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

John B McArthur
GROWING PAINS: BUILDING ARBITRATION’S LEGITIMACY THROUGH EVERYDAY ARBITRAL DECISIONS.

John Burritt McArthur
March 2, 2010
Copyright © 2010
Arbitration is an unusual procedure because it draws on the state’s compulsory enforcement power, yet is invoked only if the parties voluntarily 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 both sides agree to use this displacing, parallel dispute-resolution procedure.

Fueled by the traditional desire for a low-cost, quick alternative to courts and enhanced by many large corporations’ eagerness to resolve repetitive, often relatively small claims outside the normal judicial process, arbitration has spread rapidly in the United States 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, it was
administering 137,000 cases a year by 2006. The National Arbitration Forum, a relative
upstart founded only in 1986, claims to have administered an astounding 214,000
arbitrations in the same year.2

In spite of these signs of success, the past few years have brought two reminders
of the precariousness of this private institution that relies on public enforcement for its
viability. The first came with 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, citing the strong federal policy in its favor as it held that parties
cannot expand the scope of judicial review by agreement and that courts cannot devise a
common-law ground for vacating awards for manifest errors of law in disputes falling
under the Federal Arbitration Act. But the debate that has swirled around Hall Street
points to the risk of so insulating awards that they cannot be challenged even for very
obvious error.

A second reminder of arbitration’s shaky foundation is unfolding in the
burgeoning effort in Congress to outlaw “mandatory” arbitration in the corporate cases
where arbitration is most commonly used today. The Arbitration Fairness Act (AFA)

* B.A. Brown University 1975; M.A. (economics) University of Connecticut 1978; J.D. University of Texas
1984; M.P.A. Kennedy School, Harvard University 1994; Ph.D. Goldman School of Public Policy,
University of California (Berkeley) 2003. A former partner at Susman Godfrey LLP in Houston and Hosie
McArthur LLP in San Francisco, Mr. McArthur has been trying complex commercial cases for 26 years
and been serving as an arbitrator for 15 years. He is a neutral on the commercial and energy panels of the
American Arbitration Association and the International Institute for Conflict Prevention & Resolution, and
has written a number of articles on issues of judicial management.

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).
would prohibit forcing consumer, employment, franchise, and civil-rights disputes into arbitration. Not only would the Act terminate the most common applications of arbitration, but the debate unfortunately has spread a tarnished image of arbitration to a large national audience.

Both Hall Street and the pending 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 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 at least as fair as ordinary litigation, and quicker and cheaper. Yet that is not likely to be the popular image of arbitration. The publicity over certain misuses of arbitration requires arbitrators to be yet more vigilant to ensure that their decisions reinforce the fairness of awards as well as speed and economy. And the fact that awards falling under the FAA will not be eligible for review for manifest error imposes an added responsibility to infuse all arbitral decisions with extra care.

I. Hall St v. Mattel: Blessing or Curse for Arbitration?

Last year’s Supreme Court decision in Hall Street turned on just how much deference an award should command from the courts. The issue in Hall Street was
whether parties can contract for full judicial review under the Federal Arbitration Act (FAA). In the process of deciding this question and answering that they can not, the Court additionally denied the judicial authority to create a nonstatutory, common-law ground of reviewing awards for manifest errors of law.

The FAA 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. If these are the only bases for overturning an award, then even an egregious error of law, even a gross blunder, is not sufficient ground for vacatur.

The federal courts of appeal were divided on whether the FAA leaves room to reverse an award that is based on a palpably incorrect (but not corrupt, fraudulent, or partial) reading of the law. A number of courts had proved unwilling to use their authority to enforce, and so to legitimate, awards that appeared manifestly wrong. Others disagreed and held that broad deference is required even for flawed awards so that arbitration will stand on its own as an independent system of dispute resolution.

---

4 Id. § 10(a)(1)-(4).
5 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.
6 For a review of the general positions on manifest disregard, see IV IAN MACNEIL, RICHARD SPEIDEL, & THOMAS STIPANOWICH, FEDERAL ARBITRATION LAW § 40.7 (1994 & Supp. 1999).

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.
Even when courts apply manifest-disregard review, the doctrine is extremely stingy. It generally requires that arbitrators know the law but refuse to apply it or otherwise obviously disregard governing principles.\(^7\) Nonetheless, manifest-disregard review does protect against absurdly wrong results by creating an extra, merits-based ground for review. The doctrine gives parties a benchmark assurance of fairness, and presumably increases their willingness to send disputes to arbitration. Awards rarely are overturned for manifest disregard, but the doctrine reassures parties that they have a remedy if arbitrators go too far off track.

In *Hall Street*, a commercial landlord/tenant dispute over liability for environmental cleanup, the Supreme Court swept away this protection. *Hall Street* presented a strong case for allowing judicial review because the parties, Hall Street Associates, L.L.C. and Mattel, had contracted to have their arbitration subject to an ordinary standard of review. They agreed to arbitrate after their case was underway in federal court and, when they did, provided that the district court could overturn any award based on fact findings not supported by substantial evidence or based on “erroneous” legal conclusions.\(^8\) The trial court reversed the award because it disagreed with the merits.\(^9\) The Supreme Court, like the Ninth Circuit, refused to enforce the clause providing for judicial review. It held that parties do not have authority to require judicial review of arbitral awards under the FAA.

\(^7\) See infra notes 33-36 & accompanying text.

\(^8\) *Hall Street*, 128 S. Ct. at 1400-01.

\(^9\) 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 again because he found the award “implausible.” *Hall Street Assocs., L.L.C. v. Mattel*, 196 Fed. Appx. 476, 477 (9th Cir. 2006).
Taking a narrow, literal reading of the FAA, the Supreme Court held that federal courts are not authorized to reverse awards on grounds not specified in the Act.\textsuperscript{10} The holding was fatal to the agreement to expand review, and to the judicially created doctrine of manifest disregard. The Court reasoned that because “manifest error” is not listed as a ground to vacate an award, the trial court should not have remanded the award to the arbitrator on this basis.\textsuperscript{11} This holding left intact an underlying award that even the arbitrator ultimately agreed was wrong.\textsuperscript{12}

The Supreme Court noted that under FAA section 9, a district court “must” confirm an award unless it can be vacated under the limited grounds allowed in section 10, or modified or corrected as allowed in section 11.\textsuperscript{13} It read this language as “carrying no hint of flexibility.”\textsuperscript{14} The Court also cited legislative history showing that Congress had modeled the FAA on a New York statute that severely limited judicial review, rather than a well-known Illinois statute that allowed it.\textsuperscript{15} Under Hall Street, then, a court is required to enforce an award even if it is clearly, manifestly, in error, as long as the error is not induced by corruption, fraud, or undue means, the arbitrators motivated by partiality or corruption, or the award poisoned by misbehavior or acts beyond the arbitrator’s authority.

