

## ARBITRATION: THE “NEW LITIGATION”

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*Provisions for binding arbitration of disputes are now employed in virtually all kinds of contracts, making arbitration a wide-ranging surrogate for civil litigation. This has also subjected arbitration to unprecedented strains and unparalleled criticism. Once promoted as a means of avoiding the contention, cost, and expense of court trial, binding arbitration is now described in similar terms—“judicialized,” formal, costly, time-consuming, and subject to hardball advocacy. Though “court-like” arbitration has alienated many business users, others strive to make arbitration even more like court trial, as through agreements for expanded judicial review of arbitration awards. Meanwhile, the emergence of mediation and other “thin-slicing” methods for resolving disputes more quickly and effectively has raised serious questions about the value of arbitration and its continuing role in the conflict resolution marketplace.*

*Additionally, broad judicial enforcement of arbitration provisions in standardized adhesion contracts governing employees and consumers has fueled impassioned debate over the need for regulation of arbitration agreements. The real concerns of reform advocates, lawmakers, legal commentators, and educators have produced strong responses that “spill over” into the realm of arm’s-length business-to-business agreements—often imposing new transaction costs without commensurate benefits.*

*These developments point to a critical need for more effective exercise of choice by users of arbitration and others whose decisions affect the arbitration experience. The most important difference between arbitration and litigation—and the fundamental value of arbi-*

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*tration—is the ability of users to tailor processes to serve particular needs. In order to make the most of the promise of arbitration, contract planners and drafters must move beyond a monolithic one-size-fits-all view of arbitration and make deliberate process choices based on client goals and priorities. The need for a more nuanced approach also requires planners to strategically assess arbitration’s particular value in a world of expanding process choices. Similarly, those who make or propose laws affecting arbitration and those who prepare tomorrow’s lawyers must look “beyond the monolith” to understand that regulation that is essential in one transactional setting may be detrimental in another.*

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*The moon waxes only to wane, and water surges only to overflow.*

— Ancient Chinese Proverb<sup>1</sup>

## INTRODUCTION

The latest edition of the American Institute of Architects (AIA) construction forms, the nation’s most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively elect arbitration or go to court.<sup>2</sup> A new, much-heralded rival set of standard construction contract documents also relegates arbitration to an option rather than a default procedure.<sup>3</sup> Along with a drumbeat of headlines heralding arbitration’s ebb tide,<sup>4</sup> such developments provoke discussion and introspection among commercial arbitration<sup>5</sup> practition-

1. 100 PEARLS OF CHINESE WISDOM 189 (Sinolingua 1999).

2. AM. INST. OF ARCHITECTS, AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION art. 15 [hereinafter AIA DOCUMENT A201-2007]; AM. INST. OF ARCHITECTS, AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT art. 8 (Projects 2007); *see also* Am. Inst. of Architects, Contract Documents, [http://www.aia.org/contractdocs/AIAS076659#P8\\_1567](http://www.aia.org/contractdocs/AIAS076659#P8_1567) (last visited Nov. 25, 2009) (comparing current and previous versions).

3. CONSENSUSDOCS LLC, CONSENSUS DOCS 240: STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER art. 9.5, at 19 (2007).

4. *See, e.g.*, ROBERT GAITSKELL, SOC’Y OF CONSTR. LAW, TRENDS IN CONSTRUCTION DISPUTE RESOLUTION (2005), <http://www.scl.org.uk/files/129-gaitskell.pdf>; Editorial, 17 CONSTR. L.J. 1, 1–2 (2001); Leslie A. Gordon, *Clause for Alarm*, A.B.A. J., Nov. 2006, at 19; Sylvia Hsieh, *Arbitration Falling out of Vogue*, LAWYERSUSA, Mar. 10, 2008, at 1; *Knocking Heads Together*, ECONOMIST, Feb. 3, 2000, at 62 (noting that arbitration is no “cheaper, fairer or even quicker” than trial); Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?*, INSIDECOUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration’s Fall from Grace*, LAW.COM, July 13, 2006, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005457792>.

5. Throughout this Article, “commercial arbitration” is used in its stricter, more straightforward sense—arbitration between commercial entities. The term is sometimes used more broadly to encompass many forms of binding arbitration outside the collective bargaining sphere. *See* Thomas J. Stipanowich, *The Evolving Standards and Persistent Challenges of Employment Arbitration*, in RESOURCE BOOK FOR MANAGING EMPLOYMENT DISPUTES (CPR Inst. for Dispute Resolution, Inc. ed., 2004). It

ers, advocates, and critics, raising questions about arbitration's future in the increasingly crowded and diverse marketplace of conflict resolution.

An ABA Symposium on "The Vanishing Trial" spotlighted an eighty-four percent decrease in the percentage of federal civil cases resolved by trial between 1962 and 2002, as well as significant parallel declines in state courts.<sup>6</sup> This dramatic decrease in the trial rate may be attributed, at least in part, to business and public concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.<sup>7</sup>

The concerns that contributed to the waning of civil litigation would seem to offer opportunities for the growth of private adjudication through binding arbitration.<sup>8</sup> Conventional wisdom suggests that businesses choose binding arbitration mainly because it is perceived to be different from litigation.<sup>9</sup> Parties look for some or all of the following: cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.<sup>10</sup> It is not

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should also be distinguished from "commercialized" arbitration, a term some have employed in reference to the recent evolution of arbitration and dispute resolution as a business. *See, e.g.*, Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 459 (2004) (observing that arbitration "has changed significantly . . . from the traditional model involving voluntary arbitration between parties of relatively equal bargaining power, to . . . become a profession and a commercialized industry that is imposed upon consumers and employees").

6. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-63 (2004).

7. *See* VALERIE P. HANS, BUSINESS ON TRIAL 50-78 (2000) (describing public's apprehension regarding litigation); Stephen Daniels & Joanne Martin, "The Impact It Has Had Is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers, 50 DEPAUL L. REV. 453, 454 (2000) (noting businesses' fear of litigation); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 26 (1998) (stating that ninety-four percent of surveyed executives believed there had been a "litigation explosion").

8. As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes." Telephone Interview with David McLean, Managing Partner, New Jersey Office, Latham & Watkins LLP (Oct. 7, 2008) [hereinafter McLean Interview].

9. COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 7 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST]; *see also* William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 532 (2000); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1340-41 (1996).

Some recent data suggests, however, that the choice often favors litigation. A survey of international contracts in Form 8-K filings by reporting corporations over a six-month period in 2002 reflected that only about eleven percent of contracts included binding arbitration clauses, which led the authors to the conclusion that arbitration might not always be perceived as value-enhancing compared with litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335-36 (2007).

10. *See* DAVID B. LIPSKY & RONALD L. SEEGER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 tbl.15 (1998) (detailing reasons why companies use mediation and arbitration), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs>; Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Percep-*

surprising, therefore, that today arbitration provisions are utilized in all kinds of contracts, making arbitration a wide-ranging surrogate for civil trial.<sup>11</sup>

Yet for a variety of reasons arbitration often falls short of popular expectations. Despite repeated evidence that business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost),<sup>12</sup> the literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal.<sup>13</sup> There are, moreover, frequent complaints regarding delay and high cost.<sup>14</sup> In spite of efforts by national institutions to enhance arbitrator quality<sup>15</sup> and provide guidance for improved practice,<sup>16</sup> it appears that discontent with commercial arbitration has never been more palpable if not more widespread.<sup>17</sup>

It would be irresponsible to suggest that arbitration, which in recent years experienced unprecedented growth,<sup>18</sup> is facing imminent extinction

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tions of Attorneys and Business People, 30 INT'L BUS. LAW. 203, 203–04 (2002) (performing a simple forced-rank analysis of factors important to attorneys and clients in AAA international arbitration cases).

11. See Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839–44.

12. See FULBRIGHT & JAWORSKI L.L.P., U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY FINDINGS 10 (2004), [http://www.fulbright.com/images/publications/15122612\\_1.PDF](http://www.fulbright.com/images/publications/15122612_1.PDF) [hereinafter FULBRIGHT 2004 SURVEY]; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, CORP. LEGAL TIMES, Feb. 2004, at 44, 44–45 (2004); John H. Henn, *Where Should You Litigate Your Business Dispute?*, DISP. RESOL. J., Aug.–Oct. 2004, at 34, 36–38; see also *infra* text accompanying notes 35–36.

13. See, e.g., Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, ANTITRUST, Fall 2004, at 31, 32–34; Paul J. Masinter et al., *Arbitration: Be Careful What You Ask For*, 7 COMM. & BUS. LITIG. 5, 5 (2006); Robert Shapiro, *Advance Sheet*, 28 LITIGATION 59, 61 (2001). Such concerns are also raised, along with others, in connection with arbitration conducted pursuant to standardized provisions in adhesion contracts. See, e.g., JACKSON WILLIAMS, PUB. CITIZEN, THE COSTS OF ARBITRATION 4–5 (2002); see also *infra* Part III.

14. See *supra* note 4; see also Michael M. Marick et al., *Excess, Surplus Lines and Reinsurance: Recent Developments*, 26 TORT & INS. L.J. 231, 232 (1991); Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 14, 2004, at 13, 13; Benjamin J.C. Wolf, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306–07 (2006) (describing the disadvantages of arbitration, include costs similar to litigation and lengthy discovery process and hearings). Recent surveys of corporate counsel in the United States and United Kingdom suggest that with respect to the resolution of international cases, lawyers are increasingly likely to see arbitration as just as costly and lengthy as litigation. See *infra* text accompanying notes 151–53.

15. See, e.g., Am. Arbitration Ass'n, Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, <http://www.adr.org/si.asp?id=4223> (last visited Nov. 25, 2009).

16. See CPR-GEORGETOWN COMM'N ON ETHICS & STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), <http://cpr-prod.ibelongnetworks.com/Portals/0/CPRGeorge-ModelRule.pdf> [hereinafter LAWYER AS THIRD-PARTY NEUTRAL]; THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2005), available at <http://cpr-prod.ibelongnetworks.com/ClausesRules/ArbitrationEthics/tabid/80/Default.aspx>.

17. See *supra* notes 4, 13–14; *infra* notes 37–38.

18. See Stipanowich, *supra* note 11, at 831, 841–44. For additional background material, see Joseph M. Matthews, *Consumer Arbitration: Is It Working Now and Will It Work in the Future?*, FLA. B.J., Apr. 2005, at 22, 22 (“During the past 30 years, use of arbitration has expanded both as to the quantity and the nature of the disputes subjected to it.”).

or even extreme marginalization in the manner of court trial, at least for now. Indeed, a close reading of some of the articles with “alarmist” headlines reveals a more moderate though highly variegated view of arbitration and lawyer perceptions.<sup>19</sup> The business arbitration caseload of the American Arbitration Association (AAA), the largest and longest-standing national provider of business arbitration services, has remained relatively stable.<sup>20</sup> Moreover, new opportunities for arbitration continue to appear,<sup>21</sup> at least on the international scene.<sup>22</sup>

In the United States, however, three significant developments are subjecting business arbitration processes to unprecedented stress and strain, and subjecting arbitration to swelling criticism. First, it appears that as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial. Today, for example, proceedings under standard arbitration rules are likely to include prehearing motion practice and extensive discovery.<sup>23</sup> Hearings may go on for extended periods of time in order to avoid charges of procedural injustice,<sup>24</sup> and there is evidence that the much-vaunted finality of arbitral awards is eroding.<sup>25</sup> The higher costs associated with these developments is a leading cause for complaint

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19. See, e.g., Gordon, *supra* note 4; Curtis E. von Kann, *Not So Quick, Not So Cheap*, LEGAL TIMES, Sept. 20, 2004, at 43; Whiteman, *supra* note 4; see also Henn, *supra* note 12 (expressing a more moderate opinion regarding the drawbacks of arbitration).

20. Over the last decade, the Association’s commercial caseload has increased from 15,232 cases in 1998 to 20,711 in 2007. See E-mail from Ryan P. Boyle, Vice President, Statistics & In-House Research, Am. Arbitration Ass’n (May 21, 2008) [hereinafter *AAA Commercial Caseload Statistics*] (on file with author). Although reliable figures are elusive, data on a dozen of the leading international commercial arbitration institutions compiled by the Hong Kong International Arbitration Centre (HKIAC) provide a rough touchstone. The data indicate that the volume of cases at most institutions is stable or increasing. See Hong Kong International Arbitration Centre, About the HKIAC, [http://www.hkiac.org/show\\_content.php?article\\_id=9](http://www.hkiac.org/show_content.php?article_id=9) (last visited Nov. 25, 2009).

21. See, e.g., DONALD C. WINTER, SEC’Y OF THE NAVY, SECNAV INSTRUCTION 5800.15: USE OF BINDING ARBITRATION FOR CONTRACT CONTROVERSIES (Mar. 5, 2007), <http://www.usdoj.gov/adr/secnavinst5800-15.pdf> (establishing “a comprehensive Department of the Navy (DON) policy for the use of binding arbitration for contract issues in controversy under the [Federal Acquisition Regulations Part 33.2] and [DoD Instruction 4105.71, Nonappropriated Fund (NAF) Procurement Policy]”). The practical impact of this regulation remains to be seen.

22. For example, under the new Organisation for Economic Co-operation and Development (OECD) model tax convention, multinationals in the middle of cross-border tax disputes may seek binding arbitration with government authorities. OECD COMM. ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25(5), at 37–38 (2008), <http://www.oecd.org/dataoecd/14/32/41147804.pdf>.

A 2006 survey of international corporate counsel conducted by Queen Mary College and PricewaterhouseCoopers suggests that the vast majority of companies expect to continue using arbitration as a preferred method of international dispute resolution, and that the expansion of international trade will produce a commensurate increase in the volume of arbitration. QUEEN MARY, UNIV. OF LONDON, SCH. OF INT’L ARBITRATION & PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 22 (2006), [http://www.pwc.com/en\\_BE/be/publications/ia-study-pwc-06.pdf](http://www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf) [hereinafter *QUEEN MARY 2006 SURVEY*].

23. See *infra* Part I.B.1–2.

24. See *infra* Part I.B.3.

25. See *infra* Part I.B.4.

about arbitration among business users.<sup>26</sup> At the same time, paradoxically, it appears that an increasing number of lawyers are seeking ways of eliminating the remaining differences between arbitration and court trial, most notably through contractual provisions for expanded judicial review of arbitration awards.<sup>27</sup>

A second, concurrent phenomenon is the explosion of mediation and other competing dispute resolution alternatives to “extended adjudication.”<sup>28</sup> Just as alternative dispute resolution (ADR) has played a prominent role in changing the landscape of civil litigation, the use of mediation and other “thin-slicing” approaches is dramatically altering the environment of private dispute resolution. Such approaches are generally perceived as doing a better job of accomplishing many of the benefits traditionally associated with arbitration, and they often better serve and resonate with various business goals.<sup>29</sup> As a result, if changes to recent standard contracts are any indication, arbitration usage may be diminishing in some commercial arenas such as construction;<sup>30</sup> some suggest that we have passed the zenith of commercial arbitration in America—at least in anything similar to its present form.<sup>31</sup> Whether and to what extent arbitration continues to play a primary role in the resolution of commercial conflict, or is marginalized in favor of mediation and other ADR mechanisms on the one hand and court litigation on the other, remains to be seen.

A third momentous trend is the broad enforcement of binding arbitration provisions in standardized adhesion contracts that govern employment relationships and consumer transactions.<sup>32</sup> This evolution has fueled a continuing debate over the need for regulation of arbitration agreements—regulation that sometimes “spills over” into the business-to-business arena in ways that increase related costs without enhancing the value of the process.<sup>33</sup> It has also contributed to a generally negative image of arbitration, as evidenced in first-year contracts casebooks.<sup>34</sup>

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26. See *supra* notes 4, 13, 14; *infra* notes 37, 38.

27. See *infra* text accompanying notes 96–110.

28. See *infra* Part II.

29. See *infra* Part II.C (discussing relatively favorable perceptions of mediation).

30. It is too early to gauge the impact of the removal of the default arbitration provision from the AIA documents and the absence of such a provision in other documents. See *supra* text accompanying notes 2–3. The American Arbitration Association, undoubtedly the largest institutional provider of arbitration services for U.S. construction projects, reported 4677 construction cases in 2000, but reported successively lower numbers in each of the next five years (bottoming out at only 3809 cases in 2005). See *AAA Commercial Caseload Statistics*, *supra* note 20. However, the Association caseload increased in the last two years, with 4085 reported cases in 2006 and 4199 cases in 2007. *Id.* It is impossible to determine the overall volume of construction arbitration from the AAA caseload, because reduced volume at that institution may reflect increased business at other institutions or more reliance on ad hoc procedures.

31. See, e.g., Matthews, *supra* note 18, at 22, 24–27 (discussing the current state of arbitration and its feasibility and viability in the future).

32. See *infra* Part III.

33. See *infra* Part III.B–C.

34. See *infra* text accompanying notes 359–61.

An appreciation of these developments and their implications for users of arbitration is critical for those who counsel business clients on the planning and drafting of dispute resolution agreements, for those who purport to provide administrative or dispute resolution services, and for advocates, lawmakers, and legal educators. Part I of this Article chronicles the developments surrounding arbitration's evolution as the "new litigation" and the oft-perceived dissonance between user experiences and user goals and needs. Part II explores concurrent trends in the use of mediation and other "thin-slicing" approaches in the resolution of contract-related disputes and their potential impact on perceptions and use of arbitration. Part III examines concerns about pre-dispute arbitration provisions in adhesion contracts, the resultant regulation and other responses, and the "spillover" of the latter into the realm of commercial (business-to-business) arbitration. Part IV responds to these three trends with three general proposals, each of which requires those involved with arbitration to fulfill the "promise" of arbitration by embracing a more nuanced view of arbitration processes and by making or promoting more appropriate process choices.

### I. ARBITRATION BECOMES THE NEW LITIGATION

Early in the twentieth century, the dawn of the modern era of American arbitration was heralded by the passage of a federal statute underpinning the enforcement of contractual agreements to arbitrate future disputes; advocates championed arbitration as a means of avoiding the "needless contention that [is] incidental to the atmosphere of trials in court."<sup>35</sup> Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation.<sup>36</sup> By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—"judicialized," formal, costly, time-consuming,<sup>37</sup> and subject to hardball advocacy.<sup>38</sup>

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35. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n.44 (1928); see also Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988) (noting that "observers frequently depict arbitration as a speedy and economical process").

36. See Stipanowich, *supra* note 35, at 429; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies."); von Kann, *supra* note 19 (describing the "rough justice" of traditional commercial arbitration).

37. See Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 35–36 (2003) (discussing perceptions of the American influence on international arbitration); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434–35 (2000) (observing that international arbitration is no longer quicker than adjudication and suggesting that the "American law model" is a cause); John Wilkinson, *The Future of Arbitration: Striking a Balance Be-*

Contractual provisions for the resolution of disputes by arbitrators are now featured in many kinds of commercial contracts.<sup>39</sup> These practices, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom. As a consequence, the arbitration experience has become increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice.<sup>40</sup> Not surprisingly, clients and counsel often complain about the costliness and length of arbitration—yet at the same time, ironically, they or their peers bemoan the non-appealability of awards and other features that still distinguish arbitration from litigation. Consider the double-edged lament of one corporate general counsel: “[W]e found arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable. Arbitration is often unsatisfactory because litigators . . . run it exactly like a piece of litigation.”<sup>41</sup>

#### A. *The Expansion of Arbitration*

In the twentieth century, pre-dispute (or “executory”) arbitration agreements evolved from disfavored status<sup>42</sup> to judicially denominated “super-clauses.”<sup>43</sup> Once categorized as separable from the remainder of

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*tween Quick Justice and Fair Resolution of Complex Claims*, 8 Expert Evidence Rep. (BNA), at 189 (Apr. 21, 2008); Wolf, *supra* note 14, at 281 (describing the disadvantages of arbitration to include costs similar to litigation and lengthy discovery process and hearings).

