Commercial Arbitration in Evolution: An Assessment and Call for Dialogue

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I. INTRODUCTION

At the core of the law of corporate governance is the business judgment rule. In application, the business judgment rule precludes the need for extensive judicial interference in the management and operation of commercial enterprises and enables corporate officials to focus their attention on running the business and making a profit.[1] By using this construct the courts are able in most instances to avoid becoming entangled in the frequent internecine disputes that arise between corporate shareholders and the officers, directors, and executives who manage the corporation.

In recent years, the federal and state judiciaries have laid the groundwork for achieving the same result in a broader range of commercial disputes by strictly enforcing contractual agreements to arbitrate between businesses, businesses and consumers, and employers and employees.[2] By deferring to contractually-provided arbitration in commercial disputes that otherwise would be the subject of lawsuits, the courts hope to provide an effective vehicle for reducing the current logjam in civil dockets[3] while at

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[1] The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). *See generally* S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979); Dennis J. Block et al., *The Role of the Business Judgment Rule in Shareholder Litigation at the Turn of the Decade*, 45 BUS. LAW. 469, 489-97 (1990).

[2] *See, e.g.*, Lee v. Chica, 983 F.2d 883 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 287 (1992); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993); Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1993). *See also* David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, 48 ARB. J., Sept. 1993, at 18, 22; Bret F. Randall, Note, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 759 (1992); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 204 (1989); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 439 (1988).

[3] Much has been written about the overcrowded status of the civil dockets in the nation's courts, particularly the federal courts. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, THE JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 101-416, 101st Cong., 2d Sess. 6-7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6808-10; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 563 (1993); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889-90 (1991); R. William Ide II, *It's Time to Work Together*, 80 A.B.A. J., Feb. 1994, at 8 (reporting that total civil filings in the state courts increased by 33% between 1984 and

the same time simplifying, shortening, and reducing the expense of the commercial dispute resolution process.[4] This phenomenon and the challenge it presents to commercial arbitration are the genesis of this article.

II. THE NEED FOR DIALOGUE

Commercial arbitration is at a critical juncture in its movement from the periphery of the civil justice system to its center stage. Although commercial arbitration was employed in the United States as far back as colonial times, its utility prior to enactment of the Federal Arbitration Act (FAA)[5] was hampered by the reluctance of the courts to enforce agreements to arbitrate future disputes.[6] Even after the passage of the FAA, and despite the widespread adoption by the states of the Uniform Arbitration Act (UAA),[7] during the period from the mid-1920s to the mid-1980s commercial arbitration lay fallow.

In the last ten years, spurred largely by the U.S. Supreme Court's abandonment of its long-standing skepticism as to the suitability of contractually-provided arbitration as a method for adjudicating commercial disputes otherwise appropriate for adjudication in court, including claimed

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1991); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1187 (1993); Robert M. Parker & Leslie J. Hagin, *Two Judges: Differing Values and Visions - "ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1906-11 (1993); J. Clifford Wallace, *Tackling the Caseload Crisis*, 80 A.B.A. J., June 1994, at 88. However, not all observers agree that a "caseload crisis" really exists. *See, e.g.*, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Hon. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907-10 (1989).

[4] *See, e.g.*, Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981) ("The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation."). *See also* Chief Justice Warren E. Burger, *Using Arbitration to Achieve Justice*, 40 ARB. J., Dec. 1985, at 3, 6; Malin & Ladenson, *supra* note 3, at 1187; Michael Segalla, *Survey: The Speed and Cost of Complex Commercial Arbitrations*, 46 ARB. J., Dec. 1991, at 12; G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 626 (1988).

[5] Federal Arbitration Act, 9 U.S.C. §1 (1988 & Supp. V 1993).

[6] *See* I. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.3 (1994); William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J., Sept. 1993, at 27.

[7] UNIF. ARB. ACT, §1 7 U.L.A. 1 (1955) [hereinafter U.A.A].

violations of federal law,[8] the use of commercial arbitration has begun to accelerate. Today, as a result of this turnaround in the attitudes of the

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[8] The Supreme Court's skeptical attitude towards commercial arbitration was best illustrated in Wilko v. Swan, 346 U.S. 427 (1953). In *Wilko*, the plaintiff customer sued his brokerage firm for violations of the Securities Act of 1933, alleging fraudulent misrepresentations. The defendant brokerage firm insisted that the customer was obligated to arbitrate the claim on the basis of an existing agreement to do so. The Supreme Court held that the customer could not be compelled to arbitrate the claim. In discussing arbitration, the Court remarked:

> Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care," or "material fact," cannot be examined. Power to vacate an award is limited.

346 U.S. at 435-36.

By the mid-1980s, however, the Court's assessment of the value and viability of commercial arbitration had changed. For example, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984), the Court held that an agreement to arbitrate "all disputes, controversies or differences that may arise" required the arbitration of alleged violations of the antitrust laws. The Court noted, "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. *See also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that the FAA indicates a "liberal federal policy favoring arbitration agreements"); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that state statutes that restrict or prevent the arbitration of claims that otherwise would be covered by agreements to arbitrate are subject to preemption by the FAA); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding that claims arising under the Securities Exchange Act of 1934 are arbitrable, if covered by an agreement between customer and broker to arbitrate); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling *Wilko v. Swan* and holding that a claimed violation of the Racketeer Influenced and Corrupt Organization (RICO) Act is a proper subject for arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that alleged violations of the Age Discrimination in Employment Act are subject to compulsory arbitration where the employee

federal and state courts regarding the use of arbitration as a surrogate for judicial adjudication of commercial disputes, the likelihood of a successful effort to resist enforcement of a contractual arbitration clause, or of a loser in arbitration securing vacation of an unfavorable award in court, is remote indeed.

Increasing numbers of more complex commercial disputes, involving larger amounts in controversy, are being routinely submitted to arbitration.[9] A substantial number of commercial contracts contain boilerplate arbitration clauses providing that virtually all controversies arising between the parties to those contracts will be subject to final and binding arbitration.[10] Thus, for example, agreements to arbitrate contractual and related disputes are routinely included in sales contracts, construction contracts, broker-customer contracts, loan agreements, partnership agreements, and employment and employment-related contracts.

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signed, as part of his securities registration application, an agreement to arbitrate disputes arising out of his employment); Allied-Bruce Terminix Co., Inc., v. Dobson, 115 S.Ct. 834 (1995) (the interstate commerce language, contained in Section 2 of the FAA, reaches to the limits of the Commerce Clause power). *See generally* Howard, *supra* note 6, at 27; Stipanowich, *supra* note 2, at 426-27 nn.2-3; Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 388-400 (1992).

[9] For example, commercial arbitration filings with the American Arbitration Association rose from 6448 in 1981 to 13,603 in 1992. Segalla, *supra* note 4, at 12. Commercial case filings in 1993 were down somewhat from 1990, but the value of the claims and counterclaims filed in 1993 reached $6 billion, almost twice the 1992 level. Securities case filings increased from 55 in 1985 to 635 in 1993. Ted E. Pons, *AAA Business Expanded in 1993*, DISP. RESOL. TIMES, Spring 1994, at 1. In 1986, Robert Coulson, the former president of the AAA, stated that "[i]n less than twenty years, the use of commercial arbitration has increased by over 250%." Douglas R. Davis, Note, *Overextension of Arbitral Authority: Punitive Damages and Issues of Arbitrability*--Raytheon Co. v. Automated Business Sys., Inc., 65 WASH. L. REV. 695, 696 (1990) (citing Comment, *The Scope of Modern Arbitral Awards*, 62 TUL. L. REV. 1113, 1113 n.2 (1988)).

[10] The non-profit Center for Public Resources has prepared and championed a "corporate pledge" movement, in which large companies pledge themselves to explore the use of ADR techniques, prior to litigation, in the event of a dispute between signatories. Over half of the Fortune 500 companies, and more than 600 corporations in all, have signed the "corporate pledge." Victoria Cundiff, *Companies are Seeking Litigation Alternatives*, NAT'L L.J., May 17, 1993, at S25, *cited in* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2189 (1993). Numerous trade and professional associations use or recommend the use of arbitration under the AAA. For an extensive list, see Stipanowich, *supra* note 2, at 431 n.24.

It is this increasing routinization of commercial arbitration, and its progress toward institutionalization as an integral part of the legal framework for resolving commercial disputes that creates the need for a comprehensive, thoughtful dialogue. Litigators, business executives, arbitrators, the organizations that provide arbitration services, the courts, and legislators are obliged to enter into a deliberate evaluation of the process and the neutrals who serve thereunder, with an eye toward ensuring that the accelerating evolution now underway produces a dispute resolution model that truly is cost effective; procedurally predictable and fair; and capable of consistently producing accurate and correct results in a wide array of controversies. The legal and related research reported in the literature to date has failed to generate this type of wide-ranging dialogue.

For the most part, the commentary in the literature has consisted of legal analyses of relatively narrow topics[11] or empirical studies that describe specific subsets of the current practice of commercial arbitration.[12] These

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[11] Some topics, such as the arbitrability of statutory rights, have been the subject of considerable academic attention. *See, e.g.*, Malin & Ladenson, *supra* note 3, at 1187; G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/Am. Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397 (1988); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. DISP. RESOL. 157 (1989). The arbitrability of particular types of disputes, other than those involving statutory rights, has also been explored. *See, e.g.*, Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability:* David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 BROOK. L. REV. 279 (1992); Strickland, *supra* note 8 (discussing the jurisdictional reach of the FAA); Davis, *supra* note 9, at 695. The proper standard for judicial review of arbitral awards has been analyzed on several occasions. *See, e.g.*, Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241 (1993); Bret F. Randall, Note, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759 (1992); Michael J. Smith, Note, *Efficient Injustice: The Demise of the "Substantial Injustice" Exception to Arbitral Finality*, 8 J. ON DISP. RESOL. 209 (1993); Speidel, *supra* note 2. *See also* Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267 (1980) (focusing on labor arbitration). Other specific issues have also been addressed. *See, e.g.*, Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992) (advocating the application of procedural due process principles to commercial arbitration); Shell, *supra* note 4 (discussing the use of claim and issue preclusion in commercial arbitration).

[12] Probably the most widely cited such studies are those described by Professor Thomas Stipanowich, *supra* note 2, and Professor Soia Mentschikoff, in *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). The results of a 1985-86 survey conducted by the Forum Committee on the Construction Industry and the Construction Litigation Division of the

efforts, while useful in initiating the dialogue the Authors envision, are not sufficient to generate the type of colloquy required to advance the state of the art of commercial arbitration and ensure its maturation into a device capable of routinely serving as a substitute for traditional litigation in a broad range of commercial disputes.

The Authors assert that like the Total Quality Management (TQM) movement that has captured so much attention in recent years in the manufacturing and service sectors of American society, [13] the organizations and individuals involved in commercial arbitration must adopt a customer-oriented perspective that consistently drives the practice in the direction of satisfying the expectations of both those who utilize commercial arbitration and the public policy makers who sanction its use. It is the purpose of this article to set the parameters for a concrete dialogue among those with a stake in ensuring the institutionalization of commercial arbitration that will facilitate that result. The focuses of this dialogue must be on developing a vision of the process at maturity; fashioning an archetype of the mainline commercial arbitrator who will be the key to its effective operation; and ascertaining the measures necessary to bring both of those constructs to reality.

In the Sections below, the Authors first will briefly describe the legal framework for commercial arbitration. The commentary will then turn to a

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American Bar Association Section on Litigation provided much of the data analyzed and discussed in Professor Stipanowich's article. Professor Mentschikoff's study surveyed and examined arbitration conducted independently by various trade associations, and arbitration conducted through the American Arbitration Association. There have, of course, been other studies. The General Accounting Office has produced reports on the arbitration of disputes between securities firms and their customers. *See Securities Arbitration: How Investors Fare*, GAO/GGD-92-74 (May 11, 1992) [hereinafter *Securities Arbitration*]. It has also produced reports on the arbitration of employment discrimination suits between securities firms and their registered representatives. *See Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17 (Mar. 30, 1994) [hereinafter *Employment Discrimination*]. Other organizations, most notably the American Arbitration Association, also conduct surveys from time to time dealing with various aspects of commercial arbitration. The results of such surveys occasionally appear in print later on. *See, e.g.*, Segalla, *supra* note 4; Thomas L. Watkins, *Assessing Arbitrator Competence: A Preliminary Regional Survey*, 47 ARB. J., June 1992, at 43. Nonetheless, there is a dearth of reliable, carefully considered empirical research that goes beyond merely describing certain dimensions of the current practice. There is much we do not know about commercial arbitration.

[13] *See* W. Edwards Deming, *Improvement of Quality and Productivity through Action by Management*, NAT'L PROD. REV., Winter 1981-82, at 12-22. *See also* JAMES W. DEAN & JAMES R. EVANS, TOTAL QUALITY: MANAGEMENT, ORGANIZATION, AND STRATEGY (1994).

description of the major characteristics, attributes, and shortcomings of contemporary commercial arbitration, including a juxtaposition of the process with traditional litigation. Proceeding from this foundation, the Authors will attempt to provide a framework for the dialogue envisioned above by articulating what they believe to be the key characteristics of a viable mature commercial arbitration mechanism and by describing the archetype of the commercial arbitrator who will oversee it.

III. THE LEGAL FRAMEWORK FOR COMMERCIAL ARBITRATION

Commercial arbitration has been practiced in the United States for several hundred years.[14] For most of that time, the common law has been the basis for its use. It was not until the 1920s that enabling and empowering statutes began to appear, both at the federal and state level, with the avowed purpose of remedying the shortcomings of common law arbitration.[15]

Common law arbitration was based on contract principles. Thus, an agreement to arbitrate a dispute could be entered into much the same way that any contract could be entered into, but with some significant, and often disabling limitations. The most serious limitation was that agreements to arbitrate were revocable at any time prior to award.[16] Furthermore, agreements to arbitrate future disputes were generally deemed void, as against public policy.[17] Thus, although arbitration *could* function as the final method for resolving a commercial dispute, there was no assurance at the inception of the agreement to arbitrate that it *would* so function. Today, common law arbitration still exists, although its use is limited to those situations in which the relevant state or federal arbitration statute does not apply.[18]

The potency of modern commercial arbitration comes from statutes. It is the willingness of the courts to enforce agreements to arbitrate that makes commercial arbitration a plausible alternative to litigation in the courts. At least at the outset, judicial willingness to enforce agreements to arbitrate and

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[14] MACNEIL ET AL., *supra* note 6, § 4.3; Mentschikoff, *supra* note 12, at 854-56.

[15] Howard, *supra* note 6, at 28-29; Strickland, *supra* note 8, at 388-90. *See also* RODMAN, COMMERCIAL ARBITRATION § 3.1 (1984).

[16] Howard, *supra* note 6, at 28; Strickland, *supra* note 8, at 389.

[17] MACNEIL ET AL., *supra* note 6, § 4.3.2.2. *See also* Home Ins. Co. v. Morse, 87 U.S. 445, 452 (1874); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915).

[18] RODMAN, *supra* note 15, § 3.1; DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 3.02 (1968); Daniels Ins. Agency, Inc. v. Jordan, 657 P.2d 624 (N.M. 1982).

to enforce arbitral awards, was procured through legislation.[19] At the federal level, the Federal Arbitration Act (FAA) is the principal source of authority. [20] Almost every state has an arbitration statute of some sort. The predominant statute, enacted in substantially similar form in some 34 states, is the Uniform Arbitration Act (UAA).[21] Of the remaining states, all but two (Alabama and West Virginia) have statutes which provide for the enforcement of agreements to arbitrate both existing and future disputes.[22]

A. General Parameters Of The Law Of Commercial Arbitration

While there are differences between the Federal Arbitration Act and the Uniform Arbitration Act, they are similar in purpose and operation.[23] As a result, the basic legal contours of commercial arbitration are well established and generally consistent. Agreements to arbitrate disputes arising in the future, as well as existing disputes, are specifically enforceable by application to the appropriate court.[24] The parties are free to draft their own procedure, or to use one of several neutral organizations that provide arbitration services (hereinafter "neutral appointing authorities"), such as the American Arbitration Association. The parties may select their own arbitrator(s), or they may ask to have an arbitrator appointed, either by a neutral appointing authority, or, if need be, by the court.[25] Arbitrator(s)

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[19] *See* Howard, *supra* note 6, at 28; Nelson, *supra* note 11, at 279, 280-81; Strickland, *supra* note 8, at 389.

[20] For a brief history of the enactment of the Federal Arbitration Act, see Howard, *supra* note 6, at 28-30; Nelson, *supra* note 11, 280-83.

[21] The statutory citations are collected in 7 UNIF. LAWS ANN. 1 (Supp. 1993).

[22] Both Alabama and West Virginia have arbitration statutes, but they apply only to existing disputes. *See* ALA. CODE §§ 6-6-1 to 6-6-16 (1975); W.VA. CODE §§ 55-10-1 to 55-10-8 (1994). In Mississippi, construction contracts may provide for the arbitration of future disputes. MISS. CODE ANN. § 11-15-101 to 11-15-143 (1981). *See generally* RODMAN, *supra* note 15, §§ 3.7, 3.8 (Supp. 1992). The continuing vitality of these statutes is highly doubtful. In Allied-Bruce Terminix Co., Inc. v. Dobson, 115 S.Ct. 834 (1995), the Supreme Court held that Section 2 of the FAA, which makes enforceable a written agreement to arbitrate in a contract "evidencing a transaction involving commerce," preempts Alabama law to the contrary.

[23] *See* MACNEIL ET AL., *supra* note 6, § 5.4.2 for a compilation of the differences between the FAA and the UAA.

[24] 9 U.S.C. §§ 2-4 (FED. ARBITRATION ACT §§ 2-4) (1994) [hereinafter F.A.A]; UNIF. ARBITRATION ACT §2 [hereinafter U.A.A.].

[25] 9 U.S.C. § 5 (F.A.A. § 5) (1994); U.A.A. § 3.

ordinarily have considerable discretion as to the conduct of the hearing.[26] Arbitrator(s) are not bound by the rules of evidence,[27] unless the parties so stipulate, nor is a written opinion usually required.[28]

The arbitrator's award may be enforced by application to the appropriate court.[29] The grounds for judicial review of the award are quite limited. Although the precise terminology varies, under both the FAA and the UAA a court may vacate an arbitral award only if the arbitrator(s) exceeded their powers, or if corruption, fraud, evident partiality, or arbitrator misconduct can be shown.[30] In addition, both statutes authorize a reviewing court to modify an award that on its face contains a material miscalculation or mistake in the description of any person, thing, or property referred to in the award.[31] An award may also be modified where the arbitrators have determined a matter not submitted to them.[32]

In addition to these statutory grounds for vacation of awards, courts have on occasion resorted to more generalized bases for overturning an arbitral award. Several phrases recur in the case law. Thus, there are opinions which suggest an award will not be enforced if it violates an accepted principle of public policy.[33] Other cases indicate an award will not be enforced if the arbitrator acted with "manifest disregard" of the relevant law.[34] Still other cases indicate a willingness to vacate awards that are found

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[26] Robbins v. Day, 954 F.2d 679, 682, 685 (11th Cir. 1992), *cert. denied sub nom.* Robbins v. PaineWebber, Inc. 113 S. Ct. 201 (1992); Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017 (5th Cir. 1990); U.A.A. § 5. *See generally* MACNEIL ET AL., *supra* note 6, §§ 32.1.2, 32.3.1.1; OEHMKE, COMMERCIAL ARBITRATION § 6.8 (1987); RODMAN, *supra* note 15, § 19.1.

