# Arbitration Decision Making—By the Numbers

## Do arbitrators always base their decisions on the strict application of the law or on what seems fair?

In the course of an arbitration, when do arbitrators make up their minds? How open are they to changing their minds and how often do they do it? How confident are arbitrators that they are right, and how often do they think that other arbitrators may have come to a different result?
These are intriguing questions, but can we ever know the answers?

The Toronto Arbitration Society Gold Standard Course in Commercial Arbitration, of which I serve as course designer and director, offered a modest opportunity to explore these questions in a systematic way. The course runs from September to May and culminates in a highly realistic award-writing exercise in a fictionalized case called *BEHL v. Cutler*. I based the exercise on a real case but substantially rewrote the facts and submissions to make it as hard as possible to decide for one side or the other.

In *BEHL v. Cutler*, the claimant relies on the strict wording of the agreement to obtain a result that may seem unfair to many. The respondents urge a more contextual approach to interpreting the contract to achieve what they suggest is a fairer result. The specifics of the exercise are not important (and I do not want to reveal them here) but in almost all cases involving contract interpretation, this is the paradigmatic conflict. Canadian case law supports giving effect to the plain meaning of contractual language but also provides room for a contextual analysis based on the surrounding circumstances or "factual matrix" at the time a contract is entered into. In any given case, the lawyers representing the parties can usually find support in the jurisprudence to support either a strict constructionist or a contextual approach. One of these two approaches will prevail in each case based upon myriad factors, and the pre-dispositions of the judge or arbitrator will almost certainly play a role. Thus, the conflict between fairness and strict interpretation never goes away. And, I would suggest, never will.

In each of the first two years of the course, which is now entering its fourth year, twenty students enrolled. With one exception (a person who audited the course and did not do the exercise), they were all practising lawyers who aspired to be arbitrators.[1] Their years of practice ranged from 3 to 43, but most were in mid-career. The award-writing exercise took place over six weeks, and students received the material in three stages: first the pleadings and witness statements, second the written submissions, and finally a summary of the written submissions that were made at the hearing. There is a twist in the evidence at the end and the (fictional) parties elect to proceed without oral examinations of the witnesses.

Even though *BEHL v. Cutler* was not an actual arbitration, it occurred to me that the exercise replicated arbitration's core decision-making process and that the students were reasonable proxies for arbitrators. I sensed that we could learn something about arbitral decision making by asking all students some questions after they had completed the exercise. I collected their responses and sent them to FTI Consultants in Toronto, Ontario, who compiled the responses into chart form on a non-identifying basis.[2]

The combined results for the two years are reproduced below without extensive commentary so readers can explore them and draw their own conclusions.

I would make the following observations of my own:

1) In the sample of thirty-nine arbitrators[3], twenty-four (60%) decided in favour of the claimant (legal

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correctness) and fifteen (40%) decided in favour of the respondents (fairness).

2) Those coming down on the side of fairness found it slightly harder to decide the case and were somewhat less confident in their conclusion.
3) Most arbitrators initially came to whichever conclusion they finally reached in the award well before the final hearing (some as early as the pleadings).
4) Most arbitrators changed their minds at least once before coming to their final conclusion (presumably often returning to their initial conclusion).
5) Almost all of the arbitrators recognized that other arbitrators could come to a different conclusion.
6) More of those applying a strict legal analysis felt that it conflicted with a fair result, whereas more of those who came down on the side of fairness felt it was also legally correct.
7) There is some evidence that if arbitrators encounter an issue in the course of practising law, they will tend to decide that issue in a way that is consistent with the position they advocated in practice.
8) Some arbitrators admitted to having been influenced by a factor which they did not express in the award, but most said they were not.

No doubt there are methodological faults to my approach. There are obvious questions as to whether the sample size is meaningful and whether the aspiring arbitrators are a reasonable proxy for the real thing. I also appreciate that many other questions could have been asked and other parameters explored. But this was an exercise in professional curiosity, not behavioral science. Based on my own experience as an arbitrator, I am inclined to think that the human dynamics of arbitral decision making are well represented in the results. Perhaps there is room for a more elaborate experiment by others who would like to explore this further to see whether the results can be replicated.

I stopped the survey after the first two years of the course because I wanted to be able to refer to the results in the teaching of the course. However, it is interesting to note that in its third year, enrollment rose to twenty-six, and four of those who took the course were not practising lawyers. These comprised an executive in the mining construction industry, an insurance executive, an individual involved in the condominium management business, and a law student. One of the students who practises law remarked, "I don't know how a non-lawyer could process the issues in the case given the complexity of the problem."

