GROWING PAINS; BUILDING ARBITRATION'S LEGITIMACY THROUGH EVERYDAY ARBITRAL DECISIONS

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Arbitration is an unusual procedure because it draws on the state’s compulsory enforcement power, yet ordinarily is invoked only if the parties choose to arbitrate rather than go to court. This dual nature means that arbitration has legitimacy only if courts are willing to enforce awards, but, unlike regular court proceedings, also only if parties continue to agree to use this displacing, voluntary, parallel dispute-resolution procedure.

Fueled by the traditional desire for a low-cost, quick alternative to courts and enhanced by many corporations’ eagerness to handle repetitive, often small claims outside the normal judicial process, arbitration has spread rapidly in the last few decades. Its increasing use can be seen in the fact that while the American Arbitration Association (AAA), traditionally the country’s largest arbitration administrator, “settled” only 500 cases in its first two years in the 1920s, it was administering 137,000 cases a year by
The National Arbitration Forum, a relative upstart founded in 1986, claims to have administered an astounding 214,000 arbitrations in the same year. By this measure, arbitration appears to have been a great success over the last few decades.

In spite of these signs of health, the past few years have brought two reminders of the precariousness of this private institution that relies on public enforcement of its awards for its viability. First is the Supreme Court’s decision in Hall Street Associates, L.L.C. v. Mattel, 552 U.S. 576 (2008). The Court took a very supportive, deferential approach to arbitration, restricting the review that courts can make of appealed awards. The debate that has swirled around its apparently severe limits on judicial review of awards is a reminder of the risk of so insulating awards that they cannot be challenged even for very obvious error. The Court’s latest pronouncement brings into question how much the Court really has narrowed the scope of appeal, but awards under the Federal Arbitration Act almost certainly are significantly more insulated than before Hall Street.

A second reminder of arbitration’s unstable foundation is the persistence of congressional efforts to outlaw “mandatory” arbitration in certain common, repetitive

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1 For the AAA caseload, see S. Rep. No. 68-536, at 3 (1924)(figures on first two years); Brief of Amicus Curiae American Arbitration Association *7, Hall Street Assocs., L.L.C. v. Mattel, Cause No. 06-989 (Sept. 14, 2007)[hereinafter cited as AAA Amicus Brief] (2006 caseload);
2 The NAF figures are drawn from Complaint § 3, Swanson v. National Arbitration Forum (4th Judicial District, Hennepin County, Minnesota, July 14, 2009)[hereinafter cited as Swanson Complaint], http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf (last visited Nov. 29, 2009).
commercial cases. The Arbitration Fairness Act (AFA) would prohibit forcing consumer, employment, franchise, and civil-rights disputes into arbitration. Support for the Act gained steam after exposure of the boilerplate operations of the National Arbitration Forum, a rapidly growing provider that had come to dominate certain kinds of consumer arbitrations.

Both Hall Street and the proposed legislation are reminders that arbitrators still have to fight for their profession’s legitimacy. This need to constantly reinforce arbitration’s support carries distinct meaning for decisions that arbitrators frequently face: (1) whether the arbitrator has to faithfully apply applicable law, or instead can override it to impose a personal sense of justice; (2) whether to issue a reasoned decision, and if so how much explanation to provide; (3) whether depositions and other often expensive discovery procedures should be presumptively off limits; and (4) whether summary disposition should be as readily available as in state and federal court proceedings.

Properly run, arbitration should be as fair as ordinary litigation, and quicker and cheaper. Yet that is not its popular image. The publicity over certain recent misuses requires arbitrators to be yet more vigilant in ensuring that their decisions foster fairness as well as speed and economy. And the fact that awards falling under the FAA will rarely be eligible for appellate review imposes added responsibility to infuse all arbitral decisions with extra care.

I. Storm Clouds on the Horizon: Hall Street and the AFA

The Supreme Court decision in Hall Street turned on just how much deference an award should command from the courts. The main issue addressed was whether parties
can contract for full judicial review under the Federal Arbitration Act (FAA), and in passing the Court also discussed the extent to which courts independently can correct “manifest” errors. In the process of deciding that parties cannot expand judicial review of awards by contract, the Court additionally denied the judiciary authority to create a nonstatutory, common-law ground of reviewing awards for manifest errors of law.

Before **Hall Street**, federal courts had been divided on whether the FAA leaves room to reverse awards that are based on palpably incorrect (but not corrupt, fraudulent, or partial) readings of the law. In **Hall Street**, a commercial landlord/tenant dispute over liability for environmental cleanup, the Supreme Court appeared to reject the idea that courts can reverse an award because it is plainly (“manifestly”) wrong in cases under the FAA. It did so even though **Hall Street** presented a strong case for allowing judicial review because the parties had contracted to have their arbitration subject to an ordinary standard of review. The trial court reversed the award because it thought the panel had misapplied governing law. The Supreme Court, however, like the Ninth Circuit, refused

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5 The Supreme Court determined that parties cannot expand review of awards beyond the grounds already listed in the FAA. The statute lists four grounds on which courts should vacate awards: (1) when an award is “procured by corruption, fraud, or undue means”; (2) when an arbitrator displays “evident partiality or corruption”; (3) if arbitrator “misbehavior,” such as refusing to hear evidence, prejudices a party; and (4) if the arbitrators “exceeded their powers” or otherwise fail to enter a final and definite award. Id. § 10(a)(1)-(4).
6 In **Hall Street**, the Supreme Court listed the First, Second, Fifth, and Eleventh Circuits as recognizing manifest disregard as an additional ground for vacatur. 556 U.S. 576, 128 S. Ct. at 1403. As far as the enforceability of agreements to expand review, the other issue in **Hall Street**, the Court identified the First, Third, Fifth, and Sixth Circuits as circuits enforcing such agreements (and the Fourth Circuit in an unpublished decision), and the Ninth and Tenth Circuits as having refused to do so (and the Eight Circuit in dictum). Id. at 1403 n.5. For general background to the conflicting positions on manifest disregard, see IV IAN MACNEIL, RICHARD SPEIDEL, & THOMAS STIPANOWICH, FEDERAL ARBITRATION LAW § 40.7 (1994 & Supp. 1999).
7 **Hall Street**, 128 S. Ct. at 1400-01.
8 The trial court vacated the award twice. Even after the Ninth Circuit sent it back once because, under the Ninth Circuit law announced in **Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.**, 341 F.3d 987 (9th Cir. 2003)(en banc) that the FAA’s grounds for vacatur are exclusive, the energetic trial judge vacated
to enforce the contract clause providing for judicial review, holding instead that the FAA listed the only grounds for overturning awards. In addition, it held that courts cannot expand the bases for review by applying a judicially created doctrine of manifest disregard. In holding that the only bases to vacate an award are the four narrow grounds listed in the FAA, the Court relied on the Act’s listing of specific grounds for review, the Act’s requirement that courts confirm awards unless one of these grounds is present, and legislative history suggesting that Congress avoided language that might have authorized judicial review.

Hall Street rested its refusal to allow judicial review for even manifest error (and, here, even when the parties contracted for it) heavily on the ground that such review would undercut the national goal of “maintaining arbitration’s essential virtue of resolving disputes straightaway.” This was a peculiar emphasis when, in the past, the Court repeatedly stressed enforcing the parties’ agreement as the “principal” and “preeminent” goal of the FAA even if doing so increases costs and delay.

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9 Hall Street, 128 S. Ct. at 1403-06.
10 Id. at 1403-04.
11 Id. at 1403-06.
12 Id. at 1405.
13 In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), for instance, the Supreme Court refused to stay arbitration of certain issues even if the result might be added delay and a need to maintain two proceedings in different forums. The Court called enforcing the parties’ agreement the FAA’s “purpose,” its “motivation,” its “principal objective,” and the “preeminent concern.” Id. at 219-21. This overriding goal had to prevail even if the result was “piecemeal” litigation, id. at 221, an obviously inefficient outcome. In First Options of Chicago v. Kaplan, 514 U.S. 938, 947 (1995), the Court rejected arguments that the FAA required a presumption that parties agreed to arbitrate the question of arbitrability and again held that the Act’s “basic objective” is enforcing the parties’ agreement, not speed. “After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, . . . .” Id. (citations omitted). The Court emphasized enforcement of arbitration in the manner designed by the parties as the FAA’s primary purpose yet again in Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 474-75, 478-79 (1989), and it returned to this traditional approach in subsequent cases, see infra note 17.
The Court did leave open the possibility of “more searching review,” review “based on authority outside the statute,” and mentioned state statutes and common law as examples of outside authority. Awards can be vacated if an agreement to arbitrate can be voided on general legal or equitable grounds for invalidating any contract, and courts have refused to enforce awards that violate public policy. Moreover, state courts may be able to provide broader review under parallel state statutes, even in cases also governed by the FAA. In Cable Connection, Inc. v. DIRECTV, Inc., issued shortly after Hall Street, the California Supreme Court held that parties can opt for expanded judicial review under California Arbitration Act.

In this year’s decision in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., the Supreme Court majority put the status of the seemingly banished manifest-disregard review in doubt because it seemed to accept the possibility that such review might survive Hall Street after all. Nonetheless, Hall Street reflects hostility to any general

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14 Hall Street, 128 S.Ct. at 1406.
15 Under state law, awards can be vacated if the agreement is voidable on general legal or equitable grounds, or if it violates a general public policy (not an anti-arbitration policy). The FAA reversed the prior American rule that agreements to arbitrate future disputes are revocable at will when it provided that such agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2000 ed. & Supp. V). Courts cannot apply a state public policy aimed only against arbitration, as the Supreme Court indicated in Southland Corp. v. Keating, 465 U.S. 1 (1984) when it overturned a California statute voiding arbitration clauses in claims brought under the California Franchise Investment Law. But courts can apply a general public policy that applies indiscriminately to arbitration and court cases. See generally United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42-45 (1987); MACNEIL et al, supra note 6, § 40.8. In Hall Street, the Court did leave a small teasing note of dictum that manifest disregard might survive as shorthand for the four grounds for vacatur in FAA section 10. Hall Street, 128 S. Ct. at 1404.
16 The California Supreme Court allowed review for legal error in a case that fell under the FAA but also California’s Arbitration Act in Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal.4th 1334, 190 P.3d 586, 599-608 (Cal. 2008), a decision issued just five months after Hall Street. For its forceful articulation of the position contra Hall Street and its conclusion that courts can reverse legal errors in awards because they are beyond the arbitrator’s authority if the parties agree that the arbitrator should not have the power to commit errors of law, see Cable Connection, 44 Cal.4th 1334, 190 P.3d 586, 604-06 (2008).
17 Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1768 n.3 (2010) (“We do not decide whether “manifest disregard” survives our decision in Hall Street.” Stolt is a reminder of the oddity of Hall Street in another way because it returned to the traditional strong emphasis on the parties’ agreement as the primary value protected in arbitration. See id. at 1773-75. Had the Hall Street court honored that
power of judicial review of awards. And even if the scope of Hall Street has been thrown into question by Stolt-Nielsen, surely one reason Stolt-Nielsen’s conservative majority reached out to reverse a panel was its hostility to class actions and its unwillingness to make class proceedings readily available in arbitration. The language on manifest disregard was dictum in any event, because not only did the Court say it would not decide the scope of that doctrine, but it rested its holding on its argument that the panel (which clearly thought it was following precedent) actually was applying its own “policy,” and so acting outside of its contractual authority.

In the many cases that do fall under the FAA, the Supreme Court appears to have narrowed the grounds for review and ensured that reversal in FAA cases will be an even rarer event. Its resistance in ordinary (nonclass) cases to arbitrators’ being reversed for plain error will encourage arbitration’s critics. Parties who value the speedier certainty of an unappealable award can contract to avoid such review. But for many other parties, the principle, it would have honored the parties’ decision to provide for judicial review. The same majority emphasized party agreement again in Rent-A-Center, West, Inc. v. Jackson, 2010 WL 2471058 (June 21, 2010), esp. id. *4 (“An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” Hall Street is a reminder that agreements on some issues are more equal than others, and that this holding is not literally true).

