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COMMERCIAL ARBITRATION AND SETTLEMENT:
EMPIRICAL INSIGHTS INTO THE ROLES ARBITRATORS PLAY

By

Thomas J. Stipanowich* & Zachary P. Ulrich**

I. INTRODUCTION

It is generally understood that arbitrators adjudicate disputes and mediators help settle them through negotiated agreement.¹ But what role, if any, is there for arbitrators in promoting settlement? This aspect of arbitration is overlooked in some quarters,² while occasionally provoking controversy.³ A thoroughgoing consideration of the subject is long overdue.⁴

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¹ See, e.g., John W. Cooley, *Arbitration vs. Mediation – Explaining the Differences*, 69 JUDICATURE 263 (1986).

² See Paul M. Lurie, *Using the guided choice process to reduce the cost of resolving construction disputes*, 9 CONSTR. L. INT'L 18, 19 (Mar. 2014) (“The legal profession generally sees arbitration as an alternative to a court proceeding; they do not see customized arbitration as a method to develop information which can affect settlement positions and break impasses”).

³ See *infra* text accompanying notes 99-105.

⁴ A step forward in terms of international dialogue on the subject is represented by a recent effort by the Centre for Dispute Resolution (CEDR). See Centre for Effective Dispute Resolution, CEDR COMMISSION ON SETTLEMENT IN INTERNATIONAL ARBITRATION, FINAL REPORT, 3, 11-12 (Nov. 2009) [hereinafter CEDR COMMISSION REPORT], available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf (reporting results of a commission sponsored by CEDR, the London-based mediation and mediation training organization), discussed *infra* text accompanying notes 91-105. The resulting Recommendations and Rules have stirred controversy. See *infra* text accompanying notes 99-105. See generally Sophie Nappert & Dieter Flader, *A Psychological Perspective on the Facilitation of Settlement in International Arbitration—Examining the CEDR Rules*, 2 J. INT'L DISP. SETTLEMENT 459 (2011) (raising questions about the basic premises of the CEDR Recommendations in light of considerations regarding the psychological makeup and cultural background of arbitrators).

The *Rules of Ethics for International Arbitrators* of the International Bar Association begin with a single “fundamental rule” that calls upon arbitrators to “*proceed diligently and efficiently* to provide the parties with a just and effective resolution of their disputes”⁵ The *Code of Ethics for Arbitrators in Commercial Disputes*,⁶ the primary ethical framework for commercial arbitrators in the United States, admonishes arbitrators to “[c]onduct the [p]roceedings [f]airly and [*d*]iligently.”⁷ Arbitrators might reasonably interpret these standards to require them to manage the adjudicative process through to an award in as cost-effective and expeditious a way as is consistent with fundamental fairness. But should their ethical obligations extend to helping promote an early resolution of a dispute by means of settlement, which is very often the best way of achieving cost-savings and efficiency as well as a satisfactory result?⁸ If so, just how far should these obligations extend, and what commensurate obligations lie with legal advocates and other stakeholders?

One relevant new source of information about arbitrators’ current practices and perspectives, including (among many other topics) their roles in “setting the stage” for settlement, is an extensive recent survey of experienced arbitrators co-sponsored by the College of Commercial Arbitrators (“CCA”), an organization comprised of more than two hundred of the U.S.’ most experienced and distinguished arbitrators, and the Straus Institute for Dispute Resolution (“the Survey”).⁹ In 2013 the CCA invited the Institute to conduct a wide-ranging canvass of practices and perspectives of CCA members.¹⁰ The

⁵ INTERNATIONAL BAR ASSOCIATION, IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS 1, 2 (1987), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics. The *IBA Rules* go on to emphasize arbitrators’ “[d]uty of [d]iligence,” specifying that arbitrators “should devote such time and attention as the parties may reasonably require having regard to all the circumstances of the case, and shall do their base to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake.” *Id.* at 4, Section 7.

⁶ See THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (EFFECTIVE MARCH 1, 2004), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/A_DRSTG_003867.

⁷ See *id.*, Canon IV. An Arbitrator Should Conduct the Proceedings Fairly and Diligently (emphasis added).

⁸ See CEDR COMMISSION REPORT, *supra* note 4, at 1, ¶ 1.5 (studies of attitudes of international business regarding dispute resolution show “parties generally want their problems solved cost effectively and efficiently and . . . this will often be best achieved through negotiated settlement). *Cf.* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyer’s Intuitions Prolong Litigation*, 86 SO. CAL L. REV. 571, 573 (2013) (“[M]ost observers recognize that settlements harness the judgment of the attorneys and often a settlement judge or other mediator to offer the parties an acceptable resolution of their dispute without the expense that further litigation would entail.”).

⁹ College of Commercial Arbitrators-Straus Institute for Dispute Resolution Survey on Arbitration Practice (Fall 2013) [hereinafter “the Survey”].

¹⁰ The Survey was conducted under the umbrella of the Straus Institute’s Theory-to-Practice Research Project in connection with a report on the future of arbitration which Professor Stipanowich was invited to present to the CCA during the fall of 2013. The Survey consisted of 65 multiple-choice and short-answer questions on respondents’ arbitration experiences and opinions on arbitration practices and the future of the arbitration field-at-large. The Survey asked questions pertaining both “domestic” (defined in the Survey as “in the U.S. between U.S. parties”) and “international” (all other) arbitrations. The Survey was sent electronically to 225 individuals, all CCA Fellows, of whom 134 individuals (59.6% of the subject pool)

Survey results depict a professional cadre of arbitrators with broad and varied professional backgrounds as lawyers and judges,¹¹ most of whom arbitrate international cases as well as disputes between U.S. parties.¹² As reflected in Chart A, roughly two-thirds of respondents indicated they spend at least half of their working hours arbitrating cases.¹³

completed the survey instrument. The Survey and associated data are available from Professor Stipanowich upon request.

Subjects were given the option of whether or not to indicate their gender or age. At the time the Survey was administered, the average age of those respondents indicating their age (110 individuals) was around 65 years of age. Eighty-five percent (85.0%) of survey participants indicating their gender (123 individuals) represented that they were male.

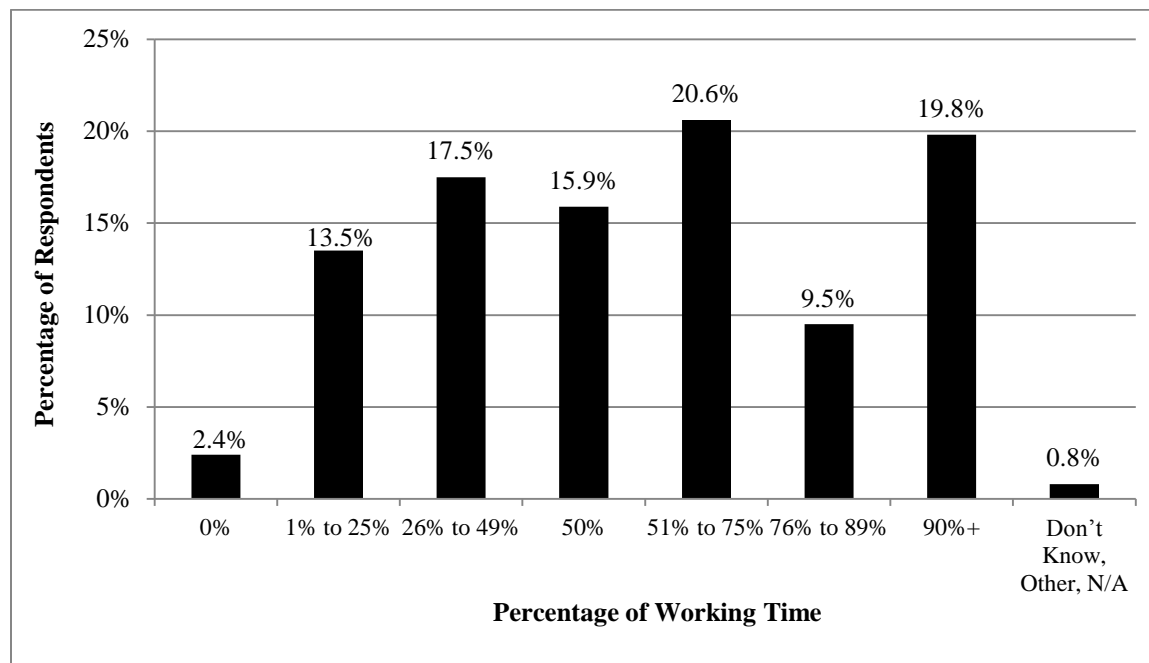
¹¹ Among respondents, 81.9% reported having “litigation” backgrounds, 28.4% reported having “transactional-attorney” backgrounds and 9.5% reported having “judicial” backgrounds (these categories were not mutually exclusive). The participant pool had a mean arbitration-career length of more than 20 years (calculated as a weighted average of responses to a multiple-choice question asking respondents to choose among several ranges indicating the length of time that has passed since they first arbitrated a case, and using the lowest-possible value for each range) and 78.7% of respondents reported having practiced as arbitrators for at least 20 years. Further, respondents indicated a mean of at least 170 arbitrations each (calculated using the same weighted-average methodology as described above), and over two-thirds of participants (67.7%) reported having served as an arbitrator over 100 times throughout their career.

¹² The great majority (84.4%) of respondents indicated they had previously arbitrated an international dispute. Of those who had done so, almost half (47.7%) had averaged at least one international case per year for the last five years, and almost one-third (32.7%) averaged at least two international cases per year.

¹³ Nearly three-fourths (74.0%) of respondents indicated that they still worked “full time,” and of those who did not work full time over ninety percent (90.9%) worked “at least occasionally.” Given the level of the subjects’ ongoing professional activities, it is of note that nearly two-thirds (65.8%) of participants indicated they spend half or more of their work time as arbitrators, while almost twenty percent (19.8%) of respondents indicated that “over 90%” of their work time is spent as an arbitrator.

Chart A. Percentage of Working Hours as an Arbitrator

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



Among other things, the resulting data highlight variations in current arbitrator beliefs and behavior and provide a foundation for more intensive discussion and debate about how and why arbitrators do what they do.¹⁴ At a time when the trend toward professionalization captured in this Survey parallels the continuing global expansion and evolution of arbitration practice,¹⁵ insights from empirical initiatives of this kind may serve as a critical element in what some have envisioned as an “informed convergence” or harmonization of perspectives and practices in arbitration.¹⁶

¹⁴ An overview and general analysis of the Survey data is forthcoming in Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* (draft available from authors).

