Growing Pains: Building American Arbitration's Legitimacy Through Everyday Arbitral Decisions

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I. Introduction: Storm Clouds on the American Arbitrator’s Horizon: Hall Street and the AFA.

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 United States during 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 handling 137,000 cases a year by 2006. \(^1\) The National Arbitration Forum, a relative upstart founded in 1986, claims to have processed an astounding 214,000 arbitrations in the same year. \(^2\) By this measure, arbitration appears to be a great success in the United States.

In spite of these signs of health, the last few years have brought two reminders of the precariousness of this private institution that relies on public enforcement for its viability. First is the United States Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel*, 552 U.S. 576 (2008). The main issue addressed was whether parties can contract for full judicial review under the Federal Arbitration Act (FAA); \(^3\) in passing the Court also discussed the extent to which courts independently can correct “manifest” errors. The court held that parties cannot expand judicial review of awards by contract, and additionally appeared to deny the judiciary’s authority to create a nonstatutory, common-law ground of reviewing awards for manifest errors of law. \(^4\) While most

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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 Assoc., L.L.C. v. Mattel*, Cause No. 06-989 (Sept. 14, 2007)[hereinafter cited as AAA Amicus Brief] (2006 caseload);
\(^4\) The Supreme Court determined that parties cannot expand review of awards beyond the grounds already listed in the FAA, *Hall Street Assoc., L.L.C v. Mattell*, 552 U.S. 576, 128 S. Ct. 1396, 1403-04 (2008). 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
international lawyers are comfortable with such restricted review, the ruling is a change of direction in American arbitral law.\textsuperscript{5}

Although the Court took a very supportive, deferential approach to arbitration, the debate that has swirled around Hall Street’s 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 in a culture in which the right to secure correction on appeal is so ingrained. Such insulation from review is common for international awards, but not for domestic United States awards. One subsequent case has brought 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 today than before Hall Street.\textsuperscript{6}

Hall Street rested its refusal to allow judicial review for even manifest error heavily on the ground that such review would undercut the national goal of 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).\textsuperscript{5}

In Hall Street, the Supreme Court listed the First, Second, Fifth, and Eleventh Circuits as having 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. Hall Street seemed to reject both avenues of added review. For general background to the manifest-disregard doctrine, see IV IAN MACNEIL, RICHARD SPEIDEL, & THOMAS STIPANOWICH, FEDERAL ARBITRATION LAW § 40.7 (1994 & Supp. 1999).

In this year’s decision in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., the Supreme Court majority cast some doubt on how far it intended to banish independent manifest-disregard review because it seemed to accept the possibility that such review might survive Hall Street after all. 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; Rent-A-Center, West, Inc. v. Jackson, 2010 WL 2471058 (June 21, 2010).

The Supreme Court did leave open the possibility of appeals under general state-law grounds, Hall Street, 128 S. Ct. at 1406, and a California Supreme Court decision issued soon thereafter reminded parties that such review still may be available under state arbitration statutes, see infra note 20.
“maintain[ing] arbitration’s essential virtue of resolving disputes straightaway.” This predominant emphasis on speed and efficiency will strike a familiar note with international arbitrators, but it was a change in American jurisprudence because the Court previously had stressed enforcing the parties’ agreement as the “principal” and “preeminent” goal of the FAA, even if honoring the agreement increased cost and delay.\footnote{Hall Street, 128 S. Ct. at 1405.}

The Supreme Court’s resistance to awards being reversed may increase certainty, but it also has spurred arbitration’s critics. For parties with significant assets at stake, the idea that a sole arbitrator or a panel might clearly misapply the law but be immune from correction can make arbitration a process they want to avoid. Hall Street will be an added deterrent for such parties.\footnote{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 resolution might require maintaining proceedings in two forums. The Court called enforcing the parties’ agreement the FAA’s “purpose,” its “motiv[ation],” its “principal objective,” and the “preeminent concern.” Id. at 219-21. In First Options of Chicago v. Kaplan, 514 U.S. 938, 947 (1995), the Court, rejecting the idea that the FAA requires a presumption that parties agreed to arbitrate the question of arbitrability, 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); accord, Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 474-75, 478-79 (1989).}