The Hall Street Court approvingly mentioned the strong federal policy in favor of arbitration,\textsuperscript{16} as it has in other decisions since the early 1980s.\textsuperscript{17} Its rationale in not

\textsuperscript{10} Hall Street, 128 S.Ct. at 1403-06.

\textsuperscript{11} Id. at 1404-05.

\textsuperscript{12} After the district court remanded the award, the arbitrator reversed himself on the dispositive question of contract interpretation and adopted the district court’s view. Id. at 1401.

\textsuperscript{13} Id. at 1402, 1405.

\textsuperscript{14} Id.

\textsuperscript{15} Id. at 1406 n.7.

reversing even for egregious error is that court intervention undercuts the national goal of “maintain[ing] arbitration’s essential virtue of resolving disputes straightaway.”18 This was a peculiar value to enforce when the parties had agreed on a higher level of review, particularly because in past decisions the Court has stressed enforcing the parties’ agreement as the “principal” and “preeminent” goal of the FAA even if doing so increases costs and delay.19 It is one sign of the Court’s new dedication to expeditious arbitration uber alles that an award containing a manifest error had to be enforced, and even in a case in which the parties wanted the federal court of appeals to correct legal errors.20

17 In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), the Supreme Court announced that the FAA is to be read liberally, that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,” and that courts should not stay arbitration in order to conduct related proceedings first. See id. at 22-25. The Court reversed a federal-court stay that had been issued to allow prior judicial interpretation of the scope of the arbitration clause in a pending state-court proceeding. Id. at 7. The stay “frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements.” Id. at 23. The opinion was designed to end the common practice of staying arbitration until civil proceedings with possibly preclusive effect were completed, a practice that could destroy the efficiencies arbitration is supposed to bring.

The Court abolished another barrier to arbitration a year later when it held that California could not exclude a class of disputes, in that case franchise disputes, from arbitration, thus holding that states cannot pass laws intended to prevent arbitration from applying to certain classes of claims subject to the FAA. Southland Corp. v. Keating, 465 U.S. 1 (1984). States cannot discriminate against arbitration compared to ordinary civil processes in cases that fall within the commerce clause.

18 Hall Street, 128 S. Ct. at 1405.

19 In Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), for instance, the 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 “motiv[ation],” 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).

20 Tellingly, in a decision that is all about the standard of review, the Supreme Court never said whether it agreed with the district court that the award was based on a manifest error of law. The award it was remanding to almost certain enforcement contained a decision that even the arbitrator now held was erroneous. The loser, Mattel, would be stuck with that error without chance of correction. Presumably
The Supreme Court did leave open the possibility of “more searching review” [in fact, the nonexistent merits review allowed under Hall Street can hardly be called “searching”] “based on authority outside the statute.”21 Its examples of extra-FAA authority were state statutes and common law.22 Awards can be vacated if the agreement to arbitrate can be voided on the general legal or equitable grounds for invalidating a contract,23 and courts have refused to enforce awards that violate public policy.24 Parties are also free, of course, to provide for an appeal to other arbitrators, but that possibility does not address the question raised by Hall Street, which is whether they can appeal in the court system if they prefer its protections.

One small teasing note of dictum in Hall Street suggested that the term manifest disregard still might have meaning in that it might just refer to the grounds listed for vacatur in FAA section 10.25 A few courts of appeal have taken this dictum as a license to read a form of merits review back into the FAA. They claim that it is an act beyond the arbitrator’s authority, a reviewable violation of section 10(a)(4), to manifestly disregard governing law.26 To them, no party would agree to hire an arbitrator who was going to

Mattel ended up wishing it had proceeded in court, where it would have had better odds that the law would be enforced.

21 Hall Street, 128 S.Ct. at 1406.
22 Id.
23 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).
24 Courts cannot apply a state public policy aimed only against arbitration, as the Supreme Court indicated in Southland Corp. v. Keating, see supra note 3, but they 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.
25 Hall Street, 128 S. Ct. at 1404 (“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.” (citations omitted)).
26 Three of the circuits to have applied Hall Street have used a § 10(a)(4) beyond-authority rationale to conclude that they still can apply a form of manifest disregard. In Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415 (6th Cir. 2008), the Sixth Circuit held that while Hall Street “significantly reduced the ability of federal courts to vacate arbitration awards for reasons” outside of § 10, “it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law.” Id, at 418. The Sixth Circuit cited
disregard the law, so, logically, decisions that violate the manifest disregard standard
must be beyond the arbitrator’s authority.27

The problem with this reading is that it contradicts Hall Street’s holding that
parties are not entitled to full judicial review even if they contract for it. If ever there was
a case in which legal error should have exceeded the arbitrator’s power, it should have
been Hall Street with its parties’ agreement that the district court could reverse for legal
error. When the dust settles after some intermediate court sifting of Hall Street, the
opinion is likely to foreclose this backdoor incorporation of manifest disregard.28

27 For a forceful articulation of the argument that legal errors are beyond the arbitrator’s authority when the
parties agree that the arbitrator should not have the power to commit errors of law, and thus rejecting the
logic that led the United States Supreme Court to reject review under the FAA in Hall Street, see the
California Supreme Court decision in Cable Connection, Inc. v. DIRECTV, 44 Cal.4th 1334, 190 P.3d 586,
604-06 (2008).