¹⁵ See Yves Dezalay & Bryant G. Garth, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 37 (The University of Chicago Press 1996) (quoting pre-eminent arbitrator and arbitration practitioner Jan Paulsson, stating “the age of innocence has come to an end . . . [and] the delightful discipline of a handful of academic *aficionados* . . . has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business.”); see also Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 AM. U. INT’L L. REV. 957, 992-99 (2005) (arguing that the field of international arbitration is a profession because, among other reasons, by nature the field provides many of the same services often ascribed to lawyers and judges).

¹⁶ Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and the West*, 16 HARV. NEG. L. REV. 1, 4 (2011). We recognize that there is a “possible gap between what professional actors *believe* they are doing in a given institutional context and what they are *actually* doing.” See Nappert & Flader, *supra* note 4, at 464. We are confident, however, that much of the data from this Survey will measurably advance our discussion of a number of topics confronting commercial arbitration.

As professional providers of private justice, arbitrators must heed Aristotle's admonition to exercise their virtue for another's good and not for themselves.¹⁷ In the present environment, this involves doing something more than simply operating in accordance with one's own intuitive lights. Given the intensity of present discourse within the web of arbitration networks regarding virtually every aspect of arbitration practice and procedure, present-day arbitrators should be increasingly mindful of the legal and ethical obligations they shoulder in the course of their practice, and be reflective and deliberate about what they do and how they do it. Through listservs¹⁸ and blogs,¹⁹ growing thousands converse online, en masse, on a daily basis, sharing perspectives on diverse issues of arbitration law and practice from legal doctrine to psychological insights regarding negotiation and decision-making. Such networks herald a new era of unprecedented discussion, debate and re-examination regarding current practices, encouraging persistent and rigorous questioning about the often-difficult practical realities that repose in the belly of our time-honored norms.

The role of arbitrators in promoting the informal settlement of disputes before them is a subject that is ripe for deliberation and debate. The topic is intertwined with concerns regarding efficiency and economy in arbitration, which in recent years has been the subject of continuing attention and discussion.²⁰ A recent poll of international corporate counsel focusing on the financial services, energy and construction industries revealed that cost and delay are frequently concerns of parties to international arbitration.²¹ A 2011 survey of Fortune 1,000 corporate counsel indicated that although saving money and saving time are the two leading reasons for major companies to choose

¹⁷ “[J]ustice, alone of the virtues, is thought to be 'another's good', because it is related to our neighbor[.] . . . [T]he best man is not he who exercises his virtue towards himself but he who exercises it towards another; for this is a difficult task.” ARISTOTLE, *THE NICOMACHEAN ETHICS*, 2010 Pepperdine.elib.com, *108-09.

¹⁸ See, e.g., Oil-Gas-Energy-Mining-Infrastructure Dispute Management Listserv, ogemid@ogeltdm.com; Mediation and Arbitration Forum listserv, mediate-and-arbitrate@peach.ease.lsoft.com.

¹⁹ See, e.g., Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com> (last accessed May 22, 2014); Arbitration Nation, <http://arbitrationnation.com> (last accessed May 22, 2014).

²⁰ See Michael McIlwrath & Roland Schroeder, *Transparency in International Arbitration: What Are Arbitrators and Institutions Afraid Of?*, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 (Arthur Rovine, ed.) 333 (2011); Richard Chernick & Robert B. Davidson, *The Search for Cost Effective and Efficient International Commercial Arbitration: There is a Solution*, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2011: A PRACTICAL CROSS-BORDER INSIGHT INTO INTERNATIONAL ARBITRATION WORK 8 (2011). See also Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 ILL. L. REV. 1, 5 (2010).

²¹ Queen Mary University of London & PriceWaterhouseCoopers, *2013 International Arbitration Survey: Corporate Choices in International Arbitration, Industry Perspectives* 2013, at 6, 8, 21, 22 <http://www.pwc.com/arbitrationstudy/>. The report states that these concerns are consistently cited by users of arbitral processes, although they may not factor highly into parties' actual decision-making when they decide whether or not to initiate arbitration proceedings. The report also notes the “intense debate surrounding cost and delay” having raised concerns among some of the largest corporate users of international arbitration, and states that more than 40% of respondents were influenced by the “overall cost of service” in selecting an arbitral institution once having already decided to arbitrate.

some form of alternative dispute resolution over litigation,²² unease about arbitration-related costs is actually perceived as a barrier to the use of commercial arbitration by a growing number of companies.²³

Concerns about mounting costs and dispute resolution cycle time have inspired important initiatives aimed at availing users of choices that facilitate more cost-effective and expeditious arbitration.²⁴ While these efforts tend to focus on hastening the rendering of judgment, they also encompass approaches that may set the stage for and encourage negotiation and other informal avenues of settlement.²⁵ As noted above, early settlement of a dispute can be a uniquely effective way of minimizing cost and cycle time in dispute resolution.²⁶ But the role of arbitrators in setting the stage for or facilitating settlement has not been given significant attention, at least in places like the U.S.²⁷

Responses to the CCA-Straus Institute Survey indicate that, as was the experience in recent decades with litigated cases,²⁸ settlement during the course of arbitration procedures, and prior to award, is becoming increasingly prevalent.²⁹ Curiously, however, many experienced arbitrators apparently do not perceive their arbitral role as extending to the promotion of settlement.³⁰ The roots of such perceptions are unclear, but may in some cases reflect an all-consuming focus on the arbitrator's adjudicative function.³¹ This focus may be reinforced by the sense of discomfort some may feel about shifting to a facilitative role, either because it requires different skills and a different mindset,³² or because it is viewed as incompatible or even detrimental to the arbitral

²² Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 37, tbl. D (2014), available at <http://ssrn.com/abstract=2221471>.

²³ See *id.* at 53, tbl. P (22.9% of companies see costs as a barrier to the use of arbitration in corporate/commercial disputes in 2011, as compared to 14.8% who saw costs as a barrier to the use of arbitration generally in 1997).

²⁴ See Thomas J. Stipanowich, Part II. *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings* (2014) in *SOFT LAW IN INTERNATIONAL ARBITRATION* (Lawrence W. Newman & Michael Radine, ed. 2014) available at <http://ssrn.com/abstract=2407187>; see also, e.g., Robert H. Smit & Tyler B. Robinson, *Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 AM. REV. INT'L ARB. 267, 267-68, 279-84 (2009) (advocating for revised guidelines on allocating arbitration costs in arbitration agreements).

²⁵ See *infra* notes 72-89 and accompanying text.

²⁶ See *infra* text accompanying note 48.

²⁷ See CEDR COMMISSION REPORT, *supra* note 4, at 1, ¶ 1.3 (noting that “it is only in certain jurisdictions that tribunals are active in [encouraging settlement]”).

²⁸ See *infra* notes 106-109 and accompanying text.

²⁹ See *infra* Part III.A.

³⁰ See *infra* Part III.B.

³¹ See *infra* text accompanying note 113.

³² See *infra* text accompanying note 115.

role.³³ (As we will see, however, it is possible for arbitrators to play a role in settlement without actively facilitating or mediating.) For some, a perhaps-unconscious motivation to ignore opportunities to promote settlement may lie in the desire to maintain sufficient hours of commercial arbitration work in an increasingly competitive environment.³⁴

On the other hand, many experienced arbitrators are conducting themselves as proactive managers of the case before them,³⁵ and many perceive a connection between their activities and settlement.³⁶ One of the most effective means by which arbitrators “set the stage” for settlement is by ruling upon dispositive motions, another focus of Survey questions.³⁷ A sizable minority of Survey respondents have gone so far as to take more direct action in facilitating settlement, sometimes by embracing dual roles in resolving a dispute (that is, by serving as both a mediator and an arbitrator).³⁸ In Part II we will briefly consider the function of settlement in the quest for economy and efficiency in dispute resolution and the various approaches aimed directly at promotion of settlement, such as stepped dispute resolution, creative variants, and “med-arb.”³⁹ We will then discuss ways in which techniques featured in recent initiatives promoting more cost-effective and expeditious arbitration may also lay the groundwork for settlement,⁴⁰ as well as the more contentious ground traversed by the CEDR Commission on Settlement in International Arbitration.⁴¹ Part III will compare Survey results showing a recent increase in the incidence of pre-hearing and pre-award settlement in arbitration,⁴² as well as Survey responses reflecting experienced arbitrators’ differing perspectives toward their role respecting informal settlement during arbitration.⁴³ Part IV will explore the activities of arbitrators who do engage in activities which they regard as setting the stage for settlement⁴⁴ and focus particularly on approaches to the handling of dispositive motions in arbitration⁴⁵ as well as the more controversial approach involving a single

³³ See *infra* text accompanying notes 116-17.

³⁴ See *infra* text accompanying notes 118-19.

³⁵ See *infra* Parts IV.A., B.

³⁶ See *infra* Table E, p. 21.

³⁷ See *infra* Part IV.B.

³⁸ See *infra* Part IV.C.

³⁹ See *infra* Part II.A.

⁴⁰ See *infra* Part II.B.

⁴¹ See *infra* Part II.C.

⁴² See *infra* Part III.A.

⁴³ See *infra* Part III.B.

⁴⁴ See *infra* Part IV.A.

⁴⁵ See *infra* Part IV.B.

individual serving the dual roles of mediator and arbitrator.⁴⁶ In Part V, we conclude by offering some straightforward proposals to stimulate appropriate involvement by arbitrators as well as attorneys and other “stakeholders” in setting the stage for settlement.

II. TECHNIQUES FOR PROMOTING SETTLEMENT IN DISPUTE RESOLUTION

Respondents to a 2011 survey of corporate counsel in Fortune 1,000 corporations identified each of the following goals as among the reasons companies choose ADR (alternative or appropriate dispute resolution) over litigation: saving time (70.9% of respondents); saving money (68.7%); allowing parties to resolve disputes themselves (52.4%); limiting discovery (51.5%); preserving privacy and confidentiality (46.8%); and preserving good relationships (43.5%).⁴⁷ Each of these goals is likely to be effectively served—indeed, perhaps best served—by a negotiated settlement of disputes occurring as early as possible after a dispute arises.⁴⁸

In recognition of the potential benefits of early settlement many parties to commercial contracts include stepped dispute resolution provisions that call for early negotiation and mediation prior to binding arbitration or litigation; some have sought to overcome the limitations of these “linear” approaches by creative variations, including casting neutrals in dual roles. In addition, recent initiatives aimed at promoting efficiency and economy in arbitration proceedings have created additional opportunities for early resolution or settlement, while the CEDR Commission took a more direct—and controversial—step by casting arbitrators in a more formal role as settlement facilitators.