A second reminder of arbitration’s still somewhat unstable foundation in the United States is the persistence of congressional efforts to outlaw “mandatory” arbitration in certain common, repetitive commercial cases. Form contracts for credit cards,\footnote{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 Second-Circuit 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 from Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009), the standard that applied in Hall Street. Is any of these standards really a good advertisement for arbitration?}
telephone service, investment accounts, employment, and franchises give rise to many of these cases. The arbitration clauses in these contracts have long attracted criticism.\(^\text{10}\)

The push for legislation has been fueled by a lawsuit filed by the State of Minnesota that spotlighted abuses at one of the largest and most rapidly rowing arbitration providers, the National Arbitration Forum (NAF), whose customers included some of the largest credit-card issuers in the United States, large-volume mortgage

\(^{10}\)There is a long-running debate in the United States 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., PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009); 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).

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.

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 an example of the complexity of comparing arbitration to court proceedings, a recent study of securities arbitrations based on over 3,000 survey responses found relatively positive assessment of the mechanics of the arbitration process (for instance, whether the arbitrators listened to the parties), but contains embarrassing conclusions on fairness. Thus 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.

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).
lenders, and cell phone companies as well.\footnote{Swanson Complaint, supra note 2, § 16.} The NAF allegedly was wholly subservient to the interests of its corporate 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.”\footnote{Id. § 96.}


The NAF debacle gave new momentum to congressional efforts to limit arbitration. An Arbitration Fairness Act of 2009 would prohibit forcing consumer, employment, franchise, and civil-rights disputes into arbitration.\footnote{For major bills, see H.R. 1020, 111th Cong., 1st Sess. (2009); S. 931, 111th Cong., 1st Sess. (2009).} The speed with which the ground may be pulled out from under arbitration in these cases is a reminder that organizations that do not allow participants “voice” may find that their support has vanished by the time they realize a problem exists. As political scientist Albert Hirschman argued in \textit{Exit, Voice and Loyalty}, institutions that have procedures to receive voice can respond to pressures for change from the populations they serve.\footnote{ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY 33 (1970)(“Voice has the function of alerting a firm or organization to its failings, . . . .”).} In contrast,
closed organizations, the obvious example being totalitarian governments, suppress dissent. Hirschman believes that political and economic organizations that block exit but lack voice mechanisms 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.” 18 The defendants in many of the form-arbitration cases have little or no effective voice in the designing the arbitration process.

Both Hall Street and the proposed AFA have reminded American arbitrators that they have to fight for their profession’s legitimacy. This need to constantly reinforce arbitration’s support carries distinct meaning for decisions 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. These issues are discussed as they arise within the United States, not in international arbitration, but the same considerations apply to almost every arbitration, no matter what the forum.

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

Arbitration awards generally are subject to very limited judicial review, even in the United States. Litigators often claim that American 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.

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18 Id. at 121.
Parties have reason to fear arbitration if there is no check at all on even odd or idiosyncratic results. When the California Supreme Court recently 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, for instance, 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.”19

Prominent critics of arbitration similarly claim that arbitrators do not follow the law.20 This belief is reflected in questions one practitioner posed about arbitrator selection as the following Hobson’s choice: “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?”21

A presumed dichotomy between the ordinary application of the law in court and “fair” equitable arbitrating reflects an older view of arbitration, one that is passing from the scene in the United States as the profession matures, with the possible exception of certain subject-matter areas in which the parties really do want their arbitrator to create an industry-specific brand of justice. The idea that an arbitrator may be “fair” by acting in

19 Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal.4th 1334, 190 P.3d 586, 589, 590 n.3, 605-06 (2008)(citations omitted). For the court’s 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 id. at 604-06.
20 THE ARBITRATION DEBATE TRAP, supra note 11, at 32-33 (“Arbitrators Are Not Required to Follow the Law, or Even Their Own Rules.”). The idea that arbitrators are not required to follow the law is also one of the complaints behind the proposed AFA. H.R. 1020, § 2(5); S. 931, § 2(5).
21 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).
opposition to the law, or at least outside of the written law, is precisely what concerns critics who portray the system as unaccountable.