28 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 court’s
blessing only after their dispute had begun to work its way through the court system. The Supreme Court
remanded this issue to the trial court. 128 S. Ct. at 1407-08. If the law ultimately settles with courts having
the power to allow review of awards in such cases, it would let parties that want full review secure it by
The possibility of an escape hatch under state law was emphasized just five months after the Supreme Court issued *Hall Street* when the California Supreme Court reached the opposite conclusion under California’s arbitration statute. In *Cable Connection, Inc. v. DIRECTV, Inc.*, that court held that parties can opt for expanded judicial review under the California Arbitration Act. The *Cable Connection* parties had agreed that the arbitration would be conducted under the FAA. The California Supreme Court nonetheless held that because certain key FAA procedural provisions do not apply to state courts, appeals conducted under the California statute are not restricted by the FAA’s now narrowed federal standard for appeal. As long as the California Supreme Court’s optimistic belief that cases like *Cable Connection* are not preempted by the FAA prevails, parties may be able to select a state jurisdiction that allows a broader review than the FAA.

In the many cases that do fall under the FAA, however, the Supreme Court has narrowed the grounds for review. It is for this reason that *Hall Street* poses a not-too-subtle threat to arbitration’s legitimacy. The idea that arbitrators cannot be reversed for very plain error will encourage arbitration’s critics and bolster support for the AFA. One of the recurrent criticisms is that awards are effectively unreviewable; *Hall Street* makes that more true.

---

29 44 Cal.4th 1334, 190 P.3d 586, 599-608 (Cal. 2008).
30 Id. at 590 n.3 (citing portion of lengthy arbitration clause that provided, “This Section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act (9 U.S.C. Section 1, et seq.).”). The parties did opt for California substantive law to apply to their claims, but even then requested federal substantive law when it “would apply to any claim.” Id.
31 Id. at 597.
32 Id. at 595-99.
Consider the standard for manifest disregard in circuits that have tried to apply Hall Street. Is it really healthy if the Second Circuit cannot vacate an award in which the arbitrators commit (admittedly, in the court’s view) an “egregious error,” fail to provide even a “barely colorable justification,” and violate the law willfully? If the Ninth Circuit has to let stand a “clearly irrational” decision? The Fifth Circuit decisions by an arbitrator who is “fully aware of the controlling principle of law and yet does not apply it,” and causes “significant injustice”? The Sixth Circuit decisions that “fly in the face of clearly established legal precedent.” Is this really 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? Even after Hall Street, not all of these circuits agree that they are barred from vacating awards for their versions of manifest disregard, but if the Supreme Court’s holding is applied with fidelity, none of these courts should be reversing FAA cases on these grounds.

Given that Hall Street is a fact of life for now, arbitrators should be more careful in their decisions and more determined to get it right. Only in that way can they do their part to continue meriting public confidence in our parallel private system of dispute resolution. Hall Street’s expansion of unreviewable discretion should make all arbitrators redouble their efforts to ensure that their decisions, procedural as well as substantive, are manifestly and visibly fair.

34 Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009),
35 Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 249, 354, 357 9 (5th Cir. 2009),
37 See supra note 26.
II. The Small, Nonnegotiated Case Challenge to Arbitral Legitimacy.

A second reminder that unceasing vigilance and care are necessary to maintain arbitration’s institutional legitimacy comes from the recent controversy over “mandatory” arbitration in certain repetitive cases. Form contracts for credit cards, telephone service, investment accounts, employment, and franchises give rise to many of these cases. Large corporations have funneled millions of these disputes into arbitration.

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

38 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.
39 Public Citizen’s list of areas in which these 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.
40 It is an irony that when the shoe is on the other foot and they are defendants, many of these corporations fight so hard against class actions, the other available procedure for economically resolving small claims.
41 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 39; 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. Moreover, there are unresolved theoretical challenges to making a comparative study between arbitration and the cost, speed, and outcomes of similar small cases that were resolved privately or in courts, including small claims court. For a taste of the conceptual difficulty, see generally Schwartz, supra.
arbitration of these repetitive 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, a company with its principal operations in Minnesota, had been co-opted by a New York hedge fund manager, J. Michael Cline. Cline supposedly invested $42 million to acquire controlling rights over the NAF. The complaint charged that Cline masterminded a merger of three of the country’s five largest collection lawfirms into a single firm, Mann Bracken. The lawfirm sold its debt collection business to Axiant, a company founded by Cline. As a

---

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).

42 For tantalizing glimpses at how the Cline group tried to rationalize 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. After it sold its assets to the debt collection company, the lawfirm,
result of interlocking arrangements, Mann Bracken ended up handling almost 60% of the astounding 214,000 claims that the NAF processed in 2006.\textsuperscript{43}

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{44}

The NAF touted itself as an independent arbitration service provider, but purportedly told companies that used it that it was a sure-thing debt collection agency. According to the State, the NAF told financial services companies that “They [customers] ask you to explain what Arbitration is then basically hand you the money” and “You have all the leverage and the customer really has little choice but to take care of this account.”\textsuperscript{45}

On July 20, 2009, six days after the complaint was filed, the NAF settled. It agreed to stop arbitrating all consumer credit transactions. The draconian ban on its operations includes all cases over “credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.”\textsuperscript{46} As one indication that even responsible arbitration providers are reconsidering their procedures in nonnegotiated cases, the AAA suspended its consumer debt-collection arbitrations -- while continuing to handle

\footnotesize{Mann Bracken, turned around and paid Axiant to provide it everything from services to equipment. Id. § 84.\textsuperscript{43} Id. § 3.\textsuperscript{44} Id. § 16.\textsuperscript{45} Id. § 96.\textsuperscript{46} Press Release, “National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson” (July 20, 2009), http://www.ag.state.mn.us/Consumer/PressRelease/090720NationalArbitrationAgremnt.asp (visited November 7, 2009).}
arbitrations brought by consumers and other kinds of consumer arbitrations.\textsuperscript{47} Several
large banks, including JP Morgan Chase, suspended their arbitration programs as well.\textsuperscript{48}

It would be nice if the NAF could be portrayed as one bad apple that should not
spoil the bunch, but it is more than that. The NAF claimed to be the largest provider of
arbitration services in the United States. Any group that arbitrated 214,000 consumer
cases in a year was far more than just one among many providers. Moreover, the speed
with which the NAF’s business grew is a sign that many large corporations succumbed to
their incentive to funnel cases into a dispute-resolution system tilted in their favor.