[27] *Robbins*, 954 F.2d at 685; State v. P.G. Miron Constr. Co., 512 N.W.2d 499, 503 (Wis. 1994); OEHMKE, *supra* note 26, § 11.9.

[28] United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960); Fahnestock & Co. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991); Associated Constr. Co. v. Moliterno Stone Sales, Inc., 782 F. Supp. 15, 16 (D. Conn. 1992).

[29] 9 U.S.C. §§ 9, 13 (F.A.A. §§ 9, 13) (1994); U.A.A. §§ 11, 14.

[30] 9 U.S.C. § 10 (F.A.A. § 10) (1994); U.A.A. §12.

[31] 9 U.S.C. § 11 (F.A.A. § 11) (1994); U.A.A. § 13.

[32] 9 U.S.C. § 11(b) (F.A.A. § 11(b)) (1994); U.A.A. § 13(a)(2).

[33] *See, e.g.*, Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993); Crosson v. N.Y. State S.Ct. Officers Ass'n., 596 N.Y.S.2d 1007, 1010-11 (Sup. Ct. 1993).

[34] *See, e.g.*, Lee v. Chica, 983 F.2d 883, 885 (8th Cir. 1992), *cert. denied*, 114 S.Ct. 287 (1993); Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994); Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

to be "arbitrary and capricious."[35] By no means, however, would it be accurate to say that all, or even most, courts recognize these nonstatutory grounds. Indeed, even in the relatively uncommon event that a nonstatutory ground for overturning an arbitral award is cited, a statutory basis — typically, that the arbitrator exceeded his or her authority — can usually be invoked as the ultimate legal basis for rejecting the award.[36]

It is a fundamental principle of arbitration law that an award will not be vacated merely because the arbitrator made a mistake of fact or law.[37] Thus, although the precise standard of review may vary from jurisdiction to jurisdiction, it is universally acknowledged that arbitral awards are not easily vacated.[38] This principle is a key attribute of commercial arbitration. It is one of the primary ways of distinguishing arbitration from litigation.[39]

B. Some Unsettled Questions

While the cloth of commercial arbitration certainly remains intact, an examination of the recent case law indicates some fraying around the edges. Issues pertaining to the standard for determining whether a dispute is arbitrable under the parties' contract; the related question of what disputes

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[35] *See, e.g.*, Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1993); Nitram, Inc. v. Industrial Risk Insurers, 848 F. Supp. 162, 166-67 (M.D. Fla. 1994); Wichinsky v. Mosa, 847 P.2d 727, 731 (Nev. 1993).

[36] *See, e.g.*, *Eljer Mfg.*, 14 F.3d at 1256; Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210, 213 (5th Cir. 1993); Advanced Micro Devices, Inc. v. Intel Corp., 20 Cal. Rptr. 2d 73, 77, *review granted and opinion superseded*, 858 P.2d 567 (1993). *See also* Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 866 (6th Cir. 1990).

[37] Marra Constructors, Inc. v. Cleveland Metroparks Sys., 612 N.E.2d 806 (Ohio Ct. App. 1993); J.J.F. of Palm Beach, Inc. v. State Farm Fire Casualty Co., 634 So. 2d 1089 (Fla. App. 1994); Lane v. Liberty Mut. Ins. Co., 599 N.Y.S.2d 101 (1993); Luster v. Collins, 15 Cal. App. 4th 1338, 1344-45 (1993).

[38] *See, e.g.*, Robbins v. Day, 954 F.2d 679 (11th Cir. 1992), *cert. denied sub nom.* Robbins v. PaineWebber, Inc., 113 S. Ct. 201 (1992); Wall St. Assoc. v. Becker, Paribas, Inc., 818 F. Supp. 679 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 845 (2d Cir. 1994); Azcon Constr. Co. v. Golden Hills Resort, Inc., 498 N.W.2d 630, 635 (S.D. 1993); Allied Am. Ins. Co. v. Culp, 612 N.E.2d 41, 43-44 (Ill. App. Ct. 1993); Warner v. Aetna Casualty & Surety Co., 624 A.2d 304, 305 (R.I. 1993).

[39] The most commonly cited reason for the finality of arbitral awards is that arbitration is precisely what the parties bargained for. In exchange for a quicker, less expensive resolution of the dispute, the parties trade away some level of assurance that the correct result on the merits has been reached. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992); McIlroy v. PaineWebber, Inc., 989 F.2d 817 (5th Cir. 1993).

properly may be made the subject of compulsory arbitration; and the appropriate standard of judicial review of arbitral awards have all drawn considerable attention from the appellate courts. It is not surprising that these three questions should dominate the recent case law. For with the increased emphasis (and, at times, insistence) on the use of alternatives to litigation, the volume of commercial arbitration cases has risen dramatically.[40] Given the flexibility and lack of detailed structure of the proceeding itself and the difficulty of obtaining substantive review of the award, it is not surprising to see greater pressure applied at the beginning of the process (arbitrability) and at its conclusion (standards of judicial review of the award). Indeed, it is predictable that if the process itself does not conform to widely understood and accepted rules, the only place where challenges to the process can take place are at its beginning and at its end.

1. Arbitrability

Whether a dispute is subject to arbitration at all (i.e. the issue of substantive arbitrability) is a question frequently litigated. In such instances, the issue is whether the language in the agreement to arbitrate covers the dispute at hand. The initial inquiry centers on who decides questions of arbitrability: the courts or the arbitrator(s)?[41] In general, if the FAA applies, the court will make the determination.[42] If the UAA applies, it is more likely that the arbitrator will make the substantive arbitrability determination, particularly if the language of the agreement to arbitrate is ambiguous.[43]

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[40] The American Arbitration Association (AAA) reported 63,171 new case filings in 1993, an increase of 7% over 1992, and an increase of 59% over 1984. The AAA reported 12,872 "pure" commercial case filings in 1993, not counting securities cases. Although commercial case filings did not increase over 1992 levels, the value of the new commercial case filings rose to $6 billion, an amount almost twice that of 1992. Commercial case filings include both arbitration and mediation claims. Pons, *supra* note 9, at 1. *See also* Segalla, *supra* note 4, at 13.

[41] Questions of procedural arbitrability are generally deemed appropriate for decision by the arbitrator. *See* I.S. Joseph Co., Inc. v. Michigan Sugar Co., 803 F.2d 396, 398 n.1 (8th Cir. 1986) (citing Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 747-49 (8th Cir. 1986), *cert. denied*, 470 U.S. 1141 (1986)).

[42] *Mitsubishi Motors Corp.*, 473 U.S. 614; Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993); Magallanes Inv., Inc. v. Circuit Sys., Inc., 994 F.2d 1214 (7th Cir. 1993); Caudle v. Sears, Roebuck & Co., 614 N.E.2d 1312 (Ill. App. Ct. 1993). *See generally* MACNEIL ET AL., *supra* note 6, § 15.1.4.

[43] Glenn H. Johnson Constr. Co. v. Board of Educ., 614 N.E.2d 208 (Ill. App. Ct. 1993); Orthopedic Physical Therapy Ctr. v. Sports Therapy Ctrs., Ltd., 621 A.2d 402 (Me.

There is a consistent body of case law to guide the courts in deciding issues of substantive arbitrability. The foremost principle is that the intent of the parties, as reflected in the agreement to arbitrate, is determinative of whether a given dispute is subject to arbitration. In determining that mutual intent, the courts are precluded from looking to the merits of the underlying dispute. [44] "[T]he court is limited to ascertaining 'whether the party seeking arbitration is making a claim which on its face is governed by the contract [to arbitrate].'"[45] "[T]here is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular [claim] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[46] The "presumption of arbitrability is overcome only by a definitive showing that the dispute in question is outside the coverage of the arbitration clause."[47]

1993); Gold Coast Mall, Inc. v. Larmar Corp., 468 A.2d 91 (Md. 1983); Portland Ass'n of Teachers v. School Dist. No. 1, 555 P.2d 943 (Or. App. 1976); Layne-Minnesota Co. v. Regents of the Univ. of Minnesota, 123 N.W.2d 371 (Minn. 1963).

[44] PaineWebber, Inc. v. Hofmann, 984 F.2d 1372, 1377 (3d Cir. 1993) ("In resolving the arbitrability of particular claims, however, 'a court is not to rule on the potential merits of the underlying claims,' no matter how frivolous the claims may appear to the court." (quoting AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986))); Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1069 (11th Cir. 1993) (citing Dean Witter Reynolds v. Byrd, 470 U.S. 213, 218 (1985)); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967).

[45] Bristol Farmers Market & Auction Co. v. Arlen Realty & Dev. Corp., 589 F.2d 1214, 1217 (3d Cir. 1978) (quoting United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 568 (1960)). *See also* International Ass'n of Machinists and Aerospace Workers, Inc., AFL-CIO v. Aloha Airlines, Inc., 790 F.2d 727, 731 (9th Cir. 1986) ("When faced with a petition to compel arbitration, a court's role is limited to 'ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.'") (quoting United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1374 (9th Cir. 1984) (quoting *United Steel Workers of Am.*, 363 U.S. at 568)).

[46] *Hofmann*, 984 F.2d at 1377 (quoting *AT&T Technologies*, 475 U.S. at 649, (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960))). *See also* PaineWebber v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990) ("The sole issue is whether it may be said with positive assurance that the [particular] dispute falls outside the scope of the agreement [to arbitrate.]"); S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1524 (7th Cir. 1993) (citing International Ass'n of Machinists v. Fansteel, Inc., 900 F.2d 1005, 1010 (7th Cir. 1990), *cert. denied,* 498 U.S. 851 (1990)).

[47] Costle v. Fremont Indem. Co., 839 F. Supp. 265, 272 (D. Vt. 1993) (citing Associated Brick Mason Contractors of Greater N.Y. v. Harrington, 820 F.2d 31, 35 (2d Cir. 1987)).

"[D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[48]

However, the bias in favor of arbitration is certainly not uniform. For example, the Fourth Circuit Court of Appeals has held that the standard "broad clause" arbitration provision used by the AAA is not of itself enough to resolve questions of arbitrability, unless a clear indication that the dispute at issue was meant to be arbitrated can be ascertained.[49] The fact that a determination of arbitrability is subject to *de novo* review [50] adds a further wrinkle: it makes appeal of such a determination a potential means for delaying the process, while offering a second chance at avoiding arbitration altogether.

2. What Disputes Are Subject to Compulsory Arbitration?

Related to the question of arbitrability is the question of what disputes are appropriate, as a matter of law, for submission to compulsory arbitration. It can be maintained that as a matter of contract *any* dispute may properly be the subject of compulsory arbitration, if that is what the parties agree to. It has never been that simple. There have always been exceptions. For many years, for example, securities fraud claimants could not be forced to arbitrate their claims, even if an agreement to arbitrate disputes had been signed.[51] Nonetheless, spurred by several recent decisions by the Supreme Court, the range of disputes which may be arbitrated is expanding.

Beginning in 1985, the Supreme Court has, in succession, held that claimed violations of the Sherman Antitrust Act,[52] the Racketeer Corrupt

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[48] Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 48 (2d Cir. 1993) (quoting Mercury Constr. Corp. v. Moses H. Cone, 460 U.S. 1, 24-25 (1983) *quoted in* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). *See also Hofmann*, 984 F.2d at 1377 (quoting *AT&T Technologies*, 475 U.S. at 650); Ritzel Communications, Inc. v. Mid-American Cellular Tel. Co., 989 F.2d 966, 968-69 (8th Cir. 1993); Zink v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 13 F.3d 330, 332 (10th Cir. 1993); Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Serv., Inc., 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991); Marchak v. Claridge Commons, Inc., 633 A.2d 531, 535 (N.J. 1993).

[49] Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113 (4th Cir. 1993), *cert. denied*, 113 S.Ct. 2930 (1993).

[50] Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1994); Wheat, First Securities, Inc. v. Green, 993 F.2d 814 (11th Cir. 1993); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1294 (1992).

[51] Wilko v. Swan, 346 U.S. 427 (1953).

[52] 15 U.S.C. §§ 1-7 (West 1973 & Supp. 1994); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

and Influenced Organizations (RICO) Act,[53] and the 1933 and 1934 Securities Acts,[54] as well as charges of illegal age-based employment discrimination,[55] all can be the subject of compulsory arbitration, so long as the parties clearly have agreed to arbitrate these disputes. The fact that the underlying contract was negotiated by parties of unequal bargaining strength, or not negotiated at all, has not proved to be a significant obstacle.[56] Since the Court's 1991 decision in *Gilmer*, both federal and state courts have held that claims of race and gender discrimination with respect to employment can also be submitted to arbitration, if the employer and the employee have agreed to arbitrate them.[57]

When the focus shifts away from antitrust matters, securities fraud, and employment discrimination, however, the picture is much less clear. Courts have in the past two years found claims of unfair trade practice,[58] consumer borrower disputes with an out-of-state lender,[59] and medical malpractice claims[60] not arbitrable, even in the face of an agreement to arbitrate, essentially on public policy grounds.[61] In short, the acceptable applications of commercial arbitration are still being debated.

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[53] 18 U.S.C. §§ 1961-1968 (West 1984 & Supp. 1994); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

[54] 15 U.S.C. §§ 77a-zzz (West 1981 & Supp. 1994); 15 U.S.C. §§ 78a-III (West 1981 & Supp. 1994); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

[55] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[56] As the Court noted in *Gilmer*, "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable . . . this claim of unequal bargaining power is best left for resolution in specific cases." *Id.* at 33. *See also* Allied-Bruce Terminix Co., Inc. v. Dobson, 115 S.Ct. 834, 843 (1995).

[57] *See* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998 (N.Y. 1993), *cert. denied*, 114 S.Ct. 554 (1993); Williams v. Katten, Muchin, & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993); Hull v. NCR Corp., 826 F. Supp. 303 (E.D. Mo. 1993); Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155 (D.N.J. 1992).

[58] Bill Butler Assoc. v. New England Sav. Bank, 611 A.2d 463 (Conn. 1991).

[59] Patterson v. ITT Consumer Fin. Corp., 14 Cal. App. 4th 1659 (1993), *cert. denied*, 114 S.Ct. 1217 (1994).

[60] Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992).

[61] *But see* North American Van Lines v. Collyer, 616 So. 2d 177 (Fla. App. 1993) (concluding that a contract between a moving van line company and a consumer required the arbitration of their dispute). *See also* Allied-Bruce Terminix Co., Inc. v. Dobson, 115 S.Ct.

3. Judicial Review of Arbitral Awards

The issue on which the courts are in greatest disagreement is the exclusivity of the statutory grounds for vacating an arbitral award. A number of courts insist that awards may be overturned if they violate an established principle of public policy.[62] Some courts have held that an award which is in "manifest disregard" of the relevant law must be vacated.[63] Other courts will vacate an award found to be "arbitrary and capricious."[64] In contrast, other courts recognize only the statutory grounds for vacating awards. Thus, the California Supreme Court has held that an arbitration award cannot be vacated or corrected for errors of fact or law,[65] or because 'substantial injustice' will result from the award.[66]

Of the statutory grounds for review, the claim that the arbitrator(s) exceeded their powers seems to be invoked particularity often. The "exceeded authority" standard has application both with regard to the arbitrator's resolution of the merits of the dispute and arbitral remedy orders. For example, in *Advance Micro Devices, Inc. v. Intel Corporation*,[67] the California Supreme Court recently held that the remedy fashioned by an arbitrator does not exceed his or her authority if it "bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator."[68] The Court noted further that the deference due the arbitrator's decision under the "exceeded authority" standard "requires a court to refrain from substituting its judgment for the arbitrator's in determining the contractual scope of those powers."[69] The

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834 (1995). Writing for the majority, Justice Breyer remarked, "states may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revokation or any contract.'" *Id.* at 843 (citing 9 U.S.C. § 2). Breyer went on to state, "[w]hat states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful. . . ." *Id.*

[62] *See* cases collected at *supra* note 33.

[63] *See* cases collected at *supra* note 34.

[64] *See* cases collected at *supra* note 35.

[65] Advance Micro Devices, Inc. v. Intel Corporation, 885 P.2d 994, 1003-05 (Cal. 1994).

[66] Moncrash v. Heily & Blase, 883 P.2d 899, 900 (Cal. 1992). *See also* Marsch v.Williams, 28 Cal.Rptr. 402 (1994).

[67] 885 P.2d 994 (Cal. 1994); McIlroy v. Paine Webber, Inc., 989 F.2d 817 (5th Cir. 1993); Chameleon Dental Prod., Inc. v. Jackson, 925 F.2d 223 (1991).

[68] *Id.* at 996, 1005-06.

[69] *Id.* at 1000.

standard fashioned by the California Supreme Court is derived in substantial part from the law of labor arbitration and the rule that a labor arbitration award which "draws it essence" from the collective bargaining contract is not subject judicial vacation or modification.[70]

An intermediate position of sorts has also emerged on the issue of the appropriate level of judicial scrutiny to be applied to arbitration awards. The Eleventh Circuit Court of Appeals has held that if the arbitral award is silent as to rationale, judicial review is to consist of only one inquiry: was there a "rational basis" for the award?[71] The burden rests with the party challenging the award to refute every possible rational basis for the award.[72] If a rational basis can be established (or even if one possible basis is left unrefuted), judicial review is limited to the grounds contained in the statute. On the other hand, if a rationale is given, judicial review is to encompass both statutory and nonstatutory grounds, including manifest disregard of the law and public policy.[73]

What is the significance of this approach, in light of the prevailing practice of supplying no written opinion in an arbitral award? Many courts have noted, at times with apparent irritation, that without a written award, substantive review is next to impossible.[74] A possible clue to this puzzle comes from yet another case. In *Pacific Gas and Electric Co. v. Superior Court,*[75] the court noted that parties to an agreement are free to contract, if they so desire, for judicial review of the arbitrator's award. The Eleventh

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[70] In United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), Mr. Justice Douglas remarked, "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 597. Twenty-seven years later, Mr. Justice White restated the standard, citing to *Enterprise Wheel & Car*: "As long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 36 (1987). *See generally* Feller, *supra* note 2.

[71] Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993); *see also* Robbins v. Day, 954 F.2d 679 (11th Cir. 1992).

[72] *Brown*, 994 F.2d at 779; *Robbins*, 954 F.2d at 684. The similarity of this approach to the manner in which courts invoke the business judgment rule is apparent here. *See supra* note 1.

[73] *Brown*, 994 F.2d at 779.

[74] *See, e.g., Robbins*, 954 F.2d at 684; Azcon Constr. Co. v. Golden Hills Resort, Inc., 498 N.W.2d 630, 635-36 (S.D. 1993); Feibelman v. F. O., Inc., 604 A.2d 344, 345 (R.I. 1992); Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210 (5th Cir. 1993).

[75] 19 Cal. Rptr. 2d 295, 303-04 (1993).