One of the "non-lawyer" students did struggle to come to a decision and was unable to complete the assignment, but the remaining three came to well-reasoned conclusions that demonstrated an understanding of the basic issue in dispute. One favoured the claimant, and two favoured the respondents. That tiny sample is consistent with what most lawyers probably assume, that those not qualified in the law are more likely to decide based on fairness. Hence, the prohibition in almost all rules and statutes written by lawyers prohibiting the resolution of disputes *ex aequo et bono*[4], unless the parties expressly agree. Who can say, however, that any of the "non-lawyers" were more right or wrong in the result than their legally-qualified colleagues?

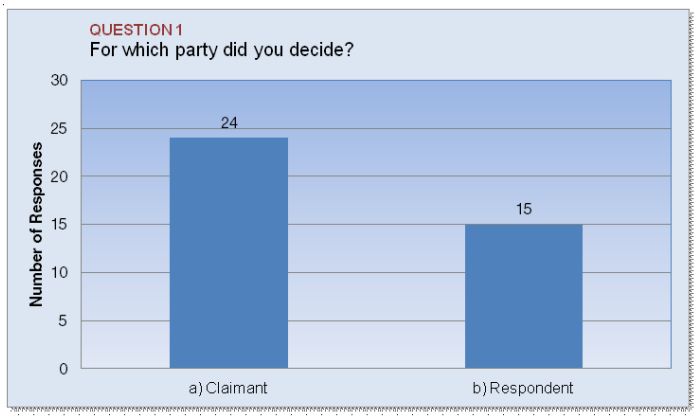
Based on the survey, it could be argued that no result is "right" in any absolute sense of the word. But the exact opposite conclusion may also be drawn. Barring procedural unfairness, bias or excess of jurisdiction, every result in an arbitration can be classified as "right" for those parties and that case. Ultimately, in arbitration the parties bargain for the judgment of the particular arbitrators whom they select, or who are selected by an agreed-upon method. The judgments of others on the same issues, as variable as they may be, are not germane.

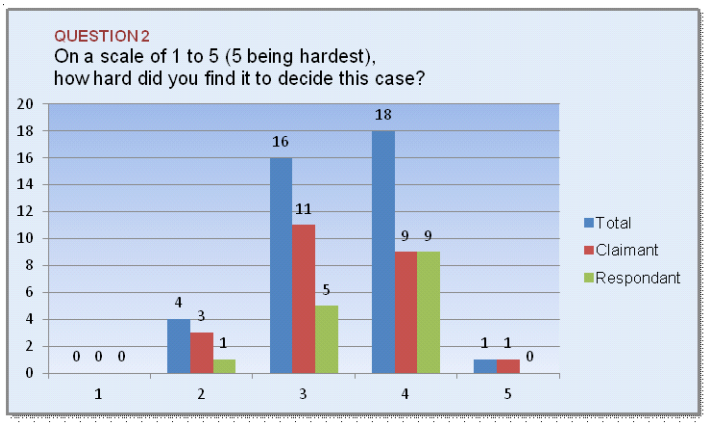
Whether or not you agree with that last statement, I hope you will find the results illustrated in the charts thought provoking.