A. Promotion of Settlement in Dispute Resolution through Stepped Systems

Stepped dispute resolution provisions in commercial contracts are a straightforward response to the reality that most business disputes are amenable to a negotiated resolution, and that there are multiple benefits associated with early, informal resolution of disputes.⁴⁹ Stepped approaches are intended to function as a series of sieves or filters to cull out all of the issues and controversies that may be resolved short of binding adjudication. Where direct negotiation between representatives of the parties is unavailing, the intervention of a mediator may help break the logjam and craft a workable resolution.⁵⁰

⁴⁶ See *infra* Part IV.C.

⁴⁷ Stipanowich & Lamare, *supra* note 22, at 37, tbl. D.

⁴⁸ See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] at 5-6 (discussing priorities for business conflict management). See also Wistrich & Rachlinski, *supra* note 8, at 575 (“Although faster is not always better when it comes to settlements, it is usually better”).

⁴⁹ See *id.*, Chapter 1 (discussing role importance of multi-tiered approaches for management of conflict and avoiding stand-alone arbitration provisions). See also CEDR COMMISSION REPORT, *supra* note 4, at 4, ¶4.2.1 (discussing benefits of multi-tier dispute resolution clauses).

⁵⁰ See *id.* at 11-14.

But the linear arrangement of elements in multi-stage dispute resolution templates does not take account of the reality that dispute resolution is very often “non-linear.” It is frequently not viewed as possible or practicable to settle a case before the filing of an arbitration demand. This may be because of differing (and often, unrealistic) expectations on the part of counsel or parties regarding the likely disposition of issues should the case go to trial or arbitration or the settlement value of a case,⁵¹ the perceived need for more information,⁵² or other factors. Recent empirical research indicates that legal advocates’ judgments and choices regarding settlement may be clouded by, and settlement delayed by, lawyers’ excessive reliance on intuition, the desire to avoid perceived loss; the tendency to seek confirmation of the biases they bring to litigation; the notion that it is always better to have more information; and concerns about justifying previously spent dollars in litigating a case.⁵³ When settlement does not occur during the preliminary stages of dispute resolution, the arbitration proceeding becomes the backdrop against which negotiated settlement discussions will occur. In many such cases, mediation is postponed until a relatively late stage in the pre-hearing process when discovery is completed or well-advanced.⁵⁴

Over the years, there have been efforts to “think outside the box” of the linear framework of stepped dispute resolution by exploiting its potentialities in different ways. For example, it has been suggested that mediators be equipped with a wider variety of tools (such as a more nuanced appreciation of cognitive factors affecting negotiations) to break impasse at early stages of conflict.⁵⁵ They may also facilitate the parties’ focus on key factual issues and related, limited information exchange⁵⁶ or targeted binding or nonbinding decisions by judges or arbitrators that could lay the groundwork for resolution of conflict⁵⁷--subjects we will re-visit below. Even where substantive issues cannot be resolved in mediation, mediators may nevertheless focus on facilitating agreements regarding dispute resolution process elements and helping parties to set the stage for arbitration proceedings with features that are effectively tailored to the issues at hand.⁵⁸

⁵¹ Wistrich & Rachlinski, *supra* note 8, at 576; Lurie, *supra* note 2, at 21.

⁵² *Id.*; Lurie at 20.

⁵³ *See generally id.* See also RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 89-195 (2010) (discussing “decision errors” by attorneys and related psychological and institutional factors).

⁵⁴ *Id.* at 19 (noting that “mediation is frequently seen as a tool to be used close to trial or an arbitration hearing as a hedge against an unfavourable judgment or award”).

⁵⁵ *Id.* at 19-20.

⁵⁶ COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 19.

⁵⁷ Lurie, *supra* note 2, at 20-21. *Cf.* Wistrich & Rachlinski, *supra* note 8, at 624-626.

⁵⁸ *Id.* at 19-20. Paul Lurie’s Guided Choice concept actually centers on the notion of using mediation to “diagnose” a dispute and assist parties in structuring an appropriate dispute resolution process, possibly including an appropriately tailored form of arbitration. Other thoughtful suggestions for promoting earlier settlement or more appropriate dispute resolution may be found in Alana S. Knaster, “*Scientific*

Finally, some have promoted or participated in forms of “med-arb,” by which we mean a proceeding in which a single third party serves, or agrees to serve, as the mediator and arbitrator.⁵⁹ Sometimes, arrangements are made between disputing parties and a third party “neutral” prior to the commencement of any services that the latter will mediate the dispute and, failing a complete resolution of the dispute, will arbitrate all outstanding matters.⁶⁰ A variant of this kind of arrangement is “MEDALOA”—mediation followed by last-offer (or final offer) arbitration.⁶¹ Sometimes, third parties who are engaged in mediating a dispute are asked to shift to an arbitral role and adjudicate the dispute;⁶² in other cases arbitrators are invited to assume the role of mediators.⁶³ These kinds of dual-role arrangements raise a variety of legal, practical, and ethical issues that have led many practitioners and neutrals to avoid them,⁶⁴ although they tend to be more readily embraced in some other parts of the world.⁶⁵ There are indications, however, that many U.S. neutrals do engage in such activities, albeit relatively infrequently.⁶⁶

B. “Setting the Stage” for Settlement during Arbitration

Leading arbitration rules often include no specific reference to settlement other than to make provision for terminating proceedings and recording the settlement in the form of an arbitration award if the parties so agree.⁶⁷ Rules such as those published by

Negotiations: ADR’s answer to the battle of expert witnesses, THE RECORDER 1 (Fall 1994); John A. Sherrill, *Cooperative Negotiation, Mediation and Arbitration: Creating a Sequential and More Efficient Dispute Resolution Process* (paper on file with Prof. Stipanowich).

⁵⁹ See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 20-24.

⁶⁰ *See id.*

⁶¹ *See id.* at 25-26.

⁶² *See id.* at 22-24 (setting forth suggested guidelines for handling such arrangements) .

⁶³ *See id.* at 29-30 (setting forth suggested guidelines for handling such arrangements).

⁶⁴ *See infra* text accompanying notes 130-134. *See also id.* at 20-22 (discussing attitudes of leading arbitrators and practitioners on CPR Commission and concerns regarding med-arb); Thomas Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 853-55 (2001), available at <http://ssrn.com/abstract=1377917>. *See also* CEDR COMMISSION REPORT, *supra* note 4, at 3 ¶ 2.5.

⁶⁵ For an excellent tabular summary of different national laws and their posture regarding arbitrators’ promotion of and involvement in settlement efforts and related issues, *see* CEDR COMMISSION REPORT, *supra* note 4, at Appendix 4, 18ff. *See also Reflections on Med-Arb and Arb-Med: Around the world*, 2 N.Y.DIS. RESOL. L. 71-119 (Spring 2009) (collection of articles highlighting use of med-arb and variants).

⁶⁶ *See* Stipanowich, *supra* note 64, at 853-54. *See also infra* Part IV.C.

⁶⁷ *See, e.g.*, AAA INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES Article 29(1) (Rules Amended and Effective June 1, 2009) (including provision for termination of arbitration proceedings and for recording settlement as consent award if so agreed); UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL ARBITRATION RULES Article

the International Institute for Conflict Prevention & Resolution (CPR) are exceptional in providing more specific guidance for parties and arbitrators.⁶⁸ The CPR Rules permit arbitrators to “suggest that the parties explore settlement at such times as the Tribunal may deem appropriate”⁶⁹ and, with the consent of the parties, even arrange for mediation of claims.⁷⁰ Reflecting concerns regarding the need for separation of mediative and arbitral functions, the CPR Rules direct that the mediator shall not be a member of the arbitration Tribunal, and the Tribunal shall not be apprised of offers or statements made during negotiations or mediation absent both parties’ consent.⁷¹

However, recent guidelines developed by organizations such as the International Chamber of Commerce (ICC) and the College of Commercial Arbitrators (CCA) aimed at promoting more cost-effective and efficient arbitration have also enhanced the opportunities for early settlement, including approaches that permit arbitrators to help “set the stage” for early resolution or negotiated settlement. In 2007, the ICC Commission on Arbitration and ADR set up a Task Force on Reducing Time and Costs in Arbitration that produced a report entitled *Techniques for Controlling Time and Costs in*

36(1) (as revised in 2010) (same); ICC RULES OF ARBITRATION 32 (1 Jan. 2012) (provision for recording of agreement as consent award).

⁶⁸ The CPR Rules for Non-Administered Arbitration of Business Disputes provide:

Rule 19: Settlement and Mediation

- 19.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.
- 19.2 With the consent of the parties, the Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.
- 19.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.
- 19.4 If the parties settle the dispute before an award is made, the Tribunal shall terminate the arbitration and, if requested by all parties and accepted by the Tribunal, may record the settlement in the form of an award made by consent of the parties. The Tribunal is not obliged to give reasons for such an award.

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES Art. 19 (Effective Nov. 1, 2007). For a summary of the provisions of various national arbitration laws on arbitrator involvement in settlement, see CEDR COMMISSION REPORT, *supra* note 4, Appendix 4 (summarizing pertinent elements of various national laws).

⁶⁹ *Id.*, Art. 19.1.

⁷⁰ *Id.*, Art. 19.2.

⁷¹ *Id.*, Art. 19.2, 19.3.