Hall Street did leave open the possibility that the decision below could be reversed under the trial court’s Rule 16 case-management powers, because the parties entered their agreement to arbitrate with the trial court’s blessing only after their dispute had begun to work its way through the court system. The Supreme Court remanded this issue. 128 S. Ct. at 1407-08. If the law ultimately settles with courts having the power to allow substantive review of awards just because an arbitration began in court before the parties agreed to arbitrate, but not otherwise, it would let parties that want full review secure it by first initiating a civil case and only then announcing (perhaps the next morning?) that what they really want is to arbitrate. Perversely, doubtful and uncertain parties would be rewarded for only opting for arbitration late in the game after judicial proceedings had begun. Those who endorse arbitration wholeheartedly from the get-go by entering predispute clauses would be punished for their greater fidelity by having less power to determine the scope of review. Such a policy would encourage waste by requiring a totally unnecessary civil proceeding, just to get into an arbitration process that includes judicial review. Hall Street also conceded that the decision below might be reversed under the court’s Rule 16 case-management powers, because in its unusual posture the parties had only agreed to arbitrate after their dispute already was in court. Id. at 1407-08.

See Stolt-Nielsen, 130 S. Ct. at 1768-70 (redefining decision of panel that appeared to think it was following precedent as if it had “simply imposed its own conception of sound policy”), 1773-76 (concluding that panel decision to allow class action contradicted contractual intent to not create basis for class actions).
idea that a sole arbitrator or a panel might clearly misapply the law but be immune from correction makes arbitration a process they want to avoid. Hall Street will be an added deterrent for such parties.\textsuperscript{20}

A second major reminder of the vigilance needed to maintain arbitration’s legitimacy comes from the ongoing controversy over “mandatory”\textsuperscript{21} arbitration of certain repetitive cases. Form contracts for credit cards, telephone service, investment accounts, employment, and franchises give rise to many of these cases.\textsuperscript{22}

The nonnegotiated arbitration clauses in form contracts have long been the target of arbitration’s critics.\textsuperscript{23} But general criticisms did not stop the rapid increase in

\textsuperscript{20}To illustrate what many parties fear, consider the standard for manifest disregard as applied in the earliest courts to apply Hall Street. If manifest disregard is not available, is it really healthy for arbitration if a court cannot vacate an award that it believes contains an “egregious error,” fails to provide even a “barely colorable justification” for the suspect decision, and violates the law willfully unless the error also fits into one of the FAA’s narrow categories for vacatur, the standard in Stolt-Nielsen SA v. Animalfeeds Int’l Corp., 548 F.3d 85, 91-93 (2d Cir. 2008), rev’d on other grounds, 130 S. Ct. 1758 (2010). Or has to let stand a “clearly irrational” decision, the Ninth Circuit standard in Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009). An award from an arbitrator who is “fully aware of the controlling principle of law and yet does not apply it,” and causes “significant injustice,” as in the Fifth Circuit? See Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 249, 354, 357 (5th Cir. 2009). Or decisions that “fly in the face of clearly established legal precedent,” the line for the Sixth Circuit. Compare Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415, 418 (6th Cir. 2008). Is any of these standards a good advertisement for arbitration? How can “resolving disputes straightaway” be more important than fixing severe errors in a system dedicated to the interests of justice? Not all of these circuits agreed that they are barred from vacating awards for their versions of manifest disregard after Hall Street, but if the Supreme Court’s holding is applied with fidelity, none of them should be reversing FAA cases on these grounds.

\textsuperscript{21}This article uses the term “nonnegotiated” instead of “mandatory” because the arbitration provisions in the form contracts that have spawned the current controversy are virtually never negotiated.

\textsuperscript{22}Public Citizen’s list of areas in which nonnegotiated clauses are common adds banks, computer manufacturers, cable tv providers, and home builders to the usual list of industries. PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009). The organization believes that automobile dealers also routinely use form arbitration clauses, but it did not receive enough cooperation from that industry to determine the prevalence of arbitration clauses in their contracts. Id. at 1, 17-19.

\textsuperscript{23}There is a long-running academic debate over arbitration’s fairness, with a separate literature on several major categories of arbitration (employment, consumer disputes, securities). Perhaps the most public, persistent critic has been the consumer group Public Citizen, which has been arguing for some time that arbitrations are biased and not even less expensive than ordinary civil proceedings. See, e.g, FORCED ARBITRATION, supra note 22; PUBLIC CITIZEN, THE ARBITRATION DEBATE TRAP: HOW OPPONENTS OF CORPORATE ACCOUNTABILITY DISTORT THE DEBATE ON ARBITRATION (2009); see also articles collected in David Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1255 n.17 (2009).
arbitration of these cases over the last decade. What may have been the tipping point are the abuses uncovered with one provider, the National Arbitration Forum (NAF).

On July 14, 2009, Lori Swanson, the Attorney General of Minnesota, sued the NAF and two related companies. The State alleged that the NAF, which is based in

Proponents of arbitrating consumer cases like to cite a recent study by Northwestern Law School’s Searle Center, CONSUMER ARBITRATION TASK FORCE, SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION (Preliminary Report March 2009). This study found AAA consumer arbitrations generally quick and inexpensive and no evidence of general repeat-player bias; to the extent that repeat customers (corporate clients) tended to prevail more often, it could not reject the hypothesis that this was because of better internal screening prior to suing. See id. IV.D & pp. 109-11.

Because the Searle Center study used a small sample of cases handled by the AAA, a reputable provider, it cannot be extrapolated to companies like NAF. Id. at xv, 2-3, Moreover, there are unresolved theoretical challenges to making a comparative study between arbitration and the cost, speed, and outcomes of similar small cases that are resolved privately or in courts, including small claims court. For a taste of the conceptual difficulty, see generally Schwartz, supra.

For a largely positive study of employment arbitration under AAA rules, with caveats including the representativeness of AAA arbitration, limited sample size, and the limit of its conclusions to “higher-paid employees” in nondiscrimination cases, see Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, 58 Disp. Resol. J. 44 (2003).

As another example of the issue’s complexity, a recent study of securities arbitrations based on over 3,000 survey responses found relatively positive assessment of the mechanics of the arbitration process (whether the parties received discovery, had enough time, and the arbitrators listened to them). But the report contains embarrassing conclusions on fairness: 35.1% disagreed with the statement that the arbitrators were impartial; 55.1% were dissatisfied with the outcome; 37.2% thought the panel did not apply the law, 38.9% would not recommend arbitration; 47.8% did not have a favorable view of arbitration, 47.9% disagreed with the statement that it was fair, and 18.1% thought arbitration was less fair than a court proceeding while another 30.8% that it was very unfair compared to a court proceeding (so roughly half of the sample viewed arbitration as worse than a court proceeding. Jill Gross, Perceptions of Fairness in Securities Arbitration: An Empirical Study, at 30, 38, 42-45, 47, http://digitalcommons.pace.edu/lawfaculty/478 (last visited November 15, 2009).

The scores generally were even worse when the population was limited to customers who arbitrated their cases. See id. Even discounting for the fact that many of the participants may have been dissatisfied with their award (with the caveat that the only way to know whether dissatisfaction was warranted is to analyze the merits), this is a dismal record for any system of dispute resolution. One of the interesting tests would be to compare these levels of dissatisfaction with views on court proceedings. Because almost every case that goes to disposition has a “loser,” some of the negative views about process may just reflect the losers’ predictable dissatisfaction with the outcome.

For a summary of the empirical literature, pro and con, see Gross, supra, at 4-6 & accompanying notes (securities arbitration studies); CONSUMER ARBITRATION TASK FORCE, supra, at 5-7 & n. 2 (listing consumer and employment studies); App. 1 (detailed description of consumer arbitration studies), App. 2 (listing empirical studies of employment and securities arbitration).
Minnesota, had been co-opted by a New York hedge fund manager.\textsuperscript{24} The NAF’s customers included some of the largest credit-card issuers in the United States -- MBNA/Bank of America, JP MorganChase, Citigroup, Discover Card, and American Express. It included large-volume mortgage lenders and cell phone companies as well.\textsuperscript{25}

The NAF touted itself as an independent provider, but it allegedly was subservient to the interests of its large financial-service company clients. According to the State, the NAF told these companies that “You have all the leverage and the customer really has little choice but to take care of this account.”\textsuperscript{26}

On July 20, 2009, six days after the complaint was filed, the NAF settled and agreed to stop arbitrating all cases over “credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.”\textsuperscript{27} Even responsible providers reconsidered their procedures for these cases; the AAA suspended its consumer debt-collection arbitrations.\textsuperscript{28} Several large banks, including JP Morgan Chase, suspended their programs as well.\textsuperscript{29}

The NAF debacle gave new momentum to congressional efforts to limit arbitration. Various versions of the Arbitration Fairness Act with the euphemistically

\textsuperscript{24} For glimpses at how the hedge-fund group allegedly rationalized having nonlawyers run a financial entity that controlled activities formerly conducted by (and acquired from) a lawfirm, see Swanson Complaint, supra note 2, §§ 71-73.
\textsuperscript{25} Id. § 16.
\textsuperscript{26} Id. § 96.
optimistic title are now pending in Congress. A number of the bills begin with “findings of fact” that summarize many of the complaints against arbitration:

1. the FAA was intended to apply only to companies of roughly similar size;
2. the Supreme Court pushed the FAA beyond its intended scope by letting it extend to disputes between parties of different size;
3. “[m]ost consumers and employees” have “little or no meaningful option” about choosing arbitration, but instead are forced to accept clauses used by entire industries;
4. arbitration providers “are sometimes under great pressure” to favor repeat clients;
5. mandatory arbitration undermines civil rights and consumer law because of the lack of judicial review; and without meaningful review, “arbitrators enjoy near complete freedom to ignore the law and even their own rules.”
6. arbitration is not transparent because it does not require written decisions or public decisions; and
7. arbitration clauses often limit substantive rights, including statutory rights; prohibit class actions; and force litigants to arbitrate far from home.

That such findings can draw any significant support is one sign that arbitrators need to do a much better job educating the public about their profession.

Small consumer cases are the closest most Americans will ever come to arbitration. The problems in these nonnegotiated cases will color their view of the process, increasing the risk that the public will come to think of arbitration as nonconsensual, stacked for one side, and secret.

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31 H.R. 1020, § 2; S. 931, § 2.
The speed with which the ground is being pulled out from under arbitration in consumer, employment, franchise, and civil-rights cases is a reminder that organizations that do not allow participants “voice” may find that their support has vanished by the time they realize they face a problem. As political scientist Albert Hirschman argued in his influential book *Exit, Voice and Loyalty*, institutions that have procedures to receive voice can respond to pressures for change from the populations they serve.\(^\text{32}\) In contrast, closed systems, the obvious example being totalitarian governments, suppress dissent. Hirschman believes that political and economic organizations that prohibit exit and lack voice mechanisms tend to lose their viability because adaptive behaviors “will be engaged in only when deterioration has reached so advanced a stage that recovery is no longer either possible or desirable.”\(^\text{33}\) The speed with which the governments of the former Soviet Union and most Eastern European countries fell from power in the late 1980s is one conspicuous recent example of how quickly closed institutions can disintegrate.

Arbitration is a closed system to the noncorporate defendants in most consumer, employment, franchise, and civil rights cases. The clause embodying the “agreement” to arbitrate is often buried in a detailed, nonnegotiable contract that the smaller party signed for reasons having nothing to do with dispute resolution. The clauses often are standardized across industries, meaning that there is no real way to avoid arbitration for many who use a credit card, have a bank account, buy a cell phone, or take out a home loan. While corporate users of arbitration services have the resources and incentive, given the amounts they have at stake, to communicate their needs to providers, there has been

\(^{32}\) ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 33 (1970) (“Voice has the function of alerting a firm or organization to its failings, . . .”).