Discussions about American arbitrators acting as if they are modern-day Solomons devising remedies from scratch tend to arise in four contexts. First is the older model of arbitration in general commercial cases 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, the Court 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. 22

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

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 a 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.’” 23

A second context in which American courts often describe arbitration as fundamentally different from the judicial process involves specialized technical disputes. For example, this concept of unbounded discretion appears in collective-bargaining cases. 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”: 24

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 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.” 25

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 are chosen for technical background. The panel was composed of three

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23 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 Devices, Inc. v. Intel, 9 Cal.4th 362, 374-76, 885 P.2d 994 (1994)(“ 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 ex aequo et bono.”’” (citation omitted)); 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”).
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, . . . .”

A world in which judges can determine disputed issues from their own experience or from 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.”

A third setting in which American courts discuss arbitrators as not strictly bound to apply the law is actually 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, one of the reasons the Court found that the securities laws needed to be applied in a judicial proceeding was that arbitrators’ legal interpretations “are not subject, in the federal courts, to judicial review for error in interpretation.”

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26 Sapp v. Barenfeld, 34 Cal.2d 515, 522 (1949). It is an ethical violation for a judge in the United States 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 consultation, id. Canon 3(B)(7)(b), available at http://www.abanet.org/cpr/mcj/canon_3.html (visited Mar. 15, 2010).

27 Sapp v. Barenfeld, 34 Cal.2d 515, 523 (1949)(emphasis added). 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”).

28 Wilko, 346 U.S. at 436-37.
Finally, arbitral discretion can be 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*, one of the strongest celebrations of the arbitrator’s power to go beyond “dry law” in crafting remedies, the California Supreme Court affirmed broad arbitral power as 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 its old hostility to arbitration. In the years since *Wilko*, the Court refused to stay arbitration of statutory claims, rejected the idea that arbitrators will not apply the law, and 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. In this 1985 decision, it announced that “we are well past the

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30 The differences between common-law and code systems are 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).
31 473 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 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.
time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals” should inhibit enforcing arbitration agreements. Indeed, even though the panel to be deciding these domestic antitrust claims was composed of three Japanese arbitrators, who presumably had no training 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.

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

As arbitration matures as a profession, common American arbitration rules have come to include an express duty to apply the law. 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 foreign to ordinary commercial arbitration.

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. Though the Tribunal has the power to grant “any remedy or relief,” the remedy or relief must be “within the scope” of the contract and “permissible” under applicable law.

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32 Mitsubishi, 473 U.S. at 627.
33 Id. at 628.
35 CPR NON-ADMIN. RULES, Rules 10.1, 10.2.
36 Id. Rule 10.3.
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{37}

The commercial rules of JAMS state 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.”\textsuperscript{38} 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.”\textsuperscript{39}

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.”\textsuperscript{40} Unlike the CPR and JAMS rules, these AAA rules do not refer to applicable law. In its consumer cases, however, the set of cases subject to public scrutiny in recent years, the AAA endorses a Protocol that limits the arbitrator’s remedial power to relief that “would be available in court under law or in equity.”\textsuperscript{41} AAA arbitrators are to “apply any identified, pertinent contract terms, statutes and legal precedents.”\textsuperscript{42}