*Arbitration.*⁷² In 2009, the CCA, convened leading dispute resolution organizations and stakeholders in a National Summit on Business-to-Business Arbitration to identify the chief causes of excessive cost and delay in arbitration and to explore “concrete practical steps” to remedy them.⁷³ This led to the publication of the *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration*,⁷⁴ comprised of proposed action steps for business users and in-house counsel, outside counsel, arbitrators and arbitration provider institutions.⁷⁵ The *ICC Techniques* and the *CCA Protocols* appear to have resonated with many arbitrators and users of arbitration and to have influenced evolving practices,⁷⁶ some of which may also create or enhance the opportunity for a negotiated settlement of all or part of the dispute. For example, the *CCA Protocols* enhance opportunities for early resolution or settlement by encouraging the following:

- contractual provisions for negotiation and mediation prior to arbitration;⁷⁷
- creative use of the skills of a mediator in laying the groundwork for arbitration, including facilitating agreements regarding information exchange; clarifying issues that have been resolved in mediation and framing issues to be arbitrated; and “encourag[ing] parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.”⁷⁸

⁷² ICC COMMISSION ON ARBITRATION AND ADR, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (August 2007).

⁷³ THE COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS ON EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS AND ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich et al, ed. 2010) [hereinafter *CCA Protocols*] at 4-21. Other important set of guidelines with similar aims was developed under the auspices of the New York State Bar Association. NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION, *GUIDELINES FOR THE ARBITRATOR’S CONDUCT OF THE PRE-HEARING PHAS OF DOMESTIC COMMERCIAL ARBITRATIONS AND GUIDELINES FOR THE ARBITRATOR’S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONA ARBITRATIONS* (2010-11). See also NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, *REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES* (June 2009), available at <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/iscoveryPreceptsReport.pdf>.

⁷⁴ See generally *id.*

⁷⁵ Although aimed primarily at U.S. domestic arbitration, the *CCA Protocols* offer guidance that is applicable to international arbitration. See, e.g., Doug Jones, *Techniques in managing the process of arbitration*, 78(2) *ARBITRATION* 140. 144-45 (2012) (observing that guidelines in *CCA Protocols* respecting limitations on discovery “are applicable to limiting document disclosure in international arbitration”). See also Michael McIlwrath, *Faster, cheaper: global initiatives to promote efficiency in international arbitration*, 76(3) *ARBITRATION* 532 (2010).

⁷⁶ See Stipanowich, *supra* note 24, at 79-88 (discussing these standards and their impact).

⁷⁷ *CCA PROTOCOLS*, *supra* note 73, at 25, 44.

⁷⁸ *Id.* at 44-45. Cf. Wistrich & Rachlinski, *supra* note 8, at 624-625 (suggesting parties tighten discovery limits as a means of focusing dispute resolution).

- resort to mediation during the course of the arbitration proceeding;⁷⁹
- continuing active involvement during the dispute resolution process by business clients and in-house counsel,⁸⁰ permitting continuous monitoring of the course of dispute resolution and periodic consideration and cost-benefit analysis of settlement opportunities;⁸¹
- “teeing up” of particular issues for early resolution when it is likely to promote fruitful settlement discussions;⁸²
- “aggressive” action on motions for summary disposition that “hold reasonable promise for streamlining or focusing the arbitration process.”⁸³
- adherence to established deadlines;⁸⁴ where appropriate, the use of streamlined procedures;⁸⁵ early “fleshing out” of the case;⁸⁶ and more targeted discovery;⁸⁷ all of which may stimulate earlier settlement.

The complete CCA-Straus Institute Survey results, soon to be published, reflect a wide array of approaches experienced arbitrators are employing to actively and efficiently manage cases through the pre-hearing and hearing stages.⁸⁸ These activities, undoubtedly influenced by initiatives like the *CCA Protocols* and related efforts,⁸⁹ can play a key role in settlement; this is exemplified by arbitrator management of dispositive motions, discussed below.⁹⁰

⁷⁹ *Id.* at 65 (“If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration.”).

⁸⁰ *Id.* at 29-30 (role of business client, corporate counsel).

⁸¹ *Id.* at 64-65 (role of outside counsel).

⁸² *Id.* at 56; (role of provider institutions); 69 (role of arbitrators). Cf. Wistrich & Rachlinski, *supra* note 8, at 626 (discussing active judicial case management, encouraging parties to pursue “diagnostic or important discovery first”).

⁸³ *Id.* at 36 (role of business users and counsel) ; 73-74 (role of arbitrators).

⁸⁴ *Id.* at 26-28 (role of business users and counsel); 55 (role of arbitration provider institutions); 69-70 (role of arbitrators).

⁸⁵ *Id.* at 29 (role of business users and counsel); 55-56 (role of provider institutions).

⁸⁶ *Id.* at 34-35 (role of business users and counsel); 57 (role of provider institutions); 70-71 (role of arbitrators).

⁸⁷ *Id.* at 26 (role of business users and counsel); 45-55 (role of provider institutions); 64 (role of outside counsel); 72 (role of arbitrators).

⁸⁸ See Stipanowich & Ulrich, *supra* note 14.

⁸⁹ See Stipanowich, *supra* note 24, at 76-77 (discussing impact of *ICC Techniques* and *CCA Protocols*).

⁹⁰ See *infra* text accompanying notes 122-129.

C. Arbitrators Directly Facilitating Settlement: The CEDR Commission

The work of the CEDR Commission on Settlement in International Arbitration⁹¹ represents the first major international effort to focus specifically on settlement during arbitration. Its stated intent is establish a broad-based international consensus on the role of international arbitrators in facilitating settlement,⁹² but although the effort is in many respects commendable it envisions roles for arbitrators in the active facilitation of settlement that fall well short of a consensus model and are in some respects controversial.⁹³

To some extent, the *CEDR Recommendations* and *CEDR Rules for Facilitation of Settlement in International Arbitration* cover ground also touched upon by other recent guidelines, including the notion of conducting arbitration proceedings “in conjunction with other processes to achieve efficient and cost-effective outcomes,”⁹⁴ the value of multi-tier dispute resolution clauses⁹⁵ and the use of a “mediation window” during arbitration.⁹⁶

Central elements of the Rules, however, are drawn from German, Swiss and Chinese practices⁹⁷ that are not universally embraced. The Rules state that in the absence of a contrary written agreement arbitrators may take any of the following measures for the purpose of facilitating settlement:

- 1.1. provide all [p]arties with the [a]rbitral [t]ribunal’s preliminary views on the issues in dispute in the arbitration and what the [a]rbitral [t]ribunal considers will be necessary in terms of evidence from each [p]arty in order to prevail on those issues;

⁹¹ See *id.* at 3, 11-12.

⁹² *Id.* at 2. See Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 J. LONDON COURT INT’L ARB. 2 (2009) (article by CEDR commission chair discussing growth of international consensus regarding arbitrators as settlement facilitators, and examining the potential of a uniform standard by which arbitrators can effectively fulfill that role). Ms. Kaufmann-Kohler observes, “[A] transnational standard may well emerge on this issue as it has for many other topics of arbitration law in the recent past.”

⁹³ See generally Nappert & Flader, *supra* note 4. See *infra* text accompanying notes 99-105; see also *infra* text accompanying notes 130-134 (discussing concerns regarding mixing of the roles of mediator and arbitrator).

⁹⁴ *Id.* at 3, ¶2.7.1.

⁹⁵ *Id.* at 4, ¶4.2.1.

⁹⁶ The Rules 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. *Id.* at 5, 12.

⁹⁷ *Id.* at 2, ¶2.2.

- 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.⁹⁸

These provisions go well the scope of other initiatives such as the *ICC Techniques* and the *CCA Protocols* by projecting arbitration tribunals into a much more forthright role as settlement masters. Many arbitrators are likely to be uncomfortable with presenting preliminary views or findings, offering suggested settlement terms, or facilitating settlement discussions.⁹⁹ Any or all of these approaches may be seen by some as undermining perceptions of arbitral impartiality,¹⁰⁰ or taking arbitrators well beyond their adjudicative comfort zone into a realm that may require different skills and a different mindset.¹⁰¹ Others may be reasonably concerned about the ability of arbitrators to filter out communications made during settlement discussions in arriving at an award;¹⁰² or how and when an arbitration tribunal decides settlement facilitation should occur;¹⁰³ how tribunals are to reach a consensus on preliminary views or findings;¹⁰⁴ and how they are collectively to facilitate settlement between the parties.¹⁰⁵

Despite these concerns, the *CEDR Rules* offer a platform for beta-testing of procedures that thrust arbitrators into the heart of the settlement dialogue, and a tangible alternative for those parties and arbitrators who are comfortable with the CEDR format. For the time being, however, many parties and arbitrators may be reluctant to make the leap afforded by the *CEDR Rules*.

⁹⁸ *Id.* at 11. 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*.

⁹⁹ Nappert & Flader, *supra* note 4, at 461. Cf. Peter Robinson, *Opening Pandora's Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques*, 27 OHIO. ST. J. ON DISP. RESOL. 53 (2012) (discussing range of approaches to judges to promotion of settlement).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 467-68.

¹⁰² *Id.* at 461. Cf. Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011).

¹⁰³ *Id.* at 465-7.

¹⁰⁴ *Id.* at 467-8.

¹⁰⁵ *Id.* at 468-9.

III. ARBITRATOR EXPERIENCES WITH AND ATTITUDES TOWARD SETTLEMENT DURING ARBITRATION: RESULTS FROM THE CCA-STRAUS INSTITUTE SURVEY

A. *The Growing Incidence of Settlement during Arbitration*

A decade ago, the American Bar Association's symposium "The Vanishing Trial" spotlighted a precipitous drop-off in the incidence of trial on the merits in litigation.¹⁰⁶ Among other things, this decline in trial was ascribed to the costs of full-blown adjudication and the risks associated with third party decision making.¹⁰⁷ A litigated case may settle prior to trial due to the granting of a motion for summary judgment or other dispositive motion, a ruling on discovery, or a settlement conference, or mediation.¹⁰⁸ Settlement may even be stimulated by the mere anticipation of a pending procedural deadline.¹⁰⁹

Settlement also appears to be an increasingly frequent occurrence during the course of arbitration. CCA-Straus Institute Survey participants were asked, "Roughly what percentage of cases in which you were an arbitrator settled prior to the first arbitration hearing?" They were asked to report settlement percentages for two time periods, "[p]rior to [five] years ago" and within the "past [five] years"; the resulting data are summarized in Chart B. The majority of respondents indicated that higher proportions of their caseloads settled pre-hearing during the last five years than prior to that time. This trend is indicated both by a relative decrease in respondents reporting lower proportions of their caseloads as having settled (*e.g.*, less respondents reporting

¹⁰⁶ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 3, 459 (2004) (reporting on a working-paper analysis conducted for the symposium, and showing that "the portion of federal civil cases resolved by trial fell from 11.5[%] in 1962 to 1.8[%] in 2002, continuing a long historic decline"); *cf.* Queen Mary University of London & PriceWaterhouseCoopers, *supra* note 21, at 16 (reporting that respondents indicated they were able to settle, on average, 57% of international disputes prior to engaging in litigation, arbitration, or other formal proceedings. Of disputes that were not settled amicably, only 32% were ultimately decided in formal proceedings; the other 68% were not). See generally Thomas J. Stipanowich, *ADR and "The Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 3, 843 (2004), available at <http://ssrn.com/abstract=1380922> (a meta-survey and summary of empirical studies examining the growth of ADR processes, resultant impact on court systems, and broader uses of and rationale for mediation and other ADR-process choices).

