Rethinking American Arbitration

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INTRODUCTION

American arbitration has come of age. In the seven decades since the dawn of the “modern era” of arbitration, its proponents have secured

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1. “Arbitration” is a process whereby parties voluntarily submit their disputes for resolution by one or more impartial third persons, instead of by a judicial tribunal provided by law. See M. DOMKE ON COMMERCIAL ARBITRATION § 1:01, at 1 (G. Wilner ed. 1984) [hereinafter DOMKE]. The late Soia Mentschikoff, a serious student of arbitration, identified four essential characteristics of the process: an agreement by the parties to arbitrate; a dispute resolution process outside the courts; a decision by the third party arbitrator (as opposed to a settlement or compromise); and, the recognition of that decision as final and binding in accordance with the prior agreement of the parties. Mentschikoff, The Significance of Arbitration—A Preliminary Inquiry, 17 Law & Contemp. Pros. 698, 699 (1952). While arbitration is adversarial rather than conciliatory in nature, it is very different from traditional litigation. Faure, The Arbitration Alternative: Its Time Has Come, 46 Mont. L. Rev. 199, 200 (1985). See also infra notes 36-176 and accompanying text.

institutional acceptance of the process from business, bench and bar. A series of recent decisions by the United States Supreme Court have significantly limited permissible judicial and legislative restrictions on the right to arbitrate under federal law. These decisions offer dramatic evidence of


Favorable legislation encouraged the use of arbitration by business and industry groups. See Kronstein, Arbitration Is Power, 38 N.Y.U. L. REV. 661, 663 (1963) (observing that "institutional" arbitration is a distinguishing feature of the modern era). At first, institutional use of arbitration was generally limited to disputes among businesspersons. See generally Mentschikoff, Commercial Arbitration, 61 COLUM. L. REV. 846, 848-56 (1961) (discussing mercantile arbitration and its historical roots). Today, however, the widespread employment of arbitration agreements in commercial boilerplate affects not only merchants and businesspersons, but customers and clients as well. Id. at 864. See, e.g., Glaberson, Brokers See Gains; Lawyers Uneasy, N.Y. Times, June 9, 1987, at D5, col. 1 (addressing the affect of arbitration provisions in brokerage contracts on investors).

In recent years, judicial decisions have provided a significant stimulus to arbitration. The courts, having overcome the notion that agreements to arbitrate are inimical to public policy, tend to liberally enforce agreements to arbitrate in furtherance of perceived public policies of the first magnitude. See Stipanowich, supra note 1, at 970-78; cf. Note, The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act, 52 B.U.L. REV. 571 (1972) (courts liberal enforcement of arbitration agreements is a reaction to their initial reluctance). But cf. Allison, Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies, 64 N.C.L. REV. 219 (1986) (courts conclude that arbitration clauses are not binding when they concern private antitrust claims).


More recently, the Court enforced arbitration of other issues which were widely believed to be nonarbitrable. In Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985), the Court ordered enforcement of an agreement to resolve statutory antitrust claims, including treble damages, by arbitration in an international transaction. The Court brushed
contemporary faith in arbitration as a successful, wide-ranging substitute for civil litigation.

The success of arbitration is a reflection of the shortcomings of the American civil justice system. Modern judicial process is characterized by

aside public policy arguments against arbitral consideration of antitrust issues and reaffirmed a strong belief in the effectiveness of arbitration as a means of dealing with international commercial disputes. See Note, Mitsubishi and Antitrust Arbitration—It's All the Japanese You Need to Know, 1986 B.Y.U. L. Rev. 219, 226-29.