Circuit's rule thus may provide a shorthand way of achieving that result. If a level of review more rigorous than that of the statutory grounds for vacating an award is desired (or bargained for) the parties might simply agree that the arbitrator(s) will provide a written opinion explaining the award.

4. Other Areas of Disagreement

The power of an arbitrator to award punitive damages continues to divide the courts. In large part, the disagreement is between the New York rule, which does not allow the arbitral award of punitive damages, and the emerging rule under the FAA, which would permit such awards.[76] A secondary, but important, question is the extent to which the New York rule should govern in cases brought under the FAA.[77] The question of arbitrator bias is also unsettled. While all agree that bias is not to be allowed, there remains the problem of the proper test to use: actual bias, or the appearance of bias. [78]

C. Conclusion

The legal framework briefly described above places few restrictions on the commercial arbitration process. Once the parties have voluntarily agreed to submit disputes arising under a contractual relationship to arbitration, the role of the courts is limited to enforcing that agreement and the award that is its result. It is the closed nature of the commercial arbitration process, the

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[76] *Compare* Garrity v. Lyle, Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976) and Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991). *See also* Lee v. Chica, 983 F.2d 883 (8th Cir. 1993).

[77] *See, e.g.*, Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991); Gouger v. Bear, Stearns & Co., Inc., 823 F. Supp. 282 (E.D. Pa. 1993); *Todd Shipyards Corp.*, 943 F.2d 1056. *See generally* MACNEIL ET AL., *supra* note 6, § 36.3.

[78] The standard for vacating an arbitral award on the grounds of bias is "evident partiality," under both the FAA (§ 10(a)(2)) and the UAA (§ 12 (a)(2)). The leading case on the question of arbitrator bias is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), but its teachings have proved difficult to decipher. See the discussion in Dowd v. First Omaha Sec. Corp., 495 N.W.2d 36, 41 (Neb. 1993). Different interpretations have emerged from the case law. Some cases insist on proof of specific facts indicating evident partiality. *See, e.g.*, Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Health Serv. Mgt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992). Other cases require proof of facts that instead create a "reasonable impression of partiality." *See, e.g.*, Pirsig v. Pleasant Mound Mut. Fire Ins. Co., 512 N.W.2d 342 (Minn. App. 1994); *Dowd*, 495 N.W.2d at 41.

fact that once they are contractually committed to it the parties effectively foreclose access to other legal avenues for resolving their disputes, that raises the ante so substantially. Parties to high-stakes commercial disputes that agree to "pay their quarter and take their chance" in arbitration, with no real prospect of correcting an error of procedure or decision that deprives them of the full benefit of their contractual bargain, are not likely to remain patient with the process if they perceive it to be an inferior substitute for litigation.

Thus, the question is presented: is the commercial arbitration process up to the task of providing commercial disputants with a viable alternative to traditional litigation? The first step in answering that question is an examination of the characteristics and the relative attributes and shortcomings of commercial arbitration as it is practiced today.

IV. CONTEMPORARY COMMERCIAL ARBITRATION: THE PRACTICE DESCRIBED

One of the most striking features of commercial arbitration today is its largely unstructured and diverse nature. Unlike civil litigation, which is governed by a body of judicially and legislatively mandated standards pertaining, *inter alia*, to hearing procedure, evidence, appeals, and remedies, commercial arbitration is virtually unregulated. As the preceding review of the legal framework demonstrates, the Federal Arbitration Act, the various state adaptations of the Uniform Arbitration Act, and the case law attendant to those statutes place very few parameters on the commercial arbitration process or the conduct of commercial arbitrators.

A. General Overview

In most instances the commercial arbitration proceeding is governed by the rules of the neutral appointing authority (e.g., the American Arbitration Association (AAA); Judicial Arbitration and Mediation Services (JAMS); Endispute;[79] the National Association of Securities Dealers (NASD); the New York Stock Exchange (NYSE), etc.) that the disputants select to adminster the arbitration tribunal and provide panels of neutrals from which

[79] On June 1, 1994, JAMS and Endispute announced their merger into a single, as yet unnamed organization. Until the merger has been fully effectuated and a new set of arbitration rules promulgated, disputes submitted to either of the predecessor neutral appointing authorities will continue to be administered under the existing JAMS or Endispute Rules. Telephone interview with Jeannine Walker, JAMS (June 16, 1994).

arbitrators are selected. [80] Like the legal framework, the commercial arbitration rules of those neutral appointing authorities are minimalist in nature.

Thus, for example, the AAA Commercial Arbitration Rules[81] constitute only seventeen single-column pages, while the substantive portion of the AAA Supplementary Procedures for Large, Complex Disputes [82] is of three single-column pages. [83] Only a small number of those rules pertain to hearing conduct, and they are very general in nature. The AAA Rules say little about standards for decision or the substantive form or content of the award. The by-words for the pre-hearing and hearing procedures under the AAA Rules are informality, expediency, and cost savings. [84]

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[80] Of course, the parties are free to devise their own mutually acceptable rules for the arbitration proceeding, select an arbitrator without the assistance of a neutral appointing authority, or both.

[81] A.A.A. COMMERCIAL ARBITRATION RULES (1993). Over the years, the American Arbitration Association has been the most well-known of the neutral appointing authorities. Accordingly, its Commercial Arbitration Rules and Supplementary Procedures for Large, Complex Disputes provide a useful conceptualization of the procedural paradigm for contemporary commercial arbitration. Most prominent among the other neutral appointing authorities are the recently merged Judicial Arbitration and Mediation Services (JAMS) and Endispute. As noted above, at the time of this writing, the new, as of yet unnamed, entity had not promulgated the rules for the arbitrations that will be conducted under its auspicies. Accordingly, the comments inserted at various points in the text below as to the alternative approaches to the AAA Rules indicated by the JAMS and Endispute Rules will be based on the exisiting separate rules of those two predecessor organizations.

[82] A.A.A. SUPPLEMENTARY PROCEDURES (1993).

[83] The JAMS Arbitration Rules are four single-spaced pages in length. (on file with *The Ohio State Journal on Dispute Resolution*). The composite (Streamlined Arbitration Rules and Comprehensive Arbitration Rules) Endispute Rules are sixteen single-spaced pages in length. (on file with *The Ohio State Journal on Dispute Journal*).

[84] Consistent with this approach, neither AAA, JAMS, nor Endispute maintain, in a readily accessible format, the data necessary to gain a fuller picture of the nature of contemporary commercial arbitration. For example, in conducting the initial research for this article, the Authors requested but were unable to obtain information characterizing the typical commercial arbitration proceeding conducted under the auspicies of the AAA, JAMS or Endispute (e.g., the average number of hearing days, the average amount in controversy, the average adminstrative fee charged, the average total charge for arbitrator compensation and expenses, or the average time from filing of the claim in arbitration to issuance of the award).

Pursuant to the AAA Rules neither the federal nor state rules of civil procedure, nor the rules of evidence apply. [85] Although the practice appears to be subject to exception, AAA arbitrators generally are not compensated for the first hearing day. [86] To further limit costs, standard AAA practice limits arbitrator study time to one day for every five hearing days. Per diem rates charged by the arbitrators on the AAA Commercial Arbitration Panel generally range from $400 to $1,000.

Under AAA auspices substantive written awards providing insight as to the arbitrator's analysis and mode of decision are the exception. In addition, due to the dispersion of the caseload among a large number of neutrals, and because of the general absence of written awards, there is no reliable mechanism for evaluating the competency and acceptability of commercial arbitrators.

There is nothing necessarily inappropriate about the present open-ended character of the rules and procedures governing commercial arbitration. What is clear, however, is that the exceedingly wide range of discretion afforded commercial arbitrators with regard to hearing conduct and related matters, as well as the form and content of the arbitration award in tandem, results in a wide variation in the current practice of commercial arbitration. To a great extent the tenor and nature of the arbitration proceeding, as well as the fairness and defensibility of the outcomes it produces, depend on the arbitrator and the skills, knowledge, and mindset he or she brings to the table. [87] Given that fact, the examination of contemporary commercial arbitration set forth below will begin with a description of the arbitrators and the current state of the commercial arbitration profession.

B. The Arbitrators

The several neutral appointing authorities do not currently maintain demographic data on the members of their panels in accessible form. [88] For

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[85] A.A.A. COMMERCIAL ARBITRATION Rule 31 speaks to the admissibility of evidence. It provides in relevant part: "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary."

[86] A.A.A. COMMERCIAL ARBITRATION Rule 50 (1993).

[87] *See Securities Arbitration*, *supra* note 12, at 55-59 (1992).

[88] The Authors requested several categories of information from AAA, JAMS, and Endispute regarding the demographic characteristics of the individuals listed on their respective commercial arbitration panels. All of the data requested was reported to be unretrieveable, either on a total panel basis or through random samples of the respective panels. The following types of information were sought:

- the age distribution of the panel members;

that reason and because the information is not available from reliable secondary sources, precise description of the existing corps of commercial arbitrators is impossible. Instead, this discussion of the characteristics of the *circa* 1994 commercial arbitrator and the current state of the commercial arbitration profession will, by necessity, be couched in general, somewhat speculative terms.

Unlike the field of labor arbitration, which has in the last forty-five years become an important dimension of the national labor policy under the Labor-Management Relations Act of 1947,[89] there is no core group of career neutrals that can be identified as constituting the commercial arbitration profession. [90] In large part, commercial arbitration appears to be

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- race, gender, ethnic makeup of the panel members;
- the percentage of panel members who are attorneys;
- the percentage of panel members with prior litigation experience;
- professions from which the nonlawyer panel members are drawn (e.g., engineering, business, etc.);
- average number of years of post-secondary education;
- number of panel members retired or still working full time;
- percentage of working time commited to arbitration (as a neutral and/or as an advocate);
- average (panel-wide) total number of selections (as arbitrator);
- average (panel-wide) number of selections per year;
- number of panel members who have never been selected;
- average (panel-wide) total awards (cases decided);
- average (panel-wide) number of awards per year;
- number of panel members who have never decided a case;
- ranges of per diem/hourly rate charges.

Interestingly, The General Accounting Office of the U.S. Congress (GAO) reported similar problems in obtaining arbitrator demographic information in conducting its recent study of the arbitration of discrimination claims brought by employees of the securities industry under the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) arbitration mechanisms. *See Employment Discrimination, supra* note 12, at 8-9, 23. The GAO reported that NASD claimed to have no information on the demographic makeup of its arbitation panel. The sole source of demographic data on the members of the NYSE arbitration panel proved to be the recollections of the senior staff attorney in the NYSE Arbitration Department. *Id.* at 23.

[89] 29 U.S.C. §§ 141-144 (1988).

[90] That core group of mainstream arbitrators in the union-employer, collective bargaining sphere consists in large part of the 600 or so active members of the National Academy of Arbitrators. Labor arbitrators are elected to membership in the National Academy

a process overseen by individuals who view the work as an avocation, a collateral dimension of their careers. There are very few, if any, full-time commercial arbitrators, in the prime of their professional careers.[91] Instead, the overwhelming majority of commercial cases are arbitrated either by attorneys, college professors, or similarly situated professionals engaged in other full-time occupations, or by former judges, lawyers, and other professionals who are in their retirement years. Despite the dearth of concrete demographic data, the fact that most commercial arbitrators are drawn from the ranks of senior or retired members of the judiciary, the practicing bar, and other professions leaves little doubt that the overwhelming number of practicing commercial arbitrators are white males over the age of 50.[92]

Other than securing placement on the panel(s) of one or more of the neutral appointing authorities or being selected to serve by the parties to arbitration or both, there is no clear career path for those who aspire to be commercial arbitrators. The qualificational standards currently in place, as applied by the several neutral appointing authorities, do not constitute any real credentialing process.[93] Beyond the rudimentary orientation programs of a few days or a week in length provided by the neutral appointing authorities, there is no accepted training or apprenticeship regimen for aspiring commercial arbitrators. There is no professional organization of any real substance, organized by and for commercial arbitrators, that

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of Arbitrators based primarily on their demonstrated, long-run acceptability among labor and management advocates who submit cases to arbitration.

[91] In February of 1994, AAA reported there were no full-time arbitrators on its commercial panel. Letter from Frank Zotto, A.A.A. Associate Vice President, Case Administration, to Stephen L. Hayford (Feb. 1, 1994) (on file with *The Ohio State Journal on Dispute Journal*).

[92] *See* Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?*, ARB. J., Sept. 1993, at 61-65; *Employment Discrimination*, *supra* note 12, at 8.

[93] In his 1988 article describing commercial arbitration under the American Arbitration Association rules, Professor Stipanowich noted, "Unfortunately, AAA panelists vary considerably in experience and ability. It is possible that an individual whose name appears on the AAA panel was appointed to the list on his or her own motion without training or experience with arbitration." Stipanowich, *supra* note 2, at 447-48. Later observers have echoed this criticism. *See, e.g.*, Stephen A. Hochman, *A Bar Association-Sponsored Forum for Arbitration is Needed*, N.Y. L.J., Oct. 22, 1992, at 1. Hochman notes that "over 95% of those who apply to be approved as AAA arbitrators are accepted." *See also* Brunet, *supra* note 11, at 88 (questioning the subject matter expertise of many, if not most, commercial arbitrators). The single apparent exception is the existing JAMS requirement that the arbitrators who serve under its auspicies be former members of the state or federal judiciaries.

provides an identity group, a code of professional responsibility, or a systematic program of professional development for commercial arbitrators.

The fragmented nature of the commercial arbitration profession and the lack of a clear professional identity and shared perspective among those professing to be commercial arbitrators gives rise to tangible questions as to the current process whereby aspiring commercial arbitrators are credentialed and secure placement on the panels maintained by the various neutral appointing authorities. Additional reason for serious concern is found in the lack of a mechanism for verifying the background information provided by prospective arbitrators, the absence of any truly effective means for evaluating the hearing conduct, substantive knowledge and analytical abilities of practicing commercial arbitrators, and the lack of any effective method for providing feedback in that regard to the advocates who make arbitrator selection decisions. [94]

Today, at least in general terms, there is considerable reason to question whether the majority of the individuals constituting the pool from which commercial arbitrators are selected possess levels of subject matter knowledge and adjudicatory skills comparable to those provided by the sitting judges whose place they take. That concern and those attendant to the largely *ad hoc* nature of the arbitrator development process and the wide range of qualifications and abilities reflected in the current pool of commercial arbitrators will be addressed at length in the latter portion of this analysis.

C. The Components of the Arbitral Proceeding

The discussion will now turn to a chronological description and critique of the contemporary commercial arbitration proceeding, set in juxtaposition where appropriate, with a description of the parallel dimensions of traditional litigation in court.

1. Pleadings and Pre-Hearing Motions

The first major distinguishing characteristic of the commercial arbitration process is the comparative simplicity and brevity of the pleadings and pre-hearing stage. In contrast to arbitration, the litigants in civil lawsuits quickly discover there is a long road to be traversed between filing the

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[94] *See Securities Arbitration, supra* note 12, at 55-59. *See also* Brunet, *supra* note 11, at 88. In March 1994, the General Accounting Office (GAO) issued a report on arbitration of employment disputes in the securities industry. The study was critical of the procedures used by the New York Stock Exchange and the National Association of Securities Dealers to select and appoint arbitrators for such disputes. *See Employment Discrimination, supra* note 12.

complaint and having one's day in court. More often than not, there is a barrage of preliminary motions whereby each side compels the other to sharpen, narrow, and consolidate its legal claims and allegations of fact within the confines of existing law. This process is governed generally by Federal Rules of Civil Procedure 7-15[95] (and their state analogs). Resolution of each of these threshold points of contention requires a motion, a response, and a hearing before the trial judge (or a designee).

Following this preliminary jousting, the pre-trial practice in traditional litigation typically moves to a motion(s) to dismiss. This motion, sanctioned by Federal Rule of Civil Procedure 12(b)(6),[96] precedes discovery and serves to test the legal sufficiency of the claims brought by the parties against one another. It ensures that only claims for relief sanctioned by law are advanced to adjudication. The final major pre-trial motion is the motion for summary judgment. This motion, seeking partial or full adjudication of the claims at issue without trial, is sanctioned by Federal Rule of Civil Procedure 56[97] and is a common feature in many civil lawsuits. It is warranted when, at the conclusion of the pre-trial discovery process, there remain no unresolved questions of material fact. In that circumstance, the trial judge acting on the motion for summary judgment applies the relevant law to the undisputed material facts and thereby adjudicates the dispute without trial.

Pre-trial motion practice can result in a number of preliminary skirmishes of questionable value that lengthen the civil litigation process unnecessarily. Nevertheless, at the same time, pre-trial motions do sharpen the inquiry at trial by limiting it only to claims with a clear basis in the law that center on disputed material facts. In addition, operation of the notice pleading mechanism results in the litigants, counsel, and the trial judge entering the trial phase fully informed as to the essential nature of the legal claims and factual allegations at issue.

In a manner analogous to traditional litigation, the commercial arbitration proceeding commences with the filing of the moving party's (claimant's) demand for arbitration, setting forth a concise description of the facts pertinent to the underlying dispute and a description of the relief the claimant seeks. [98] Subsequently, the respondent in arbitration files an answer to the claimant's submission, taking issue with any disputed factual allegations, setting forth any defenses, and articulating any counterclaims against the claimant that may arise from the subject controversy. This

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[95] FED. R. CIV. P. 7-15.

[96] FED. R. CIV. P. 12(b)(6).

[97] FED. R. CIV. P. 56.

[98] *See* A.A.A. COMMERCIAL ARBITRATION Rule 6(a); *see also* ENDISPUTE COMPARATIVE ARBITRATION Rule C-1.

pleadings process is largely mechanical and does not require any active intervention by the arbitrator. In fact, the pleadings process is usually complete before the arbitrator is selected.

There is no formal analog in commercial arbitration to the pre-trial motion practice in traditional litigation. This characteristic of the process accounts for a substantial portion of the cost and time savings that can be realized in arbitration. Rule 10 of the AAA Commercial Arbitration Rules does provide for pre-hearing proceedings, including a "preliminary hearing" However, Rule 10 does not expressly contemplate pre-hearing motions addressing the form and content of the pleadings, questions of proper parties and jurisdiction, or attempts to avoid a hearing by achieving dismissal as a matter of law or through an adjudication based on undisputed facts. [99]

Rule 4 of the AAA Supplementary Procedures for Large, Complex Disputes does speak to a more extensive preliminary hearing dealing with, among other matters: service by the parties on one another of detailed statements of claims, damages, and defenses; specification of the issues before the arbitrator; and stipulations of fact. Even though this proceeding is labeled a "preliminary hearing," on its face, Rule 4 does not contemplate any form of adjudication by the neutral in the nature of a motion to dismiss or a motion for summary judgment. In the same manner, the emphasis of the relevant pre-hearing portion of the Endispute Comprehensive Arbitration Rules is on the submission of claim, answer, and counterclaim. [100]

The omission of a surrogate for pre-hearing motion practice from the existing framework for commercial arbitration does not mean the concerns underlying that dimension of traditional litigation are not at times present in commercial arbitration. Rather, the Authors believe this circumstance is due to the fact that, to date, the parties and their attorneys generally have been willing to forego pre-hearing motion practice and present their entire cases at hearing. This is likely to continue to be the case in the commercial disputes submitted to arbitration that present relatively simple questions of law (and contract) and application of law to fact.