This weight of authority in domestic rules fits international arbitration rules, which require fidelity to law. The International Chamber of Commerce (ICC) rules

\begin{footnote}
\textsuperscript{37} Id. Commentary on Individual Rules, Rule 10.
\textsuperscript{38} JAMS COMP. ARB. RULES & PROCS., Rule 24(c).
\textsuperscript{39} Id.
\textsuperscript{40} 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).
\textsuperscript{41} CONS. DUE PROCESS PROTOCOL, Prin. 14. The Reporter’s Comment states that “[a]s a general rule, arbitrators have broad authority to fashion relief appropriate to the circumstances,” limited only by the parties’ agreement and the scope of their submission. Id. Prin. 14, Reporter’s Comments.
\textsuperscript{42} Id. Prin. 15.2. The drafters did not recommend the added insurance of formally providing for judicial review, but they “concluded that the rules should specifically direct arbitrators to follow pertinent contract terms and legal principles. Id. Prin. 15, Reporter’s Comments (discussing views of Advisory Committee).
\end{footnote}
require application of agreed upon rules of law or, lacking agreement, an appropriate set of rules, and that the Tribunal “take account of the contract and the relevant usages.”\textsuperscript{43} The Tribunal can “assume the powers of an \textit{amiable compositeur} or decide \textit{ex aequo et bono} only if the parties agreed to allow such power.”\textsuperscript{44}

The United Nations’ UNCITRAL rules have similar requirements,\textsuperscript{45} as do the international rules of the AAA, CPR, and JAMS.\textsuperscript{46} This central place of the rule of law is why the ALI/UNIDROIT Principles of Transnational Civil Procedure, that effort 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, . . . .”\textsuperscript{47}

The looser standard for specialized arbitrations like labor and construction arbitrations, where the parties seek an award honed to the practicalities of their industry, should no longer overlap with general American commercial arbitration. In most commercial arbitrations, the dispute rests on a contract entered in the context of a specific 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

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\textsuperscript{43} ICC, RULES OF ARB, Art. 17.1-2.  \\
\textsuperscript{44} Id. Art. 17.3. Blacks’ defines an \textit{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 \textit{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 \textit{ex aequo et bono} is not bound by legal rules and may instead follow equitable principles.” Id.  \\
\textsuperscript{45} UNCITRAL ARB. RULES, Art. 33.  \\
\textsuperscript{46} 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.  \\
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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, their authority is not unlimited. They are bound, and bound tightly, to the collective bargaining agreement. If a labor arbitrator attempts to impose his private beliefs in opposition to the agreement, he or she will be reversed.

To the extent that parties in commercial disputes pick arbitrators for 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. 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 (Second) 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.”

48 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”).

49 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. . . . 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).

50 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.

51 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).
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 a 1987 decision in which it noted:

\[
\ldots\text{we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.}\quad52
\]

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.\quad53 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.

\[52\text{Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). The general holding in the Supreme Court’s recent Stolt-Nielsen case that arbitrators cannot enforce their own sense of “policy” (see supra note 6) is another manifestation of the view that there are real limits on the arbitrator’s discretion.}\]

There should be no conflict between applying the law and using arbitrators’ equitable powers. When the law dictates an 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 protections of substantive law, including the law of damages, that formed the framework for contracting when they began their relationship.\textsuperscript{54}

Arbitral decisionmaking, to be fair, has to occur within the law’s boundaries. The appearance of statements in most modern United States 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 to the affirmation that they are in \textit{Mitsubishi v. Soler Chrysler-Plymouth}, indicates that this principle has become more widely established as arbitration has deepened its professional roots.

\textbf{III. The Problem with Silent Awards.}

Many American arbitrators shy away from reasoned decisions because giving reasons can provide concrete material for an appeal.\textsuperscript{55} 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

\textsuperscript{54} It surely is correct that, as dissenting Justice Kennard argued in the California Supreme Court’s \textit{Advanced Micro Devices} decision, parties in a modern arbitration “would not generally expect that the arbitrator has the power to award relief that a court resolving the same dispute could not award.” \textit{Advanced Micro Devices}, 9 Cal.4th 362, 391, 399, 885 P.2d 994 (1994)(Kennard, J., dissenting).

