Arbitrator Style and Preferences Questionnaire: Responses of Greg Wood, Arbitrator

"Parties deciding whether to select an arbitrator will often wonder what to expect from him or her, especially with respect to case management and so-called "soft skills." A 2016 article proposes a questionnaire to help reduce surprises. See Ema Vidak-Gojkovic, Lucy Greenwood and Michael McIlwrath, *Puppies or Kittens? How To Better Match Arbitrators to Party Expectations*, part IV-A, at 11 (Vienna International Arbitration Centre Yearbook 2016). [See UPDATE on Aug. 8, 2016 at http://kluwerarbitrationblog.com/2016/08/08/puppies-kittens-better-match arbitrators-party-expectations-results/ See also the authors' survey-results report.]"

My responses the questions posed in this article are below.

1. Delegation: do you believe it is acceptable for an arbitrator to delegate work to a junior lawyer who is not a member of the tribunal?

I believe my responsibility to the parties is to personally review the evidence, documents, and declarations provided; to personally assess the relevance, materiality and weight to be given to that evidence; and then to personally draft the award when a sole arbitrator or chair of a panel, and participate in the deliberation and drafting of the award writing assigned by the chair when a panel member. Nevertheless, I can conceive of the rare circumstance where the case may require delegation of some procedural or routine matter.

2. Tribunal secretaries: do you believe that it is acceptable for a tribunal to appoint a secretary to assist it with the administrative tasks relating to the proceedings?

In some cases, circumstance may suggest the use of a tribunal appointed secretary to enhance the efficiency and coordination of the proceedings. This may occur where the dispute involves numerous issues, multiple parties, multiple witnesses, a large volume of documents or will involve multiple motions or hearing dates or other similar complicating circumstances. I would inform and solicit input from the parties on any proposal to retain a tribunal secretary with the agreement of the parties and decision being address at the earliest possible time and preferably at or before the preliminary hearing.

3. Preliminary or early decisions: do you believe it is appropriate for tribunals to attempt to identify and decide potentially dispositive issues early in a case, even if one of the parties does not consent to this?

Efficiency, fairness and agreement by the parties are key factors from my perspective. If time, cost and other efficiencies can be realized by deciding a potentially dispositive issue expeditiously, and the parties have agreed that the arbitrator can initiate a suggestion for early resolution of a potentially dispositive issue, I would be comfortable in raising a potentially dispositive issue at the earlies possible time and thereafter defining, in a

collaborative interaction between the parties and panel, a process for presenting and deciding the issue as expeditiously as possible. I would not otherwise raise and issue not otherwise raised by the parties since there may be strategic reasons for not raising it. Of course, if either party raises an issue by motion or otherwise, I would engage with the parties and other panel members to discuss whether bringing such a motion would promote the efficiency of the arbitration process. Furthermore, in consultation with the parties, a proceeding may be phased to address specific issues in sequence.

4. Settlement facilitation: do you believe arbitral tribunals should offer to assist parties in reaching a settlement, and actively look for opportunities to do so?

It is not the role of the arbitrator to assist the parties in reaching a settlement or to actively look for opportunities to do so but rather to decide the matter brought before the tribunalbased on the facts, the law and the arguments presented. However, I would be inclined to grant any request to stay the arbitration proceedings to enable the parties to engage in mediation or serious settlement discussions and would always acknowledge the option of the parties to settle the matter on their own or with the assistance of others.

5. Early views of strengths and weaknesses of claims and defenses: do you believe arbitrators should provide parties with their preliminary views of the strengths and weaknesses of their claims and defenses?

In my view, giving views on strengths or weakness of claims or defenses before evidence or arguments have been presented could be interpreted as prejudging the matter and could raise questions about the impartiality of the arbitrator. I would decline any request by a party for an evaluation but would suggest one or both parties pursue other individuals or processes (e.g., a neutral, non-binding mini-trial or mini arbitration, an expert evaluation) who can assist in such evaluation. At a later stage, I might request that the parties focus or address certain issues in briefing or may raise concerns based on the evidence presented.

6. IBA Rules of Evidence: do you believe international tribunals should apply the rules in proceedings even if a party objects to their application?