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[99] The sole pre-hearing adjudication frequently requested in commercial arbitration is in the form of a claim that all or a portion of the matter in dispute is procedurally or substantively inarbitrable. Typically, such claims submitted to the arbitrator are deferred for decision until the issuance of the award.

[100] JAMS Rule 5.C grants the arbitrator authority to establish an informal procedure to "rule on dispositive motions." JAMS confirms this Rule empowers the arbitrator to hear and decide motions analogous to the motion to dismiss and the motion for summary judgment. Telephone interview with Jeannine Walker, JAMS (July 6, 1994).

However, as larger numbers of more complex cases are submitted to arbitration, arbitrators will find themselves frequently confronted with the type of complicated questions of law and application of law to fact that give rise to the pre-trial motions in traditional litigation. These cases seldom turn on simple questions of contract interpretation. Rather, they typically involve numerous and interrelated claims based in common law doctrine or statutory law, or both. Consequently, questions of law and mixed questions of law and fact are often crucial determinations that competent adjudication requires to be made in some fashion, tacitly or expressly, by the arbitration tribunal.

Motions to sharpen the pleadings and to more clearly define the issues to be arbitrated and/or to ascertain the proper parties to an arbitration are not particularly problematical. If nothing else, the parties can alert the arbitrator to these matters, and even argue them before the arbitrator at a preliminary hearing, the arbitrator deciding them at that point or, if feasible, reserving judgment until the post-hearing deliberation stage. [101] In contrast, a strong argument can be made that in light of the emphasis placed on simplicity, expediency, and expense reduction, motions to dismiss and summary judgment motions are inappropriate in arbitration. The questions of law and application of law to facts underlying those two motions are fair game for argument at the closing of the proceeding, with decision being reserved until the award stage.

Balanced against this assertion is the claim that in arbitration, like litigation, critical threshold questions of law should be resolved definitively and on the record. Surely, doubt in the minds of the parties and their attorneys as to whether the arbitrator understood, and adequately dealt with, the questions of law and application of law to facts underlying the motion to dismiss and the motion for summary judgment would not bode well for the long-run viability and acceptability of commercial arbitration as an adequate substitute for traditional litigation. It is the Authors' belief that dialogue is called for here to ascertain the value of permitting the parties to submit these claims to arbitrators in some fashion, at some point in the proceedings, and to ensure that they are adequately addressed.

2. *The Role and Nature of Discovery*

As with most all of the dimensions of commercial arbitration, it is difficult to generalize as to the extent and nature of pre-hearing discovery.

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[101] The Authors' arbitral experience provides anecdotal evidence for the assertion that these two types of motions are occasionally advanced and decided in complex commercial arbitration cases today.

The only reference to pre-hearing discovery contained in the AAA Commercial Arbitration Rules is found at Rule 10 which addresses the Preliminary Conference. Rule 10 authorizes the arbitrator to "establish . . . the extent of and schedule for the production of relevant documents and other information, [and to establish] the identification of any witnesses to be called." Rule 5(b)-(d) of the Association's Supplementary Procedures for Large, Complex Cases grants the arbitrator(s) authority to: direct an exchange of documents, exhibits, and information; limit the nature and extent of discovery; and order the deposition of, or the propounding of written interrogatories to a person possessing material knowledge if that person will not be available to testify at the arbitration hearing. In addition to these matters, Endispute's Comprehensive Arbitration Rule C-13 speaks directly to interrogatories, [102] document exchange, [103] expert witnesses, [104] and the parties' continuing obligation to provide one another with documents they rely upon to supplement their post-pleading responses.[105]

The discovery-related promulgations cited above contemplate a pre-hearing discovery process that focuses on the production of documents and data. Depositions and written interrogatories are accorded a lower level of significance, generally being deemed warranted only if the deponent or the subject of the interrogatories is not able to testify at the hearing, or if the party seeking to depose a hostile witness can convince the arbitrator of a reasonable need for the deposition(s).

This is a substantial departure from traditional litigation where one typically proceeds to trial having fully previewed and tested the testimony of the witnesses who will be called by the opposing party. Of course, by placing the testimony of potential witnesses on the record at an early date depositions also serve as a valuable honesty check on those who are actually called to testify. On the other hand, because such a large portion of the

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[102] ENDISPUTE COMPARATIVE ARBITRATION Rule C-13.2. This rule provides for ten interrogatories (without subparts) by the Responding Party within ten days of the service of the Response to Claims (the Answer) or the Response to Counterclaims.

[103] ENDISPUTE COMPARATIVE ARBITRATION Rule C-13.3. This rule, entitled "Document Exchange," states: "Within seven (7) days after the service of the Response to Claims or Response to Counterclaims, the Parties will provide each other copies of all documents in their possession or control on which they will then rely in support of their positions."

[104] ENDISPUTE COMPARATIVE ARBITRATION Rule C-13.4. This rule, entitled "Experts" states: "Within seven (7) days after the service of the Response to Claims or Response to Counterclaims, the parties will provide to each other the names and addresses of experts who may be called upon to testify or whose report may be introduced at the Arbitration hearing."

[105] ENDISPUTE COMPARATIVE ARBITRATION Rule C-13.7. This rule further precludes the introduction at the arbitration hearing of documents not previously provided to the opposing party, unless the parties mutually agree.

expense and delay of traditional litigation is the result of the deposition process, the limitations contemplated by the above-discussed AAA and Endispute Rules are understandable. Whether the litigators who now find themselves presenting cases in arbitration will, over time, conclude that the lack of comprehensive pre-hearing depositions is a significant handicap or an acceptable tradeoff for more expeditious, less expensive adjudication remains to be seen.

Because of the very obtuse nature of the discovery-related rules in commercial arbitration, the arbitrator is left in virtual complete control of the process, with little guidance other than general admonitions like that appearing in Rule 5(b) of the AAA Supplementary Procedures for Large, Complex Disputes that rulings are to be "consistent with the goal of achieving a just, speedy and cost-effective resolution" of the matter in controversy. [106] Undoubtedly, many arbitrators with substantial litigation experience are comfortable turning to Federal Rules of Civil Procedure 26-37 as a *de facto* basis for discovery-related rulings, particularly in complex cases.

Nevertheless, in light of the lack of concrete guides to arbitral action in the formal rules governing commercial arbitration, a key concern must be the degree of consistency in discovery-related matters across proceedings and among arbitrators. Wide disparity in the amounts and types of discovery permitted would be a cause for substantial concern. Because of the dearth of hard, reported data as to the extent and nature of discovery being permitted in commercial cases and the satisfaction of advocates with the current practice in that regard, both dialogue and empirical research are called for here. All of this inquiry must center on ascertaining the point of optimal tradeoff (diminishing marginal returns) between the expense and delay in adjudication that can result from excessive or vexatious discovery and the advantages of proceeding to hearing with the full knowledge of the factual underpinnings of the opponent's case and the objective assessment of the relative strength of one's own case that adequate discovery can help produce.

3. The Pre-Hearing Conference

Although it is difficult to determine the frequency with which substantive pre-hearing conferences are conducted in commercial arbitration cases, it does appear that such conferences are not uncommon.[107] The matters typically dealt with in the pre-hearing conference are largely ministerial in nature.

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[106] A.A.A. SUPPLEMENTARY PROCEDURE Rule 5(b) (1993).

[107] *See, e.g.*, Stipanowich, *supra* note 2, at 463.

Rule 10 of the AAA Commercial Arbitration Rules speaks to pre-hearing proceedings ("Administrative Conference, Preliminary Hearing, and Mediation Conference") and contemplates that they will address matters like specification of the issues to be decided, stipulations of fact, identification of witnesses, and resolution of document production matters. Rule 10 contemplates that the pre-hearing administrative conference will be conducted by an AAA official, typically the administrator assigned to the particular case. Rule 10 and Rule 4 of the Supplementary Procedures for Large, Complex Disputes further provide for a preliminary hearing conducted by the arbitrator which deals, *inter alia*, with case management matters pertaining to discovery, fact stipulations, citation of legal authorities, marking and exchange of exhibits. [108]

The above-described nature of the typical pre-hearing proceeding in commercial arbitration fails adequately to contemplate two important purposes served by the pre-trial conference in traditional litigation. First, the pre-trial conference enables the judge who will preside at trial to assess whether, and to ensure that, the parties and their attorneys are prepared to proceed, the issues are squarely joined, and the rules of engagement at trial are understood. This provides layperson litigants with a valuable orientation as to the nature, rigor, and extent of the fact-finding process they will face at trial. In addition, the judge can use the pre-trial conference as a vehicle for addressing in a preemptive fashion many matters pertaining to the admissibility of evidence, authenticity of documents, remaining discovery-related disputes, and the like. By skillfully managing the pre-trial conference, the presiding judge can do much to minimize surprise and logistical problems at trial.

Second, the pre-trial conference also allows the judge who is so inclined to encourage the parties, often in a forceful manner, to explore all possible avenues of settlement, short of trial. The "mediation" that frequently transpires at the pre-hearing conference can give the parties and counsel a sense of the judge's early evaluation of the relative merits of their respective cases and a preview of what they can expect from the bench if trial commences. This final opportunity at settlement, glossed by the reality and uncertainty of impending trial, occurs at a time and within a context that are optimally conducive to settlement. Handled adroitly by a judge who is also an effective mediator, this last-chance settlement opportunity is a most valuable aspect of the traditional litigation model.

Both of these elements of the pre-trial conference in traditional litigation are missing in most contemporary commercial arbitration proceedings. The pre-hearing conference is typically handled by a case administrator or case manager who is not an arbitrator and who will have no

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[108] *See* ENDISPUTE COMPARATIVE ARBITRATION Rule C-6.

involvement in the substantive dimensions of the case. Thus, the involvement of that administrative official in the pre-hearing conference does little to ensure an orderly and effective start to the actual arbitration hearing. Further, there is no guarantee that the manner in which disputed issues are resolved at the pre-hearing conference by the case administrator or case manager employed by the neutral appointing authority will set the rule at hearing.

Important as this first group of concerns may be, the Authors assert that the lost opportunity for a meaningful, forceful mediation effort represents a much more substantial omission. AAA Commercial Arbitration Rule 10 does advise the parties that, with their consent, AAA will facilitate a mediation effort by a person other than the arbitrator. Rule 2(c) of the AAA Supplementary Procedures for Large, Complex Disputes states that during the Administrative Conference, held between the parties and the AAA official administering the tribunal prior to selection of the arbitrator, mediation and other forms of non-adjudicative dispute resolution methods will be considered.[109] In addition, Rule 4 (g) provides that "the possibility of mediation or other non-adjudicative methods of dispute resolution" may be discussed at the preliminary hearing conducted by the arbitrator.[110]

There is no generally available empirical evidence to indicate how often and to what degree of effectiveness this dimension of the AAA Rules is implemented. Given the widely-reported success of the experiments with court-directed mediation in the several states,[111] there can be little doubt that a pre-hearing effort at mediation is well-advised in the majority of commercial arbitration cases. The Authors assert the absence of a mechanism for making mediation a *pro forma* part of the process of commercial arbitration, a precursor to the formal, adversarial arbitration proceeding, is a serious void in the current mechanism.

The key to ameliorating this omission would be convincing the parties of the utility and the cost effectiveness of a pre-hearing mediation effort. In traditional litigation, the trial judge who is inclined to mediate can easily propel the parties to do so within the context of the pre-trial conference. In arbitration, this is a more difficult task. Currently, in that alternative forum,

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[109] A.A.A. SUPPLEMENTARY PROCEDURES Rule 2(c) (1993).

[110] A.A.A. SUPPLEMENTARY PROCEDURES Rule 4(g) (1993).

[111] Several states have experimented with or have adopted the use of court-ordered mediated settlement conferences. Studies of such programs have been generally favorable. Florida has the most widely known program. For a discussion of the Florida program, see James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); KARL D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT (Florida Dispute Resolution Center, Tallahassee, Florida 1990).

there is no effective substitute for the forceful championing of mediation that can be provided by the trial judge (or the mandate of mediation in some jurisdictions found in legislation or judicial rule). This void must be filled.

Dialogue is called for on the question of whether and how in commercial arbitration an effective means can be developed for entreating the parties to enter into a meaningful mediation effort prior to proceeding to the arbitration hearing. The dialogue also should center on the parallel concerns of the timing of the inquiry as to mediation and the propriety of the arbitrator serving as the mediator.[112]

4. Hearing Advocacy Tactics and The Rules of Evidence

One of the primary selling points for the commercial arbitration alternative to traditional litigation is its relative simplicity of procedure and substance. At hearing, this characteristic is reflected by the absence of rigid standards for the admission of evidence. Rule 31 of the AAA Commercial Arbitration Rules states that "conformity to legal rules of evidence shall not be necessary."[113] Instead, the arbitrator is instructed to judge the relevance and materiality of the proffered evidence. Rule 31 does not expressly establish relevance or materiality as criteria for the admissibility of evidence.

Two somewhat contrasting approaches are indicated by the evidence-related rules of JAMS and Endispute. JAMS Rule 6.E. "Presentation of Evidence" states in relevant part:

> Judicial rules relating to . . . admissibility of evidence will not be applicable in this proceeding. Any relevant evidence, including hearsay, shall be admitted by the arbitrator if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law.[114]

Endispute's Comprehensive Arbitration Rule C-17.2 "Evidence" provides in relevant part:

> The Arbitrator will consider evidence that the Arbitrator finds is relevant and material to the dispute, giving the evidence such weight as the Arbitrator determines is appropriate. The

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[112] The advisability of arbitrators serving as mediators is discussed in a subsequent portion of this analysis.

[113] A.A.A. COMMERCIAL ARBITRATION Rule 31 (1993).

[114] JAMS ARBITRATION RULES, PRACTICE & PROCEDURE 6.E.

> Arbitrator may be guided in that determination by judicial rules of evidence; however, conformity to the judicial rules of evidence is not required, except that the Arbitrator shall apply the law relating to privileges and work product.[115]

Despite the fluid nature of the evidentiary standards in commercial arbitration, the Authors' collective experience indicates that litigators are seldom able or willing to abandon the standard jury trial *modus operandi*, including the compulsion to continually test the boundaries of the rules of evidence applicable in court while strenuously challenging the same maneuvers by opposing counsel. Generally, admonitions from the arbitrator to counsel to remember that rigid adherence to the rules of evidence is not necessary (because the case is not being presented to a jury of laypersons) go unheeded. At times this adherence to traditional jury trial tactics can result in a highly dysfunctional and unnecessary extension of the proceeding, and a significant diminution in arbitral attention span. It also leads to the application of a wide range of *de facto* evidentiary standards at hearing, depending in large part on the proclivities and the decisional consistency of the presiding arbitrator.

The roadblocks to expeditious adjudication and the inconsistency in *de facto* evidentiary standards that frequently arise at hearings are troubling and indicate a need for a careful scrutiny of this key dimension of the commercial arbitration process. Litigators, arbitrators, and neutral appointing authorities are obliged to confront this reality and openly and thoughtfully debate the utility of the current rudimentary evidentiary standards. If a consensus emerges in favor of a simplified evidentiary standard, it needs to be more clearly defined and attorneys and arbitrators alike must deem themselves obliged to abide by it. If the result is general agreement that something more than the existing evidentiary framework is called for, new standards need to be drafted that fully contemplate the presence of an expert adjudicator who need not be shielded in the same manner as a lay jury.

D. The Dual Roles of the Arbitrator and the Arbitral Decision-Making Process

In commercial arbitration there is no separation of the roles of identifier of the law and finder of fact/applier of law to fact. Like the judge in a bench trial, the arbitrator mutually selected by the parties serves both functions. Unlike a jury or bench trial, the decision process of the adjudicator in a commercial arbitration case, including formulation of an appropriate

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[115] ENDISPUTE COMPARATIVE ARBITRATION Rule C-17.2.

remedy, is not segmented in any way, is almost always completely off the record, produces a result that is unaffected by precedent, and is not subject to review or appeal. As with the several other dimensions of the commercial arbitration process noted previously, in this scenario the fairness of the procedure and the accuracy and correctness of the outcome is left entirely to the arbitrator to ensure.

Juxtaposition of this characteristic of commercial arbitration with the multiple on-the-record decision points and devices intended to ensure accurate and correct decision making present in conventional litigation makes for a stark contrast. Thus, in commercial arbitration there typically are no on-the-record rulings on pre-hearing motions to dismiss, motions for summary judgment, or jury instructions that oblige the arbitrator to reveal the law (or contract language) and interpretation thereof, or the facts as the arbitrator believes them to be. At the same time there are no devices, like the motion for judgment as a matter of law, that provide an opportunity for the parties to challenge the factual determinations of the arbitrator or the arbitrator's application of the relevant law or contract language to the facts. The shroud enveloping the decision process of the commercial arbitrator is completed by the dominant practice disfavoring any form of substantive analysis--findings of fact or interpretation/application of law--in the written arbitration award.

This state of affairs creates an irony that seems lost on many of those who advocate the minimalist, no-substantive-written-analysis model of commercial arbitration. If one accepts the premise that parties and the attorneys who represent them are concerned that their cases be resolved based on a correct identification of the controlling law, accurate findings of facts, and a proper application of that law to the facts, the inability to discover how the arbitrator decided these matters presents reason for pause and a clear focal point for further discourse.

As observed earlier, the Authors are convinced that neither commercial arbitration nor the parties would be well served by introduction of a complex web of pre-hearing and post-hearing motion practice. Nevertheless, a substantial question remains as to whether litigants and litigators, who have a choice between the civil litigation process, replete with its full array of procedural and substantive due process protections, on-the-record decision making (at least with regard to questions of law), and checks on accuracy, will continue to be willing to contractually commit themselves to an alternate procedure that provides none of the same.

This is an issue that requires serious, thoughtful examination. The Authors submit that the debate must address the utility of written awards wherein the arbitrator reveals, at least in summary form, the law identified as controlling, the key findings of fact, and the manner in which the relevant law was applied to the facts. The focal point for dialogue is

whether, over the long run, parties and the attorneys who represent them will be willing to utilize an alternative adjudicatory system that provides no insight as to the manner in which such critical issues have been resolved in the course of reaching the final adjudicative decision. A parallel consideration for discussion is what significance, if any, the parties and counsel attach to being denied an important means (the written award) for evaluation of the arbitrator's knowledge of the relevant substantive law and ability to apply that law to the facts.

E. Post-Award Appeals for Vacation or Modification

Because it has been addressed in the preceding analysis of the relevant law, the relative immunity of commercial arbitration awards from judicial vacation or modification on the merits need not be dwelt on here. Pursuant to the widely-accepted majority rule, with the exception of the very narrow grounds set forth in the Federal Arbitration Act and its state analogs (none of which go to the merits of the arbitrator's award in resolution of the dispute) the parties to a commercial arbitration proceeding are generally stuck with the result it produces.

The only guarantees of procedural fairness are the rudimentary standards of Section 10 (a)-(c) of the FAA which provide relief from only the most blatant and obvious transgressions by the arbitrator resulting in prejudice to the rights of a party. As to the merits of a dispute submitted to arbitration, the sanctity of the arbitration award leaves the parties with no avenue for challenging the correctness of the arbitrator's interpretation and application of the relevant contract language and the applicable law. Thus, in arbitration the doctrines of *stare decisis* and *res judicata* cannot be enforced. In addition, there is no means for ensuring that the award is based on an accurate reading of the facts at issue.