The NAF debacle has given new momentum to congressional efforts to limit
arbitration. The Arbitration Fairness Act with its euphemistically optimistic title is now
pending in committee.\textsuperscript{49} The bill would ban mandatory predispute arbitration agreements
in employment, consumer, and franchise disputes and under civil-rights statutes.
Consumer disputes are broadly defined to encompass any dispute over real or personal
property, services, money, or credit.\textsuperscript{50}

The Act’s seven “findings of fact” summarize many of the complaints against
arbitration. That these broad findings could draw wide support is one sign of how
seriously arbitrators need to bolster the legitimacy of their vocation. The findings assert:

\begin{enumerate}
\item that the FAA was intended to apply only between companies of
roughly similar size;
\end{enumerate}

\textsuperscript{47} Press Release, “The American Arbitration Association Calls for Reform of Debt Collection Arbitration,”
(July 23, 2009), \url{http://www.adr.org/si.asp?id=5769} (visited November 13, 2009).
\textsuperscript{48} E.g., Jay Miller, “J.P.Morgan Drops Card-Dispute Arbitration Rule,” Wall St. J. (Nov. 22, 2009),
\url{http://online.wsj.com/article/SB10001424052748704888404574547991052980108.html} (visited Nov. 29,
2009).
\textsuperscript{50} H.R. 1020, § 3; S. 931, § 401(2).
that the Supreme Court has pushed the FAA beyond its intended scope by letting it extend to disputes between parties of different size;

that “[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;

that arbitration providers “are sometimes under great pressure” to favor repeat clients;

that mandatory arbitration undermines civil rights and consumer law because of the lack of judicial review; and that without meaningful review, “arbitrators enjoy near complete freedom to ignore the law and even their own rules.”

that arbitration is not transparent because it does not require written decisions or public decisions; and

that arbitration clauses often limit substantive rights, including statutory rights; prohibit class actions; and force litigants to arbitrate far from home.\(^\text{51}\)

The proposed legislation applies to the repetitive, non-negotiated arbitration cases that have expanded so greatly in recent years. It will ban arbitration of the largest group of arbitrated cases, including a number of cases with large amounts in dispute.

Small consumer cases are the closest most Americans ever come to arbitration. The problems in these nonnegotiated cases, which may be the only experience that the average citizen has with arbitration, are likely to color their view of the process. That is the worst way to encounter private dispute resolution; it is the setting least likely to show that arbitration can yield a decision that is at least as fair as outcomes in the court system and cheaper and quicker. The public may come to think that arbitration is always nonconsensual, stacked for one side, and secret, all factors that convey unfairness.

\(^\text{51}\) 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 give voice to their customers can find that their support has vanished before they even realize it is being eroded. As political scientist Albert Hirschman argued in his influential book *Exit, Voice and Loyalty*, institutions that have a procedure to receive “voice” can adjust by responding to pressures for change in the populations they serve. In contrast, closed systems, the obvious example being totalitarian governments, suppress dissent. According to Hirschman, both political and economic organizations that prohibit exit and voice 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.” The extraordinary speed with which the governments of the former Soviet Union and most Eastern European countries fell from power in the late 1980s is the most conspicuous recent example of how unexpectedly closed institutions can lose their support.

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 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 if one uses a credit card, has a bank account, buys a cell phone, or takes 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 no

---

52 ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY 33 (1970)(“Voice has the function of alerting a firm or organization to its failings, . . . .”).
53 Id. at 121.
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 need to be even more zealous in policing the fairness of their procedures. Everyday arbitral decisions, including how bound arbitrators should be by the law, whether to explain awards, and how much discovery to grant, provide an opportunity to deepen arbitration’s legitimacy as well as to generate fair decisions for individual parties.

III. 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 mandated by the facts and the law. Parties have reason to fear arbitration if there is no check at all on even irrational results.

When it ruled on an arbitration clause stating that the arbitrators “shall not have the power to commit errors of law or legal reasoning” in Cable Connection, the California Supreme Court 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.”

---

54 Cable Connection, 44 Cal.4th 1334, 190 P.3d 586, 589, 590 n.3, 605-06 (2008)(citations omitted).
The belief that arbitrators are too free to act outside the limits that the law might impose upon a court is behind the AFA’s accusatory “finding” that “arbitrators enjoy near complete freedom to ignore the law and even their own rules.”55 Critics like Public Citizen claim that arbitrators do not follow the law.56 Nor is it surprising to find a practitioner advising lawyers who draft arbitration agreements to consider, “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.”57

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 slowly pass 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. In general, 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, lawless alternative to court adjudication.

Discussions about arbitrators not being bound by the law and doing equity as if they were modern-day Solomons devising remedies from scratch, rather than judges trained in the law and applying its principles, can arise in four quite different contexts. First is the older model of arbitration that comes from an age of judicial hostility to extra-judicial dispute resolution. Courts once wrote about arbitrators as if they were

55 H.R. 1020, § 2(5); S. 931, § 2(5).
56 THE ARBITRATION DEBATE TRAP, supra note 41, at 32-33 (“Arbitrators Are Not Required to Follow the Law, or Even Their Own Rules.”).
57 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).
unrestrained and often ill-prepared. 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. The Court assumed that arbitral decisionmaking was inadequate to protect the strong federal policy outlawing fraud by securities brokers. In Wilko v. Swan, it refused to let arbitrators decide a section 12(2) securities claim because it found no assurance that they 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.\(^58\)

Although the idea of an arbitrator as a wise elder asked to do justice 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 it 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 its 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.”\(^59\) In California, where the Supreme Court

\(^{58}\) Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (citations omitted). Arbitration offered “prompt, 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., 473 U.S. 614, 640 (1985)(Stevens, J., joined by Powell & Marshall, JJ.), described arbitration as “despotive 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.

\(^{59}\) 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
does allow parties to agree to judicial review, it is possible that a panel nonetheless cannot be reversed for an error of law -- because the arbitrators may just be trying to implement their sense of equity -- unless the parties agree both that the courts will have review powers and that the arbitrators are not authorized to commit errors of law.60

A second context in which courts have described 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 idea frequently appears in collective-bargaining cases, in which arbitrators are selected for their skill and judgment in the dynamics of a particular industry. The Supreme Court has described the labor arbitrator’s role as helping craft private rules of self-government, performing “functions which are not normal to the courts” and, indeed, may “be foreign to the competence of courts”:61

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

---

60 The California Supreme Court left to another day whether parties seeking review of errors have to agree both to allow appellate review and that committing an error of law is beyond the panel’s authority. Cable Connection, 190 P.3d at 604, but careful lawyers will draft agreements with both provisions. It also did not declare any particular form of agreement necessary. 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 indicate that the parties intended review for errors of law. 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).