\(^{33}\) *Id.* at 121.
no feasible way for consumers and others with very small claims, often unhappy and
often involuntary defendants, to do so.

From this perspective, the turmoil in Congress may have a silver lining. The very
public discontent with certain kinds of arbitration should remind arbitrators that they
must be even more zealous in policing the fairness of their procedures. It certainly is
likely to produce a clearer set of rules for consumer cases, if they are ever to be arbitrated
in large numbers again. Meanwhile, everyday arbitral decisions in other cases, including
how far arbitrators should be bound by the law, whether to explain awards, and how
much discovery to grant, provide great opportunities for arbitrators to deepen their
profession’s legitimacy while generating fair decisions for the parties.

II. Arbitrators Are Hired to Enforce the Law, Not to Impose their Personal Sense of
Justice.

Arbitration awards are subject to very limited judicial review. In addition, most
arbitration rules give arbitrators broad remedial powers. Litigators often claim that
arbitrators’ insulation from appeals and their broad power over remedies encourage them
to “split the baby” and reach results not strictly mandated by the facts and the law.

Parties have reason to fear arbitration if there is no check at all on even irrational
or idiosyncratic results. When the California Supreme Court enforced an arbitration
clause stating that the arbitrators “shall not have the power to commit errors of law or
legal reasoning” under California’s state arbitration statute in Cable Connection, it
observed that “[t]he desire for the protection afforded by review for legal error has
evidently developed from the experience of sophisticated parties in high stakes cases, where the arbitrators’ awards deviated from the parties’ expectations in startling ways.”

The belief that arbitrators are too free to act outside the limits that the law would impose upon a judge is behind the AFA’s accusatory “finding” that “arbitrators enjoy near complete freedom to ignore the law and even their own rules.” Critics like Public Citizen similarly claim that arbitrators do not follow the law. The same belief in a differentiated arbitrator role is reflected in one practitioner’s advice on arbitrator selection: “Does the party want an arbitrator who is fair, open-minded and would do equity? Or does the party want an arbitrator who is strict, rule-oriented and would apply the law?”

This presumed dichotomy between the ordinary application of the law in court and “fair” equitable arbitrating reflects a biased older view of arbitration, one that should be passing from the scene as the profession matures, with the possible exception of certain subject-matter areas in which the parties really do want the arbitrator to create an industry-specific brand of justice. The idea that an arbitrator may be “fair” by acting in opposition to the law, or at least outside of the written law, is precisely what concerns critics who portray the system as an unaccountable alternative to court adjudication.

Discussions about arbitrators acting as if they are modern-day Solomons devising remedies from scratch can arise in four quite different contexts. First is the older model of

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34 Cable Connection, 44 Cal.4th 1334, 190 P.3d 586, 589, 590 n.3, 605-06 (2008)(citations omitted).
35 H.R. 1020, § 2(5); S. 931, § 2(5).
36 THE ARBITRATION DEBATE TRAP, supra note 23, at 32-33 (“Arbitrators Are Not Required to Follow the Law, or Even Their Own Rules.”).
37 J.M. Christie, Jr., Preparing for and Prevailing at an Arbitration Hearing, 32 Am. J. Trial Advoc. 265, 291 (2008). This idea of a division between following the law and doing justice also fits Professor Mentschikoff’s study (and paradox) that 80% of arbitrators she interviewed believed they should follow the law, but even more believed that they were free to ignore it if they thought justice required a different outcome. Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 861 (1961).
arbitration that traces back to the age of judicial hostility to extra-judicial dispute
resolution. Over 50 years ago, this view led the United States Supreme Court to refuse to
compel arbitration of securities claims under section 12(2) of the Securities Act of 1933.

In Wilko v. Swan, it expressed skepticism that arbitrators would apply the law properly:

[The findings required by the claim] must be not only determined but applied by
the arbitrators without judicial instruction on the law. . . In unrestricted
submission, such as the present margin agreements envisage, the interpretations of
the law by the arbitrators in contrast to manifest disregard are not subject, in the
federal courts, to judicial review for error in interpretation. The United States
Arbitration Act contains no provision for judicial determination of legal issues
such as is found in English law.\(^\text{38}\)

The Court for that reason assumed that arbitrators should not be counted on to protect the
strong federal policy outlawing fraud by securities brokers.

Although the idea of an arbitrator as a wise elder acting outside the boundaries of
the law has its roots in an older sense of arbitration, it continues to surface unexpectedly
in modern opinions. In 2008, for instance, in the Cable Connection decision issued on the
heels of Hall Street, the California Supreme Court spoke as if this remains California’s
default model for commercial arbitration. Citing a variety of prior cases, the court stated
that arbitrators “may base their decision upon broad principles of justice and equity and
in doing so may expressly or impliedly reject a claim that a party might successfully have
asserted in a judicial action.”\(^\text{39}\) Thus in California, where the Supreme Court does allow

economical and adequate solution of controversies,” but at the cost of “less certainty of legally correct
adjustment.” Id. at 438. It was in this sense that the dissent in Mitsubishi v. Soler Chrysler-Plymouth, Inc.,
decisionmaking” that is “fine for parties who are willing to agree in advance to settle for a best
approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute
that may arise in a commercial relationship.” Id. at 656-57. Good arbitrators aspire to decisions that no one
would confuse with “despotive” decisions or just an approximation of the correct result.

\(^{39}\) Cable Connection, 190 P.3d at 600 (emphasis added), citing Moncharsh v. Heily & Blasé, 3 Cal.4th 1,
832 P.2d 899, 899 (Cal. 1992); see also Cable Connection, 190 P.2d at 602. See generally Advanced Micro
parties to agree to judicial review, it is unclear whether a panel nonetheless can be reversed for an error of law – because the arbitrators may just be trying to implement their sense of equity -- if the parties have not agreed both that the courts will have review powers and that the arbitrators are not authorized to commit errors of law.\footnote{The California Supreme Court left to another day whether parties seeking review of errors have to agree to allow appellate review and that committing an error of law is beyond the panel’s authority, \textit{Cable Connection}, 190 P.3d at 604, but careful lawyers will draft agreements with both provisions. It did not declare any particular form of agreement necessary. \textit{Id.} But the Court held, contrary to the logic of a number of arbitral rules, that merely stating that the arbitrators are required to apply the law does not necessarily indicate that the parties intended review for errors of law. \textit{Id.} (“A provision requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it ‘wrongly as well as rightly.’” (citations omitted)).}

A second context in which courts often describe arbitration as fundamentally different from the judicial process involves technical disputes that are supposed to involve practical knowledge that might be impeded by formal legal rules, and that may require a broader, less constrained sense of justice. This concept of unbounded discretion (which would be called arbitrary power in a judge) appears in collective-bargaining cases, in which arbitrators are selected for their skill and judgment in crafting industry rules of self-government. The Supreme Court has described the labor arbitrator as performing “functions which are not normal to the courts” and which, indeed, may “be foreign to the competence of courts”:\footnote{United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960).}

The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not

\textit{Devices, Inc. v. Intel}, 9 Cal.4th 362, 374-76, 885 P.2d 994 (1994)(“The choice of remedy, then, may at times call on any decisionmaker’s flexibility, creativity and sense of fairness. In private arbitrations, the parties have bargained for the relatively free exercise of those faculties. Arbitrators, unless specifically restricted by the agreement to following legal rules, ‘may base their decision upon broad principles of justice and equity’ . . . ‘arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award \textit{ex aequo et bono} [according to what is just and good].’” (citation omitted)); \textit{Sapp v. Barenfeld}, 34 Cal.2d 515, 523, 212 P.2d 233 (1949)(describing arbitrators as free, “unless specifically required to act in conformity with rules of law,” to decide on “principles of justice and equity,” and to “expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action”), \textit{cited with approval in Crofoot v. Blair Holdings Corp.}, 119 Cal.App.2d 156, 260 P.2d 156, 185 (Ct. App. 1953).
expressed in it. The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”

As the Supreme Court later held in deciding that civil-rights claims are not preempted by labor arbitration clauses, the labor arbitrator’s “specialized competence . . . pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose [a labor] arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations.” One sign of the difference between such specialized arbitration and general commercial arbitration is that the award of a labor arbitrator who based decisions on general statutes like the “public laws” of civil rights, rather than on the collective bargaining agreement, would be vacated quickly.

A similar model of specialized industry knowledge was applied by the California Supreme Court in a 1949 construction case, another category of disputes in which arbitrators ordinarily are chosen for their technical background. The panel was composed of three architects. The appellants complained that the arbitrators had consulted a cost appraiser without telling them. Rejecting this challenge, the court noted that the


“arbitrators were chosen for their technical qualifications. As experts, they could
determine construction costs from their own experience, . . .”45

A world in which judges can determine disputed issues from their own experience
or from new evidence secured ex parte – rather than on the record alone – is very
different from ordinary litigation, and from ordinary arbitration. This may explain why
the California court added the qualification that arbitrators, “unless specifically required
to act in conformity with rules of law, may base their decision upon broad principles of
justice and equity, and in doing so may expressly or impliedly reject a claim that a party
might successfully have asserted in a judicial action.”46

A third setting in which courts discuss arbitrators as not required to apply the law
is in a context that is directed to a logically distinct point, the standard of review. Courts
often cite the limited scope of review in discussing the broad freedom accorded to
arbitrators. In Wilko v. Swan, for instance, one of the reasons the Court found that the
securities laws needed to be applied in a judicial proceeding was that arbitrators’ legal

45 Sapp v. Barenfeld, 34 Cal.2d 515, 522 (1949). The fact that the panel may have felt free to consult their
own knowledge hardly seems a satisfactory excuse for letting them secretly consult a third-party expert.
The parties presumably had a good deal of control over the selection of the arbitrators, and chose them in
part for their industry knowledge, in part for their integrity and judgment, but they never had a choice over
the undisclosed expert who might as well have been a new, influential member of the panel. Even under the
old model of arbitration, in which parties did abdicate more authority to the arbitrators, that did not mean
that they had to include the arbitrators’ preferred experts as well.

It is an ethical violation for a judge to go outside the record and collect fact information, AMERICAN BAR
ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(7), commentary; or even to
seek expert advice on the law unless notice and an opportunity to object is given to the parties before such
15, 2010).

46 Sapp v. Barenfeld, 34 Cal.2d 515, 523 (1949). On the model of arbitration as an exercise of specialized
knowledge, see also Julius Cohen & Kenneth Dayton, The New Federal Arbitration Act, 12 Virginia L.
Rev. 265, 265, 279-80 (1925) (discussing arbitration as a useful mechanism for trade disputes that “reaches
the settlement of controversies by routes much more direct, much less hedged about by technicalities, much
more with an aim to homespun justice, than do actions in the courts,” and referring to the English practice
of settling mercantile disputes by arbitration “due to the ignorance of the courts of commercial customs and
the need for tribunals which would administer disputes according to such customs”).
interpretations “are not subject, in the federal courts, to judicial review for error in interpretation.”

Finally, arbitral discretion often is discussed as extending beyond the constraints that bind courts because of arbitrators’ broad remedial powers. As mentioned below, most arbitral rules endow the arbitrator – absent narrowing language in the arbitration clause – with authority to award “any remedy or relief” available. In Advanced Micro Devices, Inc. v. Intel, for instance, one of the strongest celebrations of the arbitrator’s power to go beyond “dry law” in crafting remedies, the basis for affirming broad arbitral power was a remedial issue -- whether the arbitrator had the power to issue certain injunctive relief.