This circumstance stands in stark contrast to the multiple checks built into the traditional litigation model that serve to minimize the possibility of a misidentification of the relevant law by the trial judge or a nullification or serious misapplication of the relevant law by the jury, or both. Assurance that the trial judge will correctly identify the controlling law is provided by the right to appeal any rulings on motions to dismiss, motions for summary judgment, and the like, as well as instructions to the jury that the appellant believes reflect an improper reading of the controlling law.

In addition, the Federal Rules of Civil Procedure provide the trial judge with certain devices for over-riding the jury in its task of finding the material facts and applying the controlling law to those facts. Thus, a party can move for a judgment as a matter of law, as contemplated by Federal

Rule 50(a)[116] at the close of all the evidence (traditionally referred to as a motion for a directed verdict). If such a motion has been made and denied, the party can renew the motion for judgment as a matter of law after an adverse verdict is returned by the jury[117] (traditionally referred to as a motion for judgment not withstanding the verdict (JNOV)). In either case, the standard for judgment as a matter of law is the same.[118] Judgment as a matter of law is warranted if the trial judge, after considering the evidence supporting the non-movant's case and after drawing all reasonable inferences from the evidence in the non-movant's favor, concludes that a reasonable jury could not find for the non-movant.[119]

The probability of a successful effort to take the case away from the jury by the judgment as a matter of law device is not high. Nevertheless, it provides an important fail-safe mechanism whereby the trial judge can guarantee the integrity of the jury's process of fact finding and application of law to facts, and thereby further ensure an accurate and correct result.

If a party believes that the trial proceeding itself is so rife with serious errors of procedure or substance, attorney, party, or juror misconduct, or other occurrences so prejudicial to its case as to render the trial unjust, it may enter a motion for a new trial. This motion is sanctioned by Federal Rule 59(a)-(c).[120] It is granted only in particularly extraordinary situations. Nevertheless, the motion for a new trial does provide litigants with one final, catch-all basis for seeking a re-adjudication of their case if they believe they have been denied a fair adjudication.

The final post-verdict motions available to the parties in traditional litigation permit challenges to the magnitude of the jury's award of damages. Thus, defendants facing what they believe to be an excessive compensatory and/or punitive damages award can petition the court for remittitur seeking a reduction in that award, typically within the context of a motion for a new trial.[121] In an analogous manner, in the state courts, a plaintiff that has prevailed at trial but nevertheless contends the jury's award of damages is inordinately low may petition the court for addititur seeking an enhancement of the remedy directed by the jury.[122]

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[116] FED. R. CIV. P. 50(a).

[117] FED. R. CIV. P. 50(b).

[118] FLEMING JAMES ET AL., CIVIL PROCEDURE § 7.30 n.16 (4th ed. 1992).

[119] Galloway v. United States, 319 U.S. 372 (1943). *See also* JAMES ET AL., *supra* note 118, § 7.30 nn.20-21.

[120] FED. R. CIV. P. 59(a)-(c).

[121] *See* JAMES ET AL., *supra* note 118, § 7.29.

[122] *See id.* The use of addititur in the federal courts has been deemed to abridge the Seventh Amendment and is therefore proscribed. Dimick v. Schiedt, 293 U.S. 474 (1935).

The devices discussed above furnish the parties in the traditional litigation forum with substantial assurances that if a miscarriage of justice, or even an innocent mistake occurs at trial, there will be adequate opportunity to seek redress before a final judgment is entered.[123] Because the courts are generally precluded from engaging in any form of substantive review of the arbitrator's interpretation and application of relevant contract language and law or to review in any significant way the manner in which the hearing was conducted by the arbitrator, this protection is missing in commercial arbitration. Clearly, this state of affairs greatly enhances the risks inherent in unskilled conduct of the hearing and undisciplined analysis of the merits by the arbitrator.

It goes without saying that arbitrators are duty-bound to resist the temptation, raised by the absence of an effective appeals device, to discount questions of procedure raised at the hearing, or to shortcut the analytical process in deciding the cases before them. Of more importance is the question of whether, over the long run, parties and their attorneys will continue to be willing to commit themselves to a binding, no-appeals dispute resolution process whose adjudicators are not required to articulate their reasons for decision or to reveal the analysis that leads to decision.

Because they have no desire to add to overcrowded civil court dockets, the federal and state judiciaries and their legislative counterparts are not likely to change the prevailing rule precluding appeals of the merits of commercial arbitration awards. This reality provides further support for the Authors' prior assertion as to the need for discourse on the question of the advisability and utility of substantive written awards and/or other on-the-record decision points (e.g., through the decision of pre-hearing motions) that provide the parties and their attorneys with insight as to the manner in which the arbitrator has resolved key factual issues, identified and interpreted the relevant law, and applied that law to the facts.

F. Conclusion

The preceding description of contemporary commercial arbitration reveals several dimensions of the current process that may limit its long-run viability as a widely-employed substitute for traditional litigation. The successful evolution of commercial arbitration will require that each of these matters be fully and thoughtfully debated and resolved. In order to provide a concrete starting point for this dialogue as to the proper future direction and character of commercial arbitration, in the next two Sections the Authors will articulate their vision of the commercial arbitration process at

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[123] *See* JAMES ET AL., *supra* note 118, § 12.8.

maturity and the archetype of the commercial arbitrators who will be at the center of that process and the key to its long-run viability.

V. COMMERCIAL ARBITRATION AT MATURITY: A PROPOSED MODEL

A. Introduction

It is the Authors' belief that the institution of commercial arbitration is in need of retooling. Many of the dimensions of the existing mechanism do not adequately contemplate the emerging new reality of alternative dispute resolution and the demands that reality will place on the arbitration process and arbitrators. Commercial arbitration must be brought to a new, heightened level of rigor and sophistication of the nature required by the increasingly complex and significant disputes it is being routinely called upon to resolve.

If commercial arbitration is to provide a viable, acceptable alternative to adjudication in the state and federal courts, it must become a more mature, more righteous process, guided by an identifiable corps of highly competent, sophisticated true neutrals. Those neutrals must consistently demonstrate to the parties, and the attorneys who represent them, that they are capable of producing thoughtful, well-reasoned results within the context of a procedurally and substantively fair adjudicatory framework.

Although a certain degree of specialization is inevitable and well-advised the Authors contend that commercial arbitration should be viewed holistically, rather than as consisting of a number of separate, discrete fora (securities, construction, employment, etc.). The practice of commercial arbitration must come to be seen as a singular profession, centered on a uniform model of process, outcomes, expectations, and neutral competencies. Otherwise, commercial arbitration will not fulfill its promise and the expectations placed on it by those who advocate its widespread use.

B. The Essential Characteristics of the Mature Commercial Arbitration Model

The Authors believe the dialogue they advocate must focus on developing a commercial arbitration mechanism that reflects the following characteristics:

1. It will assure consistency across proceedings and among arbitrators aimed at the goal of making the arbitration of

commercial disputes a "business as usual" proposition, as opposed to the major event that is the typical law suit.

2. It will facilitate more skillful, expert administration of the overall process focused on the goal of ensuring that commercial arbitration becomes a consistent, predictable, and time/cost effective process that can be relied upon to produce accurate, correct, and comprehensible results.

3. It will encourage the parties to match the structure of the arbitration tribunal with the particular dispute at issue and to make an informed, rational selection of the arbitrator(s).

4. It will provide for adequate pre-hearing discovery and notice pleading without unnecessarily extending the time, expense, and bother required.

5. It will establish a mechanism for ensuring that the parties fully explore and carefully consider the advisability of a pre-arbitration mediation effort.

6. It will propel litigators to take full advantage of the expert adjudicator by avoiding the use of jury trial tactics and related histrionics, and minimizing the intramural hostility that often arises between opposing counsel.

7. It will strike an appropriate middle ground regarding the rules of evidence and hearing procedure that fully contemplates (and takes advantage of) the skills and adjudicatory expertise of the experienced commercial arbitrator.

8. It will give the parties an adequate range of options pertaining to the award/decision stage of the arbitration proceeding, particularly with regard to the parties' preference for a full-blown analysis and award versus a simple "thumbs up or down" decision.

In the commentary below the Authors will set forth their thoughts as to the steps necessary to ensure that, at maturity, commercial arbitration satisfies each of these criteria.

C. The Key Components of the Mature Commercial Arbitration Model

1. Structure of the Arbitration Tribunal

The Authors contend that the efficacy and cost effectiveness of the commercial arbitration mechanism can be substantially enhanced if, at the front-end of the process, the parties make a deliberate, thoughtful decision as to the manner in which the arbitration tribunal is structured. More often than not in the current practice the parties accept whatever format is advocated by the neutral appointing authority. Although the AAA, JAMS, and Endispute frameworks all presume a single-arbitrator format,[124] the Authors' experience indicates that under the AAA procedures there is a *de facto* predisposition toward use of a three-neutral arbitrators configuration.

There is nothing inherently wrong with either the single-arbitrator or the three-neutral arbitrators format. Nevertheless, the Authors maintain that the parties and counsel should be given a clear opportunity and be encouraged to make an informed, thoughtful choice of the tribunal structure most appropriate to the dispute at hand. In the discussion below, the relative attributes of the three major variations of the arbitration tribunal are enumerated.

There are certain, obvious advantages and disadvantages to each option. The single-arbitrator framework offers a clear cost advantage over the multiple-arbitrator schemes. In addition, logistical matters pertaining to arbitrator selection, scheduling of hearing dates, and the like are greatly simplified under a single neutral format. Finally, if the single arbitrator has a proven track record as a neutral and the parties are familiar with the arbitrator's hearing conduct, analytical abilities, and other attributes, the predictability of the arbitral experience is greatly enhanced, and the prospect of unpleasant surprise once the arbitration tribunal is impaneled is minimized.

On its face, the single arbitrator variant seems most appropriate for less complex, lower-stakes disputes, where there is little risk that the arbitrator's decision process will be confused or misdirected. In such cases there is little concrete gain to be realized by paying three arbitrators to complete a task the parties and their counsel are confident can be effectively handled by a single neutral.

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[124] *See* A.A.A. COMMERCIAL ARBITRATION Rule 17 (1993); ENDISPUTE COMPARATIVE ARBITRATION Rule C-12.1.

The three-neutral arbitrator format offers the benefits to be gained from the perceptions and pooled judgment of multiple objective adjudicators.[125] At the same time, the fact finding process and the analysis of the merits can benefit further from the routine inclusion of at least one non-lawyer arbitrator who may also be an expert in the subject matter of the particular controversy. On the downside, the three-neutral arbitrator configuration brings with it tripled cost for arbitrator per diem charges and expenses, as well as increased scheduling and related logistical difficulties.

A second variant of the three-arbitrator option that is seldom considered in commercial arbitration is the use of a tripartite panel composed of a single neutral chair and two advocate arbitrators, each representing the respective interests of the party that selects them as arbitrator. The use of advocate arbitrators does little to enhance the objective, neutral evaluation of the merits of the case. The parties must rely on the abilities and judgment of the neutral chair in that regard. In exchange for the attribute of pooled, multiple judgment by three neutrals, the tripartite panel format significantly enhances the probability that the award and the deliberative process that produces it will be founded on an accurate reading of the facts and a full and correct grasp of the respective arguments of the parties. Ensuring that the neutral chair achieves both is the role of the advocate arbitrator, during the hearing and the deliberative sessions that follow which result in the award.[126]

The sharpening of the arbitrator's analysis that can be facilitated by the tripartite format holds substantial promise for enhancing the rigor,

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[125] The analogy to civil appellate practice, in which appeals are typically heard by a panel of at least three judges, is worth noting. As the Court of Appeals of New York has remarked:

> The right to have disputes adjusted by several rather than one arbitrator is not to be lightly regarded. The widespread practice of parties to arbitration agreements of making provision for those rights indicates the value placed upon them. Our appellate systems are a result of the general view that there is less possibility for error where the question for decision is to be considered by a tribunal consisting of more than one person . . . .

Lipschutz v. Gutwirth, 106 N.E.2d 8, 10-11 (N.Y. 1952).

[126] Arbitrators appointed directly by the parties are not expected to bring the level of impartiality to the panel that would be required of arbitrators appointed as "true" neutrals. Anderson v. Nichols, 359 S.E. 2d 117, 118 (W. Va. 1987); Astoria Medical Group v. HIP, 182 N.E.2d 85 (N.Y. 1962). As the court noted in the *Astoria* opinion, in discussing the role of a party-appointed arbitrator, "[p]artisan he may be, but not dishonest." *Astoria Medical Group*, 182 N.E.2d at 89.

consistency, and perceived fairness of the arbitral decision-making process. By obliging the neutral chair to articulate, discuss, and test her view of the facts and the mode of analysis she is relying upon with the advocate arbitrators, the parties can gain a significant level of assurance that the arbitrator has truly mastered these crucial matters and relied on that mastery in deciding the case. The Authors assert that the absence of that assurance in the existing paradigm for commercial arbitration is a major flaw that must be remedied in the mature model.

There are two collateral benefits to the tripartite mechanism that warrant mention. First, thoughtful advocates will quickly realize that the intrusion into the normally sacrosanct and inviolate arbitral chamber affected by the involvement of advocate arbitrators can greatly enhance the efficacy of advocacy assessment of arbitral competence. Today, given the general absence of substantive written awards revealing the arbitrator's findings of fact and conclusions of law, advocates and the parties they represent are obliged to evaluate an arbitrator's competency and acceptability based solely on the neutral's hearing conduct skills and the result reached at the award stage. The Authors assert this is not a sufficient basis for wise, thoughtful arbitrator selection decisions.

The second collateral advantage of the tripartite format is perhaps more significant than the first. The labor arbitration experience with the tripartite structure demonstrates that the extensive dialogue which typically transpires between the neutral and advocate arbitrators at the deliberative stage, and the search for consensus that lies at the core of that dialogue often lead to a certain amount of brokering of the award, its wording, and even the remedies directed. Purists may rail at this breaching of the chaste of the arbitral decision-making process. Experienced advocates and neutrals will not.

By tailoring and fine tuning the award in a manner that comports it with the underlying reality from which the parties' dispute sprang, the neutral chair-led exchanges that take place during the post-hearing executive sessions can do much to serve the goal of producing outcomes perceived by the parties to be fair that are also amenable to effective implementation without further altercation or adjudication. In fact, it is likely that in particular cases these executive sessions will often lead to mediated settlements of all or portions of the parties' dispute. The Authors are convinced that the enhanced possibility of achieving either of these results warrants the risks to the purity of the arbitral decision-making process that are inherent in the extensive neutral-advocate dialogue that often takes place in tripartite arbitration.

The Authors submit that if advocates and the parties engage in the type of thoughtful cost-benefit analysis suggested here they will, in most cases, conclude that a single, properly-credentialed, fully-qualified neutral is the

optimal choice. The three-neutral arbitrator panel is justified only where it is truly believed that the perspective and input of one or more neutral non-lawyer, subject-matter experts will significantly enhance the quality of arbitral decision making. At the same time, the considerable potential advantages of the tripartite framework for commercial arbitration propel the Authors to contend that sophisticated advocates and parties should seriously consider its use in appropriate cases.

Tripartite arbitration would seem particularly well-advised in matters centering on highly technical issues and those presenting complex questions of fact, law, or application of law to facts. It is also called for when the rigor, accuracy, and palatability of the result reached in arbitration can be substantially enhanced by the presence of advocate arbitrators at the deliberative stage of the process. This is most likely to be true when there is reason to doubt whether the neutral arbitrator can be adequately educated at the hearing and/or where it is perceived that the clarity of the parties' argument can be markedly enhanced by re-articulation during the post-hearing deliberation stage.

2. Selection of the Arbitrator

At maturity, the commercial arbitration process will be guided by a cadre of arbitrators of true neutral standing who share a minimal level of proven competence, hearing conduct skills, and analytical abilities. It is these individuals who will be primarily responsible for ensuring the long-run viability of commercial arbitration. Accordingly, it is imperative that the mature mechanism ensures the parties are able to make informed, thoughtful selections of arbitrators from arrays made up only of qualified professionals.

a. The Establishment and Evaluation of Threshold Credentials

Even in the absence of extensive empirical research into the qualifications and perceived competencies of today's commercial arbitrators, there can be little doubt that the front end of existing arbitrator selection mechanisms, the process of credentialing commercial arbitrators for placement on the panels from which selections are made, needs to be rethought. Today, many commercial arbitration panels are cluttered with unqualified or marginally-qualified arbitrators who stand little hope of achieving long-term acceptability. As a result of credentialing/training/evaluation schemes that are of insufficient rigor, the task of gleaning those panel members qualified to serve from those not qualified to serve is left largely to the parties through the selection process. The Authors assert this must change.

The neutral appointing authorities must assume a larger part of the burden for winnowing from the ranks of those who wish to be commercial arbitrators the individuals who have little realistic prospect of becoming same. A truly mature and sophisticated dispute resolution mechanism cannot leave the parties and their attorneys questioning the threshold qualifications, baseline competencies, the neutrality, and suitability of large numbers of the prospective arbitrators from among whom they are expected to select. Severe damage is done to the process and the arbitration profession when the parties are obliged to select out substantial numbers of prospective neutrals on these grounds. The parties and their advocates have a legitimate right to expect consistent levels of arbitral qualifications and competency, as well as proven neutrality among the candidate arbitrators they are provided.

At the same time it is not clear that in the majority of cases the parties are well served by limiting the universe from which commercial arbitrators are selected to retired judges. Certainly, retired judges are one valuable source of potential commercial arbitrators. The relatively high levels of trial-related and decision-making skills retired judges bring to the commercial arbitration venue enable them to provide valuable input into the evolution and refinement of the process. Nevertheless, because commercial arbitration is intended to provide an alternative to traditional litigation and not constitute a lower-case clone of that process, there is room to question whether the perspective of retired senior members of the judiciary is the appropriate predominate neutral mindset for the mature commercial arbitration model.

There is also reason to doubt whether there are enough retired judges to meet the demand for arbitral services at maturity of the process. Further cause for concern is presented by the impact of a uniform "judges-only" policy on the diversity (age, gender, race, etc.) of the arbitral profession. Finally, there are the risks of permitting the commercial arbitration profession to be dominated by older individuals who view the work as an avocation or a pleasant diversion from retirement, rather than as a long-term endeavor at the core of their long-run professional careers.

The Authors submit that neither imprecise schemes for credentialing arbitrators, nor the alternative of relying on rigid minimal qualification standards is a suitable means of ensuring an adequate, diverse, and constantly-renewed supply of competent neutrals who have made a long-term commitment to the practice and the profession of commercial arbitration. Instead, the neutral appointing authorities who provide litigants with panels of potential arbitrators would serve their clients better by carefully fashioning a set of well thought-out general guidelines (educational, experiential, and related credentials) for screening applicants to their panels. Those guidelines should focus on identifying individuals who either possess the requisite subject matter knowledge and process-

centered and analytical skills at the time of their application to the panels, or in the alternative have a very high potential for developing those attributes. As discussed below, this closer scrutiny of threshold credentials, qualifications, and abilities must be linked with more extensive and demanding pre-panel appointment regimens of training and exacting evaluation of the candidates who satisfy the initial standards for panel placement.

