

Arbitral Decision-Making/Some Considerations

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- **Big opening question: whether the objective is**
 - Justice in the eyes of the arbitrator
 - Deciding issues presented by the parties
 - Some combination of the two
 - Relevance of
 - Pro se party
 - Imbalance in sophistication in presenting claims or defenses
- **Initial distinction: decision-making by**
 - Sole arbitrator
 - panel
- **Different levels of decision-making**
 - Non-substantive matters
 - Scheduling
 - Discovery
 - Adjournment requests
 - bifurcation
 - Substantive matters
 - Arbitrability
 - Merits
 - Forms of decision
 - Orders
 - Awards
 - Interim
 - Partial final
 - final
- **Decision-making by panel members**
 - Note-taking
 - During hearing
 - At end of day or group of days of hearing
 - Types of discussions
 - Informal discussions along the way
 - Formal deliberations
 - Types of arbitrators
 - Party appointed
 - Neutral
 - Seemingly neutral
 - Seemingly partisan

- Non-neutral
- Relations within a panel
 - Equality
 - collegiality
 - Hierarchical
 - Chair/wing
 - Preparedness/engagement
 - Stature
 - Other
 - Groupthink
 - Ethical requirements
- Organization of discussions: Should the chair
 - Take the lead
 - Organize the discussions
 - Defer to the co-arbitrators
- **Process: when to decide**
 - On documents
 - Versus after a hearing
- **Timing of arbitrators' forming views of the case**
 - only after all the evidence is in
 - or sometime earlier
 - or back and forth as the evidence comes in
 - tentative preliminary views
 - significance of whether it is a case
 - with detailed pleadings, witness statements, expert's reports, pre-hearing motions and the like
 - that comes to hearing without much groundwork having been laid
 - cognitive risks of
 - early expressions of views on the case
 - early reduction of views to writing
- **Bias**
 - Actual
 - Unconscious
 - Psychological
 - physiological
- **The decision-making process: respective roles of**
 - The contract
 - The law
 - Where arbitrators
 - are already familiar with the law
 - are not familiar
 - concept of the contract and the law as the opening screens for considering the facts
 - The facts/evidence

- Arguments of counsel
 - pleadings
 - Admissions
 - Testimony
 - Exhibits
 - Briefs
 - Pre-hearing
 - Post-hearing
 - other
- Credibility
 - Significance
 - How determined
 - Can it be articulated?
 - Are we any good at it?
- Burdens of proof
- Personality/experience of the arbitrator
- Eliciting of information by arbitrators
 - On legal and factual points raised by the parties
 - On points not raised by the parties
 - Before counsel have done their thing
 - Before or while counsel are doing their thing
- Negotiations/compromise among panel members
 - Liability
 - damages
- Splitting the baby?
- **Drafting the award**
 - do arbitrators decide
 - before drafting the award?
 - or as part of the award-writing process?
 - the actual drafting
 - by the chair
 - or different parts of the award by different panel members
- **Diversity**
 - Significance of diversity on decision-making
- **Comparison of arbitral versus judicial decision-making**
- **Appraisal**
 - Characterization of arbitral practices in these areas
 - Substantially uniform
 - Or idiosyncratic?
 - Areas that need
 - Change
 - Further study
- **Arbitrator perspective**
 - What parties, witnesses, and counsel do
 - That helps

- That impedes the decision-making process
- **Counsel perspective as to these questions**