As part of arbitration’s maturation, the model of unbridled arbitral discretion has gradually yielded to a model in which arbitrators in ordinary commercial cases have to apply the law. The most prominent demonstration of this change is the United States Supreme Court’s abandonment of Wilko-type hostility to arbitration. In the years since Wilko, the Court has refused to stay arbitration of statutory claims, has rejected the idea that arbitrators will not apply the law, and has let arbitrators decide cases involving major federal statutory rights. The Court began moving away from Wilko in Mitsubishi v. Soler Chrysler-Plymouth, Inc., in which it held that antitrust claims could be arbitrated in an international arbitration. Here it relied on a much more optimistic view of the

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47 Wilko, 346 U.S. at 436-37.
49 The differences between common-law and code systems sound very much like Max Weber’s distinctions between law determined by tradition and revelation, a kind of lawmaking that sounds close to the “wise arbitrator” model, and law tied to formal rationalizations, which Weber associates with bureaucratic society and which sounds more like rule, evidence, case, and statute-bound law. FROM MAX WEBER: ESSAYS IN SOCIOLOGY 216-21 (H. Gerth & C. Wright Mills, eds. 1946).
50 473 U.S. 614 (1985). One should perhaps add Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 469 U.S. 1, 24-25 (1983), as part of the shift away from Wilko, because Wilko’s hostility to arbitration is
arbitrator’s ability (and duty) to apply the law than in Wilko: “[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals” should inhibit enforcing arbitration agreements.51 Even though the panel to be deciding the U.S. antitrust claims was composed of three Japanese arbitrators, who presumably would not be well versed in American antitrust law, the Court rejected the idea that submitting antitrust claims to this panel meant giving up legal rights:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.52

The Mitsubishi tribunal “. . . should be bound to decide that dispute in accord with the national law giving rise to the claim.”53

Two years after Mitsubishi, the Court rejected an effort to extend Wilko’s bar on arbitrating section 12(2) claims to securities fraud claims under the Securities Exchange Act of 1934 and to racketeering claims. In the process, it again distanced itself from the suspicious view of arbitration.54 The Court stressed that limited appellate review does not justify arbitrators straying from the law.55 Not long thereafter, the Court finally reversed Wilko itself, criticizing the decision for being “pervaded by what Judge Jerome Frank

not consistent with a national policy favoring arbitration. For an argument that Moses Cone was a change in direction motivated in part by “a desire to conserve judicial resources” in an age of overcrowded dockets, see Jean Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 660-61 (1996). Sternlight argues that the Moses Cone doctrine, which requires interpreting ambiguities in favor of arbitration, amounts to “spreading binding arbitration by Supreme Court fiat.” Id. at 704.

51 Mitsubishi, 473 U.S. at 627.
52 Id. at 628.
53 Id. at 636-37.
54 Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). Although the Court did not reverse Wilko at that time, it did sardonically note that it “is difficult to reconcile Wilko’s mistrust of the arbitral process with this Court’s subsequent decisions involving the Arbitration Act.” Id. at 231-32.
55 Id.
called ‘the old judicial hostility to arbitration.’”\textsuperscript{56} The Court cited Justice Frankfurter’s \textit{Wilko} dissent for the proposition that there is no reason to believe that arbitrators will not afford the parties all the rights to which the law entitles them.\textsuperscript{57} To afford the parties those rights, of course, arbitrators have to follow the law.

As arbitration matures as a profession, common arbitration rules have come to include an express duty to apply the law. Many emphasize the need for fidelity to the law as part of a fair adjudicatory process. The model of arbitration as only an exercise in common-sense discretionary wisdom, an activity outside the boundaries that constrain courts, appears to be becoming as foreign to ordinary commercial arbitration, including consumer cases, as it is to ordinary court functions.

The non-administered arbitration rules of the International Institute for Conflict Prevention and Resolution (CPR) require that the Tribunal “shall apply the substantive law(s) or rules of law” applicable to the dispute, and when resolving contract issues “shall decide” them by the terms of the contract, considering as well any usage of trade.\textsuperscript{58} Though granting the Tribunal the power to grant “any remedy or relief,” this power is constrained by the condition that the remedy or relief must be “within the scope” of the contract and “permissible” under applicable law.\textsuperscript{59} CPR’s comments note that, while arbitrators have been held to have greater equitable powers than courts,

Arbitrators may not simply do as they please, however; any remedy or relief granted must be permissible under the contact and applicable law and Rule 15.2 requires arbitrators to explain the reasoning on which their awards rest.\textsuperscript{60}

\textsuperscript{56} See De Quijas v. Shearson/American Express, 490 U.S. 477, 480 (1989); see generally id. at 479-81. The Court somewhat petulantly criticized the Court of Appeals for refusing to follow \textit{Wilko}, id. at 484, even though it agreed with that court’s assessment and the inescapable conclusion from the Court’s own recent decisions that \textit{Wilko} had become bad law.

\textsuperscript{57} Id. at 483, citing \textit{Wilko}, 346 U.S. 439, 439 (Frankfurter, J., joined by Minton, J., dissenting).

\textsuperscript{58} CPR NON-ADMIN. RULES, Rules 10.1, 10.2.

\textsuperscript{59} Id. Rule 10.3.

\textsuperscript{60} Id. Commentary on Individual Rules, Rule 10.
The commercial rules of JAMS state, somewhat less clearly but still with an emphasis on substantive law as a constraint, that the Arbitrator “shall be guided by the rules of law agreed upon by the Parties” and, absent such agreement, by “the rules of law and equity that the Arbitrator deems to be most appropriate.”61 Arbitrators can award any “remedy or relief that is just and equitable and within the scope of the Parties’ agreement,” including specific performance “or any other equitable or legal remedy.”62

The AAA’s general commercial rules contain broad power to grant “any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement.”63 Unlike the CPR and JAMS rules, these AAA rules do not refer to applicable law. In contrast, however, in its consumer cases, the set of cases subject to the most scrutiny in recent years, the AAA endorses a Consumer Due Process Protocol that does limit the arbitrator’s remedial power to relief that “would be available in court under law or in equity.”64 The Reporter’s Comment states that “[a]s a general rule, arbitrators have broad authority to fashion relief appropriate to the circumstances” as limited only by the parties’ agreement and the scope of their submission.65 But the Protocol instructs arbitrators to “apply any identified, pertinent contract terms, statutes and legal precedents.”66 While the drafters did not recommend the added insurance of formally

61 JAMS COMP. ARB. RULES & PROCS., Rule 24(c).
62 Id.
63 AAA COM. ARB. RULES & MED. PROCS., Rule R-43(a). In contrast, while the AAA rules give arbitrators the power to award attorneys’ fees, a variation from the American rule, the power is highly restricted: attorneys’ fees can be awarded only if the parties agree, the agreement so states, or applicable law authorizes the award. Id. Rule R-43(d)(ii).
64 CONS. DUE PROCESS PROTOCOL, Prin. 14.
65 Id. Prin. 14, Reporter’s Comments.
66 Id. Prin. 15.2.
providing for judicial review, they “concluded that the rules should specifically direct arbitrators to follow pertinent contract terms and legal principles.”

This weight of authority in domestic rules fits international arbitration rules, which require fidelity to law. The International Chamber of Commerce (ICC) rules require arbitrators to apply any agreed upon rules of law or, lacking agreement, to determine an appropriate set of rules, and that the Tribunal “take account of the contract and the relevant usages.” To head off unbounded discretionary decisionmaking, they provide that the Tribunal can “assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties agreed to allow such power.”

The United Nations’ UNCITRAL rules have similar requirements, as do the international rules of the AAA, CPR and JAMS. This central place of the rule of law is why the ALI/UNIDROIT Principles of Transnational Civil Procedure, a joint effort of the United Nations and the American Law Institute to design a set of multinational procedures that can be applied in any country’s courts, require that judges have the independence “to decide the dispute according to the facts and the law, . . . .”

The looser standard for specialized arbitrations like labor and construction arbitrations, where the parties seek an award honed to the practicalities of their industry,

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67 Id. Prin. 15, Reporter’s Comments (discussing views of Advisory Committee).
69 Id. Art. 17.3. Blacks’ defines an amiable compositeur as “[a]n unbiased third party, often a king or emperor, who suggests a solution that disputing countries might accept of their own volition; a mediator in a dispute between subjects of international law.” BLACK’S LAW DICTIONARY 82 (7th ed. 1999). Decisions ex aequo et bono are “[a]ccording to what is equitable and good.” Id. at 581. “A decision-maker (esp. in international law) who is authorized to decide ex aequo et bono is not bound by legal rules and may instead follow equitable principles.” Id.
70 UNCITRAL ARB. RULES, Art. 33.
71 AAA INT’L DISP. RESOL. Art. 28.1-3; CPR, RULES FOR NON-ADMIN. ARB. OF INT’L DISPS., Rule 10.1-.4; JAMS, INT’L ARB. RULES, Rules 17.1,.3, 30.1-.2.
should no longer overlap with general commercial arbitration. In most commercial arbitrations, the parties entered a contractual relationship in the context of a legal framework of rights and obligations. This is very different from the labor model, under which, as the Supreme Court has acknowledged, the labor arbitrator “performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed [be] foreign to the competence of courts.” A labor arbitrator is crafting part of the legal framework, not just applying it.

Even in labor arbitrations, while the arbitrators are not required to enforce a wide variety of statutory claims but only the contractual agreement, their authority is not unlimited. They do not have a roving decree to enforce their personal whims. Instead, they are bound, and bound tightly, to the collective bargaining agreement. The contract limits their role, just as the agreement and the broader network of governing law limit a general arbitration. If a labor arbitrator attempts to impose his private beliefs in opposition to the agreement, he or she will be quickly reversed.

To the extent that parties in commercial disputes pick arbitrators for their technical expertise, the law already equips the arbitrators with a wide variety of ways to fit an award to special industry usages, just as it empowers common-law courts to do so.

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73 United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960); see Sternlight, supra note 50, at 642 (cautioning on need to distinguish labor arbitration from commercial arbitration; “using labor arbitration in lieu of a labor strike is entirely different than using commercial arbitration in lieu of a public court proceeding”). Given this difference, it was odd indeed for the Court to cite one of the Steelworker’s trilogy, Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), indistinguishably with more ordinary commercial arbitration cases on the binding nature of the parties’ agreement. See Stolt-Nielsen, 130 S. Ct. at 1774. It was as if the Court had decided to ignore the traditional differences between labor and commercial arbitration.

74 See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)(“Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.”); Major League Baseball Players Association v. Garvey, 532 U.S. 504, 509-11 (2001).
The variability of precedent-based, common-law decisionmaking generally allows wide
room to adjust to underlying circumstances. In addition, cases covered by the Uniform
Commercial Code allow incorporation of trade usage as a source of contract
interpretation, and the same progressive impulse fits more broadly into modern contract
law through the Restatement of Contracts. Applicable law thus provides the equipment
needed to incorporate industry-specific concerns into legal and factual analysis even
when arbitrators do “apply the law.”

The third area in which courts talk about arbitral discretion, deference in judicial
review on appeal, does not justify arbitrators’ slackening their fidelity to the contract,
case precedent, and statutes. Honest, competent arbitrators still are supposed to follow the
law as far as it can take them. Like common-law courts, they can apply reasoning from
analogy, logic, and the other tools courts use when the facts require them to step beyond
settled law.

The Supreme Court rejected the idea that limited judicial review is a license for
arbitrators to ignore the law in Shearson/American Express v. McMahon, in which it
held that a section 10(b)(5) claim under the Securities Exchange Act and a racketeering
claim could be submitted to arbitration:

Finally, we have indicated that there is no reason to assume at the outset that
arbitrators will not follow the law; although judicial scrutiny of arbitration awards
necessarily is limited, such review is sufficient to ensure that arbitrators comply
with the requirements of the statute.