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."\footnote{Id. at 581-82. see also United Steelworkers of Am. v. Enter. Wheel and Car Corp., 363 U.S. 593, 596-97 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567-68 (1960); McDonald v. City of West Branch, 466 U.S. 284, 290-92 (1984); AT&T Tech., Inc. v. Commc’n Workers of Am., 475 U.S. 643, 648-50 (1986).}

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.”\footnote{Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).} 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.\footnote{Id. at 52-54; for added discussion of the labor arbitrator’s distinct role, see id. at 56-58; United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36-38 (1987); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35 (1991). For perceived limits on labor arbitrators’ competence and authority, see also Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743-45 (1981).}

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 appellant 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 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 the 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.”

The third main 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

---

65 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 consultation, id. Canon 3(B)(7)(b), available at [http://www.abanet.org/cpr/mcjc/canon_3.html](http://www.abanet.org/cpr/mcjc/canon_3.html) (visited Mar. 15, 2010).

66 *Wilko*, 346 U.S. at 523. 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.”67

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,68 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,
and not a dispute over the underlying liability standard.

The model of unbridled arbitral discretion has gradually yielded to a model in
which arbitrators have to apply the law in ordinary commercial cases. The most
prominent demonstration of this change is the United States Supreme Court’s
abandonment of its Wilko-type hostility to arbitration. 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 and its hostile view of arbitration in Mitsubishi v. Soler
Chrysler-Plymouth, Inc., in which it held that antitrust claims can be arbitrated in an
international arbitration.69 Here it relied on a much more optimistic view of the

---

67 Wilko, 346 U.S. at 436-37.
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
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.\textsuperscript{70} Even though the panel to be deciding the U.S. antitrust claims was composed of three Japanese arbitrators, who presumably would not be 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.\textsuperscript{71}

The Court found that the Mitsubishi tribunal “. . . should be bound to decide that dispute in accord with the national law giving rise to the claim.”\textsuperscript{72} Although the Court did not decide whether it would let arbitrators decide antitrust claims in a domestic arbitration, Mitsubishi contained no hint that any arbitrators would be free to disregard the law if it did not comport with their sense of fairness, or would be unable to apply the antitrust laws fairly.

Two years after Mitsubishi, the Court rejected an effort to extend Wilko’s bar on arbitrating a section 12(2) securities claim to securities fraud claims under the Securities Exchange Act of 1934 and to racketeering claims and again distanced itself from the suspicious view of arbitration.\textsuperscript{73} In the process, it stressed that limited appellate review

\textsuperscript{70} Mitsubishi, 473 U.S. at 627.
\textsuperscript{71} Id. at 628.
\textsuperscript{72} Id. at 636-37.
\textsuperscript{73} Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). Although unable to find a majority willing to reverse Wilko, the Court 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.
does not justify arbitrators straying from the law.\textsuperscript{74} Soon after that, the Court reversed \textit{Wilko}. It criticized \textit{Wilko} for being “pervaded by what Judge Jerome Frank called ‘the old judicial hostility to arbitration.’”\textsuperscript{75} The Court also 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{76} 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 take pains to 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 the 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{77} 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

\textsuperscript{74} Id.

\textsuperscript{75} See \textit{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{76} Id. at 483, citing \textit{Wilko}, 346 U.S. 439, 439 (Frankfurter, J., joined by Minton, J., dissenting).

\textsuperscript{77} CPR NON-ADMIN. RULES, Rules 10.1, 10.2.
contract and “permissible” under applicable law. 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.  

The commercial rules of the Judicial Arbitration and Mediation Services, now known as JAMS, The Resolution Experts (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.” 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.” Arbitration under either set of rules is narrower than the unfettered process described in Wilko or by the California Supreme Court in Cable Connection.

    The AAA’s general commercial rules contain the broad power to grant “any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement.” Unlike the CPR and JAMS rules, these AAA rules do not refer to applicable law. In contrast, in its consumer cases, a 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

78 Id., Rule 10.3.  
79 Id., Commentary on Individual Rules, Rule 10.  
80 JAMS COMP. ARB. RULES & PROCS., Rule 24(c).  
81 Id.  
82 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).
or in equity.”83 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.84 But the Protocol also instructs arbitrators to “apply any identified, pertinent contract terms, statutes and legal precedents.”85 While the drafters did not recommend the added insurance of formally providing for judicial review, they “concluded that the rules should specifically direct arbitrators to follow pertinent contract terms and legal principles.”86

This weight of authority in domestic rules fits international arbitration rules, which require fidelity to law. The International Chamber of Commerce (ICC) rules require the parties 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.”87 To head off unbounded discretionary decisionmaking, they allow the Tribunal to “assume the powers of an amible compositeur or decide ex aequo et bono only if the parties agreed to allow such power.”88 The United Nations’ UNCITRAL rules have similar requirements,89 as do the international rules of the AAA, CPR and JAMS.90 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

83 CONS. DUE PROCESS PROTOCOL, Prin. 14.
84 Id. Prin. 14, Reporter’s Comments.
85 Id. Prin. 15.2.
86 Id. Prin. 15, Reporter’s Comments (discussing views of Advisory Committee).
88 Id. Art. 17.3. Blacks’ defines an amible 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.
89 UNCITRAL ARB. RULES, Art. 33.
Institute to prepare 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, . . . .” A labor arbitrator is crafting part of the legal framework, not just applying it.

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 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.”

It is worth emphasizing that, 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 an entirely personal sense of justice, but instead are bound, and bound tightly, to the collective bargaining agreement. The contract sets limits on their role, just as the agreement and the broader network of governing law set limits on a general arbitration. If

---


92 United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960); see Sternlight, supra note 69, 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”).
a labor arbitrator attempts to impose his private beliefs in opposition to the agreement, he or she will be quickly reversed. 93

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 incorporate industry usages. The variability of our 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, 94 and the same progressive impulse fits more broadly into modern contract law through the Restatement of Contracts. 95 Applicable law thus provides the equipment needed to incorporate industry-specific trade-based 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 then apply reasoning from analogy, logic, and the other tools courts use when the facts require them to step beyond settled law.