In 1987, the Court further advanced the cause of arbitration by extending its reach to include investor fraud claims under section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5. Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987). Prior to the decision, a number of lower courts had refused to require arbitration of such claims, relying on the similarity between provisions of the Exchange Act and the Securities Act of 1933, both of which declare void any stipulation "to waive compliance with any provision" of the statute. See, e.g., Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1103 (2d Cir. 1970) (dicta). But see Hoelling, Arbitrability in the Wake of Byrd and Mitsubishi, 195 N.Y.L.J., Apr. 10, 1986, at 1, col. 1 (observing recent trend toward enforcement of arbitration of Exchange Act claims). The Supreme Court had declared such "non-waiver" language to prohibit enforcement of arbitration of claims under section 12(2) of the Securities Act in Wilko v. Swan, 346 U.S. 427 (1953). In McMahon, however, Justice O'Connor, writing for the majority, insisted that Wilko only barred arbitration where that process was "inadequate to protect the substantive rights at issue." 107 S. Ct. at 2334. Justice O'Connor observed that Wilko was "difficult to reconcile . . . with [the] Court's subsequent decisions involving the [Arbitration Act]." and that underlying concerns regarding the ability of arbitrators to handle the complex statutory claims had since been rejected by the Court. Id. at 2335. Moreover, Justice O'Connor noted, there had been substantial "intervening changes in the regulatory structure of the securities laws" since Wilko, with the SEC assuming a much broader role in overseeing securities regulatory organizations and their arbitration rules. Id. Justice Blackmun, joined by Justices Brennan and Marshall, dissented on the basis that the Rule 10(b) claims, like claims under the Securities Act, fell squarely within the Wilko exception to the otherwise broad coverage of the Federal Arbitration Act. Id. at 2346-49. The dissenter also evidenced a concern with practicalities such as limitations on judicial review of arbitral awards and limited oversight by the SEC. Id. at 2353-58. Justice Stevens dissented on the basis that in light of the judiciary's longstanding application of Wilko to the Exchange Act, the issue should be addressed by Congress. Id. at 2359-60.

In the same case, the Court unanimously approved arbitration of civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1964) (commonly referred to as RICO). Writing for the Court, Justice O'Connor could find nothing in the text of the statute or its legislative history indicating that Congress intended to remove RICO treble damage claims from arbitration. 107 S. Ct. at 2344-45. Justice O'Connor also rejected the notion that the potential complexity of such claims, or their "incidental policing function," should affect their arbitrability. Id.

high cost, excessive formality, and long delays. Having gone to the time and trouble of bringing a case through interminable pretrial motion practice, attempting to educate the decisionmaker while observing the intricacies of trial procedure, and waiting out a lengthy appeal, even a “victorious” litigant may well question whether justice has been served.

In the past decade, dissatisfaction with traditional adjudication of disputes has given rise to more general experimentation with forms of “ADR” (alternative dispute resolution). Reform-minded jurists, practitioners, and ed-

5. Delays and inefficiencies in the justice system have been attributed to the inability of the court system to handle greater and greater numbers of cases, extensive pretrial and posttrial procedures, inefficient judicial management, and procrastination by attorneys and judges. See generally Cooke, The Highways and Byways of Dispute Resolution, 55 St. John’s L. Rev. 611 (1981); de Seife, A Plea for the Creation of Commercial Courts, 17 New Eng. L. Rev. 437, 438-44 (1982); Lasker, The Court Crunch: A View from the Bench, 70 F.R.D. 245 (1977); Williams, Court Delays and the High Cost of Civil Litigation: Causes, Alternatives, Solutions, 71 Ill. B.J. 84 (1982). Recent efforts to reform federal discovery rules are a result of growing criticism of the tendency of the process to permit abuse, produce delays and excessive costs. See generally Janofsky, The “Big Case”—A “Big Burden” on Our Courts, 1980 Utah L. Rev. 719, 720, 723-24; Marcus, Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure, 66 Judicature 363 (1983).

6. As one commentator observed, due process is not realized when a claimant must absorb attorney’s fees and other costs equalling 30% to 50% of the amount at issue while losing the use value of the claimed principal. Max, supra note 4, at 309. See also Lasker, supra note 5, at 250. In addition to straining the pocketbook, lengthy litigation can induce severe emotional strain in parties and their attorneys. See Goldstein, supra note 4, at 75 n.15 (describing “litigation neuroses” induced by lengthy proceedings). Delays also increase the likelihood that witness testimony will be unavailable or less reliable at the time of trial. Nagel, Predicting and Reducing Court-Case Time Through Simple Logic, 60 N.C.L. Rev. 103, 105 (1981).

Some critics of the judicial system also question whether that time-honored body, the jury, is fit to address complex commercial and legal issues. See, e.g., de Seife, supra note 5, at 438. See also Delgado, Dunn, Brown, Lee & Hubbert, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1365 (hereinafter Delgado) (noting Chief Justice Burger’s suggestion that complex cases be heard by judges rather than juries); Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43 (1980) (concluding that at the time of the adoption of the seventh amendment, the practical abilities and limitations of juries were important considerations in determining whether to permit a case to be decided by a jury). In one case, the Court of Appeals for the Third Circuit held that the seventh amendment does not guarantee the right to jury trial when the lawsuit is found to be too complex for the jury. In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). But see In re United States Fin. Sec. Antitrust Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980) (holding that the seventh amendment applies without regard to the size or complexity of a suit).