38. In some cases these include “hardball” tactics, which in the international sphere have been described as “unbridled and ungentlemanly aggressivity and excess in arbitration.” Nicolas C. Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L ARB. REP., June 2001, at 24, 24; *see also* Shalakany, *supra* note 37, at 435.

39. von Kann, *supra* note 19, at 43 (commenting on the widespread, and potentially creative, use of arbitration provisions in commercial contracts).

40. *See* Helmer, *supra* note 37, at 35–36; von Kann, *supra* note 19, at 43.

41. Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004) (quoting Jeffrey Carr, Vice President & Gen. Counsel, FMC Tech., *The Torch Is Passed*, Corporate Counsel Panel, Remarks at the Annual Meeting of the CPR Institute for Dispute Resolution (Jan. 29–30, 2004)).

42. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 432–35 (1953) (deciding arbitration was inappropriate for making findings to resolve claims of fraud based on violations of federal securities acts); *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (holding “the antitrust claims raised [were] inappropriate for arbitration” because arbitrators were thought to have limited capabilities).

43. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (“We hold, therefore, that in passing upon a [FAA] § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”); *see also* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (holding that challenges to the legality of a contract as a whole must be argued before the arbitrator rather than a court because “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance”).

the contract in order to be stricken,<sup>44</sup> broad arbitration clauses may now be fully enforceable despite defenses to the contract in which they are contained, including fraud<sup>45</sup> or illegality.<sup>46</sup>

U.S. courts once tended to look with suspicion upon the capabilities and partialities of private arbitrators.<sup>47</sup> Now, led by favorable Supreme Court precedent expanding the rubric of the Federal Arbitration Act (FAA) and reflecting very different presumptions regarding arbitrators and arbitration,<sup>48</sup> courts vouchsafe to arbitrators the responsibility not just for garden variety contract matters, but also the vindication of rights under civil statutory schemes including antitrust laws,<sup>49</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>50</sup> and, as discussed below, laws designed to protect employees and consumers.<sup>51</sup> Arbitrators routinely handle statute-based claims,<sup>52</sup> as well as claims for punitive or

44. See *Buckeye Check Cashing, Inc.*, 546 U.S. at 444–45; *Prima Paint Corp.*, 388 U.S. at 402–04.

45. See *Prima Paint Corp.*, 388 U.S. at 398, 404.

46. See *Buckeye Check Cashing, Inc.*, 546 U.S. at 443, 448–49.

47. In his dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, Justice Stevens had occasion to repeat a quotation used by Justice Black in his dissent in *Prima Paint Corp.*; the passage is from an article written shortly after the passage of the FAA:

Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned.

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 n.11 (1985) (Stevens, J., dissenting) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)); see, e.g., *Am. Safety Equip. Corp.*, 391 F.2d at 824–25; *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 795–96 (N.Y. 1976) (stating that power to award punitive damages is reserved for the courts because arbitrators lack the capability to decide such matters and may be subject to manipulation).

48. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991) (“It is true that arbitration focuses on specific disputes between the parties involved. . . . [But arbitration, like litigation] can further broader social purposes.”); *Mitsubishi Motors Corp.*, 473 U.S. at 628 (declaring that the FAA created a broad national policy favoring arbitration upon parties’ choice; stating that “[b]y 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” and absent proof, there is no basis for assuming the arbitration forum is inadequate for the task); *Willoughby Roofing & Supply Co. v. Kajima Int’l, Inc.*, 776 F.2d 269, 270 (11th Cir. 1985) (stating that the strong federal policies favoring arbitrability of issues and remedial flexibility of arbitrators will govern). In *Mitsubishi Motors Corp.*, the Court also stated, “We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.” 473 U.S. at 634.

49. *Mitsubishi Motors Corp.*, 473 U.S. at 630–31 (holding that a defendant’s antitrust claims were arbitrable because the antitrust claims did not invalidate the forum selection or arbitration clauses, arbitration provided competent arbitrators, and issues were resolved using the national law where the claim arose; furthermore, there was also a strong presumption favoring arbitration in international commerce).

50. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 220–21 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 are subject to arbitration).

51. See, e.g., *Gilmer*, 500 U.S. at 27–28 (affirming that a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2006), could be subjected to compulsory arbitration pursuant to an arbitration agreement); *Shearson/Am. Express, Inc.*, 482 U.S. at 238, 242.

52. See *supra* notes 49–51.

exemplary damages;<sup>53</sup> in the absence of a contrary agreement, arbitrators might even be called on to certify and supervise “class arbitration.”<sup>54</sup>

### *B. Changes in Arbitration Procedure and Practice*

Since arbitration processes took over the territory historically reserved for litigation in the public forum, the character of arbitration has changed. In order to grapple more effectively with a wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed, and lawyers bring to bear the same tools of zealous advocacy they employ in litigation.

#### *1. Jurisdictional Issues*

Like judges, arbitrators routinely make determinations regarding their own jurisdiction. Current federal arbitration law requires courts to enforce agreements that “clearly and unmistakably” empower arbitrators to address and rule on key front-end questions such as the enforceability of the arbitration agreement or the scope of arbitrable issues.<sup>55</sup> Such “empowering” agreements may be found in virtually any situation where the parties’ contract incorporates any number of leading arbitration procedures.<sup>56</sup> Arbitrators’ power to render summary judgments<sup>57</sup> or to sanc-

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53. See, e.g., *Willoughby Roofing*, 776 F.2d at 270.

54. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453–54 (2003) (concluding that, in the absence of a contrary agreement, the question of whether arbitration provisions forbade class arbitration should have been resolved in arbitration).

The dramatic expansion of arbitral jurisdiction under the aegis of the FAA provides a curious analogue to the vast growth of judicial remedy-making power under federal legislation addressing employment discrimination, housing discrimination, discrimination in public employment, and other statutes. See Leon Silverman, *Are We a Litigious Society? The So-Called Litigation Explosion*, 58 RECORD 296, 298 (2003).

55. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (holding that absent contrary intent, the court is responsible for deciding arbitrability); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (enforcing a provision authorizing arbitrators to address arbitrability issues).

56. The following organizational provisions empower arbitrators to interpret, decide, and apply rules regarding jurisdictional challenges: AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R. 7 (2009), available at <http://www.adr.org/sp.asp?id=22440#R7>; INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, NON-ADMINISTERED ARBITRATION RULES, R. 8 (2007), [http://www.cpradr.org/Portals/0/2007 Arbitration Rules SlimJim.pdf](http://www.cpradr.org/Portals/0/2007%20Arbitration%20Rules%20SlimJim.pdf); JUDICIAL ARBITRATION & MEDIATION SERVS., COMPREHENSIVE ARBITRATION RULES AND PROCEDURE, R. 11 (2009), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule11>.

57. See, e.g., *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650, 659–60 (Cal. Ct. App. 1995) (concluding the arbitrator had implicit authority to rule on summary adjudication motions and that plaintiff was not substantially prejudiced by summary proceeding).

tion parties for failing to comply with arbitral orders<sup>58</sup> has also been recognized.

## 2. *Prehearing Discovery*

### a. The Expansion of Discovery

Arbitration hearings are now often preceded by extensive discovery, including depositions.<sup>59</sup> Because discovery has traditionally accounted for the bulk of litigation-related costs,<sup>60</sup> the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,<sup>61</sup> it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to the extent of employing standard civil procedural rules.<sup>62</sup> This should not be surprising as there is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on prehearing motion practice and intensive discovery, is reinforced by ethical rules enshrining the model of zealous advocacy.<sup>63</sup> For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to inviting claims of malpractice. As one seasoned arbitration practitioner recently observed, “Most lawyers are reluctant to go ahead and try the case. Many times I have tried to shorten the time [frame] and have the hearing soon-

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58. See *Superadio Ltd. P’ship v. Winstar Radio Prods., L.L.C.*, 844 N.E.2d 246, 252–54 (Mass. 2006) (upholding arbitral sanction against defendant for violating discovery orders during the course of arbitration).

59. See von Kann, *supra* note 19, at 43; W. Alexander Moseley, *What Do You Mean I Can’t Get That? Discovery in Arbitration Proceedings*, 26 CONSTRUCTION LAW., Fall 2006, at 18, 24.

60. According to a 1999 study, document discovery alone accounts for fifty percent of litigation costs in the average case and ninety percent in active discovery cases. *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THIRD BRANCH (Admin. Office of the U.S. Courts), Oct. 1999, <http://www.uscourts.gov/ttb/oct99ttb/october1999.html>. American lawyers devote more time to document discovery than to nearly any other activity, including client counseling, legal research, and negotiations. See JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA xxi, 24 (1998); Salvatore Joseph Bauccio, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 270 n.7 (2007); John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 506 (2000); Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 454 (1981).

61. See, e.g., AM. ARBITRATION ASS’N, *supra* note 56, R. 30; INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION *supra* note 56, R. 11 (“The Tribunal may require and facilitate such discovery as it shall determine is appropriate . . . taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.”); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56, R. 22.

62. As an arbitrator, the author has in past cases been confronted by situations in which counsel for arbitrating parties made a prior agreement to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. It is often possible to persuade the parties to forego requests for admission and interrogatories, to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

63. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980).

er, . . . [but] in many instances the lawyers want more time to get prepared.”<sup>64</sup>

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that requires conscientiously sifting through vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the “mining” effort will ultimately produce a picture that supports the position.<sup>65</sup> Alternatively, it might at least forestall an undesired resolution for months or years.<sup>66</sup>

Business clients—especially those with significant interests or assets at stake—are often ill-disposed to challenge this effort to mine information. Clients may be relying on the advocate’s preliminary counsel that the mining operation will yield productive results,<sup>67</sup> or they may have strategic reasons for using discovery to increase the cost of or delay the final resolution of the dispute.<sup>68</sup>

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule.<sup>69</sup> Arbitrators’ concerns about having their award subjected to a motion to vacate likely reinforce these tendencies, especially among arbitrators who lack the confidence of long experience. The reluctance to limit discovery may also reflect an arbitrator’s desire to avoid offending anyone in the hope of securing future appointments.<sup>70</sup>

For all of these reasons, discovery under standard arbitration procedures has tended to become more like its civil court counterpart. As one corporate general counsel explains, “[I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation . . . .”<sup>71</sup>

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64. John Hinchey, Remarks at the Annual Meeting of the American College of Construction Lawyers: Adjudication: Coming to America (Feb. 22, 2008) (notes on file with author).

65. See Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 221–22 (2000) (discussing the advent of the “discovery lawyer”); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) — “Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 697–714 (1995) (noting that overly broad discovery allows parties to go on “fishing expeditions”).

66. See BENJAMIN SELLS, *THE SOUL OF THE LAW* 83 (1994).

67. See Carr & Jencks, *supra* note 65, at 240.

68. See Sorenson, *supra* note 65, at 699–700.

69. See *id.* at 700 (explaining how discovery has been used as a tactical weapon to impose excessive costs on the opposing party).

70. See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

71. Stipanowich, *supra* note 41, at 895 n.202 (2004) (quoting James Bender, Gen. Counsel, Williams Cos., *The Torch Is Passed, Corporate Counsel Panel, Remarks at the Annual Meeting of the CPR Institute for Dispute Resolution* (Jan. 29–30, 2004)).

### b. Third-Party Discovery

The desire to obtain information prior to trial has also led to frustration with another limitation of arbitration—the difficulty of obtaining discovery from third parties who are not bound by the arbitration agreement. The strictures on nonparty witnesses are amply illustrated by *Matria Healthcare, LLC v. Duthie*,<sup>72</sup> in which a federal district court in Illinois held that § 7 of the FAA does not authorize arbitrators to compel the attendance of a nonparty witness at a deposition.<sup>73</sup> In response to concerns raised by the FAA language, the drafters of the Revised Uniform Arbitration Act (RUAA) specifically authorized arbitrators to issue deposition subpoenas.<sup>74</sup>

### c. E-Discovery

Even as the courts have begun to grapple with the immense and unprecedented challenges associated with the discovery of electronic data,<sup>75</sup> “e-discovery” looms as the ultimate test for arbitration as an alternative to court.<sup>76</sup> Today, the great bulk of information that organizations produce or receive is created electronically.<sup>77</sup> E-mail messages, word processing or spreadsheet documents, databases, web pages, and other data proliferate in multiple forms, including in backup or archive form—sometimes without human knowledge or direct action.<sup>78</sup> These data are dynamic, metamorphosing as a result of human modification or through the automatic operation of computers. It is becoming less and less likely

72. 584 F. Supp. 2d 1078 (N.D. Ill. 2008).

73. *Id.* at 1083. The decision followed *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), a decision by then Judge Samuel Alito strictly construing the FAA language empowering arbitrators to “summon . . . any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material.” *Id.* at 407 (quoting 9 U.S.C. § 7 (2000) (internal quotations and emphasis omitted)). Alito concluded that the FAA “unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator [in other words, at the arbitration hearing].” *Id.*; accord *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).

74. The Act provides that “upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing.” UNIF. ARBITRATION ACT § 17(b) (2000), 7 U.L.A. 61 (2009).

75. For the text of various recent amendments to the Federal Rules of Civil Procedure, see AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf). See also SEDONA CONFERENCE WORKING GROUP, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 1–2 (2005) [hereinafter SEDONA GUIDELINES].

76. See John B. Tieder, Jr., *Electronic Discovery and Its Implications for International Arbitration*, in INTERNATIONAL ARBITRATION AND MEDIATION—FROM THE PROFESSIONAL’S PERSPECTIVE (Anita Alibekova & Robert Carrow eds., 2007); Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 9.

77. See SEDONA GUIDELINES, *supra* note 75, at vi (citing PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? (2003), available at <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/>).

78. Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 1, 3–4 (2007).

that a thoroughgoing dispute resolution process will fail to deal with electronic information.<sup>79</sup> The magnitude and cost of e-discovery and the possibility of sanctions for spoliation are becoming primary determinants of the momentum, pace, and cost of adjudication, as well as the scope of trial issues and the timing and terms of settlement.<sup>80</sup>

### 3. *The Hearing Stage*

At the hearing stage, “docketing” problems are a primary concern in large or complex cases.<sup>81</sup> The problem of finding mutually acceptable dates is exacerbated by the use of a three-member tribunal, common in commercial arbitration. Such realities may be readily exploited by parties hoping to benefit from delay.<sup>82</sup> Clients’ agendas will also come into play. As in litigation, a defendant “sitting on cash” may seek opportunities for delay for tactical reasons; resourceful advocates are adept at advancing plausible bases for time extensions.<sup>83</sup>

Hearings are also likely to be prolonged by the tendency of arbitrators to proceed cautiously in order to avoid even colorable grounds for vacatur of award; these motivations may cause arbitrators to avoid dispositive rulings, to accept the estimates of counsel regarding hearing schedules, and to be very liberal in the admission of evidence. As a result, arbitration may be no less costly or lengthy than litigation. In the words of one experienced advocate,

Arbitration may or may not produce shorter resolution times, but arbitrations are more likely than litigation to “go the distance.” Moreover, arbitrators tend to be reluctant to refuse admittance to evidence, and are less likely than federal judges to dramatically shorten presentation times. Arbitrators tend to go along so no one can say that justice has not been served—and so the award will be rendered more bullet-proof.<sup>84</sup>

### 4. *Post-Hearing Process*

The “judicialization” of arbitration is also observable at the post-hearing stage. Here, the focus is on one of the longstanding verities of

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79. See, e.g., FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 22–23 (2007), [http://www.fulbright.com/images/publications/FourthAnnual\\_LitTrends.pdf](http://www.fulbright.com/images/publications/FourthAnnual_LitTrends.pdf) [hereinafter FULBRIGHT 2007 SURVEY] (indicating trend among corporate legal departments toward retaining e-discovery vendors and law firms with special technical expertise in e-discovery issues).

80. See Mazza et al., *supra* note 78, at 2–5; Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 792–95, 796 (1991).

81. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 226.

82. See *id.* at 194.

83. See *id.* at 195.

84. McLean Interview, *supra* note 8; see also von Kann, *supra* note 19, at 43, 45 (noting that arbitrators will “probably resolve close calls in favor of more extensive evidence-gathering and presentation”).

arbitration—finality of award. Under the FAA,<sup>85</sup> the RUAAs,<sup>86</sup> and other state arbitration statutes,<sup>87</sup> judicial review of arbitration awards is limited to fundamental procedural deficiencies, such as procurement of the award “by corruption, fraud, or undue means,”<sup>88</sup> “evident partiality or corruption in the arbitrators,”<sup>89</sup> prejudicial arbitrator misconduct like a failure to hear material and relevant evidence,<sup>90</sup> a decision beyond the scope of the arbitrators’ contractual authority, or a decision “so imperfectly executed . . . that a . . . final[] and definite award upon the subject matter submitted was not made.”<sup>91</sup> These limited grounds for review, generally adhered to by courts reviewing commercial arbitration awards, have long been viewed as rendering arbitration awards much more impervious to reversal than court judgments.<sup>92</sup> But consider the results of a survey of published federal and state court decisions on motions to vacate arbitration awards during a ten-month period in 2004: although far from conclusive, the data suggest that the much-vaunted “finality” of arbitration awards varies considerably among jurisdictions.<sup>93</sup> In particular, it appears that reversal or vacatur may be much more likely in the courts of key commercial states. Federal courts granted only six of sixty-one motions to vacate during the survey period, whereas the courts of California, New York, and Connecticut collectively vacated awards in nineteen of sixty-four cases—nearly one-third of all requests.<sup>94</sup> Although, again, one must take care in drawing final conclusions from such a small sample, the numbers suggest that, at least in some states, arbitration awards challenged in court may be as vulnerable to reversal as trial court judgments.<sup>95</sup>

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85. 9 U.S.C. § 10(a) (2006).

86. UNIF. ARBITRATION ACT § 23 (2000), 7 U.L.A. 77–78 (2009).

87. See, e.g., CAL. CIV. PROC. CODE § 1286.2 (West 2007); N.Y. C.P.L.R. 7511 (McKinney 1998).

88. 9 U.S.C. § 10(a)(1). “[Courts] have uniformly construed the term undue means as requiring proof of intentional misconduct.” *Spiska Eng’g, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804, 806 (S.D. 2004).

89. 9 U.S.C. § 10(a)(2).

90. *Id.* § 10(a)(3).

91. *Id.* § 10(a)(4).

92. E.g., *Durkin v. Cigna Prop. & Cas. Corp.*, 986 F. Supp. 1356, 1358 (D. Kan. 1997) (“Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.” (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995))); see also Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 444–45 (1998); Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 401–05 (1995). Some courts have occasionally entertained motions for vacatur on grounds such as “manifest disregard of the evidence,” but these grounds are rarely successful. *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004).

93. Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 25 fig.5.