In order to maximize the age, gender, race, educational, and experiential diversity of the commercial arbitration corps, while at the same time preventing the profession from becoming a closed shop, it may well be that the initial emphasis in this regard should be placed more on the training/evaluation of candidates and new arbitrator development programs than on the satisfaction of inviolable threshold qualificational standards. In addition, there must be a provision for a significant, ongoing effort at evaluating the performance and skills of the panel members who are selected to serve as arbitrators in order to facilitate culling those individuals whose performance indicates that they are not suited for selection. Finally, panel members who are not selected to serve as arbitrators after a reasonable number of listings over a reasonable period of time should be removed from the panel.

b. The Need to Facilitate More Informed Arbitrator Selection Decisions

Advocates today often find themselves making arbitrator selection decisions (or more accurately stated, decisions to strike names of arbitrators they do not wish to use from the rosters of arbitrators they are provided) based on scant information as to the credentials, qualifications, hearing-conduct, and analytical skills of those individuals. At the present early stage of the profession's development, there is little reliable word of mouth information available as to the various competencies of the arbitrators whose names appear on the panels submitted to the parties. Thus, the attorneys who usually make the arbitrator selection decision must rely almost entirely on the very limited information contained in the typical arbitrator biographical sketch provided by the neutral appointing authority.

The Authors maintain that the various neutral appointing authorities must take the steps necessary to enhance the depth, breadth, and accuracy of the arbitrator biographical and performance-related information they provide the parties. Representative of the type of data required for a thoughtful arbitrator selection decision are the following:[127]

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[127] Some of this information is currently provided to the parties to varying extents under the procedures of the various neutral appointing authorities.

- more detailed biographies, the accuracy of which has been fully verified;

- data providing additional insight as to the acceptability of the neutral (number of times listed, number of times selected, number of times chair, number of awards issued);

- a recapitulation of the types of issues arbitrated and the types of parties served/industries arbitrated in the past;

- information as to the outcomes achieved in cases that have gone to an award (number of awards for claimant, number of awards for respondent, and, on a case-by-case basis, the amount and type of relief sought/damages (amount and type), and other relief awarded);

- some manner of feedback from the advocates and parties who have presented cases before the listed arbitrators, providing insight as to those neutrals' hearing conduct and related skills, their grasp of the subject matter of the particular controversies; and

- where feasible, prior awards of the arbitrator, especially those containing substantive analysis.[128]

Once this augmented data is made available to the parties they must use it wisely.

c. Making Intelligent Arbitrator Selection Decisions

In selecting the arbitrator, the advocates and their clients must keep the goal of that process squarely in mind, *to wit*: the selection of arbitrators who have proven themselves capable of conducting fair hearings and objectively deciding the matters in dispute. The Authors' experience indicates that too often advocates center much of their energies at this stage on attempting to secure the appointment of an arbitrator that they believe will be favorably predisposed to their case, while at the same time

[128] Of course, availability of the arbitrator's awards would be premised on the permission of the parties to the disputes in which they arose. Although the release of such awards to third parties may seem a radical departure from current thinking about the closed nature of the commercial arbitration process, reference to the widespread distribution and publication of labor arbitration awards and even the publication of court opinions indicate that it may become a reality at the mature stage of commercial arbitration.

attempting to prevent the selection of an arbitrator they perceive to be hostile either to their position on the merits or the type of client they represent.

An example of this second dynamic is the tendency of attorneys to apply the same conflict of interest standards utilized in determining if the attorney-client relationship will be established as the basis for striking listed arbitrators. The Authors suggest that the parties in commercial arbitration would be well advised to devote less attention to factors like the prior advocacy record of a listed arbitrator and other possible indicia of a predisposition toward the case of one party and focus more on the listed individuals' proven arbitral abilities and current standing and reputation as an objective, acceptable neutral.

d. Ensuring Adequate Levels of Arbitrator Compensation

The neutral appointing authorities that credential commercial arbitrators and the advocates and parties who select from among those certified as qualified to serve must acknowledge the importance of assuring that arbitrator compensation levels accurately reflect the importance and difficulty of the work. Although there are exceptions, currently, the bulk of arbitrator per diem charges range from $400 to $1,000, with a strong bias toward the lower end of the range.[129]

As noted earlier, under the AAA Commercial Arbitration Rules, arbitrators are expected to serve the first hearing day on a pro bono basis,[130] and are limited to one compensated study day for every five days of hearing. Under the AAA Supplementary Procedures for Large, Complex Disputes, arbitrator compensation levels are "based upon the magnitude and complexity of the case . . . ."[131] No doubt, the contemporary mode of arbitrator compensation springs from the origins of commercial arbitration as a vehicle for resolving relatively simple disputes through the use of arbitrators asked to serve on a largely pro bono basis. The Authors assert that the time has come for these existing arbitrator compensation schemes to be rethought.

The ADR world has changed drastically in the last decade. No longer are commercial arbitrators called upon primarily to serve as the rough equivalent of a small claims court. The issues addressed have grown more

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[129] In the course of their initial research, the Authors requested summary arbitrator compensation data from AAA, JAMS, and Endispute. That information was reported to be unavailable. Accordingly, the above estimates of the range of per diem and hourly rates are based on anecdotal information available to the Authors.

[130] A.A.A. COMMERCIAL ARBITRATION Rule 50 (1993).

[131] A.A.A. SUPPLEMENTARY PROCEDURE Rule 3(c) (1993).

complex, and the typical amounts in controversy, as well as the time commitment required of the arbitrator for hearing and study, have increased dramatically. The parties are represented by highly skilled attorneys who charge their normal hourly rates ranging from $150 to $350 or more, or on the plaintiff's side, are compensated subject to a contingency fee arrangement that entitles them to a substantial portion of the claimant's recovery.

The Authors submit it makes no sense for the individuals who are tasked with the responsibility of deciding the weighty matters now being advanced to commercial arbitration and asked to make the type of extensive time commitments required of that work to be paid less than the attorneys who argue the cases before them. The simple truth is that professionals who are worth $200 to $300 per hour or more when serving as advocates, executives, or in other professional capacities must be deemed deserving of the same levels of compensation when serving as commercial arbitrators. Commercial arbitration is becoming a very serious business. It must be overseen and led by serious, adequately-compensated arbitrators. Otherwise, the bulk of commercial arbitration work will be left to retirees, persons who view the work only as an avocation, or those whose true market value is in the range of current compensation levels.

This is not to say that in the mature model there cannot be a significant role for otherwise competent neutrals who, for whatever reasons, are willing to work at less than a fair market rate. The point is that over the long run, holding arbitrator compensation levels at artificially and unrealistically low levels will discourage many highly-qualified individuals from entering the arbitration profession, and do much to prevent the development of the adequate corps of true professionals that is essential to the successful institutionalization of the process.

When juxtaposed with attorneys' fees, administrative costs, and the inevitable tying up of valuable executive time inherent in arbitration, the cost of adequate arbitrator compensation would remain a comparatively minor matter. Concerns pertaining to minimizing arbitrator fees and expenses could perhaps be ameliorated in many cases through a thoughtful evaluation by the parties of the efficacy of a single-arbitrator format as opposed to a three-arbitrator panel. In the same manner, careful comparisons of the costs versus the value received for various arbitrators could provide a useful decision tool for keeping arbitrator-related expenses within reasonable bounds.

3. The Pre-Hearing Stage

There are three primary topics of significance here: (1) mediation; (2) pre-hearing discovery; and (3) pre-hearing motion practice. The

observations in this subSection are premised on the Authors' belief that the properly-credentialed, competent arbitrator is the person best-equipped to oversee the pre-hearing stage. Accordingly, the Authors assert that the case handling procedures of the neutral appointing authorities, as well as the procedures independently developed by the parties in particular disputes, should be fashioned so as to interject the arbitrator into the dispute at the earliest possible time. As few matters of substance or significance as possible should be addressed before the arbitrator is selected and brought on-line. At the same time, it is submitted that the parties and the process would be well served by augmenting the existing procedural rules for the pre-hearing stage in order to strongly encourage mediation and ensure adequate discovery, as well as promote consistency across proceedings in both of these areas.

a. Mediation

Once selected, aside from rudimentary ministerial and clerical matters, the arbitrator should immediately be assigned full responsibility for oversight and timely closure of the pre-hearing proceedings.[132] First and foremost among those matters must be a full exploration of the possibility and potential utility of mediation. The Authors strongly assert that a mere suggestion of the availability of mediation by a case administrator employed by the neutral appointing authority is not enough to propel the parties to seriously consider that dispute resolution option when they are not already predisposed to do so.

Accordingly, where the nature of the dispute and the circumstances indicate mediation may be fruitful, the parties should be tactfully, yet forcefully encouraged to utilize it. This is a task most well-suited to the arbitrator who will decide the case if it is not resolved short of adjudication. Although this threshold effort will require tact and discretion, it is within the province of a skilled arbitrator to explain to the parties the benefits, the dynamics, and the procedure of mediation, as well as assure them that this preliminary effort at resolving their dispute will have no effect on their respective cases should the matter proceed to arbitration.

It seems clear that the earlier in the process that mediation is initiated, the better. More often than not, the level of animosity and the rigidity of the parties and their attorneys increases the further they progress through the process of deposition, interrogatories, and document production, particularly when there has been no effective mechanism for resolving the disagreements that inevitably arise during that process. Therefore, the

[132] In carrying out these responsibilities, the arbitrator would work closely with the administrator assigned to the case by the neutral appointing authority.

Authors contend that the mediation inquiry should be made by the arbitrator at the earliest appropriate moment.

If mediation can be initiated before the positions of the parties have hardened, and the damage and the expense inherent in extensive pre-adjudication skirmishes is incurred, the prospects for a successful conciliation effort will be substantially increased. Finding a way for routinely facilitating this early intervention by a competent mediator is essential and constitutes an important point for dialogue.

An additional question that should be addressed in the dialogue that the Authors hope to engender is whether the individual selected as arbitrator should be permitted to mediate the dispute. The conventional view, as reflected in AAA Rule 10, is that it is inappropriate for the arbitrator to mediate.[133] The Authors do not quibble with the general proposition that caution must be exercised when assignment of the mediation task to the arbitrator is contemplated, in order to avoid improperly mixing the role of the mediator/conciliator with that of the adjudicator. Regardless, the facial validity of this conventional view must be evaluated in light of the fact that trial judges frequently engage in informal mediation efforts and failing full resolution of the controversy, proceed comfortably to the adjudicatory role. Further instructive in this regard is the occasional effective use of "med-arb" (mediation-arbitration where one neutral performs both the mediation and, if necessary, the arbitration functions) in the labor-management dispute resolution field.

The Authors acknowledge the risk inherent in arbitrators mediating and the ethical concerns that may arise regarding misuse of the information and insight accrued during mediation. In order to preserve the separation between the mediation and arbitration processes, arbitrators who mediate would be particularly well-advised to avoid engaging in premature evaluation of the strengths and weaknesses of the parties' respective cases. Nevertheless, use of the "med-arb" hybrid device in the limited

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[133] A.A.A. COMMERCIAL ARBITRATION Rule 10 (1993). Rule 10 states: "The mediator shall not be an arbitrator appointed to the case." *Cf.* ENDISPUTE ARBITRATION RULES AND PROCEDURES B-19 which provides:

> The Endispute mediator assigned to the case will not be the Arbitrator or any of the Arbitrator candidates submitted to the parties. The parties may also agree to seek the assistance of the Arbitrator in reaching a settlement. However, the Arbitrator's assistance in such settlement efforts will not disqualify the Arbitrator from serving as Arbitrator if settlement is not reached.

See also, Lon Fuller, *Collective Bargaining and the Arbitrator, in* DISPUTE RESOLUTION 247 (Stephen R. Goldberg et al. eds., 1985).

circumstances where it is appropriate may be an experiment worth undertaking. The Authors maintain that at the very least, arbitrators and the neutral appointing authorities should remain alert to the possibility that as the level of ADR experience and sophistication of the parties increases, they will more frequently request the arbitrator to attempt mediation of all or some of the matters at issue.

Regardless of when mediation is initiated or whether it is deemed appropriate for the arbitrator to mediate, the Authors are convinced that devising a methodology for effectively pairing mediation with arbitration will be a key to the evolution of a viable ADR mechanism that will provide civil disputants and their attorneys with an acceptable, truly effective alternative to traditional litigation. Allowing mediation to remain the minor dimension of the ADR process that it so often is today would be a serious mistake.

b. Pre-Hearing Discovery

In recent years, as the amounts in controversy and complexity of many of the disputes submitted to arbitration have increased, recognition has emerged of the need to provide some manner of enhanced structure and discipline to the pre-hearing discovery process. As observed earlier, today's commercial arbitration rules pertaining to discovery are of a very general nature. The Authors assert that rudimentary rules of the type reflected in AAA Commercial Arbitration Rule 10 and Rule 5(b)-(d) of the Association's Supplementary Procedures for Large, Complex Cases are not sufficient to facilitate effective, consistent arbitral oversight of the discovery process.

Instead, the Authors suggest that in all commercial arbitration cases, especially those of a more complex nature, the process would be aided by the promulgation of more detailed discovery rules loosely modeled after the new Federal Rules of Civil Procedure 26, 30, 33, and 37.[134] That brief compilation of rules would accomplish the following:

- set a maximum time period for the completion of discovery;

- require an early exchange of witness lists, documentary evidence likely to be introduced at hearing, and information pertaining to damages and insurance;

- mandate early disclosures regarding expert witnesses and their testimony;

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[134] FED. R. CIV. P. 26, 30, 33, 37.

- set a reasonable maximum number of depositions and written interrogatories allowed; and

- preclude the introduction at hearing of any evidence subject to disclosure or discovery pursuant to the rules that was not revealed in a timely manner during the pre-hearing stage.

Of course, any such rules should provide for exception with leave of the arbitrator for good cause.

As previously indicated, the Authors contend that the timing of the arbitrator's appointment should be such that he or she will supervise the discovery process virtually from its start and be responsible for promptly resolving any disputes that may arise. The goal in enhancing the discovery-related rules in commercial arbitration and tasking the arbitrator to oversee the process should be to optimize the benefits of adequate discovery (i.e., assuring the parties gain full knowledge of the relevant facts and facilitating the objective assessment of the relative strengths and weaknesses of their cases) while at the same time minimizing the time, effort, and resources expended. Where that point of optimality lies is a matter for dialogue.

c. Pre-Hearing Motion Practice

As observed earlier, there are two dimensions to pre-hearing motion practice in commercial arbitration. The first embraces motions to sharpen the pleadings and more clearly define the issues to be arbitrated and motions to ascertain the proper parties. Currently, these types of motions are on occasion submitted to and competently decided by commercial arbitrators. There is no reason to alter the current practice. The second dimension, pre-hearing motions potentially dispositive of the merits of the dispute (e.g. the motion to dismiss for failure to state a claim and the motion for summary judgment), is not a routine feature of contemporary commercial arbitration.

It is the Authors' belief that under one condition and with one caveat, the process of commercial arbitration would not be well served by the routinization of the pre-hearing motion to dismiss for failure to state a claim and the motion for summary judgment. The condition on which this assertion rests is a procedural requirement obliging the arbitrator to articulate the key findings of fact, identify the controlling contract provisions and applicable law, and state how, when the controlling contract provisions or law are applied to the material facts, the case is resolved in favor of the claimant or the respondent. If that arbitral act is procedurally ensured, then the parties can be confident the key questions of law and the questions of material fact at the heart of their dispute will be squarely

addressed and resolved on the record. With that assurance in place, the goals of expediting the pre-hearing process and focusing the parties' and the arbitrator's efforts on the hearing and the award warrant dispensing with these two pre-hearing motions that constitute a major component of the traditional litigation model.

The caveat is the adoption of an express procedural rule permitting the parties to submit the case to the arbitrator for decision without hearing, on written briefs or oral argument, where following discovery they are able to stipulate to all of the material facts.[135] The probability of the parties being able to stipulate to all of the material facts in anything but the most simple controversies may be quite remote. This very limited device for achieving adjudication without hearing could serve to truncate the process and minimize the parties' expense, therefore provision for it is advised.

4. The Hearing

The primary areas of concern pertaining to the actual arbitration hearing that merit discussion go to the mode of arbitral conduct of the hearing, advocacy tactics and the rules of evidence. The contemporary commercial arbitrator is provided little in the way of procedural guidelines as to the manner in which the hearing is to be conducted. The conventional wisdom underlying this general lack of structure centers on the belief that arbitration can remain a relatively simple, expeditious process only if the rules governing it are kept to a minimum. This premise is generally sound. Nevertheless, the Authors assert that the time has come for a rethinking of the balance between the simplicity and succinctness of the procedural framework for commercial arbitration and the need to supplement that framework in order to ensure that arbitrators conduct hearings that truly are acceptable surrogates for the due process guarantees and the rigor inherent in court trials.[136]

Despite the long-standing belief that arbitration is intended to be a simpler, more expeditious vehicle for adjudication than is traditional litigation, the fact remains that few of the attorneys who argue cases before commercial arbitrators adjust their trial advocacy tactics to any significant degree in order to take advantage of the simplified hearing format and the presence of an expert adjudicator. The arbitral experience of and anecdotal

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[135] ENDISPUTE COMPARATIVE ARBITRATION Rule C-15.3 speaks to "[m]otions for summary decision" on mutual agreement of the parties and submission to the Arbitrator of "written statements of their positions on the Motion . . . ." Although likely a condition precedent, it is not clear from the face of Rule C-15.3 whether this motion requires that the parties be able to stipulate to all of the material facts.

[136] *See* Brunet, *supra* note 11.

evidence available to the Authors suggests that at least in more complex, higher-stakes cases this phenomenon often precludes significant savings of time or expense at the hearing stage.[137]

As a result of this reluctance by counsel to forego traditional trial tactics and the related histrionics more suited to a jury trial, in all but the most elementary disputes commercial arbitrators regularly find themselves faced with perplexing questions of hearing procedure, most often with regard to the admission of evidence. Thus, even though the attorneys who argue cases before them more often than not rely on conventional trial tactics, commercial arbitrators are somehow expected to keep things simple and resolve complex and difficult questions of procedure and evidence without instruction from any real substantive rules.

Placed in this predicament and lacking any substantive guidance as to how they are to proceed, arbitrators resort to a variety of standards for decision and modes of hearing conduct. The Authors suggest the procedural framework for commercial arbitration must address this reality. The area of focus most likely to produce positive short-run results is the standards for the admission of evidence. The current rudimentary standards for the admission of evidence (e.g., "conformity to the legal rules of evidence shall not be necessary," with a parallel instruction to heed the relevancy and materiality of proffered evidence) needs to be supplemented in a manner that reflects current hearing practice. The Authors advocate supplementing the current evidentiary paradigm for commercial arbitration by adding the following:

- a more adequate description and working definition of the evidentiary standard of relevancy that articulates the "probative value/prejudice to the non-proffering party" standard;

- a highly-simplified version of the hearsay evidence rule, incorporating a clear definition of "hearsay evidence" and specifying certain, limited exceptions thereto that are particularly relevant in a commercial arbitration context (e.g., the exception pertaining to records kept in the customary course of business);

- a rule encouraging the use of fact stipulations by the parties and specifically empowering the arbitrator to request same where warranted;

- a rule sanctioning arbitral notice of adjudicative facts not in dispute;

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[137] This is a point of inquiry appropriate for empirical research.