93 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.”).
94 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.
95 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 fact that judicial review is limited is not a license for arbitrators to ignore the law. The Supreme Court rejected this idea 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. The Court disagreed that the very restricted judicial review of awards, which leaves open a correspondingly broader range for arbitral discretion, excuses arbitrators from applying the law correctly:

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. Unspoken but clearly assumed in this holding is the fact that it would be improper for arbitrators to decide that their sense of equity or common justice lets them override applicable statutes or other governing law.

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

---

97 Id. at 232.
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 remedial powers, parties who choose arbitration usually do not agree to forego the substantive law, including the law of damages, that formed the framework for contracting when they began their relationship.99

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 broad 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 that arbitrators are to apply the law in most modern rules, like 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, suggests that this principle has become more widely established as arbitration has deepened its professional roots.

99 It surely is correct that, as dissenting Justice Kennard argued in the California Supreme Court’s Advanced Micro Devices decision, in a modern arbitration the parties may seek a speedier, simpler resolution, but “would not generally expect that the arbitrator has the power to award relief that a court resolving the same dispute could not award.” Advanced Micro Devices, 9 Cal.4th 362, 391, 399, 885 P.2d 994 (1994)(Kennard, J., dissenting).
IV. The Problem with Silent Awards.

Many arbitrators shy away from reasoned decisions 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 certainly makes the job of writing the award easier and less expensive. And sometimes it is the right thing to do. If the parties ask that the award 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 most cases, the contract is silent on the kind of decision required.

The desire to avoid a reasoned decision made some sense in an earlier area of hostility to awards. Some courts adopted a rule that 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 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

---

100 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”).
does not discuss the competing positions and give some analysis of 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.101 Even more striking, under the AAA’s general rules, even a joint party request is only binding if it comes “prior to appointment” of the arbitrators, and its construction rules require notification before the end of the preliminary hearing.102 These rules thus do not grant the parties any authority to decide that they want a reasoned decision during real pretrial preparation or during the hearing -- i.e., the longest portion of the case.103

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 probably 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:

101 AAA, COM. ARB. RULES, Rule 42 (effective June 1, 2009); AAA, CONST. IND. ARB. RULES, Rule 44(c) (effective Oct. 1, 2009).
102 AAA, COM. ARB. RULES, Rule 42; AAA, CONST. IND. ARB. RULES, Rule 44(c).
103 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 (singing 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.
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.\textsuperscript{104}

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 involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”\textsuperscript{105} In contrast, courts issuing unexplained decisions reached because they feel right “function as a naked power organ,”\textsuperscript{106} 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.”\textsuperscript{107} In other words, a decision needs to be written in sufficient detail that it indicates why the outcome is fairly linked to the general principles of law that do apply.\textsuperscript{108}

Not surprisingly, the AFA cites lack of transparency as one of the alleged drawbacks that supposedly justify invalidating nonnegotiated arbitration clauses.\textsuperscript{109} And as one proof of lack of transparency, the Act points to the lack of public, written

\textsuperscript{104} CPR, RULES FOR NON-ADMIN. ARB, COMMENT Rule 15 (Nov. 1, 2007).
\textsuperscript{105} Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959).
\textsuperscript{106} Id. at 12.
\textsuperscript{107} Id. at 19.
\textsuperscript{108} 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 41, at 39.
decisions: “While the American civil justice system features publicly accountable
decision makers who generally issue public, written decisions, arbitration offers none of
these features.”\textsuperscript{110}

Older Supreme Court decisions discussing the model of arbitrators as not strictly
bound by the law included the lack of reasoned decisions as one sign that arbitrators
could not be trusted to apply statutes as fairly as courts. In \textit{Wilko}, for instance, 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
proceedings.”\textsuperscript{111} Arbitrators’ “conception of the legal meaning” of the securities laws
therefore “cannot be examined.”\textsuperscript{112} The Court later would justify withholding final
decision of Title VII claims from arbitration because of features that made arbitration “a
comparatively inappropriate forum for the final resolution of rights created by Title VII,”
features that included arbitrators having no obligation to explain their award.\textsuperscript{113}

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.

\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Wilko v. Swan}, 346 U.S. at 436.
\textsuperscript{112} \textit{Id.} In \textit{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 deficien[ies].”
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 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 does not even appear may amount to little more than a recital of the debt, the contract terms, and the lack of any brief filed in defense. But even here a listing of the basic elements of evidence would show that the award is based upon a reasoned process, one in which a thoughtful decisionmaker was actively working to apply the contract fairly. The need for a prompt, less expensive but fair proceeding in these cases, just as in other 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 jettisoned 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.114

114 Indeed, 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 certain 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 certain 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.
The opportunity to increase the legitimacy of arbitrated awards by using reasoned decisions should be particularly fertile in disputes in which arbitrators are selected for special expertise. These arbitrators will be versed in the vocabulary of their industry of expertise 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 indeed reduce – but not eliminate -- arbitration’s ability to produce final decisions quickly. (Appeals would not remove arbitration’s comparative advantage in pretrial preparation, so that arbitration still should remain quicker and less expensive even in cases in which there is an appeal.) 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 increase 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. Manifest disregard is such an unsuccessful ground for appeal, however, that access to reasoned awards is not likely to open a floodgate to 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.\textsuperscript{115} Of these, only four had been vacated in whole or in part.\textsuperscript{116} Moreover, three of the four vacaturs involved an award that exceeded the arbitrators’ powers, so “it is arguable that manifest disregard need not have been the basis for vacating the award, . . . .”\textsuperscript{117} 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.\textsuperscript{118}

A study published in 2005 studied every motion to vacate in state and federal court between January 1, 2002 and October 31, 2002.\textsuperscript{119} The authors identified 182 motions, with 277 grounds for vacatur.\textsuperscript{120} Manifest disregard was raised 52 times, but succeeded only twice -- approximately 4\% of the times attempted.\textsuperscript{121} Not only was this a small fraction of times attempted, but it was the least successful of the grounds of appeal observed by the authors.\textsuperscript{122} This merits-based reason for appeal does not give parties much incentive to appeal, making the idea that reasoned decisions would prompt many added appeals 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

\textsuperscript{115} Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003).
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Stolt-Nielsen SA v. Animalfeeds International Corp., 548 F.3d 85, 91 n.7 (9th Cir. 2008). The Second Circuit also remanded two cases for clarification in this later period. Id.
\textsuperscript{119} 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).
\textsuperscript{120} Id. at 23.
\textsuperscript{121} Id. at 23, 25.
\textsuperscript{122} 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.
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 rejected manifest disregard as a ground for vacatur in
FAA cases.