¹⁰⁷ *Id.* at 477-81, 500-05, 517, 519; *cf.* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 A.B.A. LITIG. J. 2, 2-4 (Winter 2004).

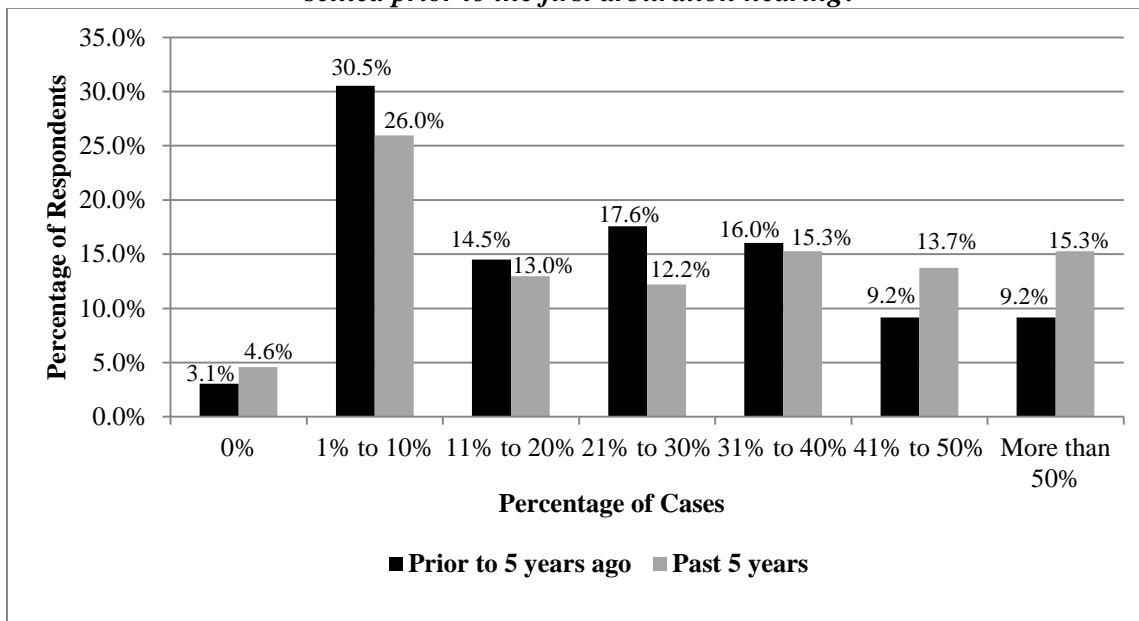
¹⁰⁸ See generally Hon. Patrick J. Walsh, *Rethinking Civil Litigation in Federal District Court*, 40 A.B.A. LITIG. J. 1, 6-8 (Fall 2013) (discussing how "less than one percent of the civil cases that could go to trial actually do" and arguing that such a high instance of court-case settlement means that motion practice, discovery management and settlement efforts should be approached by judges with the assumption that cases will settle, and that courts should consider introducing procedural mechanisms that facilitate and encourage settlement).

¹⁰⁹ Kenneth Glasner, *Contract Disputes: The Role of ADR*, DISP. RESOL. J. 50 (2000); Jeremy A. Mercer & Evan A. Bloch, *Settlement Tactics in US Litigation*, PRACTICAL LAW COMPANY (2011), available at http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2262.

that “31% to 40%,” or less, of their caseload settled pre-hearing) and by a relative increase in respondents reporting higher proportions of their caseloads having settled (e.g., more respondents reporting that “41% to 50%” and “[m]ore than 50%” of their caseloads settled pre-hearing).

Chart B. Settlement prior to Hearing

Q: Roughly what percentage of cases in which you were an arbitrator settled prior to the first arbitration hearing?

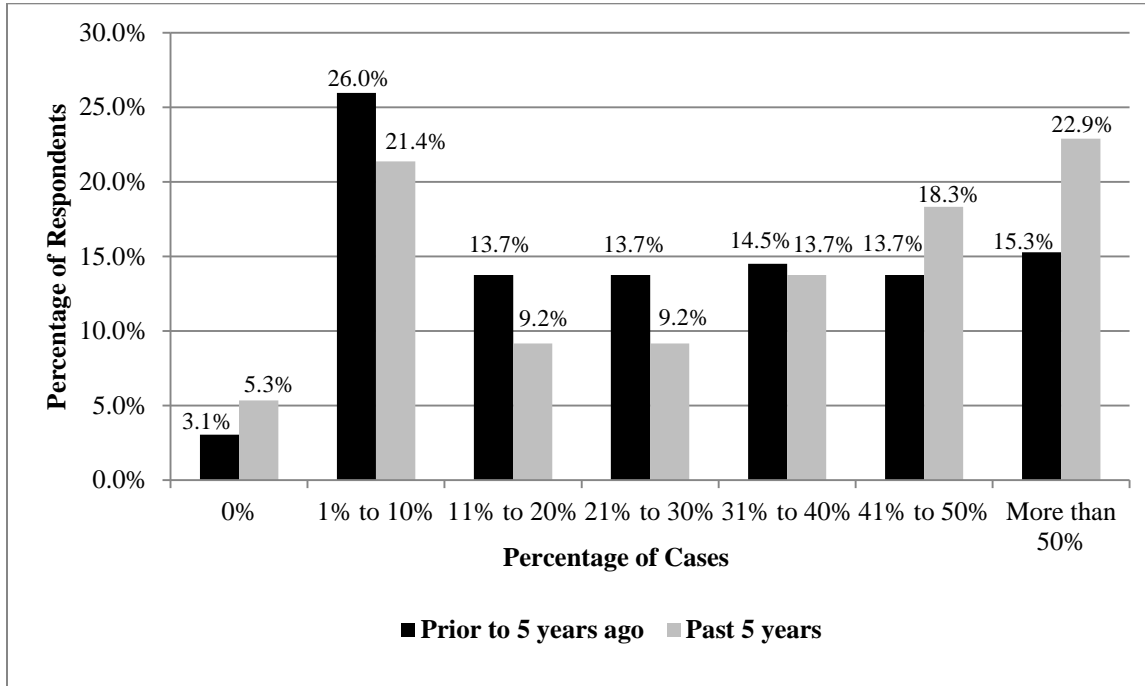


The Survey also asked respondents, “Roughly what percentage of cases in which you were an arbitrator settled at any time prior to award?” Again, participants were asked to distinguish between their experiences “[p]rior to [five] years ago” and those within the past five years (Chart C). The responses to this question tell much the same story as those displayed in Chart B, above. Experienced arbitrators indicate that, during the past five years, higher proportions of their caseloads settled pre-award than before that time. However, while the data reflect a general upward shift in extent of pre-award settlement as well as the overall number of arbitrators whose cases are settling pre-award, the data also reflect dramatic variances in settlement rates among arbitrators.

As might be expected, the data indicate that some disputes that did not settle prior to hearings are settled during hearings. (For example, while 15.3% of respondents indicated “[m]ore than 50%” of their caseload settled pre-hearing in the past five years, 22.9% of the same respondent pool indicated that proportion of their cases settled pre-award (including those that settled after the hearing had begun). These results underscore the potential impact of arbitrators’ case management at all stages of the process.

Chart C. Settlement prior to Award

Q: Roughly what percentage of cases in which you were an arbitrator settled at any time prior to award?



If cost-effectiveness and expeditious process are often important goals to arbitrating parties, and if a growing number of parties are availing themselves of opportunities to settle their disputes prior to hearings on the merits or the rendition of an arbitration award, shouldn't arbitrators be more conscious of their potential role in setting the stage for early settlement? Why, given the fact an extremely high percentage of litigated cases are resolved prior to trial¹¹⁰ and that contract cases are particularly likely to settle,¹¹¹ is the overall percentage of cases settling during arbitration not much higher?¹¹²

¹¹⁰ See *supra* note 106 and accompanying text.

¹¹¹ Several studies have been conducted to analyze correlations between case-types and settlement, albeit for cases adjudicated through the United States court system, but that nonetheless show tort- and contract-related cases tend to have relatively higher settlement rates than other case types. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 1, 111-46 (Mar. 2009) (analyzing public records for two United States federal district courts, and showing that tort [an 87.2% settlement rate one federal district for the time period analyzed] and contract cases [a 72.5% settlement rate] tend to have higher settlement rates than others examined); D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT, Part A, at 1-58, 1-72 (1983) (tbl.5) (empirical study indicating that a statistically significantly higher percentage of tort cases were settled pre-trial than were contract or commercial cases, and that a statistically significantly higher percentage of contract or commercial cases were settled than civil rights, civil liberties, or discrimination cases). Since commercial arbitration is presumably dominated by contract-related disputes, and to a lesser extent tort claims, one would expect a relatively high percentage of arbitrated disputes to be resolved through settlement, as in court.

Why do some arbitrators report much higher rates of pre-hearing or pre-award settlement of their cases than others? Do these variances reflect differences in personal philosophies regarding the arbitral role in settlement, arbitrators' relative proactivity in case management, or some other factors such as the mix of cases they arbitrate? With these questions issue in mind, we will examine other data from the CCA-Straus Institute Survey regarding perspectives on the roles of arbitrators in promoting settlement.