- a rule clearly defining cumulative evidence, which grants the arbitrator authority either to exclude such evidence, or take arbitral notice of it.[138]

The assertion that the commercial arbitration process would benefit from a moderate flushing out of the standards for the admission of evidence is based on two dimensions of the current practice. First, despite the admonition that the rules of evidence do not apply, commercial arbitrators familiar with those rules often find themselves obliged to rely on some semblance of those standards when presented with evidentiary objections. The rules governing commercial arbitration must acknowledge this reality.

The second reason underlying the Authors' assertion is the more significant one. The attorneys who argue cases in the commercial arbitration forum persist in raising objections founded on the rules of evidence because they are conditioned to do so and because they perceive those objections to be an important factor in maintaining the integrity of the fact-finding process and thereby adequately representing their clients. The absence of clear evidentiary guidelines in commercial arbitration inevitably leads advocates to fall back on the rules of evidence which frame the remainder of their litigation practice.

If arbitrators do not respond to these objections with consistent, predictable, and comprehensible rulings, the rigor of the commercial arbitration fact-finding process will come into serious question. At the same time, arbitral failure to exercise sufficient diligence in supervising the admission of evidence into the record by, as it often does, allowing proof into the record "for what it is worth" further undermines confidence in, and unnecessarily extends and muddles the arbitral fact-finding process by inviting endless rounds of rebuttal and surrebuttal, cumulative evidence, and the like.

At a minimum, evidentiary rulings must reflect a clear understanding of the concepts of relevancy, probative value, and undue prejudice. That result can be achieved by the supplemental evidentiary standards advocated above and by ensuring, through adequate training and ongoing performance evaluation, that arbitrators are facile with them and the principles of procedural and substantive due process on which they are founded. The residual web of the rules of evidence relied on in traditional litigation will

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[138] *See, e.g.*, ENDISPUTE COMPARATIVE ARBITRATION Rule C-17.1 (providing, "The Arbitrator may impose time limits on each phase of the proceeding and may limit the testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.").

remain in the background, available when appropriate to gloss the evidentiary rulings of arbitrators who are familiar with them.

It can be hoped that over time, litigators will come to realize the value of fine tuning their trial advocacy tactics to take advantage of the unique aspects of the commercial arbitration forum and the neutrals who oversee it. In the meantime, arbitrators must be given the direction necessary to ensure consistency of decision, rule, and procedure within the context of the current practice. Adoption of a full-blown evidentiary paradigm on the order of the Federal Rules of Evidence is not called for, and in fact would be highly dysfunctional. Instead, the Authors advocate a restriking of the evidentiary standard that more accurately reflects the nature of the contemporary commercial arbitration hearing and moves toward an appropriate midpoint on the evidentiary continuum.

That augmented standard would both set the proper tone for the hearing and provide a sufficient basis for cogent, rational evidentiary rulings by the arbitrator. The integrity and rigor of the arbitral fact-finding process would benefit from changes that produce more consistent, predictable, and defensible evidentiary rulings. In addition, it would effectively discourage counsel from attempts to burden the record with marginally relevant, cumulative or unduly prejudicial evidence, and/or to inordinately limit the evidence adduced by opposing counsel. The precise mix of evidentiary standards necessary to achieve these parallel goals is a matter for dialogue.

5. The Post-Hearing Stage

The sole issue of significance here is the question of the utility and advisability of post-hearing briefs. The conventional wisdom is that post-hearing briefs are not necessary or appropriate in most commercial arbitration cases. There are several reasons for this belief. First, post-hearing briefs are not a routine feature of traditional civil litigation. In addition, under the traditional litigation model, counsel usually have had a full opportunity to advance their respective contentions regarding the identification and application of the relevant law and contract language during pre-trial motion practice and the jury instruction stage. Thus, in commercial arbitration attorneys are pre-disposed to follow traditional trial practice and to make oral closing arguments. Further, the additional delay and expense (for attorney time and arbitrator study time) inherent in the decision to file post-hearing briefs mitigate against post-hearing submissions in commercial arbitration.

The Authors maintain that the process of commercial arbitration and the interest of the parties would benefit from a methodical determination, on a case-by-case basis as to whether post-hearing briefs are warranted. In many instances, where the facts are straightforward and the questions of law and

contract interpretation comparatively simple, post-hearing briefs would not enhance the quality of the adjudicative process and thus would not be cost or time effective. However, when in a particular case post-hearing briefs would significantly elevate the quality of argument, and thereby enhance the rigor of arbitral analysis, the long-standing presumption in commercial arbitration that briefs are not warranted should not control.

The decision as to whether briefs are advised is made on two levels. Although it is most obviously a matter to be determined by counsel, it is also incumbent on the arbitrator to request briefs if they are necessary in order to ensure a full and rigorous analysis of the issues.[139] The Authors suggest that the following case characteristics should propel both arbitrators and advocates to conclude that post-hearing briefs are warranted:

- complex facts that require careful ordering and integration in order to be fully comprehended;

- complex questions of the identification and interpretation of law and/or contract language, especially those of a nature that in traditional litigation would have given rise to and been addressed in a motion to dismiss and subsequent order;

- complex questions of application of law to facts, especially those of a nature that in traditional litigation would have been addressed in a motion for summary judgment and subsequent order; and

- where the nature of the dispute or the desires of the parties call for a full-blown written award setting forth the arbitrator's findings of fact and legal/contractual analysis.

In these circumstances advocates and arbitrators alike will experience a need to ensure that the neutral's evaluation of the dispute is informed by a careful recapitulation of the key evidence in the record and a methodical articulation of each party's position on the merits. The written post-hearing brief is the most reliable vehicle for achieving that result.

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[139] In this regard, arbitrators must be sensitive to the fact that it is difficult for an attorney not to offer to file a post-hearing brief when queried in the presence of the client. In the same manner, when the attorney for one party offers to submit a post-hearing brief, opposing counsel invariably will respond to that challenge by offering to do the same. This reality obliges the arbitrator to consider the advisability of discussing the matter of post-hearing briefs with counsel in the absence of clients, in order to maximize the prospect of a careful, reasoned decision.

Viewed from the perspective of counsel, there are two additional factors that strongly indicate briefs. The first is obvious. The larger the amount in controversy and the more important the dispute to the interests of the client, the substantial risk of not filing a brief likely will outweigh the additional expense and delay inherent in the decision to submit a post-hearing brief. Second, when as a result of the arbitrator's conduct at the hearing, an advocate is concerned that the arbitrator has failed to grasp the theory of the client's case or is unclear as to the material facts, the relevant law, or contract language, the opportunity to ameliorate that omission through the post-hearing brief should not be foregone.

6. The Arbitration Award

The conventional wisdom of commercial arbitration dictates that the arbitrator's award should be kept as brief as possible and reveal as little as possible of the analytical process that leads the arbitrator to the result achieved. The Authors assert that as commercial arbitration moves toward maturity, this conventional wisdom needs to be re-examined.

Besides minimizing the expense and delay associated with extensive arbitrator study time in formulating the award, the most obvious goal served by avoiding substantive written awards in commercial arbitration is eliminating the primary basis (i.e., faulty arbitral reasoning as revealed in the award) on which an attempt to vacate the award can be founded. Those who advocate summary awards fear that inclusion in the arbitration award of substantive analysis disclosing the arbitral reasoning which led to the identification of the controlling law and contract language, the key findings of material fact, and the application of the controlling law to the material facts will provide judges otherwise inclined to intervene in order to produce correct results with a window of opportunity that they will be unable to resist.

On its face, the rationality of the conservative approach is difficult to challenge. It is frequently noted in the case law that the essence of the arbitration "bargain" is that the parties trade the increased risk of an erroneous outcome for speed of resolution, privacy, and reduced costs.[140] If that tradeoff is indeed the bargain the parties have struck, it can be forcefully argued that there is no reason for the parties to request, or for the

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[140] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. Superior Ct. 1992); McIlroy v. PaineWebber, Inc., 989 F.2d 817 (5th Cir. 1993); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990); Marra Constructors, Inc. v. Cleveland Metroparks Systems, 612 N.E.2d 806 (Ohio Ct. App. 1993); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986).

arbitrator to provide, any rationale to support the award and/or remedy order.

The minimalist award model also tracks well with the form and nature of the general verdict in a jury trial. Similarly, until the effectuation of the new Federal Rules of Civil Procedure in January of 1994, even in bench trials adjudicated without a jury, the presiding judge had the discretion to provide as little in the way of substantive analysis as deemed advisable.[141] However, there is one important distinction between traditional litigation and commercial arbitration that eviscerates this analogy.

In a court trial, the arguments of parties pertaining to identification and application of the substantive law are for the most part addressed and decided on the record. That on-the-record decision making transpires in the course of written opinions or oral rulings from the bench, most often in response to motions to dismiss or motions for summary judgment, and in the trial judge's instructions to the jury. In addition, by use of the special verdict device the parties can gain specific knowledge of the jury's or the trial judge's determination of the material facts. Finally, the parties are assured that any mistakes of law or erroneous application of law to fact that they believe have transpired at trial will be definitively addressed and resolved on appeal.

In commercial arbitration, in the absence of substantive written awards, the parties are obliged to accept an adjudicative mechanism where the substantive decision-making process remains almost completely off the record. Thus, except for the basis for inference provided by the result reached, the parties are left with virtually no insight as to the manner in which the arbitrator decided the case. It is also possible that the practice of avoiding a written rationale can be counterproductive to its supposed end of minimizing attempts to secure judicial vacation or modification of the award. An award without explanation may have the effect of encouraging an appeal, because the losing side has been given no principled basis for accepting, however reluctantly, the wisdom of the award.[142]

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[141] *See* FED. R. CIV. P. 52(a). Rule 52(a) now makes clear that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . ."

[142] As Judge Martin of United States Court of Appeals for the Sixth Circuit has said,

> [T]his case and many others reach our docket solely because the arbitrators fail to state the reasons for their awards and decisions. While arbitrators are not obliged to the courts to give their reasons for an award, . . . the absence of any evidence of an arbitrator's decision process makes this Court's review of an arbitration award something of a judicialship hurt with counsel for the parties arguing about contract law analysis that may or may not have been manifestly disregarded by the arbitrator.

The Authors suggest it is this juxtaposition of the comparatively open, on-the-record decision-making process in traditional litigation with the largely undisclosed, off-the-record decision-making process inherent in contemporary commercial arbitration that provides the true focal point for dialogue as to the utility and advisability of written substantive awards in the mature commercial arbitration model. The critical question that must be addressed is whether the quality of the adjudications produced in commercial arbitration, and the willingness of the parties to routinely accept that alternative dispute resolution device as a substitute for traditional litigation, will be enhanced by requiring arbitrators to write substantive written awards that disclose the analytical process which leads to the arbitral disposition of the dispute.

There are several significant value-added factors that can be reached by giving the parties the option to request a written award. First, it will provide concrete notice to the arbitrator of the parties' expectation that the resolution of their dispute will be founded on careful, thoughtful efforts at: (1) identifying the relevant law and contract language; (2) evaluating the hearing record in order to discern the material facts adduced at hearing; and (3) applying the relevant law and contract language to the material facts. This increased assurance of thoughtful analysis should do much to encourage the belief that arbitration produces accurate and correct results. Second, the decision to require something more than a summary award will surely oblige arbitrators to pay careful attention and remain fully engaged throughout the proceedings.

Finally, written awards revealing the arbitrator's mode of analysis and decision methodology will provide advocates with a very useful appliance for facilitating evaluation of the neutral's knowledge of the substantive law and the principles of contract interpretation, grasp of the evidence, and analytical ability. As noted previously, in most cases today the only indicia of these arbitrator competencies are the manner in which the neutral conducts the hearing and the perceived correctness of the result reached. The Authors contend that this scant evidence of competence is not a sufficient basis for evaluating neutrals in the mature commercial arbitration mode.

In the portion of the broad discourse the Authors hope to stimulate as to the future of commercial arbitration concerning the optimal form and nature of the written award, it will be important for the participants not to fall into the trap of thinking dualistically. Thus, it may be that the optimal form of the award in commercial arbitration falls at some midpoint on a continuum

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Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 871 (6th Cir. 1990) (Martin, J., concurring).

between the polar extremes of the summary, no-analysis award model and the full-blown award that fully sets forth the arbitral analysis and conclusions that lead to decision. A possible paradigm for that midpoint model might be found in the very recent modification of Federal Rule of Civil Procedure 52(a) that requires federal judges who decide cases without a jury or with an advisory jury to recite the findings of fact and the law on which judgment is based.[143]

It is by no means clear that the judiciary's long-standing distrust of the arbitration process[144] has been summarily swept aside by the Supreme Court's recent rejection of its prior suspicion of the process. Therefore, the risk posed by substantive written awards revealing the arbitrator's basis for decision cannot be entirely discounted.[145] Nevertheless, the Authors believe that something more than a summary, no-analysis award will be necessary in the mature model of commercial arbitration. Should the rule of the FAA and UAA as to the exceedingly narrow grounds for vacation of the arbitration award hold over time, the parties will soon learn the futility of seeking a "second bite at the apple" in court when they are not satisfied with the result achieved in arbitration. If the general rule of no judicial review of the merits of the arbitrator's award continues to hold at the maturity of the commercial arbitration process, demonstrating the accuracy and correctness of the results achieved in arbitration by providing the parties with insight into the arbitral fact-finding and decision process will be

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[143] FED. R. CIV. P. 52(a).

[144] *See, e.g., Stroh Container Co.*, 783 F.2d at 751 n.12 ("The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."). *See also* Reicks v. Farmers Commodities Corp., 474 N.W.2d 809, 811 (Iowa 1991) ("A refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution . . . [i]t is no idle coincidence that the words "arbitration" and "arbitrary" are both derived from the same Latin word.").

[145] *See* Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the Manifest Disregard of the Law Standard*, 27 IND. L. REV. 241, 262 (1993):

> The various circuits are so divergent on what grounds are sufficient to vacate an arbitral award that the law is essentially in a state of confusion. Because parties involved in the arbitration process do not know what will justify vacation of arbitral awards, the courts are forced to review many motions to vacate that border upon being frivolous.

See also Bret F. Randall, Note, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759.

a crucial dimension of maintaining the faith of litigators and their clients in the commercial arbitration process.

The desire to provide as few bases or excuses for appeal is understandable. Nevertheless, the Authors contend that without objective evidence of the rigor and completeness of the arbitral analysis underlying the award, the attributes of expediency and simplicity offered by the present mode of commercial arbitration may not over time be deemed of sufficient value to outweigh the risks presented by a decision process that remains unrevealed and is not subject to challenge. Competent decisions and accurate, correct results are the hallmark of any adjudication mechanism that can stand the test of the dispute resolution marketplace. Well thought-out, rational written awards that demonstrate to the parties the manner in which the dispute was decided are the most effective vehicle for demonstrating that commercial arbitration consistently achieves that result.

7. A Final Thought: The Possibility of an Appellate Arbitration Mechanism

Undoubtedly, it is the absence of a substantive guarantee of accurate and correct results that causes many experienced litigators to be reluctant to embrace commercial arbitration as an acceptable alternative to traditional litigation. That fact prompts speculation as to the feasibility of the parties to a given dispute agreeing contractually, at the outset of the arbitration proceeding, to some form of appellate arbitration mechanism that would provide a check on the otherwise unreviewable nature of the commercial arbitration award. As incongruous as such a proposition may seem to those who praise the relative simplicity and expediency of arbitration, the Authors maintain it merits consideration.

The scope of such appellate arbitral review almost certainly would be limited to the questions of law and application of law to fact decided by the original tribunal.[146] Thus, like in traditional litigation, arbitral appellate review would not extend to the findings of fact made in the original adjudication. In order to facilitate effective appellate review of these matters, the arbitrator(s) in the original adjudication would be required to articulate, in writing, the findings of fact and conclusions of law upon which the award is founded.

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[146] Because of the comparatively simple rules of procedure that will govern commercial arbitration even at the mature stage, the Authors contend that providing arbitral appellate review for alleged errors of procedure in the original arbitration would be ill-advised. Of course, the parties would retain the discretion to resort to the court to enforce the procedural rights afforded them by the Federal Arbitration Act and the various state adaptations of the Uniform Arbitration Act.

Procedure at this appellate stage of arbitration would be of a nature similar to appellate practice in traditional litigation. The proper structure of the appellate tribunal almost certainly would consist of three neutral arbitrators, selected for their particular knowledge of the law and intellectual capacity to perform the appellate review task.[147] The primary procedural parameters of the process would be defined by setting timelines for appeal of the original award and the submission of the arbitration record and briefs to the appellate panel, stipulation as to the length and character of any oral argument that is to be permitted, and specification of a deadline for the appellate panel's decision. All of these characteristics of the appellate step, as well as the nature and length of the appellate panel's award and the scope of its remedial discretion (e.g., reversal of the original award, remand to the tribunal below with instructions, or direction of a second arbitration, *de novo*) likely would be determined as a function of the complexity of the dispute balanced against the amount in controversy.

If structured properly in the agreement to arbitrate, this type of arbitral appellate review seldom would require more than a few months from the date of the original award. Concerns regarding additional expense and cost could be largely ameliorated by a presumption that the use of the single arbitrator format in the original adjudication is appropriate. Further comfort, as well as assurance that the resort to the appellate mechanism would not become a routine feature of commercial arbitration, could be provided by an agreement in the submission document that, except for good cause shown and as directed by the appellate panel, the loser on appeal would be assessed all arbitral per diem charges, expenses, and costs or attorneys' fees, or both, appurtenant to the appeal.

Whether arbitral appellate mechanisms of the type just described become a common feature of commercial arbitration at the mature stage remains to be seen. It does bear mention that by providing an arbitral "safety net" whereby egregious errors of law or application of law to fact can be corrected within the private arbitral framework, effective appellate mechanisms might provide an important impetus to the judiciary to continue to exercise restraint when asked to vacate or modify the result produced in arbitration. Regardless, dialogue is called for here. In the Section below, the final component of the mature commercial arbitration mechanism — the commercial arbitrator who oversees the process — will be examined.

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[147] Given the nature of the appellate review task, many retired judges would be particularly well-qualified to serve in this capacity.

VI. THE COMMERCIAL ARBITRATOR ARCHETYPE

The demands placed on the neutrals who will supervise the commercial arbitration mechanism envisioned above will be substantial. The simple truth is that many of those who today hold themselves out as commercial arbitrators do not possess the subject matter expertise, the process-related skills, or the analytical/award-writing competencies necessary to the effective functioning of the mature model. Here, more than in any other dimension of commercial arbitration, it is critical that a reasonable level of expectation be established among advocates, parties, neutral appointing authorities, and arbitrators as to what will be required of and delivered by mainline commercial arbitrators. Once those expectation levels are defined, they must be consistently satisfied.