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75 UCC §§ 1-303(c), 2-202(1)(a). The inclusion of usage of trade as part of contract interpretation allows a
contract term “to be interpreted as meaning what it may fairly be expected to mean to parties involved in
the particular commercial transaction in a given locality or in a given vocation or trade.” Id. § 1-303
Official Comment.
76 RESTATEMENT (SECOND) OF CONTRACTS §§ 202(3)(b)(application of technical terms and words
of art), 219-22 (application of established usage, including usage of trade in § 222) (1981).
78 Id. at 232.
Unspoken but clearly assumed in this holding is the fact that it would be improper for arbitrators to let that their personal values override applicable statutes or other governing law. The general holding in the Supreme Court’s recent Stolt-Nielsen case that arbitrators cannot enforce their own sense of “policy” is another manifestation of the view that there are real limits on the arbitrator’s discretion.

Finally, the fact that arbitrators have broad remedial powers does not authorize them to act beyond the law when the law produces clear outcomes. American statutes and common-law provide various damage remedies, and rules of equity authorize judges to enforce special remedies if certain conditions are satisfied. Arbitration rules equip arbitrators with broad powers, but those powers ought not let them impose liability not supported by law, deny liability when the law requires its imposition, refuse the damages provided by governing legal principles, or award damages contrary to those allowed at law.

There should be no conflict between applying the law and using arbitrators’ equitable powers. When the law dictates the outcome, arbitrators sworn to act impartially should follow the law unless their agreement prescribes a different role. Even though arbitrators generally are not bound by the ordinary rules of evidence and do have broad powers, parties who choose arbitration ordinarily do not agree to forego the substantive law, including the law of damages, that formed the framework for contracting when they began their relationship.


80 It surely is correct that, as dissenting Justice Kennard argued in the California Supreme Court’s Advanced Micro Devices decision, while parties in a modern arbitration seek a speedier, simpler resolution, they “would not generally expect that the arbitrator has the power to award relief that a court resolving the
The assault on arbitration embodied in the proposed Arbitration Fairness Act, the fallout from the NAF’s collapse, and the expansion of the area of unreviewable decisionmaking by Hall Street should make arbitrators more determined than ever to follow the agreement, cases, statutes, and any other binding authority. This does not mean that arbitrators should not do equity and cannot apply remedial powers. But it does mean that they have not been appointed to impose an undisclosed, intuitive sense of justice that conflicts with the law’s dictates.

Arbitral decisionmaking, to be fair, has to occur within the law’s boundaries. The appearance of statements in most modern rules that arbitrators are to apply the law, an appearance parallel to the shift from the old view that arbitrators are not really equipped to do so in Wilko to the assertion that they are in Mitsubishi v. Soler Chrysler-Plymouth, indicates that this principle has become more widely established as arbitration has deepened its professional roots.

IV. The Problem with Silent Awards.

Many arbitrators shy away from reasoned decisions \(^{81}\) because giving reasons can provide concrete material for an appeal. If an award is not explained, it is harder to prove that the arbitrators knew the law but disregarded it, or made a palpable error, because no one can be sure why they decided as they did.

Issuing an award without explanation makes writing the award simple and inexpensive. And sometimes it is the right thing to do. If the parties ask that the award

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\(^{81}\) This article does not distinguish between the less structured award ordinarily called a reasoned award, and the more formal, often more detailed award that contains findings of fact and conclusions of law. The difference is often more a difference in form than in substance; either should be sufficiently detailed to explain to the parties how the arbitrator or panel reached the final decision.
not state reasons, they have chosen speed and finality over a fuller understanding of the
decision and that is the end of the issue. Conversely, if the parties agree to a reasoned
decision, they have tipped the balance the other way and then, too, the arbitrator’s path is
clear. But in many cases, the contract is silent on the kind of decision required.

The desire to avoid a reasoned decision made some sense in the earlier period of
hostility to awards. Some courts required deference to unexplained awards, but assumed
that if the arbitrators did provide reasons, they intended that courts fully review the
award. Under such a regime, arbitrators understandably avoided providing reasons in
order to ensure that their awards received maximum deference.

The belief that it is best to leave the smallest target possible for appeal can
produce a preference for the most limited decision even when a reasoned decision is
required. A “reasoned” award that states ultimate factual and legal conclusions but does
nothing more in many cases is not enough to explain why the case ended as it did. An
award that does not explain why the arbitrators chose one side often provides little more
information than an award without reasons.

The AAA’s commercial and construction rules track the inclination of many
arbitrators to limit reasoned decisions. The AAA requires a written award, but provides
that the arbitrators need not give reasons unless both sides require them, or the arbitrator
otherwise determines that reasons should be given. Even more striking, under the
AAA’s general rules, even a joint party request is only binding if it comes “prior to

82 The California Supreme Court applied this model of dual review in the mid-nineteenth century in
Muldrow v. Norris, 2 Cal. 74, 77 (1852) (holding that “general submission” awards without reasons are not
reviewable for mistakes, but “[i]n all cases where the arbitrators give the reasons for their finding, they are
supposed to have intended to decide according to law, and to refer the point for the opinion of the Court”).
83 AAA, COM. ARB. RULES, Rule 42 (effective June 1, 2009); AAA, CONST. IND. ARB. RULES, Rule
44(c) (effective Oct. 1, 2009).
appointment" of the arbitrators, and its construction rules require notification before the end of the preliminary hearing. These rules thus do not grant the parties authority to decide to require a reasoned decision after the case has really gotten underway.

When arbitrators consider whether to explain their decision and how detailed their reasons should be, the factor they need to consider along with speed and cost is fairness. Decisions without rationale can easily appear arbitrary, and are more likely to be arbitrary. As CPR commented in explaining its rule that arbitrators must give reasons unless both sides request a silent award:

Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. CPR, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result. . . . [In addition, any] tendency on the part of arbitrators to reach compromise awards should be restrained by the requirement of a reasoned award.

Reasoned decisions fit the general understanding of what makes a judicial decision fair under values embedded in American culture. Speaking of a Supreme Court that he believed had strayed from its duty to explain important decisions, constitutional law professor Herbert Weschler argued that “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is

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84 AAA, COM. ARB. RULES, Rule 42; AAA, CONST. IND. ARB. RULES, Rule 44(c).
85 The AAA’s amicus brief in Hall Street can be read to assume an opposition between speed and finality on the one hand, and reasoned decisions on the other. Finality and a concomitant need to avoid the delay of judicial review are dominant values in the brief, ones that it cites repeatedly. AAA Amicus Brief, supra note 1, at *2 (singling out “economy and finality” as one of two “valuable characteristics” of arbitration, the other being party choice; discussing “strengthening the principle of finality in order to preserve the essential nature of arbitration as an expeditious, predictable, and private alternative to litigation,” and claiming that allowing enhanced judicial review would “eviscerate” finality); *12 (claiming that FAA’s supporters “consistently cited the finality of awards and the resulting reduction in delay and expense as among the primary benefits of arbitration”); **24-26 (arguing that international rules reflect belief in finality). At the same time that the brief stresses finality, it cites as one guarantee of arbitration’s expeditious nature the fact that arbitrators are not required to issue a reasoned decision “in typical commercial proceedings” under its rules unless the parties agree before appointment. Id. * 8.
involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. In contrast, courts issuing unexplained decisions reached because they feel right “function as a naked power organ,” not an instrument of justice. To Weschler, a principled decision “rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.” In other words, a decision needs to be written in sufficient detail to indicate why the outcome is linked to the general principles of law that apply.

The proposed Arbitration Fairness Act discussed in Part I treats lack of transparency as one of the alleged drawbacks that supposedly justify invalidating nonnegotiated arbitration clauses. And, not surprisingly, the Act points to the lack of public, written decisions as one proof of lack of transparency: “While the American civil justice system features publicly accountable decision makers who generally issue public, written decisions, arbitration offers none of these features.”

Older Supreme Court decisions discussing the model of arbitrators as not strictly bound by the law similarly sometimes pointed to the lack of reasoned decisions as one sign that arbitrators could not be trusted to apply statutes as fairly as courts. In Wilko, the reasons why the provisions of the Securities Act of 1933 would be “lessened in arbitration as compared to judicial proceedings” included that arbitrators may render an award “without explanation of their reasons and without a complete record of their

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88 Id. at 12.
89 Id. at 19.
90 It is no surprise that 46% of respondents in a study of securities arbitrations reported that they would have been “more satisfied” if they had received an explanation for their award. Gross, supra note 23, at 39.
92 Id.
Arbitrators’ “conception of the legal meaning” of the securities laws therefore “cannot be examined.” In a later case, when the Court justified withholding final decision of Title VII claims from arbitration by citing features that made arbitration “a comparatively inappropriate forum for the final resolution of rights created by Title VII,” it included that arbitrators had no obligation to explain their award.

The absence of a reasoned decision undercuts an award’s credibility. In the absence of reasons, neither side can be sure that the arbitrators considered key parts of the evidence. They cannot tell if their chosen judges understood the positions, mastered the record, and applied the correct law to the facts. What was heard, what was understood, and what the arbitrators thought they were doing all remain matters of speculation.

A lack of reasons can be particularly upsetting to arbitral litigants because of their lack of effective appeal. There is good reason to believe that a truly arbitrary trial judge will be brought in check by a court of appeals or supreme court. But arbitration already trades away the checks-and-balances in the civil system’s multiple levels of review. Only in arbitration do the parties rest their fortunes almost entirely upon a single decisionmaker. If the sole arbitrator or panel won’t give reasons, the loser is likely to end up feeling that the arbitrator was under no real pressure to get it right.

Not all cases require detailed reasons. A fair explanation of small collection cases in which the defendant often does not appear may amount to little more than a recital of the debt, the contract terms, notice to the defendant, and the lack of any brief filed in defense as well as an explanation of the damages awarded. But even here a listing of the

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94 Id. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991), the petitioner who unsuccessfully sought to persuade the Court that arbitration could not be relied on to fairly decide age discrimination claims included the lack of written opinions as one of arbitration’s “alleged deficienc[ies].”
basic elements of evidence would show that the award is based upon a reasoned process, one in which a thoughtful decisionmaker was concerned to apply the contract fairly. The need for a prompt, less expensive but fair proceeding even in such small cases underscores that the ability to provide a written explanation without adding excessively to the cost (or failing to meet deadlines) is a vital skill for every arbitrator.

The need for explanations is even more acute in FAA cases now that the Supreme Court has curtailed manifest disregard as a ground for vacatur. The more the award is the end all and be all of the proceeding, the more it needs to fully convey the propriety of the decision reached.96

The opportunity to increase the legitimacy of arbitrated awards by using reasoned decisions should be particularly great in disputes in which arbitrators are selected for special expertise. These arbitrators will be versed in the vocabulary of their industry and should be adept at explaining their decisions using technical language.

The counter argument that withholding reasons avoids appeals is not persuasive. When an award is appealed, it does push a case back into the often slow judicial system, and can delay the award’s finality as well as increase costs. If giving reasons meant that the percentage of awards that were appealed would rise markedly, then reasoned decisions would reduce -- but not eliminate -- arbitration’s ability to produce final decisions quickly. (Appeals still would not remove arbitration’s comparative advantage in shorter pretrial preparation and prompt hearings, so arbitration still should remain

96 The parties’ control over arbitration could allow them to improve the adequacy of the explanation they receive, because unlike ordinary litigants these parties can stipulate to specific issues the award must address. Tyrone Holt, Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation’s Ill Effects?, 7 DePaul Bus. & Comm. L.J. 455, 466 (2009). While it would not be wise to limit the award to discussion of specific issues in advance, when the parties do not know how the case will be decided or the issues that will be determinative, they certainly could list issues they do want addressed.
quicker and less expensive.) But giving reasons is not likely to increase appeals significantly.