\textsuperscript{55} 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. In the author’s experience the difference is often more a difference in form than in substance.
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 United States 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 the same deference as other awards.

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 a 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 request for a reasoned decision is binding only if it

56 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”).

57 AAA, COM. ARB. RULES, Rule 42 (effective June 1, 2009); AAA, CONST. IND. ARB. RULES, Rule 44(c) (effective Oct. 1, 2009).
comes “prior to appointment” of the arbitrators, and its construction rules require notification before the end of the preliminary hearing.\(^{58}\)

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 has stated:

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.\(^{59}\)

Reasoned decisions fit a traditional American understanding of what makes a judicial decision fair. Speaking of a Supreme Court that he believed had strayed from its duty to explain important decisions, professor Herbert Weschler argued in the 1950s that “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”\(^{60}\) In contrast, unexplained decisions reached because they feel right “function as a naked power organ,”\(^{61}\) not an instrument of justice. A decision needs to be written in sufficient detail to show that the outcome is based on general, applicable legal principles.\(^{62}\)

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\(^{58}\) AAA, COM. ARB. RULES, Rule 42; AAA, CONST. IND. ARB. RULES, Rule 44(c).

\(^{59}\) CPR, RULES FOR NON-ADMIN. ARB, COMMENT Rule 15 (Nov. 1, 2007).


\(^{61}\) Id. at 12.

\(^{62}\) It is no surprise that 46\% of respondents in a study of American 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.
The proposed AFA points to the lack of public, written decisions as one proof of American arbitration’s alleged 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 sometimes pointed to the lack of reasoned decisions as one sign that arbitrators cannot be trusted to apply statutes as fairly as courts. In Wilko, the reasons why the provisions of the securities law 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 proceedings.” Arbitrators’ “conception of the legal meaning” of the securities laws therefore “cannot be examined.” In a later case, the Court found arbitration “a comparatively inappropriate forum for the final resolution of rights created by Title VII” in part because 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, applied the correct law to the facts, or even understood the law. What was heard, what was understood, and what the arbitrators thought they were doing all remain matters of speculation.

64 Wilko v. Swan, 346 U.S. at 436.
65 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 deficiencies.”
A lack of reasons can be particularly upsetting because of the 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 trades away the checks-and-balances of the civil system’s multiple levels of review. If a 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.67

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 American 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 quicker and less expensive.) But giving reasons is not likely to increase appeals significantly.

The grievance most likely to be encouraged by 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. Yet manifest disregard is such an unsuccessful ground for

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67 The parties’ control over arbitration could allow them to improve the adequacy of the explanation they receive, because unlike ordinary litigants these parties could 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). Yet when the parties do not know how the case will be decided or the issues the arbitrators will view as determinative, it often is hard to do much more than specify the form of the award at the outset.
appeal, and appeals generally so rare, that access to reasoned awards is not likely to open
the floodgates.

Even before Hall Street, very few cases were reversed for manifest disregard. In
2002, the Second Circuit, that leading business-oriented circuit, calculated that the circuit
had handled only 48 appeals for manifest disregard since 1960, barely one a year.68 A
study published in 2005 studied every motion to vacate in state and federal court between
January 1, 2002 and October 31, 2002.69 The authors identified 182 motions, with 277
grounds for vacatur.70 Manifest disregard was raised 52 times, but succeeded only twice
-- approximately 4% of the times attempted.71 Not only was this a small fraction of times
attempted, but it was the least successful of the grounds of appeal.72 This merits-based
reason for appeal thus does not give parties much incentive to appeal.