A. The "Umpire" Model

The Authors foresee a commercial arbitration process guided by an identifiable group of trusted professionals of unchallenged neutral standing. At bottom, it will be the mainline commercial arbitrators who bear the primary responsibility for creating and maintaining a commercial arbitration mechanism that consistently strikes an optimal balance between the attributes of the traditional litigation model and existing commercial arbitration devices.

Mainline commercial arbitrators will be charged with guiding an adjudicative process which produces expeditious calls that reflect acceptably high levels of legal, factual, and "gut level" accuracy, correctness, and reliability, while at the same time providing sufficient procedural and substantive due process protections. When one realizes that these results must be achieved without the safety net of a judicial appeals process whereby significant errors of law or application of law to facts can be corrected, the importance of ensuring adequate numbers of professional arbitrators who have demonstrated their competence, sound judgment, and capacity to make tough decisions wisely is crystallized.

Although not an entirely apt metaphor, the Authors find strong analogy between their conceptualization of the mainline commercial arbitrator and the umpires and referees charged with maintaining order and proper conduct in the world of professional athletics. Those officials are given virtually unreviewable authority to enforce the rules of the game being played. They are expected to make expeditious calls in high-pressure, high-stakes situations and to do so in a business as usual manner, all the while deftly handling controversy and acrimony and keeping the proceedings focused and running smoothly.

Nevertheless, the officials in professional sports are not expected to be perfect. The decision of professional sports owners to forego the opportunity for achieving the greatly increased accuracy in the decisions of those umpires and referees that can be facilitated by instant replay technology, in favor of retaining the traditional system of instant adjudication, speaks clearly to the willingness of the parties to entrust their fates and their fortunes to a dispute resolution process founded on the integrity and competence of a select group of seasoned, proven neutrals.

It is this same level of confidence in the process and the adjudicators to which commercial arbitration and commercial arbitrators must aspire. The optimal balance point that will produce that result lies at the fulcrum of the tradeoff between the substantial guarantees of due process and correct results provided by traditional litigation and the expediency, reduced expense, and simplified procedure of commercial arbitration. The mainline commercial arbitrators' competent striking of that balance will be *sine qua non* to the institutionalization of the commercial arbitration process.

B. The Attributes of the Mainline Commercial Arbitrator

Having defined the formidable task faced by mainline commercial arbitrators in the mature model, this inquiry now turns to a discussion of the characteristics and virtues required of those individuals. Being charged with standing in the place of the judicial system and judges is a sobering responsibility. It will take a special breed of professional to withstand the close scrutiny to which mainline commercial arbitrators will be subjected.

At the threshold, those who aspire to the profession must possess a basic working knowledge of civil procedure and the substantive law at issue in the types of controversies in which they wish to serve. The presumptive credentials, although not necessary, indicating this subject matter expertise is a law degree and relevant practice or teaching experience. Thoughtful advocates will remain alert to the exceptional individuals who do not possess a law degree who nevertheless have demonstrated a sufficient grasp of civil procedure and the substantive law at issue in a particular controversy to enable them to conduct a fair hearing and provide an informed adjudication. Of course, there will remain a role for the non-lawyer arbitrator in those disputes where the parties and counsel perceive advantage in the multi-arbitrator format, assuming those neutrals are not expected to serve as chair of the arbitration panel.[148]

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[148] This observation reflects the Authors' beliefs that, with perhaps rare exception, the chair of multi-arbitrator panels should be an attorney with a sound grasp of hearing procedure, evidence, and related matters.

The remaining hallmarks of the mainline commercial arbitrator, reflective of the individuals who will in fact do most of the work at the mature stage of the process, are more difficult to ascertain and define. Perhaps most susceptible to definition and objective verification is proven acceptability as a neutral adjudicator, as demonstrated by repeated selections and service in commercial disputes. However, if only those with prior experience are deemed qualified to serve, inexperienced persons, even those with high potential for becoming acceptable arbitrators, can never achieve entry into the profession, and advocates and the parties they represent would be denied the benefit of their services.

In order to avoid that dilemma and all of its undesirable side effects, those who select arbitrators and those who aspire to serve as arbitrators must look behind the selection decision and ask what it is that makes a mainline commercial arbitrator acceptable. The Authors suggest that the hallmarks of the mainline commercial arbitrator fall into two primary skills categories: those associated with effective handling of the pre-hearing proceedings and conduct of a fair hearing and those pertaining to the ability to engage in effective legal analysis and, when requested to do so, write cogent, thoughtful awards.

Among the indicia of a person capable of mastering the first category of process-centered skills is previously demonstrated ability to cope with conflict effectively, remaining goal- and process-focused while projecting an unemotional, objective perspective. Certainly, individuals who have earned reputations as effective, even-handed, and dispassionate negotiators will predict well in this regard. Many respected litigators manifest these qualities in their professional conduct. Similarly, many of those with prior dispute resolution experience and proven acceptability in other fora (e.g., mediation), or as arbitrators in other fields (e.g., the labor arbitration profession), can be reliably predicted to possess the process-centered skills necessary to long-run acceptability as commercial arbitrators.

The second skills bundle required of the acceptable commercial arbitrator goes to the ability to bring the threshold knowledge of the relevant law and principles of contract interpretation to ground by ensuring that the adjudicative result achieved is the product of lucid factual and legal analysis. The best calisthenic for developing this faculty is deciding actual cases. Those who have not had the opportunity to arbitrate an actual case most likely will have developed and evidenced this proficiency in prior writings or other exercises requiring application of law and contract principles to real controversies. Thus, legal briefs written in an advocacy mode, scholarly or other professional articles, or speeches and addresses made in public or private venues can all serve to confirm the desired quality. In addition, reputation in the legal community for insightful,

thoughtful legal analysis can provide a reliable indication of the ability to produce reasoned analysis and awards.

The final attribute is the most important. There are a substantial number of lawyers and other professionals who are possessed of all or most of the characteristics just identified. It is the Authors' belief that despite their credentials, most of those people will not be well-suited to provide the leadership and craftsman-like effort that will be required of arbitrators in the mature model. The work of the mainline commercial arbitrator will more often than not be solitary in nature and be performed in an environment that is at once highly contentious, difficult, and intellectually challenging.

Individuals who view arbitration as an avocation, or little more than an occasional, albeit pleasant diversion from retirement or other endeavors, will have little hand in ensuring the maturation and institutionalization of commercial arbitration. The Authors do not maintain that retired lawyers, judges, and other professionals, as well as part-time neutrals do not have a place in the mainstream of the arbitration profession at the mature stage. Rather, what they assert is that: (1) arbitrators drawn from those two sub-populations must be properly motivated and fully aware of the weighty responsibilities that accompany the arbitral office; and (2) the commercial arbitration corps cannot consist solely of retirees and part-time neutrals.

Only persons with the necessary intellectual firepower, unquestioned integrity, and rigorous ethical standards, and a firm commitment to the profession and competent practice will be deemed fit to serve over the long run. What will be required of the mainline commercial arbitrator is a long-term perspective and a willingness to serve an ongoing role in ensuring that the commercial arbitration process consistently provides those who resort to it with timely, fair, accurate, and correct adjudications of their disputes. The work of commercial arbitration is a serious, often high-stakes game that requires serious, committed adjudicators.

Describing the commercial arbitrator archetype that will stand at the core of the profession in the mature model is a relatively simple task. The keys to developing sufficient numbers of competent neutrals to fill that role is a more complex matter, one that must be a subject of the dialogue the Authors propose.

C. The Creation of a Sufficient Corps of Professional Commercial Arbitrators

In an earlier Section of this Article, the Authors discussed their views regarding the need to supplement and upgrade existing paradigms for the initial credentialing of commercial arbitrators, the importance of providing some form of meaningful arbitrator performance evaluation, and the changes necessary to facilitate more informed arbitrator selection decisions.

As important as those steps will be, they are the more pedestrian, easy to accomplish dimensions of the larger arbitrator development strategy that must be devised.

The effective, competent practice of commercial arbitration requires the highest levels of intellectual skill, integrity, and professionalism. Despite this reality, to date little attention has been paid to the matters typically of concern to the members of an important profession to which society has assigned weighty responsibilities. Most important among these is the fashioning of a vision of how those who wish to master the craft gain entry into it, move from apprentice to journeyman status, and eventually ascend to the master craftsman level. Until a clearer conceptualization of the career path of the mainline commercial arbitrator is achieved, it is unlikely that an identifiable, cohesive group of practitioners with the necessary level of commitment to the profession will emerge.

The reality is that current arbitrator development programs provide little more than the most rudimentary training in the basics of hearing conduct and the relevant substantive law. This is not very sophisticated training, and it leaves many nascent arbitrators ill-prepared for the rigors of the hearing room and arbitral decision-making. A first step in upgrading these existing arbitrator training programs might be to look beyond the more rudimentary subjects to topics like effective handling of the pre-hearing stage (e.g., pre-hearing motion practice, discovery, mediation), models for effective case analysis and award drafting, dealing with and defusing the often rancorous relationship between counsel, and the importance of de-emotionalizing the process. A second important step in this regard might be the establishment of well thought-out, rigorous programs of continuing education intended to keep active commercial arbitrators apace of the evolving law and related matters in their areas of practice.

At the same time, it is important to remember the limitations of traditional classroom training. Arbitration is a craft that is best learned through experience, personal and vicarious. There is little evidence of effective use of mentoring arrangements and apprenticeship programs in the commercial arbitration field. These devices have proven their worth in labor arbitration, and should be utilized in the commercial arbitration realm.

An additional step on the career path for entry into the commercial arbitration trade might be to require that new arbitrators sit in on the hearings and attendant decision conferences of several experienced, diverse neutrals. This experience could extend to analyzing the cases observed to final decision as a sort of "shadow arbitrator," followed up by a discussion and critique from the experienced arbitrator(s) actually assigned to decide the observed case. The practice, the additional perspective, and the sense of continuity from one generation of the profession to the next gained through

these types of experience can be invaluable to the new and the experienced neutral and will almost certainly enhance the performance of both.

Another means to maximize the experiential learning opportunities available to new arbitrators might be the direct appointment by the neutral appointing authorities of such individuals to arbitrate relatively simple, low-stakes disputes on a pro bono or limited fee basis. The parties willing to submit their controversies to this procedure would reap the benefit of a prompt, no or low-fee decision while providing an otherwise inexperienced arbitrator with the opportunity to be tested under fire.

Whatever shape these enhanced arbitrator development programs eventually take, it is essential to remember that their goal is to produce a group of self-involved craftsmen, unequivocally dedicated to the profession of dispute resolution who can be trusted to consistently produce appropriate outcomes in even difficult, contentious cases. Arbitrators of that caliber are not produced in a few weeks, months, or even years. In all but the most exceptional instances, one does not somehow magically transform from competent attorney or business professional to competent arbitrator merely by changing chairs and adopting a new appellation. Rather, the true craftsmen we envision who will lead the commercial arbitration profession into the next century will have spent many years accruing and sharpening their skills, learning through achievement and error, and establishing their acceptability by surviving the test of the commercial dispute resolution marketplace over the long haul. Viable arbitrator development programs must contemplate this fact and be configured so as to be a significant component of that long-run process.

D. The Final Component of the Development of the Commercial Arbitrator Archetype

As the cadre of the true professional, career neutral begins to emerge and to define itself over the next several years, the final step in the evolution of the commercial arbitration profession will begin. That step will be the development of a shared professional identity and conscience among the mainline practitioners of the craft. The absence of this essential professional core is one of the major voids limiting the commercial arbitration process today.

The task of shepherding the commercial arbitration profession to maturity is most appropriately taken up by the mainline arbitrators who sit at its center. It is unrealistic to expect this leadership role to forever be assumed by neutral appointing authorities like the American Arbitration Association, Endispute, or JAMS. Just as the American Medical Association leads the medical profession and the American Bar Association leads the legal profession, the most appropriate organizational vehicle for

leading the commercial arbitration profession is the yet-to-be formed professional association of commercial arbitrators. In the very near future, the groundwork for this organization must be put into place. Existing professional groups like the Society of Professionals in Dispute Resolution (SPIDR) are too diffuse or too non-selective to stand at the apex of the commercial arbitration profession and provide it with the guidance and conscience it must have. The organization we envision must be built from the ground up.

The most useful model for this organization is the National Academy of Arbitrators which sits at the pinnacle of the labor arbitration profession. One gains election to the National Academy only after accruing a sufficient number of years in the profession and issuing a number of awards adequate to demonstrate broad acceptability as an arbitrator of labor-management disputes.[149] The National Academy, in conjunction with the American Arbitration Association and the Federal Mediation and Conciliation Service, played the key role in promulgating the Code of Professional Conduct for Labor Arbitrators that governs neutral conduct in the labor arbitration profession.

The National Academy of Arbitrators polices the professional conduct of its members and convenes semi-annual meetings that constitute the primary intellectual fora for the exploration and debate of issues affecting the profession and process of labor arbitration. The Proceedings of the Academy's Annual Meetings are published in hard back form by the highly-respected Bureau of National Affairs and constitute a major vehicle for dialogue and debate among labor arbitrators and the advocates who argue cases before them. In sum, the National Academy of Arbitrators serves as the professional standard bearer, the intellectual engine, and the conscience of the labor arbitration profession. The time to begin the development of a parallel organization to serve and lead the commercial arbitration process is now.

VII. CONCLUSION

There remains today substantial question as to whether the process of commercial arbitration will achieve the level of rigor and reliability necessary to justify the continued, long-run deference of the judiciary in business disputes that otherwise would be appropriate for adjudication in the state or federal courts. If it does not, the window of opportunity created by

[149] Currently, the minimum number of issued awards necessary for application to the National Academy of Arbitrators is 50 over a five-year period. The *de facto* standard for actual admission to the National Academy is closer to 100 awards over that same five-year period.

the interaction of the U.S. Supreme Court's current charitable view of the process, the logjam in the courts, and the concerns of business decisionmakers with the costs and other problems associated with traditional litigation may prove to be short-lived.

It would be a most egregious error and the height of vanity for the champions of commercial arbitration to believe that the courts, state legislatures, and Congress will stand idly by if, over time, arbitration fails to provide the parties that employ it with a dispute resolution mechanism that is cost effective, procedurally consistent, and fair, and capable, as a matter of course, of producing outcomes that are accurate and correct. In the same manner, the parties themselves and the attorneys who represent their interests will not long remain committed to the commercial arbitration process if their expectations in this regard are not consistently met.

The decision by business executives to utilize arbitration in lieu of permitting commercial disputes to proceed to traditional litigation is based on an implicit risk-return assessment. The risks of submitting one's business fortunes, *a priori*, to a private system of adjudication, virtually immune from judicial interference or usurpation are considerable. Commercial arbitration will continue to prosper only for so long as it produces returns sufficient to outweigh the risks its adoption entails.

The current uproar, *circa* mid-1994, over the arbitration of employee fair employment practices claims in the securities industry is a prime example of how the advocates of commercial arbitration can stumble when they fail to pay adequate attention to the design of the arbitration mechanism, the careful credentialing and selection of arbitrators, the provision of adequate levels of due process guarantees, and ensuring an appropriate level of on-the-record decision-making. By adopting wholesale, without modification, an arbitration mechanism originally intended to resolve broker-client disputes over matters pertaining to the trading of securities (largely concerned with simple claims of fraud and/or misrepresentation) to the adjudication of complex statutory-based claims of employment discrimination brought by brokerage firm employees, the National Association of Securities Dealers and the New York Stock Exchange have prompted legitimate expressions of concern among the civil rights plaintiffs' bar, the press, and several members of Congress.[150] This very serious oversight by the officials in charge of the securities industry

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[150] *See Employment Discrimination*, *supra* note 12; *see also* Steven A. Holmes, *Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, April 5, 1994, at 86; Margaret A. Jacobs, *Required Job-Bias Arbitration Stirs Critics*, WALL ST. J., June 22, 1994, at B5; Margaret A. Jacobs, *Riding Crop and Slurs: How Wall St. Dealt with a Sex Bias Case*, WALL ST. J., June 9, 1994, at A1.

arbitration mechanism must be quickly remedied, lest the courts or Congress act in their stead.

That there are viable alternatives to the commercial arbitration process is demonstrated by the appearance of experiments like the recently-initiated Sta-Fed ADR Inc. organization in Hartford, Connecticut. In 1993, the Connecticut state legislature authorized the creation of this private, non-profit mediation service that employs sitting federal and state and senior federal judges, working nights to provide mediation services to litigants under the auspices of the state-sanctioned mediation program.[151] There is also the possibility that the judiciary may sanction new, innovative devices whereby judges, magistrates, and similar judicial officials would be permitted, with the agreement of the parties, to decide disputes in their judicial capacities under informal, expedited procedures.[152] Finally, there exists the possibility that the ultimate authority to adjudicate commercial disputes in an alternative mode could also be returned to the federal and state judiciaries through judicial or legislative approval of a special master-like device whereby judges would themselves designate neutral parties to hear and decide commercial disputes that the parties did not wish to submit to traditional court trial.[153]

The blessing recently granted the process of commercial arbitration by the U.S. Supreme Court is both a boon and a challenge. By taking the process from the fringes of litigation and placing it squarely in the forefront of the commercial dispute resolution arena, *Mitsubishi* and its progeny have vastly accelerated and indeed compelled the maturation of commercial arbitration. The challenge of creating in a short period of time a system of private adjudication that leaves disputants and their attorneys satisfied that they would have gained nothing of importance by utilizing the highly-developed system of civil justice provided by the federal and state courts is daunting to say the least.

The Authors assert that the institutionalization, the permanence of commercial arbitration, is by no means assured. The present absence of a

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[151] Kirk Johnson, *Public Judges as Private Contractors: A Legal Frontier,* N.Y. TIMES, Dec. 10, 1993, at D20.

[152] *See, e.g.,* DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163, 1166 (7th Cir. 1994) ("Parties are free within broad limits to agree on simplified procedures for the decision of their case."). In this opinion, Judge Posner observed that an agreement between two parties to a dispute in federal district court that a magistrate judge would make a decision on a limited record and arguments pertaining only to that limited record, and that they would not appeal the judge's decision would be deemed "not improper." *Id.*

[153] *See* Stephen L. Hayford, *The Coming Third Era of Labor Arbitration,* ARB. J., Sept. 1993, at 8-17, 77-99.

true core, a sense of identity and mission, a gestalt around which to build the profession of commercial arbitration indicates a certain shallowness, a lack of substance that does not bode well for the ability of the process to stand in the place of the state and federal judiciaries, especially in complex, high-stakes disputes. There are serious concerns about the ability of a few highly-entrepreneurial, unregulated private organizations and a large group of essentially self-labeled "arbitrators" of widely-divergent qualifications, competencies, and perspectives to lead the task of securing commercial arbitration's long-run viability and establishing the foundation for a bona fide profession.

It is for this reason that the Authors reassert their earlier contention that all of the persons and organizations with a stake in the successful maturation of commercial arbitration must become involved in a rigorous, comprehensive public dialogue, including substantial efforts at empirical research, intended to thoughtfully shape the form and character of the process and the neutrals who will be key to its effective operation. Set forth in the text above is a first conceptualization of the primary focuses of that dialogue, and, as a starting point for the dialogue, the Authors' views on those subjects. It remains now for the others with a voice in this matter to step forward and engage.