Where the parties have agreed in the arbitration clause or at the preliminary hearing to apply specific rules of evidence, the party's agreement should be followed where legally and practically possible. If not otherwise specified, or agreement upon, the final decision on the rules to be followed should be decided by the Panel at the preliminary hearing and contained in the scheduling order. The IBA rules are comprehensive and provide a baseline that can be adopted by the parties and panel.

7. Document disclosure: do you believe it is appropriate for international tribunals to grant a party's request for e-discovery?

E-discovery is authorized by the IBA Rules and the rules of most other arbitral institutions and I would follow whatever rules the parties agreed to follow in the arbitration. That said, broad, expansive discovery in the nature of litigation discovery is inappropriate for arbitration even when the rules allow some discovery. Therefore, my general approach to discovery when it is allowed under the agreed rules is to first require the parties to meet to narrowly and specifically define the discovery they want. Often, and this is my experience, the parties will agree on that scope and the need for further arbitrator intervention becomes unnecessary. Where the parties cannot agree, Article 3, paragraph 3 of the IBA Rules define a process for narrowing and focusing the discovery including e-discovery requests. I would opt for those or similar rules to focus discovery if any, on what was clearly relevant and material.

8. Skeleton arguments: do you prefer for parties to provide a summary of their arguments to the tribunal before the hearing?

There are two times that a "summary" should be provided. First, before or immediately after the preliminary hearing to clearly define the issues to be decided by the tribunal. This first summary should disclose the legal theories and supporting facts for each of the claims to be decided as well as the damages or other relief for each claim. The second time would be before the hearing of evidence, testimony and argument. This second prehearing brief would recite the claims and the supporting legal and factual basis for the claims, counterclaims and defenses and the related relief to be sought. Rarely provided but very helpful would be a timeline annotated with names of witness or key figures and key exhibits. A separate timeline from each party would highlight the perspective of each party and focus the issues in dispute.

9. Chair nominations: do you believe co-arbitrators should consult with the parties who appointed them before proposing names for a chair to the other co-arbitrator?

If the applicable rules allow Party appointed arbitrators to consult with the parties regarding appointment of a chair, then I would be willing to engage in such a consultation. However, even party appointed arbitrators are generally expected to be neutral. To protect the process and my neutrality, any such consultation would be focused and limited to that issue and once the chair was appointed, I would refrain from further contact with appointing party.

10. Arbitrator interviews: are you available to be interviewed by the parties before being appointed (in accordance, for example, with the Guidelines for Arbitrator Interviews published by the Chartered Institute of Arbitrators)?

Yes, I would be available for a schedule interview.

11. Arbitrator interviews: if you are appointed as a co-arbitrator, do you think parties should interview a prospective chair that you and the other co-arbitrator have identified, before agreeing the appointment?

In my experience, a party has never requested to interview a prospective chair. Absent a specific provision the rules to be applied or in the arbitration agreement itself, I cannot see a basis or rationale for permitting such an interview.

12. Counsel misconduct: for a counsel that has engaged in misconduct, do you generally take steps while the proceedings are underway, or include consideration of the misconduct in a subsequent award of costs, or do you believe it is not within the responsibility of the arbitral tribunal? (choose only one)

(a) Discipline during proceedings, immediately when misconduct occurs

(b) Discipline both during proceedings and in subsequent award on costs

(c) Take misconduct into consideration in cost award

(d) Do not believe counsel misconduct is responsibility of the tribunal

It depends on the misconduct and the resultant prejudice to the other party or to the process itself. Absent a need to prevent or remediate prejudice caused by the misconduct, I would generally warn a party of the potential for sanctions and if the conduct continued or was repeated then consider sanctions. In that situation, I would give each party notice and an opportunity to be heard.

13. Costs: do you believe it is appropriate for a party to recover all of its reasonable costs (including counsel fees) if it has prevailed on its claims or defenses?

Where an agreement in issue, arbitration agreement itself, or the applicable law permits the recovery to the prevailing party, it would certainly be appropriate to award the prevailing party its costs including reasonable legal fees. The issue of who the prevailing party is may also require briefing.

14. Costs: do you believe it is appropriate for a party to recover the reasonable costs of any in-house counsel who conducted or assisted the party's conduct of the arbitration?

