a. Refuse to accept evidence deemed cumulative, unreliable, unnecessary, or of slight value?	<b>3</b> 1.40%	<b>56</b> 26.70%	<b>41</b> 19.50%	<b>100</b> 47.60%	<b>10</b> 4.80%
b. Refuse to accept evidence of settlement negotiations on the grounds that they are privileged?	<b>121</b> 57.30%	<b>64</b> 30.30%	<b>5</b> 2.40%	<b>18</b> 8.50%	<b>3</b> 1.40%
c. Grant subpoenas to produce witnesses and documents at the hearing?	<b>82</b> 38.90%	<b>97</b> 46.00%	<b>20</b> 9.50%	<b>12</b> 5.70%	<b>0</b> 0.00%
d. Receive and consider evidence of witnesses by declaration and affidavit?	<b>21</b> 10.00%	<b>75</b> 35.70%	<b>53</b> 25.20%	<b>60</b> 28.60%	<b>1</b> 0.50%
e. Give evidence submitted by affidavit equal weight to live testimony?	<b>6</b> 2.90%	<b>52</b> 25.00%	<b>43</b> 20.70%	<b>82</b> 39.40%	<b>25</b> 12.00%

	Always	Usually	Half the Time	Seldom	Never
f. Do you find a site inspection to be helpful?	<b>23</b> 11.00%	<b>93</b> 44.30%	<b>69</b> 32.90%	<b>25</b> 11.90%	<b>0</b> 0.00%

**26. In considering claims for interim or permanent equitable relief in construction cases:**

	Always	Usually	Half the Time	Seldom	Never
a. Are you generally less likely to grant equitable relief than a court?	<b>5</b> 2.60%	<b>51</b> 26.60%	<b>36</b> 18.80%	<b>73</b> 38.00%	<b>27</b> 14.10%
b. Do you apply the same applicable judicial standards as you think a court would for such claims?	<b>53</b> 26.20%	<b>129</b> 63.90%	<b>11</b> 5.40%	<b>5</b> 2.50%	<b>4</b> 2.00%
c. Do you require bonds or other security similar to courts when issuing temporary injunctions?	<b>14</b> 7.60%	<b>43</b> 23.40%	<b>22</b> 12.00%	<b>60</b> 32.60%	<b>45</b> 24.50%
d. Are you open to consider and order specific performance?	<b>48</b> 23.90%	<b>98</b> 48.80%	<b>16</b> 8.00%	<b>35</b> 17.40%	<b>4</b> 2.00%
e. Would you consider making an award for unjust enrichment even if there is a contract between the parties and another available remedy at law?	<b>2</b> 1.00%	<b>23</b> 11.60%	<b>18</b> 9.00%	<b>108</b> 54.30%	<b>48</b> 24.10%

**22. In reaching your decision and rendering your award, how often do you:**

	Always	Usually	Half the Time	Seldom	Never
a. Enforce the parties' contract in strict accordance with its terms?	<b>48</b> 23.00%	<b>141</b> 67.50%	<b>19</b> 9.10%	<b>1</b> 0.50%	<b>0</b> 0.00%
b. Only enforce the parties' contract in strict accordance with its terms if the contract requires the arbitrator to do so?	<b>24</b> 12.20%	<b>48</b> 24.40%	<b>7</b> 3.60%	<b>56</b> 28.40%	<b>62</b> 31.50%

	Always	Usually	Half the Time	Seldom	Never
c. Resolve disputes strictly in accord with applicable law or statutes?	<b>57</b> 27.30%	<b>125</b> 59.80%	<b>18</b> 8.60%	<b>8</b> 3.80%	<b>1</b> 0.50%
d. Apply your own sense of justice and industry standards in formulating your awards even if it is contrary to what the contract or applicable law may require?	<b>3</b> 1.40%	<b>17</b> 8.20%	<b>18</b> 8.70%	<b>84</b> 40.40%	<b>86</b> 41.30%

**23. Regarding an often-heard sentiment that arbitrators often "split the baby" or render a compromise award, how often do you:**

	Always	Usually	Half the Time	Seldom	Never
a. Render and award based only on the law and facts presented?	<b>132</b> 62.60%	<b>70</b> 33.20%	<b>2</b> .90%	<b>6</b> 2.80%	<b>1</b> 0.50%
b. Render compromise awards based on the amounts of the claims asserted?	<b>0</b> 0.00%	<b>4</b> 1.90%	<b>3</b> 1.40%	<b>56</b> 26.70%	<b>147</b> 70.00%
c. Award an amount in arbitration greater than you would expect in court because you are often not bound by rules of evidence and procedure?	<b>1</b> 0.50%	<b>1</b> 0.50%	<b>9</b> 4.30%	<b>55</b> 26.40%	<b>142</b> 68.30%
d. Award an amount in arbitration lower than you would expect in court?	<b>0</b> 0.00%	<b>2</b> 1.00%	<b>18</b> 8.70%	<b>65</b> 31.60%	<b>121</b> 58.70%
e. Render a compromise award in close cases rather than what might be awarded based on a strict view of the proof and law?	<b>1</b> 0.50%	<b>4</b> 1.90%	<b>10</b> 4.80%	<b>70</b> 33.30%	<b>125</b> 59.50%