Fittingly, most United States arbitration rules stress the importance of explaining
decisions and rank that value above the added certainty that might be bestowed on silent
awards. CPR requires a statement of reasons unless the parties agree otherwise; so does

68 Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003). Of these 48
appeals, only four had been vacated in whole or in part. Id. Moreover, three of the four 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, . . . .” Id. 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. Id.
69 Lawrence Mills et al., Vacating Arbitration Awards: Study reveals real-world odds of success by
grounds, subject matter and jurisdiction, Disp. Resol. Mag. 23 (Summer 2005).
70 Id. at 23.
71 Id. at 23, 25.
72 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.
JAMS. 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 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. Its 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.

The AAA’s inclusion of the requirement of reasoned decisions in categories of cases that have received heightened scrutiny 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 should bring American arbitration more 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.

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73 CPR, RULES FOR NON-ADMIN. ARB. 15.2 (November 1, 2007); JAMS, COMP. ARB. RULES & PROCOS. 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. PUSRS. TO PRE-DISP. CLAUSES, MIN. STDS. OF PROC. FAIRNESS 10 (July 15, 2009).

74 JAMS, STREAMLINED ARB. RULES & PROCOS. 19(g)(July 15, 2009).

75 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.

76 AAA, EMP. ARB. RULES, Rule 39.c (June 1, 2009); AAA, SUPP. RULES FOR CLASS ARB., Rule 4.b.5(a)(October 8, 2003).
The United Nations UNCITRAL Code requires arbitrators to state their reasons absent contrary agreement;\(^{77}\) the ICC requires a statement of reasons without qualification.\(^{78}\) In their rules for international arbitration, the AAA, CPR, and JAMS all make a reasoned decision the default position.\(^{79}\) The ALI/UNIDROIT Principles for Transnational Civil Procedure similarly require a reasoned explanation of the “essential factual, legal, and evidentiary basis of the decision.”\(^{80}\)

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. 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. But arbitration will live below its potential if the average award is not explained.

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\(^{77}\) UNCITRAL ARB. RULES, Art. 32.3.

\(^{78}\) ICC, RULES OF ARB. Art. 25.2.

\(^{79}\) AAA, INT’L DISP. RESOL. PROC., 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).

\(^{80}\) ALI/UNIDROIT PRINCIPLES, Prin. 23.2.
IV. Arbitrators Can Reduce Delay Without Unfairly Curtailing Discovery.

A presumption shared by many United States arbitrators is that discovery has to be severely compressed in order to give the parties the benefit of their bargain. Even though domestic American arbitrations, unlike international arbitrations, occur within a legal culture that treats discovery as a necessary part of fair pretrial preparation, a number of American arbitrators presume there should be no depositions, no interrogatories, no requests for admission, and limited document discovery, including almost no electronic discovery.\(^\text{81}\)

It certainly is true that speed and low cost are core goals, and should be core virtues, of arbitration, and here as elsewhere limited discovery is one of the things that 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 United States Supreme Court was citing “the need for avoiding the delay and expense of litigation, . . .” as one of arbitration’s fundamental purposes.\(^\text{82}\) The belief that arbitration enables parties to avoid delay and cost is discussed in many early supporting documents of American arbitration, including the FAA’s legislative history.\(^\text{83}\)

\(^{81}\) 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.”).


\(^{83}\) 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. 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.” A practitioner with international arbitration experience claims that such a trend has led to a decline in international arbitration as well since 2000. According to him, “many practitioners were engrafting traditional litigation procedures onto an arbitration process originally designed to be quicker, more efficient, and less costly.”

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86 McLeod Interview, supra note 86, 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
The anecdotal perception of declining usage may not be borne out by empirical data, 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. 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 discuss 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 “on good cause shown and consistent with the nature of arbitration.”

CPR’s commercial rules begin by stressing the objective of providing a procedure that is “fair,” a value that might support broad discovery, but then immediately add a list of contrary attributes: “expeditious, economical, and less burdensome and adversarial

Holt, supra note 68 (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.

For instance, 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 Drhozal & 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.

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.

Id. Rule 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.