94. *Id.*

95. See, e.g., THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, 4 tbl.5 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/agctlc05.pdf> (finding, in contract cases in state courts, a reversal rate of 16.7 percent where a plaintiff filed a notice of appeal, and a reversal rate of 22.5 percent where

The greater readiness of some courts to scrutinize awards is paralleled by another emergent phenomenon of recent years—the contractual agreement for expanded judicial review of awards.<sup>96</sup> Such provisions, which appear to be driven by concerns about excessive damages or irrational results in high-stakes cases,<sup>97</sup> attempt to augment the limited statutory grounds upon which courts may vacate awards with provisions permitting judicial inquiry into the merits of arbitrator decisions.<sup>98</sup> Such provisions have received mixed judicial response<sup>99</sup> and have resulted in considerable post-arbitration litigation.<sup>100</sup>

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a defendant filed a notice of appeal). In drawing comparisons, of course, we are missing at least one other critical factor—the percentage of arbitration awards that are not submitted to court for confirmation or vacatur.

96. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98; Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 16, 17 (examining the tension between the limited grounds for review under the FAA, common law grounds for review, and arbitration provisions negotiated by the parties themselves); Joshua K. Norton, Note, *Having Your Cake and Eating It Too?: Contractually Expanding Judicial Review of Arbitration Decisions*: *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), 86 NEB. L. REV. 183, 185 (2007) (addressing the circuit split regarding expanded review).

97. See Margaret Moses, *Can Parties Tell Courts What to Do?: Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 (2004) (“[P]arties sometimes harbor fears that a maverick arbitrator will render an egregious award . . .”).

98. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98.

99. Five circuit courts came down in favor of enforcement. *Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 710–12 (6th Cir. 2005); *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 30–31 (1st Cir. 2005) (dicta); *Rodway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (dicta); *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at \*6–7 (4th Cir. Aug. 11, 1997); *Gateway Tech., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996–97 (5th Cir. 1995). Four circuits reached a contrary conclusion. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935–37 (10th Cir. 2001); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997–98 (8th Cir. 1998) (dicta); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (dicta); see generally Norton, *supra* note 96.

State courts are similarly divided on the issue. Decisions favoring enforcement include *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 608 (Cal. 2008), and *NAB Construction Corp. v. Metropolitan Transportation Authority*, 579 N.Y.S.2d 375, 375 (N.Y. App. Div. 1992) (enforcing contractual provision permitting judicial review of an arbitration award “limited to the question of whether or not the [designated decision maker’s] determination is arbitrary, capricious or so grossly erroneous to evidence bad faith” (internal quotations omitted)). Other state courts have found no room under arbitration statutes for expanded review. *Chi. SouthShore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist.*, 682 N.E.2d 156, 158–59 (Ill. App. Ct. 1997), *rev’d on other grounds*, 703 N.E.2d 7 (Ill. 1998) (denying effect to a contract term permitting a party to claim an “arbitrator’s decision is based upon an error of law . . . [to] institute an action at law . . . to determine such legal issue” and concluding that “[t]he subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute”); *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (finding that a contractual opt-in provision permitting appeal to the courts of “substantive issues” relating to the award attempted to create “a hybrid form of arbitration” that did not “comport with the requirements of the [Michigan] arbitration statute”).

New Jersey has addressed the issue by statute under the New Jersey Alternative Dispute Resolution Act, providing for parties to arbitration agreements to “opt in” to a heightened standard of review established by the statute. N.J. STAT. ANN. § 2A:23A-12 (West 2009). The RUAAs drafted considered and rejected such an approach, declining to establish any explicit basis for expanded review under that uniform act. See UNIF. ARBITRATION ACT § 23 (2000), 7 U.L.A. 79–83 cmt. B (2009).

100. For a thorough discussion on this topic, see Thomas S. Meriwether, Comment, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739 (2007).

The Supreme Court's pronouncement in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>101</sup> that such relief could not be obtained under the FAA,<sup>102</sup> far from putting the matter to bed, has opened up a whole new realm of questions regarding the ability of parties to contract for judicial appeal under some other body of law.<sup>103</sup> The majority concluded that agreements for expanded review were inconsistent with the specific language of FAA §§ 10 and 11,<sup>104</sup> which "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."<sup>105</sup> But the Court proceeded to invite consideration of other avenues to the same ends,<sup>106</sup> as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."<sup>107</sup> Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;<sup>108</sup> in *Cable Connection, Inc. v. DIRECTV, Inc.*, California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.<sup>109</sup>

Although *Cable Connection* appears to be a rational interpretation of arbitration law, this may be a situation in which having the legal authority to engage in an activity is an invitation to misadventure.<sup>110</sup> Effective judicial review requires implementing a variety of steps, including the creation of a record<sup>111</sup> and the preparation of a rationale to accompany the award.<sup>112</sup> As reflected in leading commercial procedures, such

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101. 128 S. Ct. 1396 (2008). See Russ Bleemer, *The Calm and the Storm: Arbitration Experts Speak Out on Hall Street Associates*, 26 ALTERNATIVES TO HIGH COST LITIG. 104, 104-05 (2008).

102. *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1396; see also 9 U.S.C. §§ 1-16 (2006).

103. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285-98.

104. See *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1399.

105. *Id.* at 1405 ("Any other reading [would] open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . .'" (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003))).

106. In a highly unusual move, the Court requested additional briefing on these issues after the initial arguments. Its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. See *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1407-08. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award." *Hall St. Assocs., L.L.C. v. Mattel Inc.*, 531 F.3d 1019, 1019-20 (9th Cir. 2008).

107. *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1406.

108. See N.J. STAT. ANN. § 2A:23A-12 (West 2009).

109. 190 P.3d 586, 599 (Cal. 2008).

110. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285-98 (describing the pitfalls and concerns associated with expanded review).

111. *Id.* at 289.

112. *Id.* at 279-81.

elements are more common in current arbitration practice.<sup>113</sup> In addition, a number of arbitration institutions have established processes that are private counterparts for appellate courts.<sup>114</sup>

### 5. *Unauthorized Practice of Law; Conflict of Interest*

The growing similarity of arbitration to litigation (as well as the growing use of trial tactics in arbitration) is also reflected in the increased emphasis on the unauthorized practice of law. In recent years, a number of state tribunals or other bodies have considered motions to remove party representatives<sup>115</sup> or vacate an award<sup>116</sup> under this rubric. Several state rulemaking bodies have announced limitations on lawyers from other states representing clients in arbitration.<sup>117</sup>

Relatively few issues in arbitration have generated more legal activity than concerns about arbitrator conflict of interest.<sup>118</sup> A host of legal

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113. See, e.g., INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 56, R. 15.2 (“All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise.”); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56, R. 24(h) (“Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.”). But see AM. ARBITRATION ASS’N, *supra* note 56, R. 42(b) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”).

114. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 298–313.

115. See, e.g., Disciplinary Counsel v. Alexicole, Inc., 822 N.E.2d 348, 349–50 (Ohio 2004) (finding that a nonlawyer who regularly “prepares statements of claims, prepare[s] discovery, participate[s] in prehearing conferences, participate[s] in settlements, and attend[s] mediation and/or arbitration hearings” on behalf of clients in securities cases engages in unauthorized practice of law).

116. See, e.g., Superadio Ltd. P’ship v. Winstar Radio Prods., L.L.C., 844 N.E.2d 246, 252 (Mass. 2006) (declining a motion to vacate an award on the basis that opposing party’s attorney was not licensed to practice law in the seat of arbitration). Allegations of unauthorized practice have also underpinned efforts to deny counsel payment for legal services, resulting in some of the leading precedents in this area. See, e.g., Prudential Equity Group, LLC v. Ajamie, 538 F. Supp. 2d 605, 610–11 (S.D.N.Y. 2008) (considering and rejecting an argument that a fee-sharing agreement could not be enforced because the lawyer engaged in unauthorized practice of law by participating in arbitration in New York although not admitted to the New York bar); Donald J. Williamson, P.A. v. John D. Quinn Constr. Corp., 537 F. Supp. 613, 615–16 (S.D.N.Y. 1982) (finding a New Jersey law firm was entitled to compensation for legal services and disbursements rendered with respect to arbitration in New York even though the attorney who performed most of the services was not admitted to practice in New York); Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal. 1998) (holding that a New York law firm could not recover for representation of a California client in dispute, including making preliminary arbitration arrangements and negotiating settlement, because attorneys providing services were not members of the California bar).

117. See CAL. CIV. PROC. CODE § 1282.4 (West 2007) (providing an arbitration exception to rules governing the unauthorized practice of law and requiring *pro hac vice* registration); Paul M. Lurie, *Court Committee Opinion Limiting ADR Representation Raises Constitutional Issues, as well as Problems Rooted in Protectionism*, 25 ALTERNATIVES TO HIGH COST LITIG. 72, 74 (2007) (discussing the New Jersey Court Unauthorized Practice of Law committee’s opinion of January 4, 2007 and approaches in other states); D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1, 5–12 (2007).

118. See Bethany L. Appleby, *Arbitrators Must Investigate or Disclose, 2nd Circuit Says*, DISP. RESOL. J., Oct. 2007, at 5, 5, 15 (discussing the court’s decision to impose a duty on an arbitrator to either investigate conflicts of interest of which they become aware, or inform the parties that no investigation was undertaken); Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28

decisions have considered motions to vacate based on an arbitrator's failure to disclose a connection to the case or participants.<sup>119</sup> These concerns have also been among the stimuli for reform of standards governing arbitration, including statutes.<sup>120</sup>

### C. *The Impact of Statutory Reform*

When the RUAA,<sup>121</sup> whose predecessor was the model for arbitration statutes in thirty-five states,<sup>122</sup> was published in 2000, it incorporated many new elements that reflect the "legalization" of arbitration. These include sections establishing judicial and arbitral authority to order provisional remedies;<sup>123</sup> authorizing courts to consolidate arbitration hearings in appropriate cases;<sup>124</sup> expressly requiring disclosures by arbitrators;<sup>125</sup> authorizing summary dispositions by arbitrators;<sup>126</sup> setting requirements for notice of hearings;<sup>127</sup> permitting all parties to have a lawyer;<sup>128</sup> authorizing arbitrator subpoenas, deposition orders, and arbitrator-supervised discovery;<sup>129</sup> and permitting a wide range of arbitral remedies, including punitive damages and attorney fees if authorized by law.<sup>130</sup> In many cases, the substance and detail of these provisions, and in some cases their mandatory character, reflect the need to address concerns associated with consumers and employees brought into arbitration under standardized contracts, a subject addressed below.<sup>131</sup> Just as the scope and structure of the RUAA was influenced by the "legalized" practice of its time, it will undoubtedly reinforce these trends. Recent discussions among commercial arbitrators and practitioners suggest, for example, that colleagues are viewing the RUAA's procedural due

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FORDHAM URB. L.J. 915, 920–28 (2001) (describing elements that create an arbitrator conflict of interest).

119. *Compare* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150–51 (1968) (White, J., concurring) (distinguishing important nondisclosures from insignificant ones in order to determine whether there is evident partiality under the FAA), Uhl v. Komatsu Forklift Co., 512 F.3d 294, 307–08 (6th Cir. 2008) (working on an unrelated case did not provide enough evidence that arbitrator had improper motives in issuing award), and Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding the arbitrator is disqualified under the "evident partiality" standard of the FAA only when a reasonable person, considering all the circumstances, would conclude the arbitrator was partial), with Rebecca Callahan, *California's New Ethics Standards: A Hot Bed of Controversy and Conflicting Decisions*, 5 J. AM. ARB. 295, 329–38 (2006) (discussing the move away from a reasonableness standard to new standards in determining arbitrator conflict of interest).

120. See *infra* text accompanying notes 125, 134–35, and 292–310.

121. UNIF. ARBITRATION ACT §§ 1–33 (2000), 7 U.L.A. 11–98 (2009).

122. See *id.* prefatory note 1.

123. *Id.* § 8, 7 U.L.A. 33–34.

124. *Id.* § 10, 7 U.L.A. 40.

125. *Id.* § 12, 7 U.L.A. 46.

126. *Id.* § 15(b), 7 U.L.A. 56.

127. *Id.* § 15(c), 7 U.L.A. 57.

128. *Id.* § 16, 7 U.L.A. 60.

129. *Id.* § 17, 7 U.L.A. 60–61.

130. *Id.* § 21, 7 U.L.A. 72–73.

131. See *infra* Part III.

process “enhancements” as a mandate for more discovery in commercial arbitration.<sup>132</sup>

The RUAA and state legislative enactments represent only one of several layers of regulation currently governing arbitration. Arbitrators and practitioners are best advised to engage in the process with an eye not only to applicable institutional arbitration procedures, but also to federal and state laws fleshed out by case law,<sup>133</sup> as well as ethical standards governing arbitrators<sup>134</sup> and lawyers.<sup>135</sup>

#### *D. Evolution of the Arbitration Bar; Perceptions of Counsel and Arbitrators*

Like the litigators of earlier generations, attorneys with practices emphasizing arbitration have organized themselves at regional and national levels in groups such as the Public Investors Arbitration Bar Association (PIABA) and arbitration committees of different ABA Sections.<sup>136</sup> At the same time, tort reform and other developments leading to the contraction of litigation have forced some long-time litigators into arbitration practice in the United States or internationally.<sup>137</sup> Listservs sponsored by bar groups and other professional organizations feed a growing appetite for discussion and analysis of court decisions and other developments affecting arbitration.

Recent canvasses of business lawyers reveal decidedly mixed experiences with commercial arbitration and perspectives on the current state of arbitration. Results from a 2004 survey of 300 corporate counsel conducted by Fulbright & Jaworski, which looked at attitudes toward domestic arbitration, reflect a tendency to view arbitration more positively than litigation but also portray a division of perspectives among corporate counsel.<sup>138</sup> In the Fulbright survey, in-house attorneys were asked whether they believed that arbitration offered cost savings over litiga-

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132. Ironically, the Reporter’s Comment makes it clear that “extensive discovery . . . eliminates the main advantages of arbitration in terms of cost, speed and efficiency.” UNIF. ARBITRATION ACT § 17 cmt. 2, 7 U.L.A. 59. Moreover, continues the commentary, “it should be clear that in many arbitrations discovery is unnecessary” and “parties can decide to eliminate or limit discovery as best suits their needs.” *Id.* cmt. 3, 7 U.L.A. 59.

133. See generally IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1995) [hereinafter FEDERAL ARBITRATION LAW].

134. See, e.g., AM. ARBITRATION ASS’N & AM. BAR ASS’N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977) (revised 2003), [www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf). Representatives of the CPR Institute for Dispute Resolution were also heavily involved in the revisions to the Code, but for political reasons CPR’s name did not appear on the finished revision. The author was involved in the deliberations as Chair of the ABA Committee that began the reforms to the Code and later as President and CEO of the CPR Institute.

135. See, e.g., LAWYER AS THIRD-PARTY NEUTRAL, *supra* note 16.

136. Other organizations, such as the American College of Construction Lawyers, consistently place heavy emphasis on arbitration law and practice in meetings and publications.

137. Interview with Mark Baker, Partner, Fulbright & Jaworski (Oct. 27, 2007).

138. FULBRIGHT 2004 SURVEY, *supra* note 12, at 10.

tion. Not quite half of those responding answered affirmatively. A *Corporate Legal Times* survey sought a similar comparison, with most respondents (fifty-nine percent) concluding that arbitration generally was less costly.<sup>139</sup> In the latter survey, almost four-fifths (seventy-eight percent) of those responding thought arbitration tended to produce quicker results than litigation.<sup>140</sup> Moreover, most counsel perceived arbitration results as just as fair or fairer than litigation, but responses to another question indicate that there remains an abiding perception that arbitrators tend to “split the baby” in their awards.<sup>141</sup>

For some attorneys, arbitration tends to be too much like going to court. In a 2002 survey of experienced commercial arbitrators, three-quarters of respondents expressed the belief that “arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes.”<sup>142</sup> For others, however, even “legalized” forms of arbitration are an unsatisfactory substitute for court trial; critics cite, among other things, the reluctance of arbitrators to grant summary judgments or dispositive relief;<sup>143</sup> the limitations on multiparty practice that result in inefficiencies and potentially incompatible results;<sup>144</sup> the fact that decision makers must be paid by the parties, unlike public judges;<sup>145</sup> the bifurcation of the authority to render and to execute decrees;<sup>146</sup> and the limits on

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139. Burr, *supra* note 12, at 45. A more recent Fulbright survey of corporate counsel in the United States and United Kingdom, however, suggests that when it comes to international disputes, perceptions about the cost benefits of arbitration over litigation are changing, with fewer and fewer attorneys perceiving arbitration as less expensive. FULBRIGHT 2007 SURVEY, *supra* note 79, at 30. Another recent study of perspectives of corporate counsel found expense and time as the leading *disadvantages* of international arbitration. QUEEN MARY 2006 SURVEY, *supra* note 22, at 7.

140. Burr, *supra* note 12, at 45. However, the 2007 Fulbright survey of corporate counsel in the United States and United Kingdom suggests that with respect to the resolution of international disputes, there is a decided trend toward seeing arbitration as taking just as long as litigation. FULBRIGHT 2007 SURVEY, *supra* note 79, at 30–31.

141. Burr, *supra* note 12, at 45. The latter conclusion is fueled by suspicions that some who rely on work as an arbitrator or mediator for their livelihood are reluctant to disappoint anyone in the hopes of obtaining future business. See Summers, *supra* note 70, at 717.

142. Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RESOL. J., Feb.–Apr. 2003, at 37, 38 (noting that arbitration has become a legalistic method of adjudication).

143. See Gordon, *supra* note 4, at 19.

144. Bernard Hanotiau, *Problems Raised By Complex Arbitrations Involving Multiple Contracts—Parties—Issues: An Analysis*, 18 J. INT’L ARB. 251, 253–55 (2001) (discussing the limitations on multiparty practice in complex arbitrations as compared to the ability to join parties in traditional litigation); see also Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987) (discussing the difficulties associated with bringing about multiparty arbitration through consolidation or joinder in the absence of clear agreement); JOHN UFF, ARE WE ALL IN THE WRONG JOB?: REFLECTIONS ON CONSTRUCTION DISPUTE RESOLUTION 12 (2001), <http://www.scl.org.uk/files/094-uff.pdf> (addressing the “multiparty problem” under English arbitration law).

145. See Gordon, *supra* note 4, at 19.

146. See 1 FEDERAL ARBITRATION LAW, *supra* note 133, § 36.5.5 (noting the division of authority between arbitrators and courts regarding specific performance).

review.<sup>147</sup> The perspectives of counsel reflect the variety of goals and needs that business parties bring to arbitration and suggest that different process options are desired.

### E. Trends in International Arbitration

Although our focus is on business arbitration in the United States, there is no question that the “legalized” American arbitration model has reverberated in the international sector, if only because of the dominant role played by large Anglo-American law practices.<sup>148</sup> The U.S. influence has been ameliorated by countervailing forces,<sup>149</sup> producing efforts at harmonization such as the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.<sup>150</sup> That influence, however, is regularly blamed for imbuing international arbitration with what Lord Mustill memorably termed as “all the elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge’s power to bang together the heads of recalcitrant parties.”<sup>151</sup> Whatever the cause, it appears that international arbitration proceedings “increasingly simulat[e] court proceedings in the length of time it takes to complete a[] . . . case,”<sup>152</sup> and arbitration is generally perceived as tending to be as expensive as litigation.<sup>153</sup>

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147. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (commenting that “in exchange for reduced costs and speedier resolution, arbitrating parties agree to limit their right to appeal”).

148. E.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 51–57 (1996); Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 80–88 (2003); Arthur Marriott, *The Arbitrator’s Responsibilities for the Proper Conduct of Proceedings*, in INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY 80, 81 (Albert Jan van den Berg ed., 2001); see also GEORGE J. SIEDEL, *USING THE LAW FOR COMPETITIVE ADVANTAGE* 13–18 (2002) (describing the exportation of U.S. law and the convergence of legal rules).