More and more of late, commentators have challenged the notion that traditional processes are the only avenue to justice. See Bell, Crisis in the Courts: Proposals for Change, 31 Vand. L. Rev. 3, 7 (1978); de Seife, supra note 5, at 443; Lasker, supra note 5, at 251, 256; Lurie, supra note 4, at 9. Former Chief Justice Burger put the case most strongly when he described our civil justice system as “too costly, too painful, too destructive, too inefficient for a truly civilized people.” Burger, Remarks at the Midyear Meeting of the ABA, 52 U.S.L.W. 2471 (Feb. 28, 1984).

7. See Delgado, supra note 6, at 1360; Edelman, Institutionalizing Dispute Resolution Alternatives, 9 Just. Sys. J. 134, 135-36 (1984); Henry, Alternative Dispute Resolution: Meeting
ucators have encouraged disputants to lend objectivity to their negotiations by means of third-party mediation or mini-trial. Other reformers trumpet the glories of formalized pretrial procedures such as court-annexed arbitration and summary jury trial. In the current wave of enthusiasm for procedural substitutes, consensual arbitration remains a favorite alternative.

Arbitration is often described as everything that civil litigation is not. Observers frequently depict arbitration as a speedy and economical process.


10. See Bell, supra note 6, at 7 & n.11; Note, Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes, 29 Hastings L.J. 475, 479-500 (1978) (discussing various judicial arbitration programs and their success at reducing court dockets); Comment, supra note 2, at 428-32; Lempert, Arbitration Found Effective in Expediting Settlement, Legal Times, May 25, 1981, at 2, col. 1 (describing the positive effect of court-annexed arbitration in stimulating settlement in federal district court cases).


14. See infra notes 74-92 and accompanying text.
characterized by informal hearings before one or more judges selected on the basis of knowledge and expertise in the commercial context of the dispute.\textsuperscript{15} There is no extensive pretrial practice,\textsuperscript{16} and very little possibility of successful appeal.\textsuperscript{17} The scheduling and location of the hearings may be arranged for the parties' convenience,\textsuperscript{18} and the proceedings conducted in privacy.\textsuperscript{19}

Despite the current popularity of arbitration, its future remains in doubt. Even now, proponents as well as critics of arbitration observe that it frequently fails to live up to its billing as a "speedy and economical" substitute for litigation,\textsuperscript{20} especially in large or complex disputes.\textsuperscript{21} If the contemporary supermarket of procedural alternatives results in significant improvements to the civil justice system, arbitration may become a less viable option.

The primary responsibility for meeting such challenges rests with the institution which is and always has been at the forefront of the arbitration movement, the American Arbitration Association (AAA).\textsuperscript{22} Since its inception in the early days of the modern era of arbitration, the AAA has given form and substance to domestic and international arbitration.\textsuperscript{23} It has overseen

\textsuperscript{15} See infra notes 36-73 and accompanying text.
\textsuperscript{16} See infra note 38 and accompanying text.
\textsuperscript{17} See infra notes 84-88 and accompanying text.
\textsuperscript{18} See infra note 40 and accompanying text.
\textsuperscript{19} See infra note 55 and accompanying text.
\textsuperscript{22} The AAA is a nonprofit public service organization that promotes voluntary resolution of disputes through arbitration and mediation. While there are other business and trade groups that sponsor arbitration, including the New York Stock Exchange and other securities regulatory organizations, the AAA is the preeminent forum for resolution of commercial disputes by arbitration in the United States. See Meyerowitz, supra note 13, at 79. See also Max, supra note 4, at 325 (observing that AAA arbitration rules are referenced in no less than forty statutes in twenty different jurisdictions). See generally Mentschikoff, supra note 2 (comparing various forms of commercial arbitration).
\textsuperscript{23} The organization that became the AAA was founded in the early 1920's by an illustrious group including Dean (later Chief Justice) Harlan Stone and then Chief Justice Charles Evans Hughes. Its purpose was the development of arbitration as an adjunct to the courts. See
the development of arbitration rules\textsuperscript{24} and established nationwide panels of arbitrators.\textsuperscript{25} Through its network of regional offices, the AAA administers a growing number of commercial arbitrations, as well as other forms of dispute resolution.\textsuperscript{26} The AAA is also committed to ongoing experimentation.