   The grievance most likely to be encouraged by having a reasoned decision, and so to spawn appeals, is manifest disregard. Seeing the reasons behind an award may give lawyers better raw material to turn into an appeal for disregarding the law than a simple announcement of who won. In contrast, other appeals, like those claiming that an award exceeds the arbitrators’ authority or that the panel improperly excluded evidence, are usually possible to prepare in cases without a reasoned decision (although an opinion may help make clear whether an exclusion of evidence was harmful). Manifest disregard is such an unsuccessful ground for appeal, however, that access to reasoned awards is not likely to open a floodgate to such appeals.

   Even before Hall Street, very few cases were reversed for manifest disregard. In 2002, the Second Circuit calculated that the circuit had handled only 48 appeals for manifest disregard since 1960, barely one a year. Of these, only four had been vacated in whole or in part. Moreover, three of the four vacaturs involved an award that exceeded the arbitrators’ powers, and “it is arguable that manifest disregard need not have been the basis for vacating the award, . . . .” By 2008, the circuit had considered 18 more challenges for manifest disregard, so the rate of appeals on this ground had increased, but the court vacated only one award.

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98 Id.
99 Id.
100 Stolt-Nielsen SA v. Animalfeeds International Corp., 548 F.3d 85, 91 n.7 (9th Cir. 2008), rev’d on other grounds, 130 S. Ct. 1758 (2010). The Second Circuit also remanded two cases for clarification in this later period. Id.
A study published in 2005 studied every motion to vacate in state and federal court between January 1, 2002 and October 31, 2002. The authors identified 182 motions, with 277 grounds for vacatur. Manifest disregard was raised 52 times, but succeeded only twice -- approximately 4% of the times attempted. Not only was this a small fraction of times attempted, but it was the least successful of the grounds of appeal. This merits-based reason for appeal thus does not give parties much incentive to appeal, making the idea that reasoned decisions would prompt many added appeals based on manifest disregard an unpersuasive reason for avoiding such awards.

We do not have a controlled experiment in which one group of randomly selected arbitrators issues reasoned decisions, while another does not, in a statistically significant number of cases, and researchers then test relative appeal volume. Nor do the studies just cited indicate which manifest-disregard appeals were based on a reasoned decision. But when manifest disregard is so unsuccessful when tried, as one would expect from such a parsimonious doctrine, providing reasons for awards is not likely to lead to many more appeals. The idea that reasoned awards should be resisted to avoid appeals is even less persuasive now that Hall Street has discouraged use of manifest disregard as a ground for vacatur in FAA cases.

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102 Id. at 23.
103 Id. at 23, 25.
104 The “[m]ost potent” ground for appeal was that the arbitrators exceeded their powers, tried in 101 cases and successful 21 times, 20.8% of the time. Other grounds were prejudicial misbehavior, successful 7 out of 42 times, 17% of the time; refusal to postpone the hearing, tried 12 times but successful twice, 16.7% of the time; evident partiality or corruption, tried 33 times but successful only 4 times, 12.1% of the time; refusal to hear evidence, tried 24 times but succeeding only 3 times, 12.5% of the time; and that the award was procured by corruption, fraud or undue means, tried 13 times but succeeding only once, 7.6% of the times attempted. Id. at 25-26.
Most arbitration rules stress the importance of explaining decisions and rank that value above the added finality that might be bestowed on silent awards. Most require a reasoned decision unless both parties ask to forego one. The CPR rules require a statement of reasons unless the parties agree otherwise; so do JAMS’ domestic rules. JAMS’ streamlined rules, even though designed to expedite cases, mandate a reasoned award as well.

Even though the AAA’s general commercial rules are not as supportive, three categories of cases that have been subject to extra scrutiny of late fall under special rules that do require reasons unless the parties direct otherwise. The Consumer Due Process Protocol, which the AAA follows, requires reasons if either party makes a timely request for them. The AAA’s employment rules state that an award “shall provide the written reasons for the award” unless the parties agree to not require them, and its supplementary rules for class-action cases require a reasoned explanation of the certification decision.

While giving reasons for an award does increase its cost, the fact that even the AAA requires reasons in consumer and employment cases, which often have relatively small amounts in dispute, shows that cost is not the governing principle.

Because a record often will be needed to document the reasons for appeal, the same factors that counsel having a reasoned decision often justify having an official

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105 CPR, RULES FOR NON-ADMIN. ARB. 15.2 (November 1, 2007); JAMS, COMP. ARB. RULES & PROC. 24(h) (requiring “concise written statement of the reasons for the Award” unless parties agree to dispense with reasons)(July 15, 2009). JAMS policy statement on consumer cases requires a statement of the “essential findings and conclusions” underlying the award. JAMS POL’Y ON CONS. ARBS. PURS. TO PRE-DISP. CLAUSES, MIN. STDS. OF PROC. FAIRNESS 10 (July 15, 2009).
106 JAMS, STREAMLINED ARB. RULES & PROCES. 19(g)(July 15, 2009).
107 CONSUMER DUE PROCESS PROTOCOL, Prin. 15. The Protocol’s comments explain that while those who discourage reasoned decisions appeal to the policy of finality and the simplification of an award, those arguing for reasoned decisions claim that it “encourages more disciplined decision-making and enhances party satisfaction with the result.” Id. Reporter’s Comments Principle 15.
108 AAA, EMP. ARB. RULES, Rule 39.c (June 1, 2009); AAA, SUPP. RULES FOR CLASS ARB., Rule 4.b.5(a)(October 8, 2003).
record. Some cases are so small that a record makes no economic sense. But given the limited grounds for appeal and arbitrators’ broad powers over admitting evidence (so that disputes over admission or rejection of evidence are unlikely to support a meritorious appeal), there is as little reason for avoiding a written, official record as to avoid a reasoned decision.

The AAA’s inclusion of the requirement of reasoned decisions in categories of cases that have received heightened scrutiny, consumer cases being the most conspicuous example, is one sign that as arbitration matures in the United States, it is shifting away from a model of silent awards toward one of explained decisions. This evolution will bring American arbitration in line with the major international rules. The mere presence of a provision in international rules does not prove that it is the better option, but it is notable that the major international rules require a statement of reasons unless the parties agree to forego them. The United Nations UNCITRAL Code requires arbitrators to state their reasons absent contrary agreement; the ICC requires a statement of reasons without qualification. In their rules for international arbitration, the AAA, CPR, and JAMS all make a reasoned decision the default position. The ALI/UNIDROIT Principles for Transnational Civil Procedure similarly require a reasoned explanation of the “essential factual, legal, and evidentiary basis of the decision.”

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109 It is for this reason that the AAA’s expedited rules provide that in the small claims ordinarily subject to expedited rules, there generally will not be a stenographic record. AAA, COMM. ARB. RULES, Rule E-8(b).
110 UNCITRAL ARB. RULES, Art. 32.3.
111 ICC, RULES OF ARB. Art. 25.2.
112 AAA, INT’L DISP. RESOL. PROCES., INT’L ARB. RULES, Art. 27.2 (effective June 1, 2009); CPR, RULES FOR NON-ADMIN. ARB. OF INT’L DISPS., Rule 15.2 (effective Nov. 1, 2007); JAMS, INT’L ARB. RULES, Rule 32.2 (effective April 2005). If the parties opt for CPR’s accelerated international rules, the award “shall be as concise as circumstances permit.” CPR, GLOBAL RULES FOR ACCELERATED COMM. ARB., Rule 16.1 (effective Aug. 20, 2009).
113 ALI/UNIDROIT PRINCIPLES, Prin. 23.2.
Reasoned decisions will not increase legitimacy with everyone. Some losing parties never will be appeased. Seeing why they lost will only deepen their feeling of having been cheated. Every experienced litigator has had the memorable client who treats disagreement as proof that the judge, the jury, and the appellate court is conspiring against him. But for most parties, seeing why they lost is an important part of having their day in court.

Arbitrators should realize that avoiding reasoned decisions means foregoing one of the most powerful means of demonstrating the benefits of arbitration. Indeed, eagerness to avoid providing reasons solely to avoid the very limited review that might occur suggests a lack of confidence in the caliber of decisionmaking. Instead of trying not to explain their conclusions, arbitrators should use written explanations to demonstrate the validity of the outcome. Arbitrators must have the skill and time to ensure a fair process in a way that many overcrowded courts no longer can match, and they should used reasoned decisions to document the fairness of the outcome reached.

In the long run, the need for arbitration to be fair cannot be sacrificed on the altar of finality. The NAF problem is one reminder that if arbitrations are not conducted as transparently fair proceedings, the procedure will lose the support it needs to sustain robust long-term use. Unexplained awards may not deter parties from using arbitration, as long as the cost and congestion in the court system remain as bad as they are today. And fear of juries and desire for confidentiality, strong goals for some parties, may be enough to overcome some parties’ concerns about fairness. But arbitration will live below its potential if the average award is not explained. Deciding to provide a reasoned decision
even in relatively small cases, and giving real reasons when doing so, is an essential part
of a just arbitral regime.

V. Arbitrators Can Reduce Delay Without Unfairly Curtailing Discovery.

A presumption shared by many arbitrators is that discovery has to be severely
compressed in order to give the parties the benefit of their bargain. Some presume there
should be no depositions, no interrogatories, no requests for admission, and limited
document discovery, including almost no electronic discovery.\footnote{See, e.g., MINA BREES ET AL., ARBITRATION ROAD MAP: A GUIDE TO CLAUSES, PROCEDURES, AND HEARINGS 23 (2007)("Though discovery is rare in the arbitration process, the attorneys may agree to conduct a limited amount."); Charles Moxley, Discovery in Commercial Arbitration: How Arbitrators Think, 63 Disp. Resol. Jo. 36, 39 (2008)("Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing. So there is no need to incur the expense of earlier (and generally protracted) depositions."); Stanley Weinstein, An Arbitrator’s Wishlist, Disp. Resol. Jo. 1, 3 (May/July 2003)("Counsel should not try to turn arbitration into litigation by seeking to use other discovery devises commonly used in litigation. . . . Counsel should curb their enthusiasm to take depositions. They have no place in a process that is intended to be speedy and less costly than litigation.").} Depositions in
particular come close to being demonized as if they are inconsistent with a fair,
reasonably paced discovery process.

It certainly is true that speed and low cost are core goals, and should be core
virtues, of arbitration, and that limited discovery generally is what the parties expect out
of arbitration. Even in the relatively simple golden age of Federal discovery, before the
ubiquity of inexpensive copiers, ediscovery, and the rise of depositions took some of the
bloom off the litigation rose, the Supreme Court was citing “the need for avoiding the
delay and expense of litigation, . . .” as one of arbitration’s fundamental purposes.\footnote{Wilko v. Swan, 346 U.S. 427, 431-32, 438 (1953)(citing congressional reports on FAA); see generally Mitsubishi v. Solder Chrysler-Plymouth, 473 U.S. at 628, 633.} The
belief that arbitration enables parties to avoid delay and cost is cited in many early
supporting documents of American arbitration, including the FAA’s legislative history.\footnote{For the congressional reports on the FAA, then known as the United States Arbitration Act, see H.R. Rep. No. 68-96, at 2 (1924)("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation."); S. Rep. No. 68-536, at 3}
Speed and low cost are in tension with broad discovery like that in the Federal Rules, even after their narrowing to limit the scope of discovery to evidence “relevant to any party’s claim or defense.” \textsuperscript{117} The need to allow investigation to ensure a fair hearing frequently conflicts with the desire to move promptly to a final award. The parties’ intent in selecting arbitration can be disappointed if full discovery is allowed (except, perhaps, in complex cases in which the parties chose arbitration to avoid a jury or to maintain confidentiality, but the stakes are so high that they want broad discovery).