149. See Susan L. Karamanian, *Overstating the “Americanization” of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 34 (2003); Lucy Reed & Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration?*, 16 MEALEY’S INT’L ARB. REP., Apr. 2001, at 37, 37 (stating that international practices are “homogenized” and American influences are balanced with civil law and other practices); cf. Tieder, *supra* note 76 (noting that American-style discovery tends to repel many parties and counsel from abroad).

150. See Helmer, *supra* note 37, at 50–56.

151. Michael John Mustill, *Arbitration: History and Background*, 6 J. INT’L ARB. 43, 56 (1989); see also Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 96 (2000) (“Procedurally, international commercial arbitration is becoming more and more like public court litigation, particularly public court litigation as practiced in the United States.”); Marriott, *supra* note 148, at 81 (arguing that “US litigation techniques . . . are leading to dramatic increases in the cost of settling disputes” and urging resistance to such influences in international arbitration processes); Shalakany, *supra* note 37, at 434–36 (stating that “[t]he highly successful introduction of the American law firm model into the European market for legal services has led to a more aggressive and confrontational model of litigation” and describing how arbitration tends to be lengthier, more formal, and more costly); Ulmer, *supra* note 38, at 24 (noting that American influence has generally been positive, but acknowledging occasional instances of “unreconstructed ‘hardball’” tactics by American lawyers in international cases).

152. QUEEN MARY 2006 SURVEY, *supra* note 22, at 7.

153. See *id.*; see also FULBRIGHT 2007 SURVEY, *supra* note 79, at 17.

Despite these concerns, corporate counsel still tend to favor binding arbitration for international dispute resolution<sup>154</sup>—perhaps because, in the international sphere, it is the clearly superior alternative for adjudication.<sup>155</sup> But today arbitration provisions in international business contracts are increasingly relegated to a secondary or tertiary role in a multi-step dispute resolution agreement.<sup>156</sup>

## II. THE REVOLUTION IN THE DISPUTE RESOLUTION MARKETPLACE; THE APPEAL OF “THIN-SLICING”

Arbitration’s emergence as a surrogate for litigation, and its growing similarity to litigation, has a number of implications for arbitration’s role in the landscape of conflict management. It also affects user perceptions of binding arbitration vis-à-vis mediation and other approaches aimed at informal, party-driven consensual resolution.

### A. *The Search for Reduced Cost and Risk, Greater Value in Dispute Resolution*

The corporate retreat from litigation was fueled by concerns about cost: the cost of judgments, the cost of settlements in the shadow of litigation, and the legal and other dispute resolution costs that are often much greater than the cost of settlement before litigation.<sup>157</sup> Coupled with the risks of unpredictable jury verdicts<sup>158</sup> and the drain on internal resources that might have been better employed managing or pursuing business,<sup>159</sup> these factors help explain the attraction of arbitration with its conventional perceived benefits of lower cycle time, lower cost, and expert decision making. They also explain the present frustration of business persons whose expectations of arbitration have been disappointed by an increasingly legalized process. Arbitration too often involves the same sustained, customized, and labor-intensive approach as litigation; demands the commitment of significant in-house resources; and entails un-

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154. See QUEEN MARY 2006 SURVEY, *supra* note 22, at 22 (describing how a vast majority of corporate counsel plan to continue to use arbitration despite concerns about cost and other issues).

155. Charles N. Brower, *Introduction to INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?* ix, ix-x (Richard B. Lillich & Charles N. Brower eds., 1994) (observing that the desire to avoid an opposing party’s court system is a paramount advantage of arbitration); Alan Redfern, *Having Confidence in International Arbitration*, DISP. RESOL. J., Nov. 2002–Jan. 2003, at 60, 60–61.

156. See QUEEN MARY 2006 SURVEY, *supra* note 22, at 5 (stating that “[i]n most cases, international arbitration is not used in isolation; its use in combination with ADR mechanisms is the most common option”); see also Helmer, *supra* note 37, at 47–48 (noting an increasing use of ADR in international commercial disputes to redress some of the concerns associated with increasingly formal and costly arbitration).

157. See Lande, *supra* note 7, at 51; David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Stipanowich, *supra* note 41, at 843.

158. See Lande, *supra* note 7, at 32–35.

159. See *id.* at 35–38.

acceptable risks.<sup>160</sup> It is no wonder that corporate counsel appear to be increasingly drawn away from arbitration toward mediation and other approaches that tend to be more successful in achieving business’ goals.<sup>161</sup>

### B. Embracing ADR

Businesses as well as courts, agencies, and communities have all played a role in the revolutionary trends toward mediation and other nonbinding approaches for third-party conflict intervention in the United States, the United Kingdom, and other common law jurisdictions.<sup>162</sup> Mediation, early neutral evaluation, dispute review boards, and other strategies aimed at negotiated conflict resolution have become an accepted feature of court and administrative processes.<sup>163</sup> They have also assumed a key role in private resolution of business, employment, and consumer disputes,<sup>164</sup> often at the direct expense of arbitration.<sup>165</sup>

In a recent bestseller, Malcolm Gladwell explores many examples of “thin-slicing”—the ability of the human subconscious to identify patterns in situations and to make responses based on very quick or short “slices of experience.”<sup>166</sup> The brain develops these shortcuts as a means of enabling us to make the myriad decisions necessary to conduct everyday life, but the concept of thin-slicing has significant implications for the analysis and resolution of conflict. Gladwell’s summaries of psychological studies demonstrate, among other things, that too much information may actually cloud judgment and undermine the accuracy of conclusions.<sup>167</sup> His point is that, by developing a facility to make relatively quick judgments based on selective key data, one may avoid considerable, unnecessary effort.<sup>168</sup> The emergence of mediation and other infor-

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160. See generally Phillips, *supra* note 142.

161. See *infra* Part II.C. Such approaches may resonate with counsel such as Mark Chandler, the General Counsel of Cisco Systems, Inc., who warns of a “fundamental misalignment of interests” between business clients seeking to manage expenses and law firms driven by hourly billing. He describes his own legal department as being “as metrics-driven as manufacturing, HR or sales,” and driving constantly to improve productivity and reduce expense—a goal which he views as diametrically opposed to the highly customized, highly leveraged, labor-intensive, and expensive method by which legal services are currently provided. Mark Chandler, Gen. Counsel, Cisco Sys., Inc., Address at the Northwestern School of Law’s 34th Annual Securities Regulation Institute: State of Technology in the Law (Jan. 25, 2007) (transcript available at [http://blogs.cisco.com/news/comments/cisco\\_general\\_counsel\\_on\\_state\\_of\\_technology\\_in\\_the\\_law/](http://blogs.cisco.com/news/comments/cisco_general_counsel_on_state_of_technology_in_the_law/)).

162. See generally NANCY NELSON ET AL., COMMERCIAL MEDIATION IN EUROPE 3 (2004).

163. Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 549 (2008) (“[D]isputes are increasingly being transferred from court dockets to mediation, arbitration, or some other alternative dispute resolution[] procedure that is ‘court-connected,’ or required or advised by the court.”); see also JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION 2–3 (2004).

164. See Stipanowich, *supra* note 11, at 849–51 (discussing the expanding use of mediation).

165. *Knocking Heads Together*, *supra* note 4, at 62 (noting trend away from arbitration and toward mediation).

166. MALCOLM GLADWELL, BLINK 22–23 (2005).

167. See *id.* at 125–45.

168. *Id.* at 52.

mal approaches for the efficient, effective resolution of conflict represents an application of “thin-slicing” that has revolutionized public and private dispute resolution, as well as challenged the primacy of litigation and arbitration with their emphasis on full information exchange, full exposition, and extensive due process. Today, increasingly more disputants and counsel are recognizing that less is often more.

### C. *The Phenomenon of Mediation*

It is now commonplace to hear or read about corporate counsel drawing unfavorable comparisons between binding arbitration and mediated negotiation.<sup>169</sup> When one general counsel was asked why her company had virtually supplanted arbitration with mediation, she immediately responded with three words: “Speed, cost and control.”<sup>170</sup> She explained further, “I almost never arbitrate any more except when mandated by contract or where we are dealing with foreign nationals that expect arbitration. In arbitration you can have a very bad outcome.”<sup>171</sup>

Various potential benefits of mediation tend to be well understood by lawyers in litigation or dispute resolution departments.<sup>172</sup> These benefits include a high degree of control by parties and counsel over process and product,<sup>173</sup> with the assurance that a binding result will only occur in the event the parties reach agreement.<sup>174</sup> Control permits considerable customization,<sup>175</sup> including “layers” of protection to ensure the secrecy of

169. See *infra* notes 174, 182–85.

170. Telephone Interview with Nancy Vanderlip, Vice President & Gen. Counsel, ITT Indus. (Jan. 2007) [hereinafter Vanderlip Interview]. Professor Steve Ware appropriately stresses the notion that “mediation and arbitration are incomparable: mediation requires a post-dispute agreement to resolve the matter, while arbitration doesn’t.” E-mail from Stephen J. Ware, Professor, Univ. of Kan., to Author (Nov. 13, 2008). For additional discussion, see STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 1.7(d) (2d ed. 2007). I wholeheartedly concur, but as discussed below in the text accompanying notes 204–09, it appears some businesses that regularly utilize mediation may more readily accept litigation rather than arbitration as an adjudicatory “backdrop.”

171. Vanderlip Interview, *supra* note 170.

172. See LIPSKY & SEEGER, *supra* note 10, at 17 tbl.15 (detailing reasons why companies use mediation and arbitration); *U.S. Corporations Now Widely Use Alternative Dispute Resolution over Litigation to Solve Disputes, National Survey Shows*, CORNELL U. BUS. NEWS, May 21, 1997, <http://www.news.cornell.edu/releases/May97/ADRstudy.html>.

173. In litigation and in arbitration, the process is often dominated by the lawyer; the agent becomes the principal. See SELLS, *supra* note 66, at 88. Indeed, it has been said that because of the control exerted by lawyers over the adjudicative process, lawyers and the state may be said to expropriate the client’s “property” interest. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 648 (1980–81). In mediation, however, there is usually much greater emphasis on a client’s active engagement in the process.

174. See Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation & Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1170 (1993) (noting that disputants may prefer mediation to arbitration because they value the opportunity to control, negotiate and develop the outcome).

175. E.g., Gerald S. Clay & James K. Hoenig, *The Complete Guide to Creative Mediation*, in AAA HANDBOOK ON MEDIATION 115, 118–21 (Thomas E. Carbonneau ed., 2006) (stressing the flexibility of process and problem-solving in mediation); see also KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 36 (2003) (stressing the self-determination of parties engaging in mediation).

information and communications made during the mediation process.<sup>176</sup> The scope of discussion may embrace commercial and personal interests as well as legally or factually founded controversies, and in some cases relational considerations.<sup>177</sup> The results are not limited to the typical forms of adjudicated relief, but may even extend to overcoming communication and cultural barriers, and adjusting or transforming personal or institutional relationships.<sup>178</sup> Mediation also holds out a realistic promise of a reduction in dispute cycle time and related costs,<sup>179</sup> coupled with more creative, durable solutions<sup>180</sup> and relatively minor risks.<sup>181</sup> In short, mediation is the most popular and successful form of “thin-slicing” in conflict resolution. In the current “toolbox” of approaches to conflict, mediation is the equivalent of a multifunctional Swiss Army knife.

It is not surprising that in head-to-head comparisons with arbitration, mediation is usually perceived more positively by business persons and their counsel on several grounds.<sup>182</sup> Indeed, some of the starkest contrasts between mediation and arbitration point out the ways in which mediation may be more effective in serving the ends traditionally associated with arbitration, and more. Mediation is generally viewed more favorably with respect to cost savings,<sup>183</sup> speed of resolution,<sup>184</sup> and general satisfaction.<sup>185</sup> It typically entails significantly less preparation than adjudication on the merits and may help to minimize or forego substantial information exchange and discovery.<sup>186</sup> Parties may scale down their

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176. See KOVACH, *supra* note 175, at 193–98 (discussing a range of options parties have to ensure confidentiality in mediation).

177. See *id.* at 37–38 (stating that mediation provides an opportunity for acknowledging and preserving relationships).

178. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 12 (rev. ed. 2004); Johnnie Scott, Jr., *Addressing Race and Cultural Conflict in Employment Mediation*, in AAA HANDBOOK ON MEDIATION, *supra* note 175, at 307, 307–11 (discussing how mediation can overcome cultural barriers to agreement).

179. KOVACH, *supra* note 175, at 35 (describing how mediation can take place in a matter of days or hours, thus sparing the expenses of litigation).

180. See Howard J. Aibel, *Mediation Works: Opting for Interest-Based Solutions to a Range of Business Needs*, in AAA HANDBOOK ON MEDIATION, *supra* note 175, at 49, 49 (stating that an agreement is more likely to be adhered to faithfully when it is not imposed by a third party); Clay & Hoenig, *supra* note 175, at 116–18 (stressing the creativity of mediation).

181. Clay & Hoenig, *supra* note 175, at 116 (noting the great benefits and relatively minor costs and risks of mediation).

182. See Aibel, *supra* note 180, at 49 (“Mediation is fast becoming a preferred method for resolving business disputes as corporate counsel and business executives increasingly recognize the benefits of the process.”); Lisa Brennan, *What Lawyers Like: Mediation*, NAT’L L.J., Nov. 15, 1999, at A1.

183. See FULBRIGHT 2004 SURVEY, *supra* note 12, at 11; see also RHYS CLIFT, INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION: A COMPARISON BETWEEN ARBITRATION AND MEDIATION 7–10 (2006), <http://civilmediation.org/library-page.php?lib=3> (follow “Comparison Between Mediation and Arbitration” hyperlink).

184. CLIFT, *supra* note 183, at 7–9.

185. See *id.*; see also Stephen B. Goldberg & Jeanne M. Brett, *Disputants’ Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249, 250 (1990) (finding that groups historically utilizing arbitration processes unanimously preferred mediation).

186. See KOVACH, *supra* note 175, at 116–18 (describing how preparation for mediation is flexible and enhances the process).

presentations to address only essential elements of proof or interests.<sup>187</sup> Privacy and confidentiality tend to be protected more fully,<sup>188</sup> and the risks are typically significantly lower.<sup>189</sup> As in arbitration, parties may have the advantage of third-party substantive expertise. And, although arbitration affords the signal benefit of a binding result, private mediation is very likely to resolve disputes in a mutually satisfactory way<sup>190</sup> and holds out the possibility of a much wider variety of potential outcomes, as noted above.<sup>191</sup>

Finally, mediation tends to be a much better approach for preserving, maintaining, and even improving commercial relationships.<sup>192</sup> It is flexible, informal, and private; most significantly, it allows disputing parties to take control of their destiny by stepping back from legal claims to explore underlying issues and significant personal and institutional interests. These attributes may all contribute to parties finding creative and mutually acceptable solutions to get a venture or a partnership back on track. Mediation can also be conducted at a tempo that reflects the needs and rhythm of the relationship.

Similar to litigation, modern “legalized” arbitration tends to work against ongoing relationships.<sup>193</sup> They are both formalized adversary processes aimed at adjudicating rights and obligations, and thus are narrowly and backward focused.<sup>194</sup> Legal counsel, not the parties themselves, drive the process.<sup>195</sup> The question is not whether arbitration will improve an underlying commercial relationship, but how much harm it will do. Unresolved conflict takes time and energy from other pursuits and often results in a spiral of conflict in which parties engage in heavier and increasingly contentious tactics.<sup>196</sup> Arbitration, if not the culmination of these tendencies, will usually tend to exacerbate them. Unless they are carefully streamlined, expedited proceedings, arbitration processes will tend to divert resources away from mutually beneficial efforts and commit them to mutual combat.<sup>197</sup>

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187. See CLIFT, *supra* note 183, para. 4.31, at 10.

188. See *id.* paras. 4.18–22, at 8.

189. See *id.* para. 4.34, at 10.

190. Clay & Hoenig, *supra* note 175, at 115 (“Mediation . . . [gives parties] the power to determine their own outcome by reaching a mutually acceptable resolution of their dispute.”).

191. See *supra* text accompanying notes 172–80.

192. CLIFT, *supra* note 183, paras. 7.13–14, at 14.

193. See Kent B. Scott & Cody W. Wilson, *Questions Clients Have About Whether (and How) to Mediate and How Counsel Should Answer Them*, DISP. RESOL. J., May–July 2008, at 26, 29.

194. Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, DISP. RESOL. J., Aug. 1998, at 62, 65.

195. See *supra* text accompanying notes 173–74.

196. See DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 11–13 (3d ed. 2004).

197. Some forms of expedited arbitration may be a notable exception. See *infra* note 367 (referencing Abbott Labs arbitration program for distributorship contracts). See generally Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L.J. 383 (2009).

Mediation is increasingly visible across the commercial landscape,<sup>198</sup> and its vitality and utility will likely be enhanced by increasing reliance on information technology to transact business and resolve disputes quickly and efficiently over vast distances. For example, the online dispute resolution (ODR) program for eBay buyers and sellers resulted in the successful resolution of tens of thousands of disputes.<sup>199</sup> The Internal Revenue Service created an online resolution program to address taxpayer disputes.<sup>200</sup>

Just as students of federal and state court-connected ADR programs have observed a trend away from arbitration processes and toward mediation initiatives,<sup>201</sup> there is a growing tendency to turn to mediation *at least initially* instead of arbitration. Some years ago, the CPR Institute for Dispute Resolution (now the International Institute for Conflict Prevention & Resolution) issued a set of guidelines for business parties that designated arbitration as the final step in a recommended three-step approach for the resolution of business disputes consisting of (1) negotiation, (2) mediation, and (3) binding arbitration.<sup>202</sup> Such “filtering systems” for the resolution of disputes acknowledge the logic of relying initially on approaches that tend to be less formal, more flexible, more efficient, and less costly than binding adjudication, and only turning to arbitration as a final step if all else fails. Similar multistep dispute resolution provisions are now becoming ubiquitous in commercial contracts and related court decisions.<sup>203</sup>

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198. Mediation now appears alongside arbitration in some dispute resolution statutes. *See, e.g.*, California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE § 1297.11 (West 2007).

199. Due to eBay’s change to its feedback system in May 2008, SquareTrade decided to discontinue its ODR program, which had handled hundreds of thousands of disputes for eBay. SquareTrade, ODR Is No Longer Offered by SquareTrade, <http://www.squaretrade.com/pages/odr-discontinued> (last visited Nov. 25, 2009). If a dispute should arise, eBay now encourages users to communicate directly to their trading partner and report problems through an in-house dispute console. eBay.com, Resolving Transaction Problems in Our Resolution Center, <http://pages.ebay.com/help/tp/using-dispute-console.html> (last visited Nov. 25, 2009). For a discussion of other ODR programs, see Jim Keane & Debi Miller-Moore, *Linking Information Technology and Dispute Resolution*, DISP. RESOL. J., Feb.–Apr. 2004, at 58, 58–59 (discussing Cybersettle, an ODR provider that has assisted the insurance industry with over 70,000 settlements).

200. *See IRS Launches Pilot Programs in ADR*, DISP. RESOL. J., Nov. 2000–Jan. 2001, at 6 (describing the IRS’s implementation of the Fast-Track Mediation Program and the Comprehensive Case Resolution Pilot Program); David Parsly, Note, *The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy*, 8 CARDOZO J. CONFLICT RESOL. 677, 677 (2007).

201. Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 201 (2002) (“[S]tate and federal courts have turned away from non-binding arbitration and towards mediation.” (quoting Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 77)).

202. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 5–30.

203. The reported cases are replete with examples of multistep dispute resolution provisions, many of which include mediation followed, if necessary, by arbitration. One assumes that private dispute resolution agreements that are referenced in court documents are merely the tip of the iceberg. *E.g.*, *Tittle v. Enron Corp.*, 463 F.3d 410, 413–14 (5th Cir. 2006) (liability insurance policy); *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1047 (10th Cir. 2006) (license agreement dispute); *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 85–86 (4th Cir. 2005) (stepped em-

In tiered dispute resolution systems, arbitration or some other form of binding adjudication must play a residual role, as mediation cannot guarantee a resolution of disputes. The potential need for a binding decision is theoretically arbitration's trump card. There is, however, the possibility that some parties, contractually availing themselves of a highly flexible and often successful private ADR process in mediation, will prefer for court trial to be the final step if the benefits of binding arbitration are not seen to clearly outweigh its costs and limitations compared to litigation. Thus, many stepped dispute resolution agreements culminate not in binding arbitration, but in court.<sup>204</sup> The most striking example of such an election is the decision of the committee drafting the 2007 edition of the AIA contracts regime to delete the default arbitration provision in the standard stepped dispute resolution clause, but to retain mediation as a precondition to going to court.<sup>205</sup> This occurred after a decade of experience with a stepped process, including mediation and arbitration,<sup>206</sup> and with support from various industry sectors. As the president of a leading organization of surety companies recently explained in support of the AIA document changes, "Sureties feel that arbitration has turned into essentially litigation, with all the expense of litigation, and without the court."<sup>207</sup> The speaker was among those supporting development of another new set of construction contract documents that eschew arbitration as a default choice, instead emphasizing mediation and other processes.<sup>208</sup> The American experience with mediation is paralleled by that of other common law countries, notably England,<sup>209</sup> Australia,<sup>210</sup> and

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ployment system); *Prescott v. Northlake Christian Sch.*, 141 F. App'x 263, 265–68 (5th Cir. 2005) (employment contract between principal and Christian school); *Parsons Energy & Chem. Group, Inc. v. Williams Union Boiler*, 128 F. App'x 920, 921–24 (3d Cir. 2005) (construction contract); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 681–82 (D.C. Cir. 2003) (digital storage services contract); *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 803–05 (7th Cir. 2003) (fraternal benefit society contract); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1288–90 (11th Cir. 2002) (distributorship contract); *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 370–71 (6th Cir. 1999) (contract for security services); *Accuride Corp. v. Forgitron, L.L.C.*, No. 1:07-CV-833, 2007 WL 2381952, at \*1–2 (N.D. Ohio Aug. 17, 2007) (service agreement); *SI V, L.L.C. v. FMC Corp.*, 223 F. Supp. 2d 1059, 1060–61 (N.D. Cal. 2002) (contract for purchase and sale of land); see also James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 123–27 (2006); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Expanding Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 457 n.242 (2007) (listing published cases).

204. AIA DOCUMENT A201-2007, *supra* note 2, art. 15.3.1.

205. *Id.*

206. See Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 364–78 (1998) (discussing the evolution of stepped processes including mediation under the AIA documents).

207. Lynn Schubert, President, Surety & Fid. Ass'n of Am., Remarks at the American College of Construction Law Princeton Symposium: Delivering the Future: Technology, Risk and Reward (Nov. 3, 2006), in J. AM. C. CONSTRUCTION L., May 2007, at 129, 146 [hereinafter ACCL Princeton Symposium Proceedings]. Ms. Schubert further explained that her industry was supportive of mediation and was working with other industry groups to create new contract forms that would provide for a "standing mediator" on construction projects. *Id.* at 145–46.

208. See CONSENSUSDOCS LLC, *supra* note 3, art. 9.5.

209. GAITSKELL, *supra* note 4, at 7–9; see also ROBERT M. NELSON, NELSON ON ADR 310–12 (2003).

Canada.<sup>211</sup> First introduced to England around 1990,<sup>212</sup> U.S.-style mediation experienced steady but unspectacular growth until a decade later, when the active encouragement of courts dramatically increased mediation use.<sup>213</sup> Today, mediation is widely used in all forms of commercial disputes.<sup>214</sup> It has contributed to a precipitous drop in major litigation, including an almost eighty percent reduction in cases in the Technology and Construction Court<sup>215</sup> and a two-thirds reduction in just three years in appeals arising from Queen’s Bench, a reflection of the reduction of trials in those courts.<sup>216</sup> Mediation is also one of the reasons for a substantial decrease in the volume of commercial arbitration in the United Kingdom, informally estimated at more than thirty percent.<sup>217</sup>

Anglo-American mediation models have yet to proliferate in commercial dispute resolution outside the common law countries.<sup>218</sup> In the EU, mediation confronts numerous barriers. These include the belief that mediation is a creature of the U.S./U.K. litigation crisis, inapplicable in other European systems; a lack of understanding about the nature of mediation and its potential value; a lack of awareness of mediation resources; and limited encouragement by courts and agencies.<sup>219</sup>

But the landscape appears to be shifting. Although a 2002 CPR Institute survey of corporate counsel in the EU indicated that most respondents had little if any experience with mediation and other forms of ADR, a 2005 marketing survey conducted by DLA Piper Rudnick of corporate lawyers in five different regions of the EU suggested that they tended to view mediation and ADR more favorably than arbitration.<sup>220</sup> Perhaps the most telling harbinger of the future is a 2006 survey of corporate counsel regarding international arbitration by Queen Mary Col-

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210. See HILARY ASTOR & CHRISTINE CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA 3–22 (2d ed. 2002); NELSON, *supra* note 209, at 291–95.

211. See NELSON, *supra* note 209, at 7, 55; *Mediation and ADR in Canada*, 8 WORLD ARB. & MEDIATION REP. 212, 212 (1997).

212. GAITSKELL, *supra* note 4, at 8.

213. Miryana Nestic, *Mediation—On the Rise in the United Kingdom?*, 13 BOND L. REV. 20 (2001), available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1214&context=blr> (noting the gradual take-up of mediation and the impact of court reform).

214. *Knocking Heads Together*, *supra* note 4, at 62 (providing the oldest and biggest of U.K.-based mediation providers, London-based Center for Effective Dispute Resolution (CEDR), and its U.S. partner, JAMS, with priceless press).

215. GAITSKELL, *supra* note 4, at 3.

216. *Id.* at 5.

217. *Id.*

218. NELSON ET AL., *supra* note 162, app. 1 (providing European Corporate Survey data reflecting little usage of mediation by European corporations).

219. Despite the fact that international commercial conciliation is still in its infancy, relatively speaking, there is already a United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation. G.A. Res. 57/17, U.N. Doc. A/RES/57/17 (Jan. 21, 2003), <http://daccessdds.un.org/doc/UNDOC/GEN/N02/538/92/PDF/N0253892.pdf> [hereinafter UNCITRAL MODEL LAW].

220. DLA PIPER RUDNICK GRAY CARY, EUROPEAN DISPUTE RESOLUTION SURVEY 14 (2005–06).

lege and PricewaterhouseCoopers.<sup>221</sup> According to that study, more than half of those surveyed indicated that their preferred mechanism for the resolution of cross-border disputes was mediation or another ADR process (not including arbitration) or a multitiered approach in which arbitration would normally be preceded by (and perhaps rendered unnecessary by) negotiation, mediation, or other ADR mechanisms.<sup>222</sup>

#### D. Other Thin-Slicing Processes

Mediation is not the only nonbinding intervention strategy currently challenging arbitration for a share of the commercial market. For example, the global construction industry has gained considerable experience with other forms of thin-slicing based on nonbinding expert decisions made early in the life of a conflict. These other processes include the dispute review board (DRB),<sup>223</sup> and “statutory adjudication.”<sup>224</sup> Delay in resolving conflict on the construction site can lead to escalating conflict, diverting attention from the project, and further delaying or disrupting the job.<sup>225</sup> DRBs are intended to address disputes at the earliest practicable time by having an authoritative third party make a preliminary decision that may be nonbinding but that motivates the parties to resolve their dispute, avoiding prolonged conflict and obviating the need for traditional binding arbitration or litigation.<sup>226</sup> There are indications that DRBs have been highly successful in settling disputes without further arbitration or litigation;<sup>227</sup> many believe that the very presence of a DRB on a project dampens controversy and discourages claims.<sup>228</sup>

In developing dispute resolution programs for the nation’s largest construction project, the Boston Central Artery/Tunnel Project, authorities believed DRBs were clearly more suitable than binding arbitration. Anticipating a vast number of large and complex claims, project planners

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221. Compare NELSON ET AL., *supra* note 162, app.1, with QUEEN MARY 2006 SURVEY, *supra* note 22, at 5.

222. Sixteen percent of respondents favored mediation or other ADR processes without arbitration; forty-four percent favored arbitration in the context of a tiered dispute resolution process. QUEEN MARY 2006 SURVEY, *supra* note 22, at 5.

223. Daniel D. McMillan & Robert A. Rubin, *Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements*, 25 CONSTRUCTION LAW., Spring 2005, at 14, 14. Much relevant information may be found on the website of The Dispute Resolution Board Foundation, available at <http://www.drb.org> (last visited Nov. 25, 2009).

224. Peter Kennedy, & Janey Milligan, *Mission Drift in Statutory Adjudication* (Sept. 6, 2007), [http://www.rics.org/site/download\\_feed.aspx?fileID=3402&fileExtension=PDF](http://www.rics.org/site/download_feed.aspx?fileID=3402&fileExtension=PDF).

225. Kathleen M. J. Harmon, *Construction Conflicts and Dispute Review Boards: Attitudes and Opinions of Construction Industry Members*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 66, 69–70.

226. *Id.* at 68.

227. According to the Dispute Resolution Board Foundation (DRBF), the leading advocacy group for the process, DRBs have achieved an extraordinary level of success, with as many as ninety-eight percent of cases resulting in settlement, avoiding arbitration or litigation. DISPUTE RESOLUTION BD. FOUND., PRACTICES AND PROCEDURES § 1.3 (2007), available at [http://www.drb.org/manual\\_access.htm](http://www.drb.org/manual_access.htm) (follow “Quick Print—Section 1” hyperlink).

228. Harmon, *supra* note 225, at 73.

were concerned that arbitration was too lengthy and cumbersome.<sup>229</sup> They chose instead to establish standing DRB panels for all projects over \$20 million.<sup>230</sup> Appointed at the beginning of the project, each panel made regular visits to the project site to conduct periodic reviews of potential problems, claims, or disputes, and to check the status of outstanding claims.<sup>231</sup> As of 2009, DRBs had been employed on over twelve hundred completed projects, including many major infrastructure projects in North America.<sup>232</sup> DRBs have been used on many major international projects; the World Bank now requires DRBs on projects exceeding ten million dollars.<sup>233</sup> The International Chamber of Commerce recently announced its own Dispute Review Board documents.<sup>234</sup>

The potential impact of an abbreviated, preliminary expert decision-making process on the use of litigation or arbitration is revealed in the extraordinary evolution of “statutory adjudication” in England.<sup>235</sup> The procedure, which evolved with the stroke of a pen as a result of the Housing Grants, Construction and Regeneration Act of 1996,<sup>236</sup> has revolutionized the management of construction disputes in Britain. Its emphasis on a very short review and decision-making process—statutorily set at twenty-eight days<sup>237</sup>—significantly changed the administration of English construction projects, as well as the roles of contractors, engineers, architects, and lawyers.<sup>238</sup> Given the temporal limitations, adjudication is necessarily “rough” justice—as one English Queen’s Counsel put it, it may be “little more than a gut reaction” to the dispute.<sup>239</sup>

Although under the law the adjudicator’s determination is only preliminary and may be overturned in binding arbitration or litigation, the “vast majority” of adjudication decisions are accepted by the losing par-

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229. Kurt L. Dettman & Martin J. Harty, *The Use of Alternative Dispute Resolution Techniques to Resolve Mega Project Claim: Lessons from Boston’s “Big Dig” 2* (unpublished manuscript, on file with author).

230. *Id.* at 7.

231. *Id.* at 5.

232. The Dispute Resolution Board Foundation, *DRB Frequently Asked Questions*, <http://www.drb.org/FAQ.htm> (last visited Nov. 25, 2009).

233. See INT’L FED’N OF CONSULTING ENG’RS, *CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER* §§ 20.2–.4 (Multilateral Dev. Bank Harmonised ed., Mar. 2006); WORLD BANK, *PROCUREMENT OF WORKS 1* (2000), <http://siteresources.worldbank.org/PROCUREMENT/Resources/works-ev6.pdf>.

234. See NICHOLAS GOULD, *SOC’Y OF CONSTR. LAW, ESTABLISHING DISPUTE BOARDS—SELECTING, NOMINATING AND APPOINTING BOARD MEMBERS 4–8* (Dec. 2006) (discussing ICC and other institutional dispute board procedures).

235. See GAITSKELL, *supra* note 4, at 1, 5, 10–13.

236. Housing Grants, Construction and Regeneration Act, 1996, c. 53, §§ 1–151 (Eng.), available at [http://www.opsi.gov.uk/Acts/acts1996/ukpga\\_19960053\\_en\\_1](http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960053_en_1).

237. *Id.* § 108.

238. See UFF, *supra* note 144, at 3–7 (discussing the impact of adjudication and the evolution of dispute resolution processes).

239. JOHN TACKABERRY, *SOC’Y OF CONSTR. LAW, FLEXING THE KNOTTED OAK: ENGLISH ARBITRATION’S TASK AND OPPORTUNITY IN THE FIRST DECADE OF THE NEW CENTURY 3* (2002).

ties.<sup>240</sup> A knowledgeable Queen's Counsel reports that "well over 80 [percent] of the adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal."<sup>241</sup> Explains one judge,

The clear message appears to be that in broad terms the industry is content with adjudication. If that is so, it is worth analysing why. First, adjudication is of course a comparatively quick process. Secondly, the cost can be lower than the cost of litigation or arbitration. . . . Finally . . . [it] enables the parties to identify what is really in issue and to test the strengths and weaknesses of their case. . . . A director in a major construction company commented that he preferred to have a wrong but cheap adjudication decision than a wrong but expensive arbitration award. And after all, the scope for correcting a wrong arbitration award is narrow whereas there is always the entitlement to take the adjudicated dispute on to the next stage, whether arbitration or litigation.<sup>242</sup>

Statutory adjudication is reported to be among the primary reasons for the dramatic reduction in construction litigation and arbitration in the United Kingdom.<sup>243</sup> What began as a "quick, enforceable, interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation" became "a mainstream post-contractual method of dispute resolution."<sup>244</sup> Its success has led the British government to find ways to make improvements in the process and encourage even greater use of the process, further reducing the amount of arbitration and litigation.<sup>245</sup> Though a strong argument can still be made for binding arbitration in cases involving greater stakes or complexity,<sup>246</sup> the British experience reflects the pull of the new "thin-slicing" processes.

#### *E. Moving Upstream: Systemic Conflict Management and Cultural Change*

The growing experience with mediation and other ADR mechanisms has encouraged many thinking persons to change the way they ap-

240. GAITSKELL, *supra* note 4, at 11 ("Figures given anecdotally are that there have been about 15,000 adjudications thus far . . . Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted.")

241. *Id.*

242. FRANCES KIRKHAM, *SOC'Y OF CONSTR. LAW, THE FUTURE OF ADJUDICATION* 1-2 (2004).

243. GAITSKELL, *supra* note 4, at 11-12.

244. KIRKHAM, *supra* note 242, at 2 (quoting Lord Ackner debating the Housing Grants, Construction and Regeneration Act).

245. GAITSKELL, *supra* note 4, at 12; *see also* TACKABERRY, *supra* note 239, at 1. Predictably, those who serve as adjudicators tend to believe the breadth of their mandate could and should be expanded, at least within the construction realm. *See* Nicholas Gould & Malte Abel, *The Results of the Latham Review Questionnaire*, 20 *CONSTRUCTION* L.J. 417, 417-18 (2004).

246. *See* Vivian A. Ramsey, Justice, High Court of England & Wales, Queen's Bench Div., in *ACCL Princeton Symposium Proceedings*, *supra* note 207, at 164-69 (discussing possible avenues for conflict management, and the benefits of arbitration in some cases).

proach conflict. This may result in greater reliance on negotiation as a strategy<sup>247</sup> or more systematic approaches to managing conflict.<sup>248</sup> Although there is evidence that relatively few companies have proactively developed specific policies and procedures for the management of business disputes,<sup>249</sup> this may be gradually changing. The Queen Mary survey suggests what may be a growing emphasis on the importance of corporate policies governing the resolution of disputes.<sup>250</sup> In addition, parties to long-term contractual relationships (e.g., construction contracts or supply contracts) have found great value in contractual structures that promote alignment of objectives and active collaboration; for example, “alliancing” is a project organization method involving collective responsibility for meeting performance goals, as well as profit and risk sharing.<sup>251</sup> Such frameworks contemplate the avoidance and active management of conflict well short of adjudication, including binding arbitration.

### III. “CONSUMERIZED” OR “MASS” ARBITRATION AND THE “SPILLOVER” EFFECT

A third dimension of arbitration’s evolution into an all-purpose surrogate for civil litigation is its widespread use in standardized contracts affecting consumers and employees. This phenomenon has touched off an ongoing debate about fairness concerns and the need for regulating arbitration agreements—provoking responses that sometimes “spill over” into the broad realm of business-to-business arbitration.

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247. Experience may in some cases encourage more direct negotiation. One experienced investor attorney suggests that many of his peers are convinced that their clients are better served by negotiation without the help of a mediator. Telephone Interview with Robert A. Uhl, Partner, Aidikoff, Uhl & Bakhtiari (Feb. 1, 2007).

248. See DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 150–52 (2003); Stipanowich, *supra* note 41, at 888–94 (summarizing empirical studies regarding the management of conflict by companies).

249. See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 15 (1998); Stipanowich, *supra* note 41, at 888–94 (summarizing studies reflecting the relatively limited use of systemic approaches to conflict by companies).

250. QUEEN MARY 2006 SURVEY, *supra* note 22, at 22.

251. The concept, which has proven particularly suitable in long-term initiatives with many unknowns, avoids the typical distributive win/lose mentality underlying most commercial ventures by aligning all parties’ interests in the same measurements of success. Alliancing approaches have met with extraordinary success in major public sector construction projects in Australia and New Zealand. The international information technology industry has embraced similar models for long-term ventures to develop hard or soft technology. Under typical alliancing agreements, all parties undertake to avoid conflict in favor of affirmative collaboration and to share the profits or losses on the basis of an agreed allocation. On many projects, performance targets include not only cost targets but also environmental, safety, community, quality, and time targets. Disputes are resolved by the integrated alliance leadership team, a governance structure representing all participants that is designed to produce unanimous decisions. See Michael A. Wilke, Chief Operating Officer of the Ams., Parsons Brinckerhoff, Inc., in ACCL Princeton Symposium Proceedings, *supra* note 207, at 147–54 (discussing Australian alliancing applications).