Most arbitration rules already stress the importance of explaining decisions and
rank that value above any added finality that might be bestowed on awards that do not
provide reasons. Most require a reasoned decision unless both parties ask to forego one.
CPR requires a statement of reasons unless the parties agree to forego them; so do JAMS’
domestic rules.\textsuperscript{123} JAMS’ streamlined rules, even though designed to expedite cases,
mandate a reasoned award as well.\textsuperscript{124}

Even within the AAA’s various rules, three categories of cases that have been
subject to extra scrutiny of late fall under special rules that 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.\textsuperscript{125} The AAA’s
employment rules state that an award “shall provide the written reasons for the award”

\textsuperscript{123} CPR, RULES FOR NON-ADMIN. ARB. 15.2 (November 1, 2007); JAMS, COMP. ARB. RULES &
PROCS. 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).
\textsuperscript{124} JAMS, STREAMLINED ARB. RULES & PROCS. 19(g)(July 15, 2009).
\textsuperscript{125} 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.” \textit{Id}, Reporter’s Comments Principle 15.
unless the parties agree to not require them, and its supplementary rules for class-action cases require a reasoned explanation of the certification decision.\textsuperscript{126}

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 an appeal, the same factors that counsel having a reasoned decision often justify having an official record. Some cases are so small that a record makes no economic sense.\textsuperscript{127} 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 just to minimize the possibility of appeal as there is to avoid a reasoned decision for that purpose.

The inclusion of the requirement of reasoned decisions in certain categories of cases that recently have received heightened scrutiny suggests that as arbitration matures, it is shifting away from a model of silent awards toward one of fully explained decisions. This evolution will bring American arbitration in line with the major international rules. The presence of a provision in international rules does not prove that it is fair, but it is notable that the major international rules require a statement of reasons unless the parties agree to forego explanations. The United Nations UNCITRAL Code requires arbitrators to state their reasons absent contrary agreement;\textsuperscript{128} the ICC) requires a statement of

\textsuperscript{126} AAA, EMP. ARB. RULES, Rule 39.c (June 1, 2009); AAA, SUPP. RULES FOR CLASS ARB., Rule 4.b.5(a)(October 8, 2003).

\textsuperscript{127} 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).

\textsuperscript{128} UNICTRAL ARB. RULES, Art. 32.3.
reasons without qualification.\textsuperscript{129} In their rules for international arbitration, the AAA, CPR, and JAMS all make a reasoned decision the default position.\textsuperscript{130} The ALI/UNIDROIT Principles for Transnational Civil Procedure similarly require a reasoned explanation of the “essential factual, legal, and evidentiary basis of the decision.”\textsuperscript{131}

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, or 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 their written explanations to champion the fairness 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.

\textsuperscript{129} ICC, RULES OF ARB. Art. 25.2.  
\textsuperscript{130} 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).  
\textsuperscript{131} ALI/UNIDROIT PRINCIPLES, Prin. 23.2.
In the long run, the need for arbitration to be fair cannot be sacrificed on the altar of finality. The NAF problem is a reminder that if arbitrations are not conducted as carefully fair proceedings, the procedure will lose the support it needs to sustain robust long-term use. Unexplained awards will not deter parties from using arbitration, as long as the cost and congestion in the court system remain as bad as they are today. Or fear of juries and desire for confidentiality, strong goals for some parties, could continue to overcome concerns about fairness even if courts improve their case management. 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. 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. Even in the relatively simple golden age of Federal discovery,

---

132 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.”).
before the ubiquity of inexpensive copiers, ediscovery, and the rise of depositions had
taken 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
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
(1924)(“The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase.”); see also Wharton Poor, \textit{Arbitration under the Federal Statute}, 36 Yale L.J. 667, 677 (1926)(listing speed and ability to draw on arbitrators with technical knowledge as benefits of arbitration, but questioning whether arbitration would also lead to lower cost); Cohen & Dayton, \textit{supra} note 67, at 265, 269 (listing delay and cost as “evils” arbitration “is intended to correct”).}

Speed and low cost are in tension with broad discovery like that in the \textit{Federal} Rules, even after their narrowing to limit the scope of discovery to evidence “relevant to
any party’s claim or defense.”\footnote{Fed. R. Civ. P. 26(b)(1).} 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 indeed 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. A practitioner with international arbitration experience claims that the same trend has led to a decline in international arbitration 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.”

The anecdotal perception of declining usage may or 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. Indeed, these rules treat the narrowness of discovery as one of arbitration’s main virtues. The AAA’s general commercial rules do not specifically mention depositions or interrogatories at all. They allow the arbitrator to

---

137 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).
138 Id. 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 111 (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).
139 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.
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 even 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.” These rules clearly endow arbitrators with the authority to deny discovery even when sought by both parties, if the arbitrator decides the discovery is not consistent with arbitration’s expedited nature.

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.” These values, of course, support limiting discovery. Curtailed investigation fits CPR’s general goal of getting to hearing within six months. A CPR Tribunal is given power 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.”