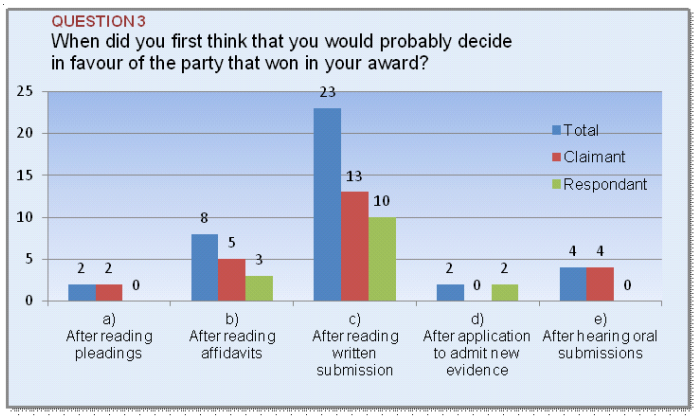


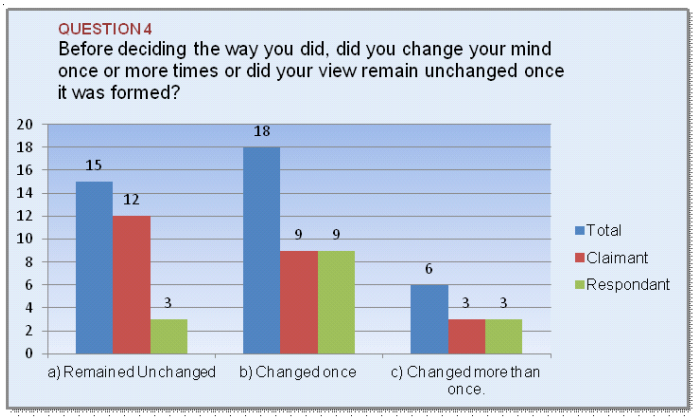
1 The course leads to a Q.Arb designation which is conferred by the ADR Institute of Canada through its provincial affiliates.
2 I am most grateful for the assistance of FTI Consultants in Toronto with this project.
3 One student audited the course and did not do the final assignment. Not all arbitrators answered all questions so there is some variability in the numbers.
4 On the basis of equity and good conscience.

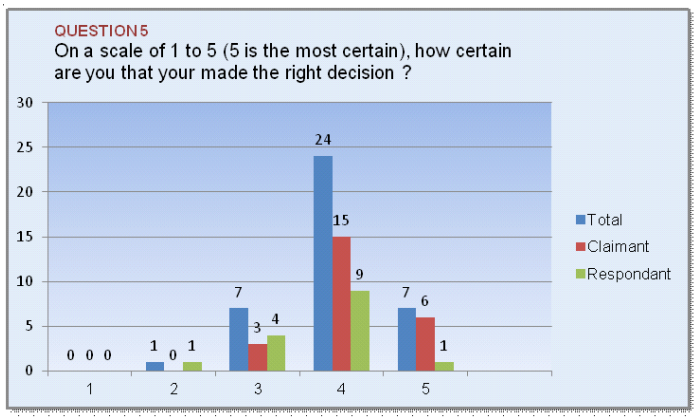
# Survey Response Summaries from 2017-2018 BHEL v. Cutler Anonymous Adjudication Questionnaire