### A. *The Evolution of Arbitration in Adhesion Settings*

The autonomy of contracting parties has always been conceptually intertwined with arbitration law and practice.<sup>252</sup> The enforcement of arbitration agreements, and of resulting awards, is founded on the principle that courts should honor expressions of assent to private adjudication.<sup>253</sup> The concept of party autonomy was emphatically strengthened and expanded by modern arbitration statutes such as the FAA, the UAA, and other state acts, which underpinned the specific enforcement of executory arbitration agreements<sup>254</sup> and encouraged greater use of arbitration in contracts between business parties.<sup>255</sup> In the mid-1980s, the Supreme Court's pronouncement of the existence of a unique, preemptive "substantive law of arbitrability" under the FAA,<sup>256</sup> and its subsequent extension to rights of action under federal and state securities laws,<sup>257</sup> employment discrimination statutes,<sup>258</sup> and other consumer claims,<sup>259</sup> ignited a firestorm of public debate and unleashed a sustained tide of litigation.<sup>260</sup>

Alternatives to the courtroom may appear very attractive, especially when one considers that litigation often falls short of the ideal.<sup>261</sup> As a response to the costs and risks of litigation, corporations began using

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252. See FEDERAL ARBITRATION LAW, *supra* note 133, § 3.2.1 ("Because arbitration depends upon and is defined by private agreement, some commentators laud it as a principle of 'social autonomy' or a manifestation of the 'natural right of self-regulation' . . . This position raises a number of questions.").

253. *Id.* § 2.1.3.6.

254. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court announced that, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. 1, 24–25 (1983).

255. See Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 322 n.9 (2007) (mentioning in a discussion of arbitration's expansion into employment and consumer contracts that the FAA "was originally intended to encourage arbitration between businesses" (quoting Hassam M. Fahmy, *Arbitration: Wiping Out Consumer Rights?*, 64 TEX. B.J. 917, 918 (2001))).

256. See *Southland Corp. v. Keating*, 465 U.S. 1, 15–17 (1984) (holding California franchise investment statute interpreted to make contractual arbitration provisions unenforceable against franchisees violative of preemptive pro-arbitration policy of FAA); see also *Allied Bruce-Terminix Cos. v. Dobson*, 513 U.S. 265, 271–72 (1995).

257. See, e.g., FEDERAL ARBITRATION LAW, *supra* note 133, § 13.1.2.

258. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

259. See *Allied Bruce-Terminix*, 513 U.S. at 281.

260. See, e.g., Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 632 (2008) (discussing the "rising tide of litigation and skepticism toward consumer arbitration"); David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400, 422 (2007) (arguing that the virtues of arbitration would be enhanced if Congress amended the FAA to overrule the Supreme Court's decisions in *Moses H. Cone*, *Southland Corp.*, and *Mitsubishi*, and removed consumer and employee contracts from the purview of the statute); Jeff W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 258–59, 263–68 (2007) (concluding that, rather than resist the enforcement of arbitration clauses, consumer advocates and arbitration skeptics should focus on arbitral impartiality and adherence to substantive law); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 351 (1996).

261. See DEBORAH L. RHODE & GEOFFREY C. HAZARD, PROFESSIONAL RESPONSIBILITY AND REGULATION 76 (2002).

standardized arbitration agreements in consumer and employment contracts.<sup>262</sup> For individuals, the promise of an opportunity to vindicate one’s claims in the public forum often falls far short of a promise of vindication; it is a fact of life that disparities in money, information, and other sources of power mean that a system that depends upon zealous representation of opposing interests often presents a far from level playing field.<sup>263</sup> The time and cost associated with getting a result may be overwhelming. There are other hurdles as well. It is relatively difficult for the average employee to get claims before a jury,<sup>264</sup> and there is evidence that it is much easier for employees with a discrimination claim to reach trial on the merits in arbitration.<sup>265</sup>

Nevertheless, the expansion of arbitration into the realm of standardized consumer and employment contracts has provoked responses on many levels, including judicial decisions ranging from unmitigated enforcement of arbitration clauses in standardized consumer and employment contracts to the recognition of process limits under the rubric of standard contract defenses such as unconscionability<sup>266</sup> or fraud.<sup>267</sup> Other responses include: “community due process standards” such as the Due Process Protocols developed by ADR provider groups and other national organizations,<sup>268</sup> the modification of leading consumer and employment arbitration rules,<sup>269</sup> government regulation in the securities arena,<sup>270</sup> and statutory reform.<sup>271</sup> All of these developments reflect concerns about the lack of choice many consumers and employees face and the potential for overreaching by parties in a position of superior influence.<sup>272</sup>

A little more than two decades ago, employees and consumers might have encountered arbitration, but in settings with built-in safeguards against overreaching. Employment arbitration, not yet a feature of standardized individual contracts, was a mainstay of dispute resolution

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262. A reduction in the number of workers covered by collective bargaining agreements coincided with greater judicial involvement in protection of employee rights. A study of cases filed in federal district court between 1971 and 1991 showed that employment litigation increased by 430 percent. SIEDEL, *supra* note 148, at 58 (citing U.S. DEP’T OF LABOR & U.S. DEP’T OF COMMERCE, COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 134 (1994)). A Rand Corporation study indicated that indirect corporate costs in attempting to avoid litigation, including retaining poor performers and offering severance, far exceeded actual litigation costs. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY xi–xiv (1992).

263. See DEBORAH L. RHODE, ETHICS IN PRACTICE 8 (2000).

264. Randall Samborn, *At-Will Doctrine Under Fire*, NAT’L L.J., Oct. 14, 1991, at 1, 40.

265. Stipanowich, *supra* note 41, at 904 (discussing empirical data).

266. Stipanowich, *supra* note 11, at 910.

267. *Id.*

268. *Id.* at 913, 916–17.

269. See, e.g., American Arbitration Association, AAA Mediation Procedures: Summary of Changes, <http://www.adr.org/sp.asp?id=32895> (last visited Nov. 25, 2009); American Arbitration Association, Summary of Changes: Employment Arbitration Rules and Mediation Procedures, <http://www.adr.org/sp.asp?id=28461> (last visited Nov. 25, 2009).

270. Stipanowich, *supra* note 41, at 906–07.

271. Stipanowich, *supra* note 11, at 844, 858–60.

272. See, e.g., *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (finding terms in shrink-wrap contract to be unconscionable).

under collective bargaining agreements.<sup>273</sup> In that context, of course, the agreement to arbitrate and the terms and conditions under which arbitration would be conducted were negotiated at arm's length by management and labor representatives functioning as a collective bargaining unit.<sup>274</sup> Consumer arbitration also existed under the rubric of state lemon laws<sup>275</sup> and under regulations implementing the Magnuson-Moss Warranty Act,<sup>276</sup> but critically, these adjudicatory procedures did not involve an automatic waiver of the right to trial. Consumers retained the ability to go to court if they were unhappy with the results of the private process.<sup>277</sup>

When, as a result of judicial enforcement, arbitration provisions became more widely utilized in consumer settings, the first major incursion was in the realm of agreements between investors and securities brokers.<sup>278</sup> An important element of the argument put forth by proponents of binding arbitration was that broker-dealer arbitration would be conducted under the auspices of securities regulatory organizations but would also be supervised and regulated by the Securities and Exchange Commission.<sup>279</sup>

The eventual further expansion of binding arbitration into the everyday lives of individual Americans undoubtedly provoked such a profound response because it is perceived to challenge the peculiarly American values of individualism, egalitarianism, and the vindication of rights that de Tocqueville observed in the early years of our country.<sup>280</sup> Americans share an "emphasis on fair procedure, having one's day in court, and broad acceptance of the myths and rituals associated with the legal and political process."<sup>281</sup> In particular, Americans exalt the jury system to a level unparalleled anywhere else in the world; the right to a trial by jury has been described as a "historic and iconic" evocation of the egalitarian and populist American ethos.<sup>282</sup> And although there is no question that this and other incidents of trial, such as discovery, may be manipulated by parties with overwhelming economic resources, the key perceptual is-

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273. Stipanowich, *supra* note 11, at 843.

274. *Id.* at 843-44; *see also* STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 350 (1995).

275. Stipanowich, *supra* note 11, at 844.

276. 15 U.S.C. §§ 2301-2312 (2006).

277. For an informative guide on the workings of lemon laws, *see* RICHARD L. KAYE, *LEMON AID: EXERCISING YOUR RIGHTS UNDER THE CONSUMER LEMON LAW* (1991). Under the Magnuson-Moss Warranty Act, most statutes require or permit the consumer to participate in an informal dispute resolution procedure established before filing an action in court. *See, e.g.*, MD. CODE ANN., COM. LAW § 14-1502(i) (LexisNexis 2005). For a discussion of how the Act operates, *see* Sarah T. Lepak, Comment, *Federal Jurisdiction Under the Magnuson-Moss Warranty Act*, 52 U. KAN. L. REV. 1041, 1045-53 (2004).

278. *See* Stipanowich, *supra* note 11, at 900.

279. *See generally* Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 *FORDHAM URB. L.J.* 483, 535-38 (1996) (discussing the foundations of securities arbitration).

280. OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL* 50 (2005).

281. Lawrence Rosen, *Individualism, Community and the Law: A Review Essay*, 55 *U. CHI. L. REV.* 571, 581 (1988).

282. CHASE, *supra* note 280, at 55-58.

sue for many seems to be the “formal equality of opportunity” to present one’s case in court.<sup>283</sup> Indeed, there is substantial evidence to support the conclusion that the “opportunity to be heard under a procedurally fair process is more important than the outcome of that process.”<sup>284</sup> Against the measuring stick of court trial, some forms of binding arbitration may be found suspect by employees or consumers from various perspectives: systemically, procedurally, and in terms of outcomes.<sup>285</sup>

Considerable scholarship has expounded upon the special dynamics and concerns associated with arbitration provisions in mass consumer and employment contracts.<sup>286</sup> Scholars have critically analyzed the extension of principles applying traditional contract theory, enhanced by policies supporting liberal enforcement of arbitration agreements, to such provisions.<sup>287</sup> Appropriately, scholars have tended to draw strong contrasts between settings involving adhesion concerns and traditional arm’s-length business-to-business arbitration,<sup>288</sup> and have aimed particular criticism at efforts to treat the former precisely like the latter.<sup>289</sup> In many cases, these distinctions have been observed in the responses of lawmakers, practitioners, and institutional leaders.<sup>290</sup>

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283. *Id.* at 61.

284. RHODE & HAZARD, *supra* note 261, at 52.

285. *See generally* Stipanowich, *supra* note 11, at 888–916 (discussing various indicia of perceived fairness in arbitration processes under standardized contracts affecting employees and consumers).

286. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

287. Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 47–57 (2007) (discussing the effect of court deference to form arbitration provisions based on contract formalism and the need for regulation in the realm of consumer arbitration provisions); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 821–22 (2004) (criticizing the effect of formalism and classical contract theory on consumer arbitration contracts).

288. *See, e.g.*, Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008). The study found that three-quarters of consumer agreements provided for mandatory arbitration, while less than ten percent of the same firms’ nonconsumer, nonemployment contracts included arbitration clauses. *Id.* at 876. The authors argue this suggests that the frequent use of arbitration clauses in consumer and employment contracts may be an effort to preclude aggregate action rather than to promote fair and efficient dispute resolution. *Id.* at 895.

289. *See, e.g.*, Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Arbitration*, 52 U. KAN. L. REV. 583, 587 (2004) (arguing for separate regulations for consumer arbitration); Donna M. Bates, Note, *A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT’L L.J. 823, 885 (2004) (“Just because arbitration may be a better choice than litigation in those situations, however, does not mean that arbitration is appropriate for consumers involved in cross-border transactions. Arbitration is not an appropriate form of dispute resolution for consumers in domestic cases. In its binding pre-dispute form and with the conflicting national policies on its use, reliance on arbitration to resolve consumer disputes in cross-border transactions is even more dubious.”); *see also* Stipanowich, *supra* note 41, at 875–81; Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, DISP. RESOL. MAG., Spring 2000, at 16, 16 (“One-size-fits-all approaches [to arbitration] are outmoded and intrinsically problematic.”).

290. Stipanowich, *supra* note 11, at 903–17.

*B. The “Spillover” Effect: Legal Enactments*

Commercial arbitration law and practice has also been affected by statutes aimed primarily at arbitration agreements in mass employment and consumer contracts. In another of the ironic twists that permeate the history of modern arbitration, pro-arbitration policy and classic contract theory combined to bring standardized employment and consumer agreements alongside commercial agreements for enforcement purposes, provoking responses that sometimes carry over into the commercial realm.

*1. State Statutes*

Efforts by state legislatures to limit enforcement of arbitration provisions in employment and consumer contracts have often fallen victim to the preemptive effect of the FAA within the broad bounds of interstate commerce.<sup>291</sup> The specter of preemption, however, has helped to shape new regulatory regimes that do not specifically deny enforcement of arbitration agreements, but instead focus on arbitration procedures. Although the impetus for these regulations is provided wholly or partially by concerns with adhesion scenarios, the regulations sometimes extend beyond these settings to commercial arbitration. For example, modifications to the California Arbitration Act, stimulated by and aimed primarily at consumer and employment arbitration, also established stringent requirements for disclosure of potential conflicts of interest by arbitrators in commercial cases.<sup>292</sup> Among other things, arbitrators are required to “disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”<sup>293</sup> The statute permits parties to disqualify the arbitrators based on such disclosures within fifteen days after receiving the disclosure statement.<sup>294</sup>

The statute has dramatically altered the landscape of commercial arbitration in California. In some ways the impact has been positive. A view expressed by some active arbitrators is that they appreciate being reminded of the obligation of professional disclosure and understanding

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291. See e.g., Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 386–87 (1992); Drew M. Guley, Note, *The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996*, 36 HOFSTRA L. REV. 1095, 1123 (2008) (“Even state laws that attempt to increase the awareness of arbitration clauses by consumers are suspect.”).

292. See CAL. CIV. PROC. CODE §§ 1281.85, 1281.9 (West 2007); Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 (West 2006); Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120–22 (2003) (critically appraising the statutory “ethics standards”).

293. CAL. CIV. PROC. CODE § 1281.9(a).

294. *Id.* § 1281.91.

its precise contours.<sup>295</sup> It may be that rigorous disclosure standards have caused arbitrators to devote more careful attention to their obligations to make disclosures, particularly with respect to non-obvious potential conflicts, such as relationships of close relatives with parties or counsel. The requirements may have enhanced the professionalism of active practitioners, although it is likely that some of those who do not regularly perform arbitral duties still rely primarily on memory as opposed to systematic record-keeping.<sup>296</sup>

From the standpoint of commercial arbitration, however, the California Ethics Standards also have a distinct downside. Though the scope of disclosures arbitrators are required to make are not in themselves inappropriately onerous, the Standards are unique in making any and all disclosures, including disclosures that might not be considered material to a finding of evident partiality under traditional arbitration law,<sup>297</sup> grounds for disqualification of the disclosing arbitrator upon the motion of any party.<sup>298</sup> These expansive rules set California apart from any other

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295. *But see* Glick, *supra* note 292, at 125–30.

296. In the case of arbitration involving a consumer, employment, or health care contract, the arbitrator is also required to disclose information about relationships between the arbitration-provider organization and any party, lawyer, or law firm in the arbitration. *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 8. These requirements may or may not have produced clear positive benefits. The requirements for larger provider organizations may produce such voluminous disclosure documents for consumer cases that the effective result may be obfuscation rather than clarity. One active arbitrator with a leading provider organization says that he routinely supplements his own multipage disclosure form with eighty to a hundred pages of disclosures from other neutrals in his organization. Unless one is very diligent and focused, he insists, it is hard to parse the really important data from the mass of material.

297. Motions to vacate usually arise in the context of nondisclosure of facts or relationships by an arbitrator, and the prevailing standards tend to require the party seeking vacatur to offer a quantum of proof that would be well above the standard set out in Section 1281.9 for automatic disqualification. *See, e.g.,* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983), *modified*, 728 F.2d 943 (7th Cir. 1984) (requiring that, to warrant vacatur for evident partiality under the FAA, the [undisclosed] circumstances must be “powerfully suggestive of bias”); *see also* Borst v. Allstate Ins. Co., 717 N.W.2d 42, 45 (Wis. 2006) (vacating an award based on substantial, continuing attorney-client relationship between an arbitrator and a party and finding vacatur appropriate “when a reasonable person would have serious doubts about the impartiality of the arbitrator”); 1 FEDERAL ARBITRATION LAW, *supra* note 133, § 28 (discussing case law on partiality and disclosure under the FAA).

298. *See* CAL. CIV. PROC. CODE § 1281.9 (“[T]he proposed neutral arbitrator shall disclose all matters that *could* cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . . .” (emphasis added)). The statutory commentary states:

The arbitrator’s overarching duty under this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial. While the remaining subparagraphs of (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The absence of particular interests, relationships, or affiliations listed in the subparagraphs does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator’s ability to be impartial and that therefore must be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under paragraph (d).

state in the Union and also depart significantly from longstanding decisional law under the FAA.<sup>299</sup> They create the potential for cynical manipulation of the arbitration process and dramatically increase the risk that a process will be derailed midstream, with potentially significant transaction costs. By way of illustration, consider the situation in which, months or years into the arbitration of a complex commercial case, a party who fears it will be on the losing end of the arbitrator's award hires new counsel or identifies a witness having some relationship to the arbitrator for the purpose of creating a requirement for the arbitrator to make a supplemental disclosure under the statute. An arbitrator who elects to make a disclosure of the relationship gives the parties an automatic right to have the disclosing arbitrator disqualified no matter how insignificant the relationship.<sup>300</sup> If the arbitrator fails to make the disclosure and the "aggrieved" party learns of the undisclosed relationship, the arbitration award may be vacated if the nondisclosure is found to be "a ground for disqualification of which the arbitrator was then aware."<sup>301</sup>

To many business clients the statute's disclosure requirements and automatic disqualification approach may seem superfluous in light of longstanding administrative mechanisms for handling arbitrator disclosures and challenges.<sup>302</sup> Moreover, given the potential risks and higher transaction costs described above, at least some commercial parties would seek to incorporate contract terms waiving the statute and its "protections" in commercial cases. This may not be possible, however. A recent court decision interpreted the California statute as requiring commercial parties to comply with the disclosure requirements of the statute; in the court's view, the statute effectively trumped the institutional disclosure and challenge procedures incorporated in the arbitration provision of the parties' contract.<sup>303</sup> A California arbitrator, in a proceeding under the AAA Construction Arbitration Rules, made disclosures to the effect that he had served as a neutral arbitrator on other cases in which a party was represented by counsel appearing for a party in the present arbitration, that seventeen years before he had been employed by a company that at the time also employed that lawyer, and that the law firm where he was "of counsel" listed a party to the arbitration as potentially

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Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 cmt.

299. See *supra* note 297.

300. See Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 cmt.

301. CAL. CIV. PROC. CODE § 1286.2(a)(6) (providing for vacatur on the basis of an arbitrator's failure to disclose in accordance with § 1281.91).

302. See, e.g., AM. ARBITRATION ASS'N, *supra* note 56, R. 16, 17 (2007) (setting forth disclosure requirements for arbitrators and providing an administrative procedure to address motions for disqualification).

303. See *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 149–51 (Cal. Ct. App. 2004).

adverse to one of its clients on another unrelated case.<sup>304</sup> When a party challenged the arbitrator based on these disclosures, the AAA handled the matter administratively under its Construction Rules and determined that the grounds for objection were not substantial enough to warrant removal of the arbitrator.<sup>305</sup> The arbitration proceeded to award and the same party that had raised the earlier objection sought to vacate the award on the basis that the arbitrator should have been removed on the basis of the disclosure.<sup>306</sup> On appeal, this argument prevailed. The appellate court concluded that the objecting party had not waived its right to have the arbitrator removed on the basis of the statutory disclosures by agreeing to arbitrate under the AAA Construction Arbitration Rules, even though these included an administrative challenge procedure, and directed the trial court to enter a new order vacating the award.<sup>307</sup> This result increases the risk of delays and greater transaction costs in commercial arbitration without clear commensurate benefits for commercial parties.<sup>308</sup>

Thus, the California Ethics Standards have made California a less hospitable place to arbitrate commercial cases. A party may sink substantial money into a case and suddenly realize it must either lose a neutral arbiter or risk vacatur of award. Though these increased risks may be justified in consumer or employment cases, the same may not be said of business cases. The Standards illustrate the dangers of lumping together very different kinds of arbitration under a single standard.