Id. Rule L-4(c)-(d).
than litigation.”

Curtailed investigation fits CPR’s general goal of getting cases to hearing within six months. A CPR Tribunal is to conduct arbitration “in such manner as it shall deem appropriate,” 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.”

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 . . . .” The tilt toward limited discovery is enhanced by CPR’s Protocol on Documents and Presentation of Witnesses, which cautions that arbitrators are to control discovery in a way that is “expeditious and cost-effective” as well as fair. “[A]rbitration is not the place for an approach of ‘leave no stone unturned’” or for untempered advocacy.

JAMS’ general arbitration rules require the parties to cooperate by voluntarily exchanging all nonprivileged documents “relevant” to their dispute, plus witness and expert lists. 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

91 CPR, RULES FOR NON-ADMIN. ARB, Introduction (effective Nov. 1, 2007).
92 Id.
93 Id., Rule 9.1.
94 Id., Rule 11.
95 Id. General Commentary.
96 CPR, PROTOCOL, supra note 118.
97 Id., Section 1(a).
98 JAMS COMP. ARB. RULES & PROCS., Rule 17(a).
documents directly or indirectly related to.’” 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.  

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. 

Relevant questions in United States arbitrations 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 too often undercut the fairness of the dispute resolution. 

In most civil cases in court, little or no discovery is needed. Most cases are relatively small, end quickly, and do not consume many resources in getting to

100 Id., Rule 17(b). 
102 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 68, at 464.
disposition. But the decision to restrict discovery in 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 a distinct American contribution to the pursuit of justice, one of the major approaches to pretrial preparation. The importance of adversarial case development in the United States 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

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103 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 of civil litigation. 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 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.

104 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 54.

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.

The surprises unearthed during discovery often benefit both parties. Facts learned in discovery can lead to quicker resolution when rosy views at the time of filing are undercut by the facts seen in the 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 as clearly as one might assume. 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 certainly is a 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. Even though they likely did want to compress discovery, that does little to indicate how much compression the parties intended.
In proceedings overseen by skilled American 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 very sizable case. Depositions are not cheap, but the ability to examine a witness directly provides much more flexible analysis than any other 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.

An area that is more likely to impose unmanageable delay than a well-arranged set of depositions is document production. 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.

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106 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 104, 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. IAALS ANALYSIS, supra note 104, 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.

107 In the backlash against excessive use of depositions, many forget the reasons for allowing them 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 had endorsed depositions because of their “simplicity and effectiveness.” Fed. R. Civ. P. 26(a), 1937 Advis. Comm. Note to subdivision (a).

108 In the 2009 IAALS federal-case sample, motions over production of documents were the most common discovery motion. IAALS ANALYSIS, supra note 104, at 45. The late 1990s Federal Judicial Center study found that document production was the greatest source of problems in its sample. Willging et al., supra note 104, at 532, 553, 574. The primary document problems were failures to respond fully and timely. Id. at 540, 574-75. Document production was the most frequently used discovery tool, used in 84% of the sample cases, with interrogatories a perhaps-surprising second (81%), and depositions third (67%). Id. at 530, 545.
Document problems are particularly acute in electronic discovery. The cost of producing millions of pages of electronic files is notorious. 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, a procedure absent from international practice, are another tool that can reduce costs. 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. 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,

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109 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).
should be similarly limited to necessary fact and contention inquiries if allowed at all. Similarly, if American arbitrators allow written requests for admission, they need to restrict this tool to requests that truly narrow the proof for trial and that concern facts that can be admitted.

One of the major reasons that American 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. 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 some discovery in domestic United States arbitrations conflicts with the goals of speed and economy shows the critical importance of arbitrators’ 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

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112 “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.
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 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 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. A measured use of depositions and pinpointed application of interrogatories would increase the fairness of some international arbitration proceedings, just as greater limits on 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 United States 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. 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

113 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.
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.

**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 American 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.