Considerations of speed and cost have assumed added importance as many come to perceive that American arbitration is slipping back toward full civil litigation and is in danger of losing its institutional competitive edge. As CPR noted in its Protocol on documents and witnesses, a product of meetings that began in 2007, some parties have become concerned that arbitration has become “increasingly more complex, costly and time-consuming” – more like ordinary civil litigation. \textsuperscript{118} A practitioner with international arbitration experience claims that such a trend has led to a decline in international arbitration since 2000. \textsuperscript{119} According to him, “many practitioners were engrafting

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\begin{itemize}
\item \textsuperscript{117} Fed. R. Civ. P. 26(b)(1).
\item \textsuperscript{119} Interview, Speed, Efficiency and Flexibility: A Call to Return to Arbitration’s Traditional Roots, 9 U.C. Davis Bus. L.J. 111, 111 (2009)(interview with Rod McLeod, Partner, Jones Day). For a detailed review of pressures on arbitration and some of the sources of criticisms, see Thomas Stipanowich, Arbitration: The New “Litigation,” 2010 U. Ill. L. Rev. 1.
\end{itemize}
traditional litigation procedures onto an arbitration process originally designed to be quicker, more efficient, and less costly.”

The anecdotal perception of declining usage may not be borne out by empirical data over time, but certainly if arbitrators let lawyers employ the full range of pretrial procedures from civil cases, one of arbitration’s major advantages will be lost. Hall Street itself rests on the assumption that letting parties employ ordinary litigation techniques would jeopardize arbitration’s fundamental virtues of speed, lower cost, and finality.

Not surprisingly, the rules of major provider organizations envision less discovery than in ordinary American civil litigation. The AAA’s general commercial rules do not specifically mention depositions or interrogatories at all. They allow the arbitrator to order the production of documents “and other information,” to require a list of witnesses to be called, and to order production of exhibits before the hearing. Only in its special rules for “large, complex” cases does the AAA mention depositions and interrogatories. The arbitrator is given authority to override requests for discovery even there, however, and depositions and interrogatories are to be allowed in large cases only.

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120 McLeod Interview, supra note 119, at 111. McLeod, who claims that international arbitrations have become longer and more expensive, calls for a “revolution” in arbitration and claims that businesses are now asking why they should bother to include an arbitration clause in international contracts. Id.; see also Holt, supra note 96 (another experienced arbitrator discussing the migration of traditional litigation techniques back into arbitration); Perry Zirkel & Andriy Krahmal, Creeping Legalism in Grievance Arbitration: Fact or Fiction?, 16 Ohio St. J. on Disp. Resol. 243 (2001)(discussing increasing “legalism” of labor arbitrations); see generally Stipanowich, supra note 119.

121 In one interesting recent study, researchers compared claims that arbitration is being resisted in franchise agreements with the terms of franchise agreements used by 75 “leading” franchisers listed in Entrepreneur Magazine’s Franchise 500 between 1999 and 2007. Christopher Drahozal & Quentin Wittrock, Is There a Flight from Arbitration?, 37 Hofstra L. Rev. 71, 90-94 (2008). The authors found no evidence of a turn away from using arbitration. Id., at 94-99. There was some evidence of adaptive behavior: the percentage of clauses requiring a sole arbitrator more than doubled from 21.4% to 46.4%, id., at 103, suggesting that cost concerns may be increasing the use of sole arbitrators.

122 AAA, COMM. ARB. RULES, Rule R21(a)-(b). The AAA’s expedited rules, which apply to cases under $75,000, merely require production of exhibits to be used at the hearing. Id. Rule E-5. The parties can apply these rules to larger cases by agreement, as long as the arbitrator agrees. Id. Rule E-2.

123 Id. Rules L-3(f), L-4(d). The introduction to the AAA’s commercial rules lists “broad arbitrator authority to order and control discovery, including depositions” as one of the distinguishing features of the rules for large complex cases. Id. Intro., Large Complex Cases.
“on good cause shown and consistent with the nature of arbitration.”\textsuperscript{124} These rules clearly endow arbitrators with the authority to deny discovery even when sought by both parties.

CPR’s commercial rules begin by stressing the objective of providing a procedure that is “fair,” a value that supports broad discovery, but then immediately add a list of contrary values: “expeditious, economical, and less burdensome and adversarial than litigation.”\textsuperscript{125} These values, of course, all support limiting discovery. Curtailed investigation fits CPR’s general goal of getting cases to hearing within six months.\textsuperscript{126} A CPR Tribunal is given power to conduct arbitration “in such manner as it shall deem appropriate,”\textsuperscript{127} and to allow “such discovery as it shall determine is appropriate” after considering the parties’ needs but also “the desirability of making discovery expeditious and cost-effective.”\textsuperscript{128}

CPR argues that while parties naturally want to develop their cases, those who choose arbitration “do so in large part out of a need or desire for a proceeding that is speedy and economical . . . .”\textsuperscript{129} Its Tribunals are given “great leeway,” including in setting discovery.\textsuperscript{130} The tilt toward limited discovery is enhanced by CPR’s Protocol on Documents and Presentation of Witnesses,\textsuperscript{131} which cautions that arbitrators are to control discovery in a way that is “expeditious and cost-effective” as well as fair.

\textsuperscript{124} Id., Rule L-4(c)-(d).
\textsuperscript{125} CPR, RULES FOR NON-ADMIN. ARB, Introduction (effective Nov. 1, 2007).
\textsuperscript{126} Id.
\textsuperscript{127} Id., Rule 9.1.
\textsuperscript{128} Id., Rule 11.
\textsuperscript{129} Id., General Commentary.
\textsuperscript{130} Id., Salient Features of the Rules no. 9.
\textsuperscript{131} CPR, PROTOCOL, supra note 118.
“[A]rbitration is not the place for an approach of ‘leave no stone unturned’” or for untempered advocacy.\(^{132}\)

JAMS’ general arbitration rules require the parties to cooperate by voluntarily exchanging all nonprivileged documents “relevant” to their dispute, plus witness and expert lists.\(^{133}\) The arbitrator retains power to modify (and so limit) this seemingly broad production. JAMS’ discovery protocol urges that document requests “should be limited to documents which are directly relevant to significant issues in the case . . .”; restricted in time frame, subject matter, and persons; and not include “broad phraseology such as ‘all documents directly or indirectly related to.’”\(^{134}\) Unlike the AAA and CPR rules, JAMS’ rules do allow each side one deposition as of right, but added depositions are to occur only in the arbitrator’s discretion and based on “reasonable need” for the information, the existence of alternative sources, and burdensomeness.\(^{135}\)

It is all well and good to note that parties who select arbitration are looking for quicker, more efficient proceedings. Like the tendency to avoid reasoned decisions, however, so the tendency to curtail discovery carries with it a very real risk of undercutting arbitration’s legitimacy. Discovery indeed needs to be narrower in scope than in civil actions and carefully regulated by arbitrators, but arbitrators must accomplish this goal without abandoning the fairness of the process. This tension poses one of the greatest challenges to arbitrators’ skill and professionalism.

\(^{132}\) Id. Section 1(a).
\(^{133}\) JAMS COMP. ARB. RULES & PROCES., Rule 17(a).
\(^{135}\) Id. Rule 17(b).
Discovery limits are important to preserve arbitration’s lower cost and speed. If arbitrators allowed a broad search for all evidence “relevant to any party’s claim or defense” as under the Federal Rules, some arbitrations would take years to resolve. The most substantial benefits in cost and speed, however, should come from the arbitrator’s ability to customize discovery, impose a more specific schedule, and monitor the case. They should not come from blocking a fair investigation prior to trial.

The relevant questions are when it is fair for arbitrators to limit discovery, not whether they have the power to do so, and how restrictive they should be. Adopting a presumptive rule of no depositions, no interrogatories, and no requests for admission just because a case is in arbitration, when not under international rules that stem from a different discovery culture, would undercut the fairness of the dispute resolution.

In many cases, little or no discovery will be needed. Most cases are relatively small, end quickly, and do not consume many resources in getting to disposition. But

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137 As Alfred Feliu pointed out in Discovery in Arbitration. How Much is Enough?, 4 ADR Currents 1, 4 (Spring 1997), “[t]he parties have selected an alternative, not lesser, forum for the adjudication of their legal dispute.” Another litigator correctly notes that while “[p]arties and their counsel seem to tolerate discovery in litigation, but loathe it in arbitration,” it is in fact the case that “complicated subjects require a corresponding depth of analysis, regardless of the type of dispute resolution.” Holt, supra note 96, at 464.
138 One recent study found that two-thirds of its sample federal cases were terminated within a year, 40% within six months. IAALS, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 4, 37 (2009). A study commissioned by the Federal Judicial Center after the pilot discovery programs under the Civil Justice Reform Act of 1990 found that in its sample cases, the median discovery cost was only $13,000 for cases that even had discovery; this was only 3% of the amount at stake. Thomas Willging et al., An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments, 39 B.C. L. Rev. 525, 531, 547-49 (1998). In contrast, the median discovery cost for the top 5% of cases was $170,000. Id. The factors that tended to raise case costs were the size of the stakes, the percentage of litigation costs devoted to document production, hours spent in deposition, the size of the lawyers’ firms (a factor begging for further analysis), and the presence of copyright, patent or trademark claims. Id. at 552-53. Patent, trademark, securities, and antitrust cases had unusually high expenses. Id. at 577.

These findings track earlier studies. For instance, a 1978 Federal Judicial Center study found that almost half of all cases had no discovery, and that even “discovered cases” – those with discovery – averaged only 3.2 depositions. PAUL CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS 31, 35 (Federal Judicial Center 1978). Fewer than five percent of its cases had more than ten
the decision to restrict discovery in the cases that do need pretrial investigation must be made with an eye to fairness, not just expediency. Arbitration cannot afford to become an institution that concludes cases quickly because the parties are not allowed to collect enough evidence to build their case.

The Federal Rules, with their relatively expansive discovery, were a major step forward. They remain so today, even as narrowed in recent decades. The Rules are a distinct American contribution to the pursuit of justice and are designed to encourage full investigation before the final hearing, be it before a judge or jury. The importance of adversarial case development is reflected in the FAA’s statutory ground of vacatur for refusal to allow introduction of evidence. This right cannot be effective unless parties can uncover the basic evidence relevant to their claims in the first place. Say what one will about the cost of American civil litigation, it is designed to ensure that no party is put to trial without a chance to secure evidence reasonably likely to support its position. Just because the parties chose arbitration does not mean that they agreed to forego all of the protections developed under American pretrial procedures.

The surprises unearthed during discovery can transform cases as the true facts become known to both sides. In many cases, facts learned in discovery lead to quick resolution when the rosy views at the time of filing are undercut by the facts seen in the discovery requests. Id. at 35. Even earlier work on discovery in a project conducted under the auspices of Columbia University showed that one-third of the cases it reviewed had no discovery, one-third no more than one “attorney-day” of discovery, 19% from one to three attorney-days, and only 13% more than three attorney days. PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY III-18 (1965). The median discovery time was .50 attorney days. Id.

For a strong statement of the motivation behind the Federal Rules’ broad discovery, and the belief that such discovery would do away with surprise and advance the interests of justice, see Alexander Holtzoff, The Elimination of Surprise in Federal Practice, 4 Vand. L. Rev. 576 (1954). For more general background, see Stephen Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691 (1998) and Subrin, supra note 79.

cold light of an adversary’s discovery requests. For instance, depositions can provide a new and unexpected sense of how hard it is to defend a weak position under oath. Or they may elicit admissions and unexpected evidence that change a case’s complexion. Sharply curtailing discovery risks abandoning these benefits.

Doesn’t the fact that the parties chose arbitration mean they opted for little or no discovery? Not really. It is almost impossible for arbitrators to know how much the desire to avoid discovery led the parties to choose arbitration in a given case. Limited discovery is one benefit arbitration should bring. But this extra-judicial process also enables parties to avoid juries and the risk of runaway jury awards, a commonly stated goal among corporate defendants. It can make proceedings confidential. The process can cut one or more years off the time to final decision compared to an ordinary civil case because of the very limited grounds for appellate review. And it can allow selection of decisionmakers with experience in the area of dispute.