Both federal and state courts have acknowledged that the California Ethics Standards are preempted by the disclosure and challenge requirements of securities arbitration rules under the SEC-supervised regulatory scheme for investor-broker arbitration.<sup>309</sup> Although it is possible

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304. *Id.* at 144–45.

305. *Id.* at 145.

306. *Id.*

307. The court explained the draconian effect of the statute as follows:

This subdivision confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute.

... [The party exercising the right has] no independent burden to demonstrate that a reasonable person would doubt [the arbitrator's] capacity to be impartial. . . . [D]isqualification is automatic, [and] the disqualified [arbitrator] loses jurisdiction over the case and any subsequent orders or judgments made by him or her are void.

*Id.* at 146, 151–52 (citations omitted).

308. Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?*, 9 DISP. RESOL. MAG., Fall 2002, at 13, 14.

309. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005) (California Ethics Standards are preempted by National Association of Securities Dealers arbitration rules); *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1114 (N.D. Cal. 2003) (“Application of the California standards would impose inconsistent and conflicting procedural rules upon those specifically agreed upon by the parties. . . . [S]uch a result is impermissible under § 2 of the FAA . . . .”); *accord Jevne v. Superior Court*, 111 P.3d 954, 958 (Cal. 2005).

that at least some of the provisions of the California Ethics Standards, such as the ability of parties to vacate awards based on nonmaterial non-disclosures, may ultimately be deemed to run afoul of and be preempted by broader pro-arbitration policies under the FAA, as well as the decisional law that has developed under the Supreme Court decision in *Commonwealth Coatings v. Continental Casualty Co.*<sup>310</sup> with its less draconian standards for judicial action,<sup>311</sup> such a possibility is yet to be determined.

A subtler but potentially more influential example of regulatory “spillover” is the RUAA,<sup>312</sup> published by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000 and enacted into law in at least twelve states.<sup>313</sup> The NCCUSL drafting committee was warned against any categorical treatment of consumer and employee contracts that might run afoul of the preemptive effect of the FAA,<sup>314</sup> they therefore made do with a commentary addressing the role of unconscionability and other means of policing overreaching in adhesive arbitration agreements.<sup>315</sup> Concerns about mass arbitration involving consumer and employee “outsiders,” however, formed a subtext for other substantive elements of the RUAA.<sup>316</sup> Like its close federal counterpart, the FAA,<sup>317</sup> the original UAA<sup>318</sup> was carefully tailored to provide a “barebones” legal framework. It aimed to facilitate very limited judicial intervention to specifically enforce arbitration agreements and awards,<sup>319</sup> including a limited statute of frauds,<sup>320</sup> key default provisions (including authority for judicial appointment of arbitrators where the stipulated method failed),<sup>321</sup> and severely restrained

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310. 393 U.S. 145, 147–50 (1968).

311. *See supra* note 297.

312. UNIF. ARBITRATION ACT §§ 1–33 (2000), 7 U.L.A. 10–98 (2009).

313. THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 89 (4th ed. 2007) (stating that RUAA has been adopted in twelve states and is pending passage in fourteen states).

314. For example, see Fred H. Miller, *Update on Uniform Laws Affecting Consumer Credit*, 60 CONSUMER FIN. L.Q. REP. 238, 240 (2006), which tellingly observes:

The 2000 Uniform Arbitration Act continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. The 2000 Uniform Arbitration Act was drafted against the significant and preemptive presence of the Federal Arbitration Act. . . . [A]ny state law that limits the availability of arbitration or differentiates among types of provisions risks failure as a matter of federal preemption.

Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Arbitration Act is drafted to avoid preemption. For that reason, it does not differentiate between arbitration provisions in commercial and consumer contracts even though many advocate the necessity of differentiation.

315. UNIF. ARBITRATION ACT § 6 cmts. (2000), 7 U.L.A. 25–30.

316. The author was an Academic Advisor to the NCCUSL drafting committee and was present for most of the meetings of the committee. He was not a voting member of the committee, however.

317. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006).

318. UNIF. ARBITRATION ACT §§ 1–25 (1956), 7 U.L.A. 99–796.

319. *See supra* note 318.

320. UNIF. ARBITRATION ACT § 2 (1956), 7 U.L.A. 248.

321. *Id.* § 3, at 343.

judicial review of challenges to awards.<sup>322</sup> The RUAA, on the other hand, is a much more expansive document that incorporates many more procedural default rules and, more importantly, a number of mandatory (required and nonwaivable) procedural elements.<sup>323</sup> These elements represent an effort to channel arbitration agreements and restrict the party autonomy that is a traditional hallmark of arbitration in favor of certain perceived requirements of due process.<sup>324</sup> Arguably superfluous in a statute aimed at traditional business-to-business arbitration agreements incorporating detailed and varied arbitration procedures,<sup>325</sup> these provisions appear to be intended primarily, if not entirely, to protect adhering parties from overreaching. Their application, however, is coterminous with the scope of the statute and, therefore, applicable to commercial arbitration.

For example, RUAA section 16 states, “A party to an arbitration proceeding may be represented by a lawyer.”<sup>326</sup> The right to legal representation cannot be waived by a pre-dispute agreement under RUAA section 4(b).<sup>327</sup> Legal representation is taken for granted in most commercial arbitration processes,<sup>328</sup> while in some traditional industry or trade settings lawyers are actually excluded from hearings by the rules.<sup>329</sup> Section 16 works little if any benefit in the former scenarios and may entail undesirable transaction costs if raised in the latter context. The concern of section 16 must center on the special concerns of individual employees or consumers who find themselves in arbitration. Indeed, the accompanying commentary acknowledges that the right of representation is “especially [important] in the context of an arbitration agreement between parties of unequal bargaining power.”<sup>330</sup>

Also nonwaivable by executory agreement are sections 17 (a) and (b) regarding the authority of arbitrators to issue subpoenas and to “permit a deposition of any witness to be taken for use as evidence at the hearing.”<sup>331</sup> To say that parties cannot by pre-dispute agreement limit the ability of arbitrators to order prehearing depositions is a significant turnabout on traditional “no discovery” arbitration and justifiable primarily on the basis of concerns about employees, consumers, and other

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322. *Id.* §§ 11–13, at 488–716.

323. UNIF. ARBITRATION ACT § 4 (2000), 7 U.L.A. 19 (detailing the nonwaivable elements of the RUAA, it did not exist in the original UAA).

324. *See id.* cmt. 1.

325. *E.g., id.* § 16, at 60.

326. *Id.*

327. *Id.* § 4(b)(4), at 19.

328. *See SELLS, supra* note 66, at 84–86.

329. *See* UNIF. ARBITRATION ACT § 16 (2000), 7 U.L.A. 60.

330. *Id.* § 4 cmt. 4.c, at 20. Note, an exception to the nonwaivability of the right to representation is made for “an employer or a labor organization . . . in a labor arbitration.” *Id.* § 4(b)(4), at 19. The Comment observes that this exception reflects “long standing practice” and also recognizes that “the parties are of relatively equal bargaining power.” *Id.* § 4 cmt. 4.c, at 20.

331. *Id.* § 17(a)-(b), at 60–61.

adhering parties having access to information and witnesses.<sup>332</sup> One critique describes the RUAA's approach as a

complicated arrangement . . . to balance, on the one hand, providing certain non-waivable protection to consumers, employees, and others who may be 'forced' into arbitration through pre-dispute agreements and, on the other hand, providing flexibility to sophisticated commercial entities and other repeat players who wish to shape the arbitration process in ways they like. Neither group is likely to be entirely happy with the balance struck.<sup>333</sup>

Finally, section 21 provides that "arbitrator[s] may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim . . . ."<sup>334</sup> Although the provision is waivable under the RUAA, the commentary clarifies that limits on or waivers of certain remedies may run afoul of judicial decisions requiring that employees and other parties "[have] the right to obtain the same relief in arbitration as is available in court."<sup>335</sup> Though punitive damages are by no means unknown in the commercial arena, it is not uncommon for business parties to limit their arbitration agreement to exclude punitive damages from the arbitral arsenal of remedies, especially in international agreements.<sup>336</sup> Again, this provision is motivated primarily by the concerns of parties in adhesion contract scenarios, a reality reflected in the cases and standards cited in the commentary.<sup>337</sup>

Although each of these statutory elements is likely to be brought to bear most directly in adhesion settings involving consumers or employees, they will undoubtedly have an impact on the law and practice of commercial arbitration. As noted previously, the expansive discovery provisions of the RUAA are already being cited to arbitrators as a standard for practice.<sup>338</sup>

## 2. *Proposed Revisions to the FAA*

It is very likely that Congress will seriously consider significant modifications to the FAA in the coming term. Although such efforts,

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332. The Comment to § 17 provides that the provisions are nonwaivable "because they go to the inherent power of an arbitrator to provide a fair hearing by insuring that witnesses and records will be available at an arbitration proceeding." *Id.* § 17 cmt. 1, at 61–62 (emphasis added).

333. Jim Carr et al., *Colorado's Revised Uniform Arbitration Act*, 33 COLO. LAW., Sept. 2004, at 11, 17–18.

334. UNIF. ARBITRATION ACT § 21(a) (2000), 7 U.L.A. 72.

335. *Id.* § 21 cmt. 2, at 73–74 (citing, among other cases, *Cole v. Burns International Security Service*, 105 F.3d 1465 (D.C. Cir. 1997), which held that an employee with a Title VII discrimination claim is entitled to the same relief in arbitration as in court).

336. *E.g.*, *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989) ("Parties that do wish arbitration provisions to exclude punitive damages claims are free to draft agreements to do so explicitly."); Mark J. Astarita, *Punishing the Industry*, SEC Law.com, <http://www.seclaw.com/docs/197.htm> (last visited Nov. 25, 2009).

337. UNIF. ARBITRATION ACT § 21 cmt. 2 (2000), 7 U.L.A. 73–74.

338. The author was part of an exchange among members of the College of Commercial Arbitrators to this effect.

driven primarily by concerns about the role of arbitration in adhesion contracts involving consumers and employees, have been regularly mounted in the past with little effect,<sup>339</sup> changes in the political landscape make passage of such legislation more probable. Two current bills each include elements that would produce potentially significant “spillover” effects on commercial arbitration.

The proposed Arbitration Fairness Act of 2007 was intended to amend § 2 of the FAA to provide that

(b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—

- (1) an employment, consumer, or franchise dispute; or
- (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.<sup>340</sup>

Speaking of this draconian proposal’s potential impact on international commercial arbitration, Professor Emmanuel Gaillard states that the act “pos[es] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate.”<sup>341</sup> The same may be said of its effect on business-to-business arbitration generally. This results in part from the vagueness of the proposed statute’s scope, particularly with respect to nonenforceability of disputes under “any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.”<sup>342</sup> The failure to provide more specific definition for the classes of affected statutes or the concept of “unequal bargaining power” creates a vast grey area of nonenforceability within which parties seeking to avoid or to delay the commencement of arbitration may roam at will, potentially undermining conventional expectations regarding arbitration’s efficiency and economy of process.

This effect is dramatically compounded by a clause providing that “the validity or enforceability of an agreement to arbitrate shall be de-

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339. The sole exception is federal legislation exempting pre-dispute arbitration provisions in contracts between auto manufacturers and dealers from the enforceability provisions of the FAA. See Motor Vehicle Franchise Contract Arbitration Fairness Act of 2000, 15 U.S.C. § 1226 (2006).

340. Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007) (internal quotation marks omitted).

341. Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J., April 22, 2008, at 3, 3.

342. H.R. 3010, § 4.

terminated by the court, rather than the arbitrator . . . .”<sup>343</sup> This provision applies to any kind of arbitration agreement, without regard to the parties’ sophistication or the way in which the parties struck an agreement to arbitrate. The practical result is to deny enforcement to provisions, now ubiquitous in domestic and international commercial arbitration procedures, that promote efficiency by vouchsafing enforcement and “jurisdictional” questions to arbitrators.<sup>344</sup> The impact of this provision is rendered far greater by a materially ambiguous provision that gives courts initial authority to address not only “challenges [of] the arbitration agreement specifically,” but also challenges to the arbitration provision “in conjunction with other terms of the contract containing such agreement.”<sup>345</sup> This provision might be interpreted to overturn, within the purview of the proposed statute, the principle first enunciated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>346</sup> and recently reiterated in *Buckeye Check Cashing Co. v. Cardegna*,<sup>347</sup> to the effect that pre-dispute arbitration agreements are separable from the contracts of which they are a part for the purposes of assessing their enforceability under the terms of the FAA.<sup>348</sup> Although the Arbitration Fairness Act was modified to delete the ambiguous language regarding statutes “regulat[ing] contracts or transactions between parties of unequal bargaining power,” it remains in other respects the same, and is still pending as of the time of this writing.<sup>349</sup>

A second bill, the Fair Arbitration Act of 2007,<sup>350</sup> took a different approach. Rather than outlawing any category of pre-dispute arbitration agreements, it set out proposed due process standards for all arbitration agreements in a manner similar to the RUAA. It did, however, go significantly further than the RUAA in regulating the form and substance of arbitration, imposing significant restrictions on choice and enhancing transaction costs in commercial arbitration. Among other things, the bill established a required format for arbitration clauses, including mandatory disclosures and conspicuousness requirements; prohibited ad hoc arbitration and required administration by “an independent, neutral alternative dispute resolution organization”; prohibited list selection of arbitrators and required the use of a tripartite panel in which each party selects an arbitrator; required arbitrators to make broad disclosures and to comply with the Code of Ethics for Arbitrators in Commercial Dis-

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343. *Id.*

344. See, e.g., AM. ARBITRATION ASS’N, *supra* note 56, R.7.

345. H.R. 3010, § 4.

346. 388 U.S. 395, 402–04 (1967).

347. 546 U.S. 440, 449 (2006).

348. This legislation has been criticized in the *Washington Post*, see Editorial, *A Good Arbitrator*, WASH. POST, Apr. 12, 2008, at A14, and the *Wall Street Journal*, see Editorial, *No Lawyers, Please*, WALL ST. J., Apr. 5, 2008, at A8 (reporting poll that found eighty-two percent of respondents preferred arbitration to court for resolution of disputes with companies).

349. See Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009).

350. Fair Arbitration Act, S. 1135, 110th Cong. (2007).

putes; required that, in the absence of contrary agreement, the arbitrator be a member of the bar of the court in which the hearing is conducted; required application of the substantive law of the state in which the non-drafting party resides; required “relevant and necessary prehearing depositions” to be granted by the arbitrator; and set outside dates for answers, hearings, and awards.<sup>351</sup> Many commercial clients and practitioners shook their heads at this litany of limitations on their ability to choose the arbitration procedure most suitable to their transaction. The Fair Arbitration Act has not been reintroduced in this Session.

It remains to be seen what form arbitration reform legislation will take. It is, however, very likely that new laws will affect day-to-day commercial arbitration practice in unhelpful ways.

### C. *The “Spillover” Effect: Scholarship and Teaching*

As previously noted, concerns with arbitration agreements in adhesion contracts have stimulated much of the scholarship addressing American arbitration subjects in recent years.<sup>352</sup> In some cases, such concerns have provoked strong academic criticism of legal doctrines that many in the commercial arbitration world might have considered more or less settled. An illustration is provided by Professor Maureen Weston’s thoughtful, robust challenge to the broad immunity accorded arbitrators and arbitral institutions by case law and statute.<sup>353</sup> Although her argument for qualified immunity is not wholly contingent on concerns with consumer arbitration, the latter provides most of its force.<sup>354</sup> She argues that in the present environment where powerful companies force many consumers and employees toward mandatory arbitration and the use of provider institutions, blanket immunity undermines public confidence.<sup>355</sup> She describes the “frustration, if not horror, and distrust” voiced by some arbitrating parties in a process “shielded from public and judicial scrutiny,” and insists that an appropriate “response is necessary if consumer arbitration is to retain legitimacy in the eyes of the public.”<sup>356</sup> She concludes that “people who find themselves bound to arbitration, whether voluntarily or as a result of adhesive mandatory arbitration contracts, must have assurance that the players in the process are not above the law.”<sup>357</sup> Although her eventual proposed solution is a minor amendment to the law of arbitration, she

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351. *Id.*

352. *See supra* note 260.

353. *See generally* Weston, *supra* note 5.

354. For example, Professor Weston points out that arbitration “provider institutions” are able to avoid liability for a range of ministerial tasks that would not be similarly protected in a courthouse setting. *Id.* at 492. She also points to the “increasingly commercialized nature” of the provision of arbitration services. *Id.* at 496.

355. *Id.* at 510.

356. *Id.* at 511.

357. *Id.*

also discusses the possibility of subjecting arbitrators to professional licensing or credentialing, including “reporting or grievance mechanisms.”<sup>358</sup> Whatever the ultimate consequences of this line of inquiry, it is doubtful that the inquiry would have begun without the strong stimulus of consumer concerns.

The “spillover” effect of concerns regarding arbitration in adhesion contracts is also evident in some first-year contracts texts. In light of the fact that arbitration agreements in standardized contracts imposed on employees and consumers have given new life to the concept of “unconscionability,”<sup>359</sup> it makes sense for contracts casebooks to include decisions on the subject. Similarly, an author might legitimately include a case on arbitration in a “shrink-wrap” contract.<sup>360</sup> When, however, a casebook, even impliedly, portrays arbitration clauses as nothing more than a mechanism for imposing unfair procedures on unsuspecting parties, students are ill-served. Without a nuanced discussion which includes a treatment of the important and beneficial role often played by arbitration in domestic and international business transactions and other settings,<sup>361</sup> students are likely to go forward with an incomplete, unsophisticated, and overly negative concept of arbitration.

#### IV. ADDRESSING THE “NEW LITIGATION”: LOOKING BEYOND THE MONOLITH

Our exploration of the realities behind current discontent with arbitration reveals a spectrum of processes under stress and strain. Arbitration’s evolution as a private surrogate for court trial and its subsequent “legalization,” the growing popularity of mediation and other “thin-slicing” alternatives, and fairness concerns stemming from the use of binding arbitration in standardized contracts with individual consumers and employees, all contribute to present dissatisfaction with arbitration and raise questions about its future. All three trends, however, point out the need to understand and embrace the primary value of arbitration and its primary advantage over litigation—choice. This Part briefly presents three propositions, all founded on the concept of choice in arbitration, that are intended to address current concerns and promote enhanced satisfaction with commercial arbitration.<sup>362</sup>

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358. *Id.* at 512–13.

359. Brafford, *supra* note 260, at 351–52.

360. *See, e.g.,* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (finding terms in a shrink-wrap contract to be unconscionable).

361. *See, e.g.,* STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* 255–66 (3d ed. 1995) (featuring two cases involving adhesion contracts and unconscionability under the heading of “The Justice Principle: Standard Form Contracts”); JAMES F. HOGG ET AL., *CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION* 426 (2008) (focusing on issues confronting Internet consumers with respect to arbitration clauses, including two cases involving adhesion contracts).