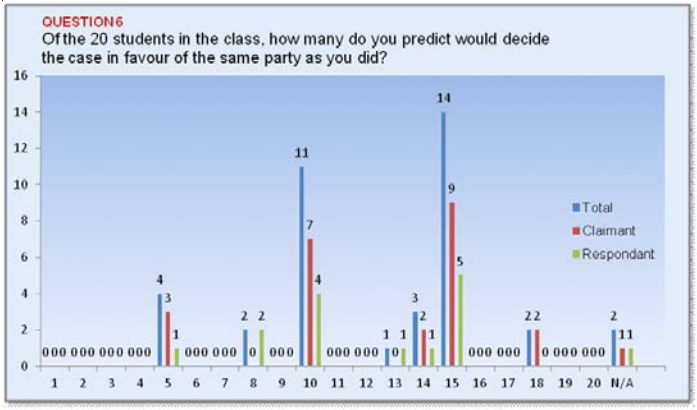


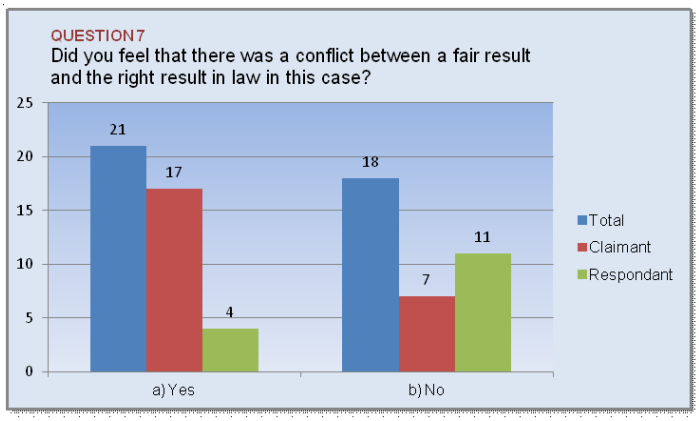



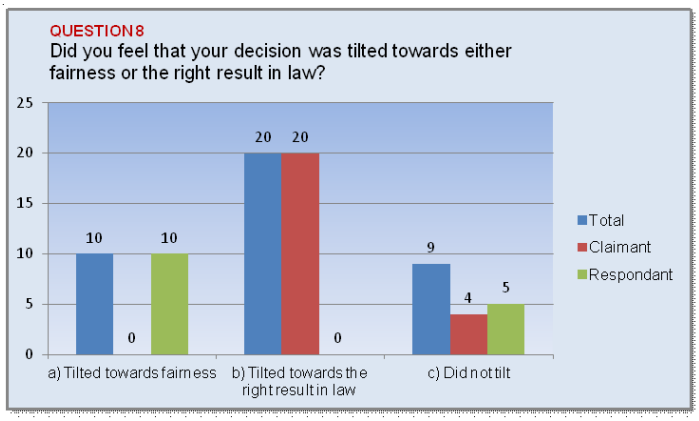



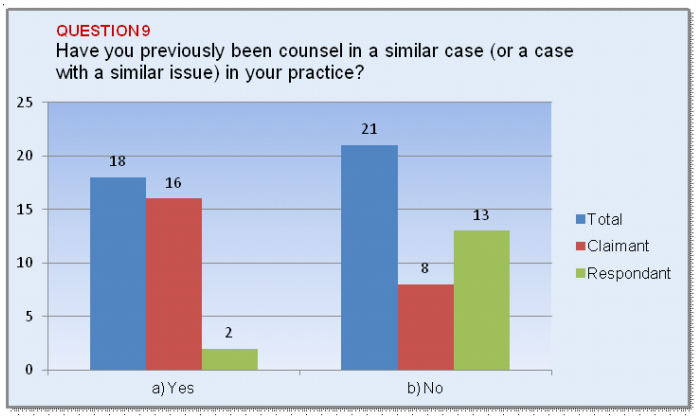



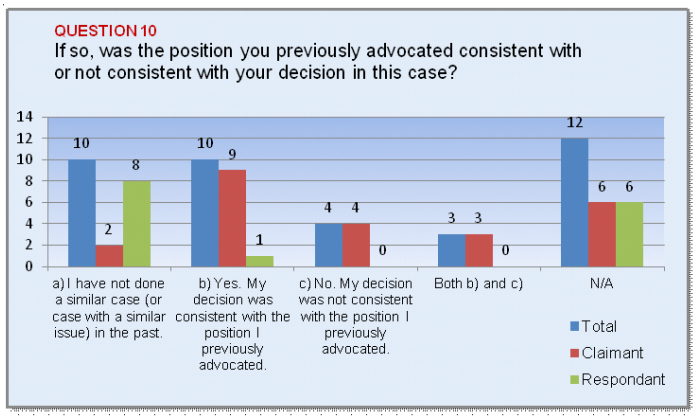



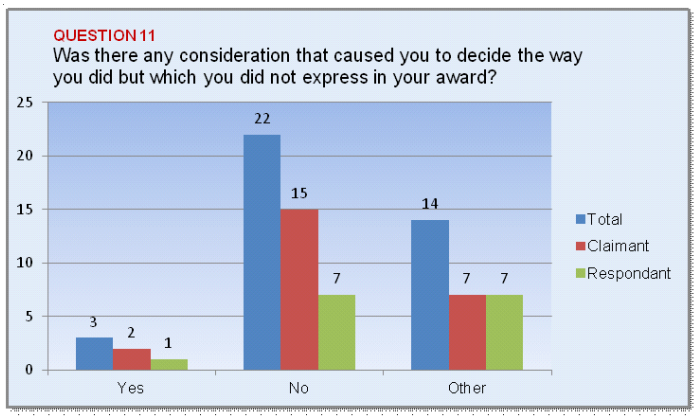






**QUESTION 11**

Comments for "other" responses *

Was there any consideration that caused you to decide the way you did?

| | |
|---|---|
| 2017 | "That's not what a tribunal is supposed to do!" |
| 2017 | "Commercial reality" |
| 2017 | "Respondents argument seemed more fair only because of the amount of the [third party] offer. It would not be compelling if the offer was much less or much more." |
| 2017 | "Clean hands doctrine. The claimants were seeking equitable relief but it was unclear whether fiduciary duties to the corporation (like self dealing) were involved. Ultimately unnecessary and would require further evidence." |
| 2017 | "Need for predictability and certainty in contractual application and interpretation." |
| 2018 | "I wanted to deal with the idea but since the claimant had not discussed this legal idea, I didn't propose it, either." |
| 2018 | "Respondents missed too many opportunities to address the issues themselves." |
| 2018 | "I don't think so." |
| 2018 | "Throwing mud on the wall to see if any of it sticks." |
| 2018 | "There was no specific legal authority that came to mind, except that equity will not act without a wrong. There was no wrong." |
| 2018 | "No particular case." |

** 3 of the respondents did not provide a response for this question.*