Absent unusually specific language in the arbitration clause, there is no way to know how much the parties valued limiting discovery compared to these other possible benefits. Moreover, even though they likely did want to compress discovery, that does little to indicate how much compression the parties intended.

In a case overseen by skilled arbitrators, the quest for speed and lower cost should not be inconsistent with discovery that is sufficiently detailed to be fair. Arbitration certainly should not mean an end to depositions in all cases. It is not that expensive to take one or a few depositions, or even a few weeks of depositions in a sizable case. Preparing for, taking, and recording depositions is not cheap, but the ability to examine a
witness directly provides much more flexible analysis than any other discovery tool.\footnote{The Federal Judicial Center study of federal cases conducted in the late 1990s found that depositions were the largest source of discovery cost, more than twice the next-most-costly procedure, even though they were not the most commonly used discovery technique. Willging et al., supra note 138, at 545 (document requests and interrogatories more frequently used than depositions), 575-76 (depositions most costly discovery technique). A more recent study found that one reason lawyers postpone depositions, waiting to see if a case settles, is that depositions are so expensive when the cost of preparing, taking, and recording the deposition is considered. IAALS ANALYSIS, supra note 138, at 32. But the relevant cost question is not whether depositions are expensive in the abstract, but whether the information gained through depositions justifies the cost. Depositions are a very potent discovery tool.}

Depositions can narrow discovery and shorten pretrial preparation, indicate points that are not really in issue, expedite the search for important documents and computer information, and open new lines of inquiry that lead to quicker resolution.\footnote{In the backlash against excessive use of depositions, many seem to forget the reasons for allowing depositions in the first place. As stated in the 1937 Committee Note to Federal Rule of Civil Procedure 26(a), which authorized using depositions to the same extent as other discovery, many states already had adopted such broad use because of depositions’ “simplicity and effectiveness.” Fed. R. Civ. P. 26(a), 1937 Advis. Comm. Note to subdivision (a).}

An area that is more likely to impose unmanageable delay than a well-arranged set of depositions is document production.\footnote{In the 2009 IAALS federal-case sample, motions over production of documents were the most common discovery motion. IAALS ANALYSIS, supra note 138, at 45. The late 1990s Federal Judicial Center study found that document production was the greatest source of problems in its sample (44% of reported problems, followed by voluntary disclosure with 37%). Willging et al., supra note 138, at 532, 553, 574. The primary document problems were failures to respond fully and to respond timely. Id., at 540, 574-75. Document production was the most frequently used discovery tool, being reported in 84% of the sample cases, with interrogatories a perhaps-surprising second (81%), and depositions third (67%). Id., at 530, 545.} Here arbitrators need to make the parties craft a reasonable, focused production plan. Arbitrators should limit production, however, by their creativity in structuring discovery, not by presuming the parties didn’t want meaningful discovery in the first place.

Document problems are particularly acute in electronic discovery. The cost of producing millions of pages of electronic files is notorious.\footnote{It was this problem that led to the section on electronic disclosure in the Federal Rules in 2006, with the specific allowance to resist electronic discovery because of its cost. Fed. R. Civ. P. 26(b)(c)(B).} If even one side produces an electronic file, both have to review it to prepare for trial. Cases that formerly would have been medium-sized cases often become large cases, in terms of preparation, when
there is extensive ediscovery. But here, too, the answer is not arbitrary limits on
discovery, but creativity in allowing sample reviews, searches based on key words, and
stipulations for undisputed facts.

Interrogatories are another area where careful management can reduce costs
without denying fair investigation. The Federal Rules early on embraced interrogatories
as “an inexpensive means of securing useful information.” Interrogatories can create
real gains when used to make a party provide compilations of data or other information
that is uniquely in its possession, or to identify documents that only someone
knowledgeable about its records can locate quickly.

As judicial confidence with the technique increased, Federal Rule 31 was
amended to provide that interrogatories can ask about opinions and legal contentions, not
just facts. Yet arbitrators know that blanket use of form interrogatories, and
interrogatories asking for “all facts” supporting claims – in essence a script for trial
evidence – have become a too frequent, and too expensive, game in civil litigation. The
parties have the right to basic facts, if not otherwise available in documents, but not to all
facts in written form or to facts that they can as readily find in documents as the
responding party. Corporate-representative depositions, which often are used like
overbroad interrogatories in an attempt to force an opponent to produce a witness who
can describe all of its evidence long before trial, should be similarly limited to necessary
fact and contention inquiries if allowed at all. If arbitrators allow requests for admission,
they should restrict this discovery tool as well to requests that truly narrow the proof for
trial and that concern facts that legitimately can be admitted.

One of the major reasons that arbitrators ought to be able to manage pretrial preparation more effectively than courts is that arbitrators do not have the overcrowded dockets of the average American court. State courts in the 12 states with unified court systems had a median intake of 1,832 non-traffic cases per judge in 2007; the figure for states with general-jurisdiction courts was 1,682 cases.\(^{147}\) Even with most cases settling, it is impractical for judges to monitor this many cases intensively. The squeaky cases get the grease because most judges are engaged in pretrial triage, hoping to push enough cases forward fast enough to keep their dockets from falling behind. In contrast, arbitrators should not take a case unless they have time to monitor it at the level of detail required to ensure prompt preparation and trial.

The fact that the fairness inherent in allowing discovery conflicts with the goals of speed and economy shows the critical importance of case management skills. The ability to devise thoughtful pretrial controls, creative measures that do not needlessly sacrifice fairness for speed but nonetheless preserve the promise of a prompt and final decision, is a core skill for good arbitrators. Discovery is the primary terrain on which speedier, less expensive adjudication has to be achieved. But discovery must be limited without sacrificing fundamental fairness.

One of the costs of the overly dismissive view of American discovery common in arbitration circles is that it undermines the healthy debate over discovery rules that should occur as a natural outgrowth of expanding international arbitration. The mixing of arbitrators from many countries is creating repeated opportunities for combining civil and

\(^{147}\) “Full-Time Judges in Unified and General Jurisdiction Courts, 2007,” furnished to author from Court Statistics Project, National Center for State Courts, February 9, 2010. Massachusetts, which had the lowest intake per judge, is a general jurisdiction state whose courts do not receive domestic or juvenile cases. Id. South Carolina, a general jurisdiction state without these limits, had the highest median intake of 4,774 cases. Id.
common-law approaches to case preparation. If American arbitrators focus too much on limiting discovery in domestic proceedings without giving proper weight to the benefits of American procedures – for instance, if they habitually speak of depositions as if they are a regrettable procedure that can be easily replaced by written statements and a little document production – they will deprive both arbitration systems of an opportunity to improve.

American arbitrators certainly become more aware of the excesses of discovery when they encounter the limited pretrial approach of arbitrators from other countries. Arbitrators outside the United States would benefit just as much from better information on why the Federal Rules are so relatively broad and on the benefits their discovery tools can bring in some circumstances.

Creative, selective use of depositions and other American discovery tools has something to teach international arbitrators, just as their experiences can suggest ways to improve domestic arbitrations by limiting discovery. A measured use of depositions and pinpointed application of interrogatories would increase the fairness of some international arbitration proceedings, just as more limited discovery would increase the effectiveness of some domestic arbitrations. The dialogue needed to produce these gains, however, is unlikely to occur as long as American arbitrators are defensive about their native country’s discovery devices. Discovery in arbitration requires careful attention to fitting a fair amount of investigation into much-shortened pretrial schedules, not just care in cutting off discovery.
V. A Delicate Balance: Dispositive Motions.

A concern with legitimacy does validate one traditional arbitrator tendency, the tendency to exercise caution over summary judgment and other dispositive motions. Nothing in the FAA, the common provider arbitration rules, or the majority of arbitration clauses prohibits summary judgments or other dispositive orders. While a provision like the FAA’s section 10(a)(3) vacatur for failure to allow introduction of evidence suggests that decisions to grant summary disposition have to be weighed very carefully – and helps account for the rarity of such decisions in arbitration -- arbitration rules do not bar a properly issued summary judgment or other dispositive order.

Nonetheless, arbitrators should exercise particular care over summary dispositions because of the lack of appellate review. The very restrictive appellate review means that awards generally elude significant review at the two standard levels of appeal. For this reason, it is all the more important that arbitrators insist on having a full record on the issues raised and to consider the arguments scrupulously before reaching their decision.

There still will be cases in which a claim is obviously deficient. If faced with a plain failure to file within the statute of limitations, the most obvious example, there is no reason that arbitrators should allow that case to proceed any more than a court would do so. Withholding summary judgment in such circumstances would perversely make the arbitration slower, less efficient, and more costly than court adjudication of the same dispute.

148 JAMS expressly provides power to issue dispositive orders. JAMS. COMP. ARB. RULES & PROCS., Rule 18. The Comment to CPR’s Rule 9, which provides the Tribunal with broad power to conduct the proceeding “as it shall deem appropriate,” mentions resolution of issues that “in litigation may be decided early by motion for partial summary judgment” as one of the topics for the pre-hearing conference. CPR NON-ADMIN RULES, Rule 9 & Commentary on Individual Rules, Rule 9.
VI. Other Opportunities to Increase Legitimacy.

Hewing to the law when it provides answers, explaining decisions, allowing meaningful discovery, and not disposing of cases summarily without very careful consideration are four areas in which arbitrators can do much to advance the bona fides of their profession. These are by no means the only areas in which they have a chance to reinforce arbitration’s legitimacy. Zealous commitment to conflicts disclosure, a sensitive area because most arbitrators have other lives as advocates, is critical to maintaining the perception and reality of fairness. Discouraging arbitration clauses that attempt to bar claims a party could bring in civil court is another. If parties have to give up substantive claims as well as procedural protections when they agree to arbitrate, it will only encourage the view that arbitration is a tarnished, second-class brand of adjudication.

More broadly, arbitrators can show their commitment to the substance of justice, and not just its surface trappings, by running their proceedings in a neutral, impartial manner.

Hall Street may not be a very reasoned decision. The Court certainly abandoned without explanation the value it previously had held is the “primary” and “preeminent” value in arbitration, the parties’ freedom to design their own dispute resolution procedure, and replaced it with finality. ¹⁴⁹ Moreover, the Court’s seeming sense that arbitration is too fragile to survive a flowering of different procedures, and federal courts too rigid and inflexible to be able to do justice in appeals based on anything but an ordinary civil record, surely shows a lack of hands-on experience among Supreme Court Justices. The California Supreme Court debunked almost every one of these arguments in Cable

¹⁴⁹ See supra note 13 & accompanying text.
The California court also made a strong case that allowing parties to contract for judicial review of appeals will strengthen arbitration, not weaken it.\textsuperscript{151}

Whatever Hall Street’s merits, it presumably means that for now the right to appeal in one significant class of arbitrations, those under the FAA, has been narrowed, even if to an extent not yet fully established. Combined with the publicity from the NAF debacle, other consumer cases, and the AFA debate generally, arbitration may continue getting bad publicity for some time. National arbitral groups need to respond by increasing efforts to educate the public about arbitration’s merits. Ultimately, however, arbitrators have to earn respect one case at a time if the institution of arbitration is to continue to prosper.

\textsuperscript{150} Cable Connection, 44 Cal.4th 1334, 190 P.3d at 605-06.

\textsuperscript{151} Id. For another strong argument that allowing judicial review of legal errors when desired by the parties will enhance arbitration, and is consistent with strongest arguments for a system of arbitration, see Alan Rau, Contracting out of the Arbitration Act, 8 Am. Rev. of Int’l Arb. 225 (1997).