362. These proposals are extensively explored in Stipanowich, *supra* note 197.

A. *Contract Planners and Drafters Need to Make Affirmative, Appropriate Choices Regarding Arbitration*

There is no recipe to ensure arbitration will produce general satisfaction among business users. Much energy and ingenuity has been devoted to improving the general quality of commercial arbitrators through heightened experiential and training requirements. There have been serious efforts to address concerns about cost and time management, including published guidelines<sup>363</sup> and extended discourse among arbitrators and advocates. The fact remains, however, that many lawyers have the general view that arbitration is “too much like litigation”; some wish it included additional litigation features, particularly judicial review and some harbor both perspectives.<sup>364</sup> Moreover, it is reasonable to assume that perspectives and expectations vary with the client and the circumstances.

1. *Choice as the Central Value of Arbitration*

Because users seek different things from arbitration and because business goals and needs vary by company, by transaction, and by dispute, no one form of arbitration is always appropriate. For this reason, the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs. In an extensive set of recommendations entitled *Commercial Arbitration at Its Best*, the CPR Commission on the Future of Arbitration observed that “many business users regard *control over the process*—the flexibility to make arbitration what you want it to be—as the single most important advantage of binding arbitration . . . .”<sup>365</sup>

Choice is what sets arbitration apart from litigation. If parties truly desire an expedited procedure in which speed and economy are the preeminent goals, it is possible to structure and implement a “lean program” to achieve those ends at the cost of various procedural bells and

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363. See, e.g., AM. ARBITRATION ASS'N, NAT'L CONSTR. DISPUTE RESOLUTION COMM., THE AAA GUIDE FOR CONSTRUCTION CONTRACTS (2007) [hereinafter AAA GUIDE] (guidance for users of AAA procedures, including those who seek to customize procedures); THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (Curtis E. von Kann et al. eds., 2006) (guidelines aimed primarily at arbitrators); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9 (extensive set of guidelines on commercial arbitration for business clients and counsel).

364. See *supra* text accompanying notes 138–47 (discussing how arbitration is too expensive and too much like litigation, and that there is also no appeal).

365. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at xxiii. The conclusion of the Commission is strongly reaffirmed by the findings of a 2006 survey of corporate counsel by Queen Mary College and PricewaterhouseCoopers regarding international arbitration. In the words of the report, “*Flexibility of procedure* was the most widely recognised advantage. The active participation of the parties in determining and shaping the procedure inspires confidence in the process.” QUEEN MARY 2006 SURVEY, *supra* note 22, at 6 (emphasis added); see also von Kann, *supra* note 19, at 43.

whistles.<sup>366</sup> Expedited arbitration may also be utilized to strike a balance between the need for final adjudication and the maintenance of an ongoing commercial relationship.<sup>367</sup> If, on the other hand, cost-savings and a quick result are much less important than controlled “quasi-litigation”—extensive legal due process with a tribunal comprised of three grand old ships-of-the-line that results in a highly “authoritative” decision—that too, is an option. The key is fitting the process to the problem(s)—from the choice of decision maker and forum to the time and location of hearings to all elements of procedure.

In recent years, much emphasis has been placed on the importance of carefully tailoring conflict management systems to organizational goals and priorities—a process that begins with thoughtful consideration of what the organization hopes to accomplish.<sup>368</sup> Such approaches have proven extremely beneficial in the development of corporate employment programs.<sup>369</sup> Unfortunately, this is not the normal procedure for contract planners and drafters who incorporate arbitration and dispute resolution provisions in commercial contracts; the usual approach in these contracts is to drop in standard boilerplate without much reflection or discussion.<sup>370</sup> Although effective arbitrators and thoughtful advocates may function effectively within this kind of framework and even overcome deficiencies in arbitration procedures, there are no guarantees. All too often, arbitration under standard one-size-fits-all procedures is likely to take on many of the trappings of litigation, with commensurate costs and delays; the result will be frustration and disappointment for those coming to arbitration with conventional expectations. Indeed, in the present environment of “legalized” arbitration, it is unrealistic to expect that traditional process attributes like economy, efficiency, and finality will be achieved without purposeful effort on the front end. It is for parties to establish definite priorities for arbitration and to translate those priorities into action through their arbitration agreement and subsequent decisions. In order to fulfill the promise of arbitration, parties must be more deliberate in taking advantage of the spectrum of available choices.

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366. See, e.g., Stipanowich, *supra* note 197, at 403–05 (discussing Abbott Labs’ customized expedited dispute resolution program for distributorship disputes); see also JUDICIAL ARBITRATION & MEDIATION SERVS., STREAMLINED COMMERCIAL ARBITRATION RULES AND PROCEDURES (2009), available at <http://www.jamsadr.com/rules-streamlined-arbitration/>.

367. See, e.g., Stipanowich, *supra* note 197, at 404.

368. See, e.g., CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 168–71 (1996).

369. See *id.*

370. See Stipanowich, *supra* note 197, at 388–92 (discussing the reasons why lawyers tend to rely on boilerplate for arbitration); see also LIPSKY & SEEBER, *supra* note 10, at 9–14 (presenting data indicating that businesses do not often take a proactive approach to the management of conflict).

## 2. *The Role of Clients and Counsel*

Business clients, guided by competent counsel, are in the best position to determine how and when arbitration will be brought to bear on commercial disputes, and what kind of arbitration processes will be employed. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they must assume control of processes and not abdicate the responsibility to outside counsel—in other words, principals, and not agents, must act as principals.<sup>371</sup> Ideally this includes not only choice making at the time of contracting, but a strategic approach to conflict management in which arbitration is considered among a variety of tools and approaches.<sup>372</sup>

In order to “take charge” and make effective choices regarding commercial arbitration, the first step is to identify the goals and priorities to be served by the mechanism for conflict resolution. These will undoubtedly include one or more of the following: (1) flexibility; (2) low cost or cost efficiencies; (3) a speedy outcome and avoidance of undue delay; (4) “fairness” and “justice”; (5) legal due process; (6) results comporting with commercial, technical, or professional standards; (7) predictability and consistency in result; (8) a final and binding resolution; (9) privacy and confidentiality; and (10) the preservation of a relationship and continuing performance.<sup>373</sup> The goals and priorities identified become touchstones for process selection.

Unfortunately, there are several daunting obstacles in the way of identifying goals and making commensurate process choices. It is often difficult to anticipate what kinds of disputes will arise under a contract and what the stakes will be.<sup>374</sup> Moreover, dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.<sup>375</sup> Perhaps, too, some transactional lawyers are reluctant to make arbitration a negotiating point, fearful of trading off more “substantive” elements.

There is also the problem of lack of sophistication on the part of contract planners and drafters. In the effort to define client goals and translate them into meaningful process choices, legal counsel, the “gatekeeper to legal institutions and facilitator of . . . transactions,”<sup>376</sup> must play a critical role. But transactional lawyers seldom have direct experience with resolving conflict; without adequate external support they

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371. Cf. SELLS, *supra* note 66, at 88 (explaining that clients use counsel as a way to avoid “the messiness of personal involvement” in litigation).

372. See generally SIEDEL, *supra* note 148, at 135–72.

373. See generally Stipanowich, *supra* note 197.

374. See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 6–8.

375. See *id.* at 6.

376. Felstiner et al., *supra* note 173, at 645.

may fall back on inadequate boilerplate language or falter in the minefield of customized drafting.<sup>377</sup>

That said, significant business, legal, and ethical imperatives make it necessary to exercise care in selecting and tailoring arbitration and dispute resolution clauses.<sup>378</sup> The published cases and literature are filled with examples of parties whose expectations of arbitration were derailed by issues such as lack of precision in describing the process; failure to clarify the consequences of noncompliance with specified pre-arbitration steps or procedures; the inability to join or to obtain discovery from third parties; a party-appointed arbitrator who functions inconsistently with expectations; failure to adequately protect trade secrets; and inability to enforce and implement a provision for expanded judicial review of award.<sup>379</sup> There is also the growing specter of discovery, which is above all the most significant determinant of cost and cycle time in arbitration, and which demands direct attention and treatment.<sup>380</sup>

Those charged with preparing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the client. If customized provisions seem appropriate, special caution is required in the crafting.<sup>381</sup> Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed ahead of time.<sup>382</sup> It is no longer ethically sufficient to tick off basic options (“mediation,” “arbitration”) and throw in convenient boilerplate language without reflection; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.<sup>383</sup> In this regard, provider institutions need to play a more affirmative role.

### 3. *The Role of Provider Institutions and the Need for Templates*

One of the biggest obstacles to effective exercise of choice and to matching procedures with parties’ goals is the relative absence of alternative process templates among procedures published by leading providers of arbitration services.<sup>384</sup> Although much effort has been expended in the development of standard arbitration provisions, the training of arbi-

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377. See John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, DISP. RESOL. J., Feb.–Apr. 2003, at 28, 30.

378. See Stipanowich, *supra* note 197, at 394–99.

379. See *id.* at 395–96.

380. See *supra* Part I.B.2.

381. One famous nightmare scenario of one-off drafting involved a contractual provision for expanded judicial review of arbitration awards. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997).

382. See Stipanowich, *supra* note 197, at 398–99.

383. *Id.*

384. *Id.* at 390–92.

trators, and other quality control initiatives, no single provider offers direct guidance regarding process tools to serve each of the ten sets of goals described above.<sup>385</sup> Some major providers have also tended to promote a single set of general-purpose commercial procedures, which leave considerable discretion to arbitrators and advocates with respect to key elements like discovery.<sup>386</sup> Moreover, the similarities among major procedural templates for commercial arbitration far outweigh the differences. Some major providers have only recently developed streamlined rules and other templates as alternatives to their standard rules.<sup>387</sup> There are now also competing initiatives to address concerns and provide options for the handling of discovery<sup>388</sup> and alternatives to expanded review in the form of appellate arbitration processes.<sup>389</sup> Busy lawyers need easily accessible templates that offer clear choices, as well as concise and comprehensive roadmaps that address all these options in addition to other drafting issues. Providers can do much more to fill this void.

#### 4. *The Role of Advocates and Arbitrators*

There are two other key “choice points” for users of arbitration—the selection of legal counsel to represent one’s interests in the resolution of disputes and the selection of arbitrators to resolve those disputes. In both cases, the choices parties make are just as critical as process choices, if not more so. Indeed, effective advocates and arbitrators may overcome the deficiencies of inadequate procedures; ineffective advocates and arbitrators may undermine the best-crafted procedural program.

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385. For example, the CPR “Suitability Screen,” one of the tools designed for counsel advising clients regarding arbitration, is useful in identifying some basic distinctions between arbitration and litigation, and may be a starting point for discussion with a client who is unfamiliar with arbitration. See JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 460–61 (2005) (featuring slightly modified version of the Suitability Screen). It is, however, overly simplistic and conceivably misleading when it comes to some subjects such as discovery. Moreover, it provides no guidance respecting decisions about the arbitration process itself.

The primary guidance afforded by leading dispute resolution organizations is in the form of arbitration rules. Generally speaking, however, these are not accompanied by user guides that explain specifically how various party goals and priorities may be served by different options. One of the better efforts to provide a template for drafters and users is the AAA GUIDE, *supra* note 363. A report of the CPR Commission on the Future of Arbitration, which is organized in a question and answer format, is among the most straightforward general resources on choices regarding commercial arbitration for clients and counsel. See generally *COMMERCIAL ARBITRATION AT ITS BEST*, *supra* note 9.

386. See, e.g., INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 56; JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56. Both organizations, however, have begun to develop and promote other options. See *infra* note 387.

387. See, e.g., INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES* (2006); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 366.

388. Stipanowich, *supra* note 197, at 414–42 (discussing current CPR, ICDR, and IBA initiatives).

389. See INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *ARBITRATION APPEAL PROCEDURE* (amended 2007), available at <http://www.cpradr.org/ClausesRules/ArbitrationAppealProcedure/tabid/79/Default.aspx>; JUDICIAL ARB. & MEDIATION SERVS., *JAMS OPTIONAL ARB. APPEAL PROC.* (rev. 2003), [http://www.jamsadr.com/files/Uploads/Documents/optional\\_arbitration\\_appeal-2003.pdf](http://www.jamsadr.com/files/Uploads/Documents/optional_arbitration_appeal-2003.pdf).

Thoughtful and sophisticated lawyers may navigate through the arbitration process in a way that most effectively promotes client goals and may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote mutual benefits.<sup>390</sup> Similarly, well-equipped arbitrators may make effective use of their discretion to strike an appropriate balance between efficiency and fairness—or, as necessary, to address other user needs such as confidentiality.<sup>391</sup>

Given the right set of circumstances, including a good working relationship between counsel and a very effective neutral that the parties trust, it might be possible to creatively address the need for flexibility in managing conflict in long-term contractual relationships by setting up dynamic programs for tailoring processes to disputes *at the time conflict arises*.<sup>392</sup> Such an approach would obviate the need for a detailed pre-dispute template for conflict management and avoid negotiations over procedural details at contract time; it would permit a process to be specifically formulated for the dispute at hand. If a facilitated negotiation failed to produce agreement on procedures to be employed, the third party neutral might even have the authority to formulate procedures. There are precedents for such an approach, including a contract-based conflict management program centered on the person of a “Dispute Resolution Advisor” that was successfully employed on several construction projects in Hong Kong.<sup>393</sup> Such innovations have not, however, attracted discernable attention in the United States, perhaps because they afford a neutral considerable discretion and leave commensurately less control in the hands of client and counsel respecting the ultimate process choice.

*B. Arbitration Should Be Considered in the Context of an Array of Conflict Management Tools*

In seeking to fulfill client goals and priorities through effective conflict management, arbitration should not be considered in isolation.

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390. See generally Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO HIGH COST LITIG. 186, 187 (describing possibilities for collaborative process design).

391. See generally Wilkinson, *supra* note 37 (discussing ways arbitrators may bring tools to bear).

392. Walter Gans, former General Counsel of Siemens and an experienced advocate and arbitrator, suggests that, in the absence of an advance agreement, [the parties] empower an arbitrator/lawyer nominated or selected by the chosen provider for his/her industrial, business & process expertise, *to mandate the rules to be applied to the conduct of the arbitration* with a view to effecting a fair outcome reached in the most cost and time efficient manner, keeping in mind the agreement of the parties. E-mail from Walter Gans to author (Sept. 10, 2008, 08:58 EST) (on file with author) (emphasis added).

A decade ago, the author explored the possibility of enhancing flexibility in the management of conflict by employing a third party to attempt to facilitate discussions about processes for resolving conflict and, if necessary, to direct the use of specific options. See Stipanowich, *supra* note 206, at 386–403.

393. See Stipanowich, *supra* note 206, at 310–23.

Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to be the primary process option for serving the day-to-day needs of businesses.<sup>394</sup> Rather, the logical, normal first step is negotiation, followed in many commercial dispute resolution procedures by mediation.<sup>395</sup> Though opinions may vary regarding the desirability of a contractual provision for mediation, the option should always be considered.

The proliferation of contractual tools for conflict management has also given rise to customized provisions that skirt the borderline between arbitration and mediation, often producing undesirable consequences, such as a result that cannot be enforced in court.<sup>396</sup> Once again, the by-word is caution.

*C. The Legal Framework for Arbitration Should Be Tailored to Reflect the Very Different Realities of Different Transactional Settings*

Planners and drafters of commercial dispute resolution agreements must move beyond a monolithic conception of arbitration and consider process options in light of contextual needs and goals. Similarly, an understanding of key contextual differences between commercial arbitration in an arm’s-length transaction and consumer or employment arbitration under the terms of an adhesion contract must inform the activities of lawyers, lawmakers, and legal educators.<sup>397</sup>

Although there is evidence that binding arbitration under adhesion contracts may produce advantages for all concerned if due process is accorded to all participants,<sup>398</sup> self-dealing, ignorance, or negligence on the part of corporate contract drafters may result in injustice against consumers or employees.<sup>399</sup> Drafters must appreciate that legal, ethical, and practice imperatives mandate adherence to fundamental due process—limiting unilateral choice and restricting options for businesses seeking to avoid litigation through binding arbitration.<sup>400</sup>

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394. See *supra* Part II.

395. See *supra* text accompanying notes 195–201. See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 1–62 (discussing general strategies for conflict management and drafting considerations).

396. These things seem to happen especially often in California! See, e.g., *Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846, 850 (Cal. Ct. App. 2006); *Saeta v. Superior Court*, 11 Cal. Rptr. 3d 610, 613–15 (Cal. Ct. App. 2004) (finding that an administrative proceeding was neither arbitration nor mediation, and privileges applicable to those proceedings did not apply); *Elliott & Ten Eyck P’ship v. City of Long Beach*, 67 Cal. Rptr. 2d 140, 145 (Cal. Ct. App. 1997) (finding that a procedure by which parties selected a judge to resolve their dispute with finality and without appellate review was not arbitration); *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 874 (Cal. Ct. App. 1996) (denying a motion to compel arbitration pursuant to a contractual provision for resolution by employer review committee on the basis that the procedure was not arbitration).

397. See *supra* Part III.

398. See Stipanowich, *supra* note 41, at 904–05 (summarizing empirical studies on results in employment arbitration).

399. See Stipanowich, *supra* note 197, 389–93.

400. See *id.* at 394–99.

At the same time, those engaged in proposing or enacting laws motivated by concerns over consumer and employee welfare must proceed with care to avoid imposing unnecessary “spillover” transaction costs in arm’s-length commercial settings.<sup>401</sup> Just because a rule makes sense in adhesion contexts does not mean it makes sense across the whole spectrum of arbitration.

Similarly, though it is understandable that legal educators will discuss arbitration in the context of unconscionability,<sup>402</sup> they need not leave law students with the notion that arbitration is an inherently bad choice. Rather, they might offer examples of how arbitration may be employed effectively in the proper setting and procedural framework.

### CONCLUSION

As courts and contracting parties have thrust arbitration into a primary adjudicative role across the broad spectrum of civil disputes, arbitration has taken on increasingly more characteristics of litigation. Although this evolution is understandable, it has led to the frustration of many users who find their arbitration experience wanting when measured in terms of its conventional attributes such as speed and economy of process. At the same time, the impetus to make arbitration even more like trial is evident in customized contractual provisions for enhanced judicial review. These provisions also exemplify the dangers of one-off drafting, which all too often goes awry when performed by unsophisticated parties.

At a time when many legal departments are in a cost-cutting mode, “legalized” arbitration, like litigation, is of much narrower utility than mediation and other emerging “thin-slicing” approaches. The growing emphasis on mediation and other alternatives that serve business’ underlying interests—including the preservation of relationships—reinforces the inadequacies of arbitration in these respects and is causing some, such as the drafters of leading construction contracts, to question the need to include arbitration as an end step.

As a surrogate for litigation in consumer and employment contracts, arbitration has attracted a great deal of controversy. This, in turn, has sparked a variety of efforts to regulate and restrict choice in order to protect the due process rights of consumers and employees—efforts that often “spill over” into the arena of arm’s-length business transactions, imposing new transaction costs without commensurate benefits.

All of these developments highlight the need to understand and address arbitration in a more nuanced and sophisticated way, moving beyond the “monolithic” approaches that tend to dominate drafting and debate. More than ever, “arbitration” must be understood not as a uni-

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401. See *supra* Part III.B.

402. See *supra* text accompanying notes 358–61.

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tary concept, but as a spectrum of possibilities and a realm of choice that demands more active participation by those who use, regulate, and comment on arbitration processes. The promise of arbitration is choice, and in order to fulfill that promise, choice must be deliberatively and effectively exercised.