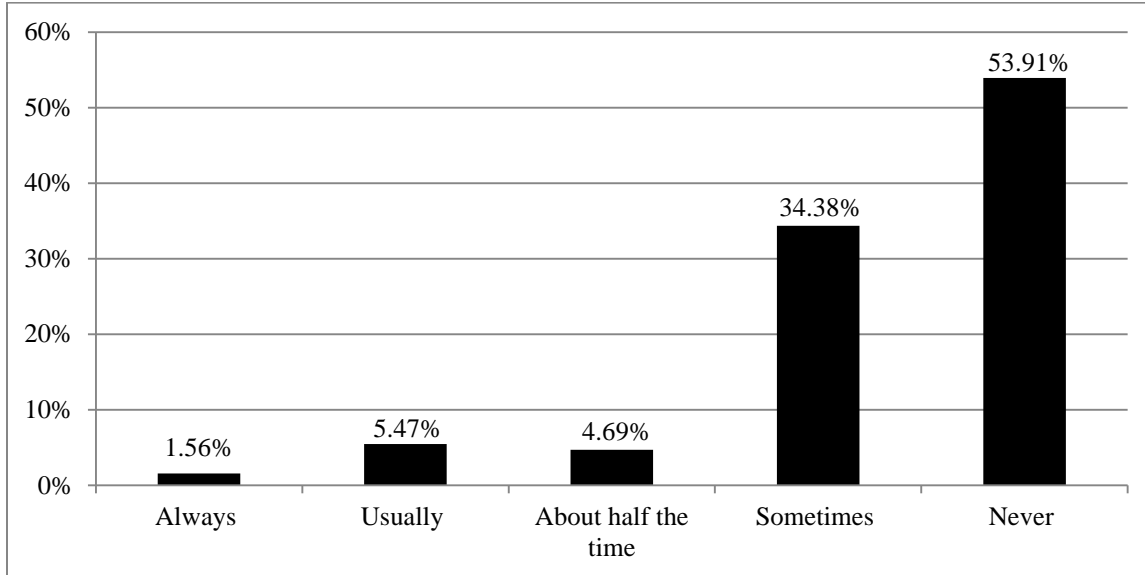
B. Varying Attitudes of Arbitrators Concerning Settlement

Survey participants were asked, “[h]ow often, if ever, are you concerned with informal settlement of the cases before you as an arbitrator?” As reflected in Chart D, more than half of participants responded, “Never.” Another third (34.4%) stated they concern themselves with settlement “sometimes.” And only about twelve percent (11.8%) of the respondents indicated they concern themselves with settlement as much as half the time.

¹¹² According to the American Arbitration Association, 65% of its commercial cases (a category that includes cases involving business contracts and individually negotiated employment contracts) settled prior to award in 2013. E-mail of Ryan Boyle, Vice President – Statistics and In-House Research, American Arbitration Association to Thomas J. Stipanowich (June 16, 2014) (on file with Prof. Stipanowich). In the years 2010 through 2014, only 21% to 23% of FINRA arbitration cases have been resolved by arbitrator decision; between 59% and 65% have been resolved by direct settlement or mediation, with another 9% to 12% withdrawn. FINRA Dispute Resolution Statistics – How Arbitration Cases Close (May 2014), *available at* <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/>. Cf. CEDR COMMISSION REPORT, *supra* note 4, at 1, ¶1.4 (reporting that “[s]ome research suggests that settlement rates in arbitration are significantly lower than in many national courts, particularly those courts where judges systematically promote early settlement and the use of ADR techniques such as mediation”).

Chart D. Concern with Informal Settlement

Q: How often, if ever, are you concerned with informal settlement of the cases before you as an arbitrator?



These responses are a bit surprising given the heightened incidence of settlement in recent years. It is possible that at least some portion of those who answered “Never” to the Survey question did so because they view their roles and responsibilities strictly within the context of superintending complete arbitration processes that culminate in awards, and do not believe it necessary or appropriate to actively consider or engage in any way with the parties’ collateral settlement efforts. Their view of their role in case management, in other words, is wholly framed in terms of the adjudicative dimension—hearing the case and rendering an award—and ignores the possibility that the case might be disposed of through settlement, however likely that might be, as irrelevant to their function as arbitrators.¹¹³

Some, too, may have read the question to imply a direct facilitative role in settlement along the lines of the *CEDR Recommendations* discussed above.¹¹⁴ It may be that some respondents interpreted the question to be, “How often do you regard yourself as personally responsible for settling the case?” or, in a more extreme vein, “How often do you put on the hat of a mediator to facilitate settlement of an arbitrated case?” They might feel a sense of discomfort with a role they believe requires them to employ skills or mindsets that are very different from those of an adjudicator.¹¹⁵ More importantly, the

¹¹³ Even the CEDR Commission on Settlement in International Arbitration concluded that “[a]n arbitral tribunal has a primary responsibility to produce an award, which is binding and enforceable,” although the arbitral tribunal “should also take steps to assist the parties in achieving a negotiated settlement of part or all of their dispute.” CEDR COMMISSION REPORT, *supra* note 4, at 2, ¶¶2.4.1-2.4.2.

¹¹⁴ See *supra* text accompanying notes 97-98.

¹¹⁵ Nappert & Flader, *supra* note 4, at 461.

question may have stirred up the concerns of some respondents that too active a role in facilitating or mediating settlement “might be perceived as incompatible with the arbitrator’s duty of impartiality,”¹¹⁶ potentially undermining the arbitral function.¹¹⁷

The focus on “seeing the case through to an award” may be reinforced by the pressures some arbitrators may feel to sustain a sufficiency of work hours in an increasingly competitive environment. The stiff competition for commercial arbitration appointments is underlined by data from the CCA-Straus Institute Survey: almost sixty percent (59.5%) of College members, who count themselves among the U.S.’—and in some cases possibly the world’s¹¹⁸—most experienced and prominent commercial arbitrators, indicated they had less arbitration work than they would like.¹¹⁹

For some or all of the foregoing reasons, many experienced commercial arbitrators are reticent about the arbitral role in settlement. However, the Survey results also indicate that many arbitrators tend to recognize and actively embrace opportunities to promote settlement of arbitrated cases through their management of the arbitration process.

IV. SETTING THE STAGE FOR SETTLEMENT

A. Case Management and Settlement

In the CCA-Straus Institute Survey, respondents who indicated some level of concern regarding settlement were asked to indicate how and to what extent their own activities

¹¹⁶ *Id.*

¹¹⁷ *Id.* Shahla Ali reported the results of an empirical study showing that, even though just over seventy percent of arbitrators from East Asia, North America and Europe see it as appropriate to suggest settlement negotiations to parties, most arbitrators from all regions rarely actually do so (although, arbitrators in East Asia tend to suggest settlement negotiations slightly more often than do arbitrators from North America or Europe). Interestingly, the percentage of arbitrators who concerned themselves with informal settlement at least some of the time was slightly *higher* among those who had never mediated a case (54.2%) than those who had mediated. *See* Ali, *supra* note 16, at 8, 25. On the other hand, when the arbitrators were asked, “[i]s it appropriate for the arbitrator to meet with parties separately to discuss settlement options (with both parties’ request)?” 38% of respondents from North America and Europe answered “[y]es,” as did 43% of respondents from East Asia. There was no statistically significant difference found between either geographically-defined group’s responses to this question. While not addressing the role of the arbitrator as “mediator” *per se*, the question does directly ask for respondents’ perceptions regarding the appropriateness of an arbitrator conducting informal settlement discussions in a manner arguably the same as a mediation caucus. *Id.* at 18.

¹¹⁸ *See supra* note 12 (describing international experience of Survey respondents).

¹¹⁹ Based on the Survey data, there does not appear to be a substantial difference between the arbitration workloads of those experienced arbitrators with much domestic or international experience and those without. There do appear to be, however, correlations between respondents’ workloads and other aspects of their backgrounds: These dynamics will be examined in much further depth in Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* (article in progress; draft available from the authors).

might stimulate settlement (Table E).¹²⁰ The large majority of this group indicated that their management of the pre-hearing process, summary disposition of issues, and rulings on discovery matters prompt settlement in at least some cases. Indeed, nearly one-fourth of respondents (23.8%) indicated that their summary disposition of issues prompts informal settlement in at least half of their cases, and more than a quarter (25.4%) responded that their management of pre-hearing processes plays an important role in pre-hearing settlements in at least half of their cases.

Table E. Promotion of 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 the case prior to hearing.	0.0% (0)	20.3% (12)	5.1% (3)	57.6% (34)	17.0% (10)	59
My summary disposition of issues prompts informal settlement of the entire case.	0.0% (0)	6.8% (4)	17.0% (10)	66.1% (39)	10.2% (6)	59
My rulings on discovery matters prompt informal settlement of the entire case.	0.0% (0)	3.4% (2)	3.4% (2)	72.9% (43)	20.3% (12)	59

The complete Survey data are replete with more information about how experienced arbitrators manage pre-hearing process, oversee discovery, and address dispositive motions.¹²¹ For now, however, we will confine our discussion to a short exemplary summary of Survey responses regarding the handling of dispositive motions.

¹²⁰ Paralleling the CCA-Straus Survey results regarding arbitrators' reported impact on informal settlement are the results of a survey conducted in 2009 by our colleague Peter Robinson which asked 368 California state trial judges and commissioners questions regarding their efforts to assist settlement and their perceived success in doing so. In that study, much as with the CCA-Straus Survey, it was found that there were significant variations in perspectives on the adjudicator's role in promoting settlement. Forty-nine percent of responding judges and commissioners reported reaching settlement 75% of the time or more (the highest-percentage category examined) while another 38% of respondents indicated they reached settlement in 50% or less of their conferences. See Peter Robinson, *Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 114-18 (2009).

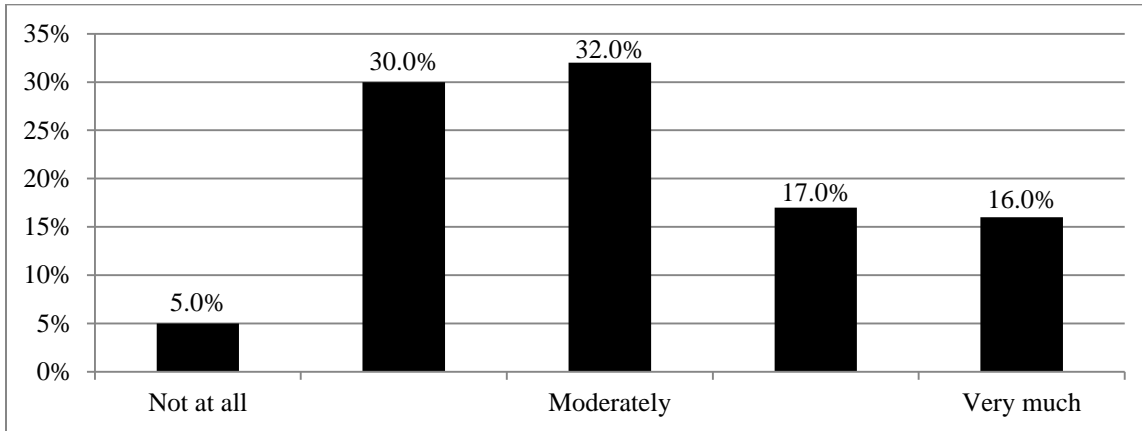
¹²¹ See *supra* note 119.