It would be appropriate to award in-house counsel fees if permitted by contract, statute or the agreement of the parties. That said, before including inhouse counsel fees, I would request the party seeking that recovery to provide the factual and legal basis for those fees and would also look to counsel to address whether the award of fees was in toto, reasonable, and the inhouse portion of those fees was necessary and non-duplicative.

15. Do you view yourself as conducting proceedings more in the style of the common law, the civil law, or no preference/depends on situation?

How proceedings are conducted will depend on the facts of each case: the location of the arbitration, the background of the panel members, the location of witnesses etc.An important consideration would be the preferences of the parties as expressed in the arbitration

agreement or by agreement at the preliminary hearing stage and I would generally defer to the process for conducting the proceedings preferred or agreed to by the parties. That said, even though my experience has been primarily in common law systems I would lean toward the civil law system approach to discovery in arbitration because of the importance which I attach to efficiency and economy in arbitration proceedings.

16. Please provide a statement of how you prefer to conduct arbitration proceedings in cases in which you have been, or could be, appointed:

My approach to arbitration is premised on providing the parties with a process that is efficient, economic and fair. At the same time, I believe it is important that the parties have significant influence in defining the process. I therefore encourage the parties to regularly communicate and to work to constructively to address and resolve procedural and other issues before bringing those issue to the arbitrator or arbitration panel. Maintaining an orderly, deliberative and predictable process is also important so requests for delays are discouraged absent a showing of good cause. At the same time, I seek to be flexibility in response to the viscidities of life. Finally, I avoid procedural formalities and welcome telephone conferences to resolve issues, requiring briefing only when necessary. My approach to specific aspects of the Arbitration follows:

<u>Preliminary Conference (defining the issues and process)</u>:

After appointment, and with the input from the parties, I schedule the Preliminary Conference as soon as practical. I will generally send the parties an agenda and request a summary brief that clearly defines all claims, counterclaims and defenses that are to be decided prior to the Conference. While not required, I prefer that a party representative attend the Conference. In most matters the Preliminary Conference will be by telephone conference but I prefer in person Conferences if feasible and cost effective. Based on the interaction between the parties, their counsel and the panel, a Scheduling Order is prepared and sent to the parties defining the process, rules and schedule for the arbitration. That Order will be subject to modification only upon good cause shown.

<u>Discovery (document exchange, document requests, other discovery, resolving disputes):</u>

I encourage the parties to collaborate in defining the information and discovery that will be exchanged. Only if the parties cannot reach agreement through this collaborative process would I entertain a motion addressing the dispute. That motion should define the discovery sought or an objection to that discovery, giving the specific reasons why the information is relevant and material to the issues to be decided by the panel. Generally, discovery vehicles such as admissions, interrogatories and depositions would not be allowed.

<u>Motion Practice (procedural, discovery, dispositive)</u>:

See the discussion of motion practice related to discovery above. I prefer dealing with procedural issues such as extensions of time and the like by telephone conference. If desired, the parties may submit short letter briefs in support of such motions but that would generally not be required. Based on the oral arguments, I sometime request a follow-up brief addressing a specific issue. If a party wants to file a dispositive brief, I would require a telephone conference where we would discuss the motion, how the motion might promote efficency, economy and fairness.

Hearing (pre-hearing submissions, witness and expert testimony, hearing process):

Prior to the hearing, I would expect the parties to provide briefs discussing each claim, counterclaim and defense; the damages or remedies being sought for each; and the specific evidence expected to be presented in support of the claim, counterclaim, defense or damage / remedy sought. Witness lists, a joint exhibit list, and a joint exhibit notebook would be submitted at the start of the hearing. I prefer that each witness prepare direct testimony in the form of a declaration be submitted prior to the hearing with live testimony at the hearing consisting of cross examination and redirect. At the close of the hearing, the parties will have the option of presenting final argument or incorporating their final argument in a post hearing brief.

Post-Hearing Briefs:

Post hearing briefs are encouraged. Such post hearing briefs should be organized by claims, counterclaims, defenses and remedies. The brief should summarize the evidence, facts and legal authority supporting each claim, counterclaim, defense and remedy. Generally, upon receipt of the briefs, the hearing will be deemed closed.

Award:

Immediately after the hearing and again after receiving the post-hearing briefs, I will confer with my co-arbitrators regarding the facts and evidence and arguments and will begin drafting of the award or my assigned portion of the award as soon as possible.