---

140 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.
141 Id. Rules L-3(f), L-4(d). The introduction of the AAA’s commercial rules lists, as one of the distinguishing features of the rules for large complex cases, “broad arbitrator authority to order and control discovery, including depositions.” Id. Intro., Large Complex Cases.
142 Id. Rule L-4(c)-(d).
143 CPR, RULES FOR NON-ADMIN. ARB, Introduction (effective Nov. 1, 2007).
144 Id.
145 Id. Rule 9.1.
146 Id. Rule 11.
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{147} The Tribunal is given “great leeway,” including in setting discovery.\textsuperscript{148} The tilt toward limited discovery is enhanced by CPR’s Protocol on Documents and Presentation of Witnesses.\textsuperscript{149} The Protocol cautions that arbitrators are expected to conduct 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.\textsuperscript{150}

JAMS’ general arbitration rules require the parties to cooperate by voluntarily exchanging all nonprivileged documents “relevant” to the dispute, plus witness and expert lists.\textsuperscript{151} The arbitrator retains power to modify (and so limit) this seemingly broad production, and its 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.’”\textsuperscript{152} Unlike the AAA and CPR rules, JAMS’ rules do allow each side one deposition as of right, but after that slight liberalization 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.\textsuperscript{153}

\textsuperscript{147} Id. General Commentary. \\
\textsuperscript{148} Id. Salient Features of the Rules no. 9. \\
\textsuperscript{149} CPR, PROTOCOL ON DISC. OF DOCS. & PRESENTATION OF WITNESSES IN COM. ARB.. \\
\textsuperscript{150} Id. Section1(a). \\
\textsuperscript{151} JAMS COMP. ARB. RULES & PROCOS., Rule 17(a). \\
\textsuperscript{153} Id. Rule 17(b).
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 many 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.

Arbitrators unquestionably have the power to limit discovery to almost any extent they find reasonable. 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. But the most substantial gains in arbitrated cases should come from the arbitrator’s ability to customize discovery, impose a more specific schedule, and monitor the case. The gains 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 much they should limit it when they apply limits. Adopting a presumptive rule of no depositions, no interrogatories, and no requests for admission just because a case is in arbitration, even when not under rules like common international rules that may require such limits, would undercut the fairness of the dispute resolution.

155 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 115, at 464.
In many cases little or no discovery will be needed. Even in court, most cases are relatively small, end quickly, and do not consume many resources in getting to disposition.\textsuperscript{156} Limits need to be firm but sufficiently light-handed not to burden these cases. But the decision to restrict discovery in the cases that do need it 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.\textsuperscript{157} The importance of fairness is reflected in the FAA’s statutory ground of vacatur for refusal to allow

\textsuperscript{156} 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 21\textsuperscript{ST} 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. \textit{Id.} The factors that tended to raise case costs were the size of the stakes, the percentage of litigation costs devoted to document production, the 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. \textit{Id.} at 552-53. Patent, trademark, securities, and antitrust cases had unusually high expenses. \textit{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 discovery requests, \textit{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. \textit{Id.}

\textsuperscript{157} 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 98.
introduction of evidence. 158 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 having a fair chance to find evidence that is 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 often 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 cold light of an adversary’s discovery requests. For instance, depositions can give a party 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 the complexion of a case. Sharply curtailing discovery risks abandoning these benefits.

Doesn’t the fact that 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. Somewhat 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 arbitration’s other 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 desire 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 have 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. Depositions can narrow discovery and shorten pretrial preparation, indicate points that are not really in issue, short-circuit the search for important documents and computer information, or open a new line of inquiry that leads to quicker resolution than in a case without such discovery.

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

---

159 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 156, 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 preparation, taking, and recording the deposition is considered. IAALS ANALYSIS, supra note 156, 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.

160 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 of 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).

161 In the 2009 IAALS federal-case sample, motions over production of documents were the most common discovery motion. IAALS ANALYSIS, supra note 156, at 45. The late 1990s Federal Judicial Center study
craft a reasonable, focused production plan. Arbitrators should limit production, however, by 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.\(^\text{162}\) If even only one side produces a massive electronic file, both parties are burdened by having to review the documents 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 factual investigation. The Federal Rules early on embraced interrogatories as “an inexpensive means of securing useful information.”\(^\text{163}\) Interrogatories can create real gains when used to make one 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.\(^\text{164}\) Yet arbitrators know that interrogatories asking for “all facts” supporting

---

\(^\text{162}\) 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).


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 and depositions. 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. Furthermore, if arbitrators allow requests for admission, they similarly should restrict them to requests that truly are likely to narrow the proof for trial and 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. 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 growing more impacted. 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

---

165 “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.
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 may undermine 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 occasions for combining civil and common-law approaches to justice, including different approaches to developing the evidence needed for trial. 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 with written statements and 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 from outside the United States would benefit just as much from better information on why the United States has its relatively broad discovery rules and the benefits they bring. Creative, selective use of depositions and other common 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 at least 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 how to fit a fair amount of investigation into much-shortened pretrial schedules, not just care in cutting off discovery.

V. Arbitrators Should Remain Reluctant to Grant Dispositive Motions.

A concern with legitimacy does validate one traditional arbitrator tendency, the tendency to deny 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 proper rarity of such decisions in arbitration – arbitration rules do not bar a properly issued summary judgment or other dispositive order.

Nonetheless, arbitrators should exercise caution over summary dispositions because of the lack of appellate review. An arbitration already has jettisoned the consideration of a jury. The very restrictive appellate review means that the award will elude significant review at two levels of appeal as well. For this reason, it is all the more

---

166 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.
important that arbitrators be careful to have a full record before them and to consider all of the parties’ arguments before reaching their decision.

There still will be cases in which a claim is obviously deficient after all pertinent discovery has occurred. 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.

VI. The Other Opportunities to Increase Legitimacy.

Hewing to the law when it provides answers, explaining decisions, allowing meaningful discovery, and not disposing of cases summarily 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 the legitimacy of private arbitration. Zealous commitment to disclosure of conflicts, a sensitive area because most arbitrators have other lives as advocates, is critical to maintaining the perception and reality of fairness. Discouraging 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. Moreover, the Court’s seeming sense that arbitration is too fragile to survive a flowering of different procedures, and federal courts too rigid to be able to do justice in appeals based on anything but the ordinary civil record, surely shows a lack of hands-on experience among Supreme Court Justices. The California Supreme Court persuasively debunked almost every one of these arguments in its Cable Connection decision. The California court also made a strong case that allowing parties to contract for judicial review of appeals will strengthen arbitration, not weaken it.

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, although to an extent yet to be fully determined. Combined with the publicity from the NAF debacle and the AFA debate generally, arbitration is going to 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.

---

167 See supra note 19 & accompanying text.
168 Cable Connection, 44 Cal.4th 1334, 190 P.3d at 605-06.
169 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).