B. Managing Motion Practice in Arbitration

Especially in the United States, commercial arbitration has tended to acquire many of the trappings of court trial.¹²² This includes, among other things, more extensive use of pre-hearing motions by counsel.¹²³ In 2009, more than 180 arbitrators, corporate counsel and attorneys representing clients in arbitration, attending a Summit on the Future of Business-to Business Arbitration, identified “excessive, inappropriate or mismanaged motion practice” as a “key source of cost and delay in commercial arbitration, as reflected in the electronic spot survey results summarized in Chart F.¹²⁴

Chart F. Motion Practice in Arbitration

Q: If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?



The subsequent *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration* explained that in arbitration, dispositive motions are, “practically speaking, a double-edged sword.”¹²⁵ On the one hand, motion practice often adds to arbitration costs and cycle time without clear benefits, as in court. The filing of a motion can trigger the setting of a schedule for briefing and argument requiring major efforts by counsel, all of

¹²²See CCA PROTOCOLS, *supra* note 73, at 4-12.

¹²³ *Id.* at 8-9. Cf. Wistrich & Rachlinski, *supra* note 8, at 626 (discussing need for active judicial management of motion practice).

¹²⁴ *Id.* at 8.

¹²⁵ COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). See also Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

which may come to naught if the arbitrators conclude that the unresolved factual disputes require action on the motion to be postponed pending a full hearing on the merits.

On the other hand, motions may in some cases serve as an excellent means of narrowing the issues in dispute and thereby reducing the scope of discovery and hearings. Certain matters that do not implicate extensive discovery, presentation of evidence and fact-finding may be effectively addressed early in the arbitration process, including contractual limitations on damages, statutory remedies, or statutes of limitations and other limits on legal causes of action.¹²⁶ Where they may be appropriately granted, such motions present arbitrators with opportunities to bring an end to some or all of the disputes before them.¹²⁷ The granting of a motion may also motivate a party to initiate settlement discussions rather than incur the expense and risk of pursuing a claim that is diminished in value and less amenable to pressing through adjudication. Conversely, arbitrators' reflexive refusal to come to grips with such issues represents a lost opportunity to save the parties time and money.

As noted above, the *CCA Protocols* call for a measured approach to the handling of dispositive motions, admonishing arbitrators to discourage the filing of unproductive motions, but to act aggressively in considering those motions that present real opportunities for shortening, streamlining or focusing the process.¹²⁸ Other institutional standards have embraced similar approaches.¹²⁹

As reflected in Table G, responses to the CCA-Straus Institute Survey suggest that most experienced arbitrators are making efforts to effectively manage motion

¹²⁶ See CCA PROTOCOLS, *supra* note 73, at 9; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 48, 53-55; see generally Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28 ARB. INT'L 3 487-510 (2012) (examining the potential for further incorporation of dispositive motions into current international arbitration practice; examining commonly cited downsides such as delays due to lengthened discovery, meritless motions, and enforceability in local courts worldwide; and concluding that not only are all of these potential downsides to summary adjudication in international arbitration outweighed by their benefits, but that dispositive motions can and should be provided for by the operating rules of international arbitration providers and in arbitration agreements).

¹²⁷ See Raviv, *supra* note 126, at 496 (discussing the possibility that meritless motions may unnecessarily lengthen international arbitration proceedings, and concluding that "In any event, the possibility of drawn-out, meritless motions is less a reason to forbid dispositive motions entirely than it is a reason to craft rules and provisions that give parties an incentive only to bring dispositive motions that have a significant chance of succeeding"); cf. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 882-83 (2007) (reporting on 2007 empirical study of six U.S. federal district courts' handling of motions for summary judgment, and showing that, of the cases where summary-judgment motions were filed, over half of the time those motions were successful, and over one-third of the time the cases were actually terminated by the summary-judgment ruling).

¹²⁸ *CCA Protocols*, *supra* note 73, at 73-74. See *supra* text accompanying note 83.

¹²⁹ See, e.g., American Arbitration Association, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES: INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES (RULES AMENDED AND EFFECTIVE OCTOBER 1, 2013) 22 (2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased; International Institute for Conflict Prevention & Resolution, GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION 1-7 (2011), <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/744/CPR-Guidelines-on-Early-Disposition-of-Issues-in-Arbitration.aspx>.

practice and not decline the opportunity 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.

Table G. Handling of 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.	43.8% (56)	28.9% (37)	4.7% (6)	18.8% (24)	3.9% (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.	0.8% (1)	14.1% (18)	2.3% (3)	47.7% (61)	35.2% (45)	128
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.	18.0% (23)	18.0% (23)	3.9% (5)	21.1% (27)	39.1% (50)	128

C. Participation in “Med-Arb”

There has long been a debate over whether mediators should assume the role of arbitrator in the event mediation does not resolve all of the issues in dispute, or whether a sitting arbitrator should accept the parties’ invitation to put on a mediator’s hat.¹³⁰ In the United States and many other places, the traditional view has been that although dual-role “med-arb” may offer perceived benefits from the standpoint of increased efficiency (since a single individual is conducting the entire proceeding) and greater impetus to settle (since the mediator carries a “big stick” as the final adjudicator if negotiations fail), it is usually inadvisable since the roles of mediator and arbitrator “are very different in focus [and] in some respects incompatible.”¹³¹ Related concerns include (1) the fundamental disjunction between mediation, which normally thrives on *ex parte* communications between the third party intervener and the parties, and arbitration, which involves presentation of evidence and argument in the presence of all parties; (2) the fear that the “big-stick” wielded by the mediator-arbitrator will undermine party autonomy

¹³⁰ See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 20-27, 28-33 (as a part of the final report of the CPR Commission on the Future of Arbitration, offering extensive discussion of issues associated with mixed roles and offering detailed guidance on the subject). Cf. Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. OF DISP. RESOL.335 (2006) (exploring conflicting perspectives and practices of California judges regarding their role in settling cases assigned to them for trial).

¹³¹ *Id.* at 20-21.

and self-determination; (3) the concern that parties will be less forthcoming during mediation, thereby compromising the ability of the mediator to bring about a settlement; (4) the fear that a mediator-turned-arbitrator's perspective on the issues will have been inappropriately influenced by information obtained during mediation; (5) in the absence of a clear waiver, the concern that a subsequent arbitration award may be subject to a motion to vacate on the basis of ex parte contact;¹³² and (6) questions about the qualifications of the third-party intervener to play both roles.¹³³ Despite all of these concerns, however, there is evidence that many mediators and arbitrators in the United States have engaged in med-arb, at least occasionally,¹³⁴ and that proponents of these "hybrid" processes see them as a valuable consensual alternative to more traditional approaches if appropriately utilized.¹³⁵ For this reason, the CCA-Straus Institute Survey included a series of questions regarding med-arb.

Of the 59 respondents to the Survey who indicated some level of concern with respect to informal settlement of disputes (representing 46.1% of all respondents), nearly half (27 individuals, or 45.8%) indicated that they had served as both a mediator and an arbitrator with respect to the same dispute.¹³⁶ The specific kinds of scenarios in which this experience occurred are reflected in Table H.

¹³² *Id.* at 21-22. See also Blankley, *supra* note 102; Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65-OCT DISP. RES. J. 52 (May-Oct. 2010).

¹³³ *Id.* at 23.

¹³⁴ See Gerald F. Phillips, *Back to Med-Arb: Survey Indicates Process Concerns are Decreasing*, 26 ALTERNATIVES TO HIGH COST LITIG. 73 (April 2008) (discussing results of survey of arbitrators); Stipanowich, *supra* note 64, at 853-54 (discussing informal poll of mediators regarding incidence of med-arb in their practice).

¹³⁵ See, e.g., Louise A. LaMothe, *Med-Arb: Yes or No?*, 5 N.Y. DISP. RESOL. L. 43 (Spring 2012); Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. L. 71 (Spring 2009); Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?* 60-JUL DISP. RESOL. J. 24 (May-July 2005); Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 Ohio St. J. on Disp. Resol. 871 (2007).

¹³⁶ Because only individuals who expressed a concern with informal settlement were queried regarding participation in med-arb, we are unable to ascertain the level of experience with med-arb within the overall Survey group.

Table H. Experience with Med-Arb
(Question to CCA Members who claimed to have experience with med-arb)

Q: Have you served as both an arbitrator and a mediator with respect to the same dispute, where . . .

	Yes	No	Total
During mediation, the parties asked you to switch to the role of arbitrator?	66.7% (18)	33.3% (9)	27
During arbitration, the parties asked you to switch to the role of mediator?	92.6% (25)	7.4% (2)	27
The parties agreed at the outset that you would mediate the dispute and, failing a resolution through mediation, switch to the role of arbitrator.	66.7% (18)	33.3% (9)	27

Shortly after the completion of the CCA-Straus Institute Survey, a parallel canvass of experienced mediators was undertaken by the authors at the invitation of the International Academy of Mediators, an organization of experienced mediators from the U.S., the E.U. and some other parts of the world.¹³⁷ This survey provided another opportunity to explore the extent of experience in med-arb (Table I).

¹³⁷ The IAM-Straus Institute Survey on Mediator Practices and Perceptions was sent to 153 individuals, all IAM Fellows, and 85.0% (130 individuals) participated in the survey; 78.4% (120 individuals) completed the entire survey. The respondent pool included individuals who stated they “regularly practiced” in Africa; Asia, including the Middle East; Australia and New Zealand; Canada; Europe (both Western and Eastern, with a majority from the UK); Latin America; and the United States.