Major construction arbitrations are often heard by a panel of three arbitrators. Question No. 27 explores the dynamics of a three-arbitrator panel, focusing on whether and how a three-arbitrator panel decision varies from the decision that would have been made by a solo arbitrator.

**27. In construction arbitrations in which you have served on a panel of three arbitrators, how often:**

	Always	Usually	Half the Time	Seldom	Never
a. Do you find the input of the other 2 arbitrators to have had an impact on your view of entitlement or quantum?	<b>46</b> 22.30%	<b>102</b> 49.50%	<b>42</b> 20.40%	<b>16</b> 7.80%	<b>0</b> 0.00%
b. Do you compromise on your view of entitlement and quantum based on the input of the other two panel members?	<b>8</b> 3.90%	<b>63</b> 30.70%	<b>67</b> 32.70%	<b>60</b> 29.30%	<b>7</b> 3.40%
c. Do you think your award decision would have been the same if you had been a solo arbitrator?	<b>5</b> 2.40%	<b>134</b> 65.40%	<b>50</b> 24.40%	<b>14</b> 6.80%	<b>2</b> 1.00%
d. Have you been part of a split decision among the panel?	<b>2</b> 1.00%	<b>2</b> 1.00%	<b>10</b> 4.90%	<b>102</b> 49.50%	<b>90</b> 43.70%

Arbitration was at one time perceived to be a true cost-saving method of dispute resolution, cheaper and quicker than litigation. Whether that reflects the current reality is beyond the scope of this paper, but arbitrators are often asked to consider an award of the arbitrator’s fees, administrative expenses, attorney’s fees, and other costs of the arbitration. Question Nos. 28 and 29 explore this issue both with and without “prevailing party” clauses.

**28. Without a "prevailing party" clause, how often do you award administrative fees and the expenses and compensation of the arbitrator:**

	Always	Usually	Half the Time	Seldom	Never
a. To be borne equally between the parties?	<b>15</b> 7.20%	<b>106</b> 51.00%	<b>43</b> 20.70%	<b>39</b> 18.80%	<b>5</b> 2.40%
b. To be borne more by one party than the other?	<b>1</b> 0.50%	<b>32</b> 15.50%	<b>42</b> 20.40%	<b>111</b> 53.90%	<b>20</b> 9.70%
c. To be borne entirely by one party only?	<b>1</b> 0.50%	<b>28</b> 13.50%	<b>33</b> 15.90%	<b>121</b> 58.20%	<b>25</b> 12.00%

**29. For the purposes of awarding costs and fees pursuant to a "prevailing party" clause, how often:**

	Always	Usually	Half the Time	Seldom	Never
a. Do you consider the claimant to have prevailed if it is awarded any amount on it's claim?	<b>4</b> 1.90%	<b>50</b> 24.30%	<b>44</b> 21.40%	<b>83</b> 40.30%	<b>25</b> 12.10%
b. In cases where there are claims and counter-claims, do you find that the party who is awarded the highest percentage of its claim, as opposed to the largest dollar amount, to be the prevailing party?	<b>1</b> 0.50%	<b>67</b> 33.20%	<b>53</b> 26.20%	<b>63</b> 31.20%	<b>18</b> 8.90%
c. Do you consider how much the respondent's defenses decreased the amount of claimant's claims in determining which party prevailed?	<b>18</b> 8.80%	<b>103</b> 50.50%	<b>34</b> 16.70%	<b>40</b> 19.60%	<b>9</b> 4.40%
d. Do you find that neither party was the "prevailing party"?	<b>0</b> 0.00%	<b>21</b> 10.10%	<b>65</b> 31.30%	<b>107</b> 51.40%	<b>15</b> 7.20%



The survey results presented in this paper are only the results received at the time we had to go to press. We are still receiving survey responses and intend to keep the survey open until the beginning of the Conference so that we can obtain more results to present the most complete, accurate, and statistically significant information possible. We intend to provide an update on the survey results, and additional analysis, at the Conference. Thank you to everyone who participated in the survey to date. Finally, please click on the following link if you wish to take the survey: <http://www.surveymzmo.com/s3/2117307/Construction-Arbitrator-Survey>.