About ninety percent (89.8%) of respondents indicated that they worked “full-time” at the time the Survey was administered, and devoted, on average, more than seventy percent of their work time to mediation practice. Nearly half (47.7%) of respondents indicated that they devote more than ninety percent of their work time to practice as a mediator. Survey participants had, on average, over eighteen years of mediation experience, and had conducted, on average, almost 1,500 mediation cases throughout their careers. (It should be noted that Survey participants were asked to select ranges of the estimated percentage of their work time dedicated to mediation practice, the length of time since they first began mediating, and the number of cases they estimated themselves to have previously mediated. The respondent-pool averages were then calculated by multiplying the proportion of respondents selecting each range by the lowest value in each range (e.g., for a range of “500-999” cases, it was assumed that all respondents selecting that range chose “500”). Thus, the calculated averages stated here almost surely underestimate the actual experience level of the respondent pool.)

Table I. Experience with Med-Arb (IAM Members)

Q: How many times would you estimate you have served as both a mediator and arbitrator, with respect to the same dispute, where . . .

	0 times / none	1-5 Times	6-10 times	11-25 times	26-50 times	51+ times	Total
During mediation, the parties asked you to switch to the role of arbitrator?	61.3% (76)	20.2% (25)	9.7% (12)	2.4% (3)	4.8% (6)	1.6% (2)	124
During arbitration, the parties asked you to switch to the role of mediator?	64.5% (80)	20.1% (26)	7.3% (9)	4.8% (6)	0.0% (0)	2.4% (3)	124
The parties agreed at the outset that you would mediate the dispute and, failing a resolution through mediation, switch to the role of arbitrator.	52.4% (65)	33.9% (42)	5.7% (7)	3.2% (4)	3.2% (4)	1.6% (2)	124

As reflected in Table I, at least a third of responding experienced mediators had had the experience of switching roles at the behest of the parties during the course of a mediation or arbitration; nearly half claimed to have experience with med-arb where the parties agreed ahead of time to conduct mediation, and if mediation failed the mediator would switch to the role of arbitrator. A total of 76 of the 124 respondents to the questions (61.3%) reflected some experience as a dual-role neutral.

Thus, despite evidence that multiple concerns regarding dual-role intervention dissuade many from engaging in such activity, many arbitrators and mediators apparently do so at least occasionally. Indeed, a majority of surveyed mediators have had at least some experience with med-arb. Given these results, perhaps it is time to closely examine the collective experiences of mediators, arbitrators and advocates with med-arb, to ascertain whether and to what extent it can produce satisfactory experiences, and what guidance (cautionary or otherwise) might be offered to those contemplating its use.¹³⁸

V. CONCLUSION: SOME STRAIGHTFORWARD PROPOSALS

We are in the midst of a continuous, expanding international dialogue that is gradually spurring a re-assessment of the roles played by arbitrators and other stakeholders in arbitration and dispute resolution processes. This evolution is increasingly informed by a new wave of empirical studies including those that record and examine perceptions and experiences, like the CCA-Straus Institute Survey, as well as

¹³⁸ One possibility, proposed in Part V, would be a refinement of protocols for those contemplating the use of med-arb in various settings. See *infra* text accompanying note 147.

others that are bringing to the surface cognitive biases and filters.¹³⁹ More and more, it behooves arbitrators, as well as counselors and advocates, to approach their roles thoughtfully and reflectively rather than reflexively.

Our brief consideration of settlement in arbitration suggests that the time is ripe for informed discussion and deliberation respecting opportunities for settlement and the appropriate roles of arbitrators with regard to the settlement of disputes. As commercial arbitration has taken on more of the trappings of litigation such as extended pretrial proceedings with accompanying motion practice and discovery, Survey data indicate that the incidence of pre-award settlement has also increased.¹⁴⁰ Recent initiatives focused on promoting economy and efficiency in arbitration also create enhanced opportunities for settlement before and during arbitration.¹⁴¹ The Survey data indicate that many arbitrators are making efforts to more actively manage cases, including more effectively handling dispositive motions¹⁴²; the result will surely be not only reduced process cost and cycle time, but also greater number of cases resolved earlier in the arbitration process. It appears, too, that despite frequently pronounced concerns regarding the pitfalls of acting as both mediator and arbitrator in the same dispute, many mediators and arbitrators occasionally accept dual roles.¹⁴³

Many arbitrators, arbitration practitioners and scholars are now recognizing that the traditional paradigm of the arbitrator as single-minded adjudicator must be refined to incorporate a broader concept of the arbitral role, including active case management at all stages of the proceeding, early resolution of some or all issues, and activities that set the stage for settlement.¹⁴⁴ The Survey data, however, suggest that such attitudes are far from pervasive, and that some arbitrators adhere to a mindset focused solely on resolution through adjudication.

Guidelines for Settlement in Commercial Arbitration

A logical next step would be to lay the groundwork for a broader appreciation of the opportunities that exist for achieving early resolution of arbitrated cases through settlement. Recognizing that, as in dealing with the problem of excessive costs and inefficiencies in arbitration, the solution must be a shared one involving all of the key stakeholders in arbitration, the proposed effort would involve the development of an authoritative set of guidelines giving clear direction to arbitrators as well as business

¹³⁹ See, e.g., Wistrich & Rachlinski, *supra* note 8; Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889(2011); Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 *Emotion Rev.* 142(2014); Neil Vidmar, *The Psychology of Trial Judging*, 20 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 58 (2011).

¹⁴⁰ See *supra* Part III.A.

¹⁴¹ See *supra* Part II.B.

¹⁴² See *supra* Parts IV.A., B.

¹⁴³ See *supra* Part IV.C.

¹⁴⁴ See *supra* Part III.B.

users and corporate counsel, advocates and arbitration provider institutions on these subjects along the lines of the *CCA Protocols*. Like the *Protocols*, these guidelines might have an impact on practice as well as the formulation of future commercial arbitration procedures.

Neither the *CCA Protocols* nor the *ICC Techniques* focus specifically on settlement, while the *CEDR Commission Report* and resulting *Rules* fail to touch upon a number of options for setting the stage for settlement. A set of *Guidelines (or Protocols) for Settlement in Commercial Arbitration*, put together under the leadership of one or more prominent organizations with the involvement of arbitrators, provider institutions, corporate counsel and arbitration practitioners, could create a platform for mutual appreciation and understanding of the ways in which early settlement may be most effectively encouraged in arbitration. This would offer specific recommendations on methods for setting the stage for settlement through exchange/discovery of key information, effective handling of dispositive motions, and the like. It would also provide specific examples of interplay between mediation and arbitration, including “Guided Choice” options.¹⁴⁵

In the course of developing such *Protocols*, there would also be an opportunity to further examine the pros and cons of the approaches at the heart of the *CEDR Rules*, including providing parties with preliminary views or findings of fact or facilitating settlement conferences.¹⁴⁶ The discussion should also embrace med-arb, particularly since so many arbitrators and mediators engage in such activities at least occasionally.¹⁴⁷ Even if there is not a consensus favoring the use of these approaches, some form of guidance (including appropriate cautionary notes) might be developed for those wishing to utilize them.¹⁴⁸

¹⁴⁵ As a part of his Guided Choice platform, for example, attorney-mediator Paul Lurie, has proposed language to create a mechanism for mediators to seek decisions from judges or arbitrators to help settle cases. The proposed language (revised by Professor Stipanowich to focus solely on arbitrated cases) is as follows:

The parties participating in mediation may agree that a binding or non-binding opinion from an arbitrator pursuant to an agreement to arbitrate would be useful in helping to settle the dispute. The suggested protocol for such a procedure would be:

- The mediator may assist the parties to define the issue to be submitted to the arbitrator for an opinion.
- The submitted issues may include, but not be limited to, matters of jurisdiction, discovery, motions to dismiss, pre-trial orders, evidentiary matters and summary judgment.
- An informal opinion will only be given to the mediator, who will communicate its substance in a manner which the mediator determines to be the most likely to help settle the case.
- This informal opinion will not be part of any record used in a subsequent proceeding if the case does not settle.

E-mail from Paul M. Lurie to Thomas Stipanowich, May 2, 2014 (on file with Prof. Stipanowich).

¹⁴⁶ See *supra* text accompanying note 98.

¹⁴⁷ See *supra* Part IV.C.

¹⁴⁸ Earlier templates for such guidance are contained in the Report of the CPR Commission on the Future of Arbitration. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 48, at 22-24 (“Guidelines for situations where parties desire a mediator to assume the role of arbitrator”), 29-32 (“The arbitrator as

Ethical Guidelines

Consideration might also be given to related ethical guidelines for dispute resolution professionals. This could take the form of proposals to revise the *Code of Ethics for Arbitrators in Commercial Disputes*¹⁴⁹ and the *IBA Rules of Ethics for International Arbitrators*¹⁵⁰ to incorporate more specific treatment of the role of arbitrators in settlement. Alternatively, an annotation or commentary on the application of the current standards to settlement-related scenarios could be developed.

Of course, legal counselors and advocates must play a leading role in creating appropriate opportunities for settlement during the course of dispute resolution. To this day, however, no set of specific ethical guidelines exists for attorneys who draft dispute resolution agreements and represent clients in mediation and arbitration. Today, as growing attention is being given to the ethical responsibilities of legal counselors and advocates in international arbitration,¹⁵¹ it would be appropriate to develop ethical guidelines for U.S. practitioners that reflect current U.S. practice but that take note of or, to the extent possible, are harmonized with developing international norms. Such a project might begin as an annotated version of the *Model Rules of Professional Conduct*¹⁵² for legal counselors and advocates in commercial arbitration, to be used as a basis for education and training.¹⁵³

mediator in the same matter” and Draft Protocol for Arbitrators Who Participate in Settlement Discussions”). See also CEDR COMMISSION REPORT, *supra* note 4, at 13-15 (“Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement”). Another interesting possibility would be the creation of a Commission on Mixed Roles in Dispute Resolution (see draft concept paper on file with Professor Stipanowich).

¹⁴⁹ See *supra* note 6.

¹⁵⁰ See *supra* note 5.

¹⁵¹ See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L. 341 (2002); Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration* (Bocconi Legal Studies Research Paper No. 18-2010, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012.

¹⁵² MODEL RULES OF PROF’L CONDUCT (2013).

¹⁵³ A beginning of this effort may be found in Thomas J. Stipanowich, *Effective Advocacy in Arbitration: What Arbitrators Wish Lawyers Knew* (draft on file with Prof. Stipanowich).