Gotshal, The Art of Arbitration, 48 A.B.A. J. 553, 553-54 (1962). This goal was furthered by the creation of an independent national institution for the administration of arbitration. For a detailed history of the AAA, see F. Kellor, American Arbitration: Its History, Functions and Achievements 11-60 (1948).

24. The promulgation of rules governing arbitration procedure remains one of the most significant contributions of the AAA. See F. Kellor, supra note 23, at 23-24, 64-65; Braden, Sound Rules and Administration in Arbitration, 83 U. Pa. L. Rev. 189 (1934). In addition to its standard Commercial Rules, the AAA has worked with industry and trade groups to develop specialized industry rules. For example, the AAA Commercial Rules were slightly modified with the assistance of representatives of the construction industry to develop uniform arbitration procedures for owners, architects and contractors. See American Arbitration Association, Construction Industry Arbitration Rules (Jan. 1, 1986) [hereinafter Construction Rules]. Compare American Arbitration Association, Commercial Arbitration Rules (Mar. 1, 1986) [hereinafter Commercial Rules].

The AAA also developed standardized contract clauses providing for arbitration of disputes in accordance with appropriate AAA procedural rules. See, e.g., Commercial Rules, supra, at 2; Construction Rules, supra, at 6. The AAA derives most of its commercial business from submissions under contractual arbitration clauses. See Meisel, supra note 13, at 6. See also S. Lazarus, supra note 1, at 22-24; Smith, Commercial Arbitration at the American Arbitration Association, 11 Arb. J. 3, 5 (1956).

Among the trade and professional associations using AAA administered rules or recommending the use of AAA services for member disputes are:


Letter from Constance O'Sullivan, AAA Director of Marketing, to author (Sept. 1, 1987) (answering the author's request for trade/professional associations which provide for AAA administration of their dispute resolution procedures).

In the wake of recent Congressional concerns regarding arbitration of securities disputes, the AAA recently published a modified version of its standard commercial rules for use in securities arbitration. See American Arbitration Association, Securities Arbitration Rules (Sept. 1, 1987). Prior to publication, the rules were subject to review and comment by the Securities Exchange Commission. It is anticipated that the rules will be adopted for use in many standard brokerage agreements. Telephone interview with George Friedman, AAA Vice President for Case Administration (July 27, 1987).

25. The New York City-based organization currently maintains a nationwide pool of tens of thousands of arbitrators of various specialties. Meyerowitz, supra note 13, at 79. This pool includes more than 32,000 construction arbitrators. Letter from AAA Vice President Mark Sholander to author (Jan. 14, 1987). See also F. Kellor, supra note 23, at 31, 35-36.

26. See supra note 12.
and research to understand and improve arbitration, a task which it is uniquely equipped to undertake. The experience of the AAA through its nationwide "laboratory" should provide revealing insights into the successes and failures of contemporary arbitration.

Unfortunately, efforts to determine how effectively arbitration works and what improvements might be made to the system have been hampered by the relative lack of meaningful empirical data. There are few pertinent studies upon which to base firm conclusions regarding the degree to which arbitration fulfills its declared goals. Most writings on the subject tend to focus on personal experience.

Recently, however, the American Bar Association sponsored a major survey of opinions and attitudes toward arbitration under AAA rules. For the first time in a quarter of a century, a significant number of attorneys were canvassed on a wide range of topics relating to their experiences as advocates and arbitrators. The resulting data offers a detailed picture of contemporary commercial arbitration as perceived by those most familiar with the process. Based upon an analysis of the responses of the survey participants, this Article assesses the current status of arbitration and proposes means to guarantee its future success as a vehicle of alternative dispute resolution.

Section I of this Article discusses conflicting views of modern commercial arbitration, contrasting the advantages ascribed to the process by its proponents with concerns voiced by its critics. Section II presents a detailed analysis of the results of the recent ABA arbitration survey, thus providing a perspective for evaluation of the claimed advantages and disadvantages of arbitration. Finally, section III draws conclusions from the survey analysis and suggests possible reforms to procedural rules governing arbitration to insure the continued viability of the process.

I. CONFLICTING PERCEPTIONS OF AMERICAN ARBITRATION

Proponents of arbitration invariably ascribe a variety of virtues to the process: flexibility, informality, speed, economy, expertise in the factfinder,

27. See F. KELLOR, supra note 23, at 25, 55.
28. See Kritzer & Anderson, supra note 21, at 21-23 (observing that there is little data upon which to evaluate the claimed advantages of various dispute resolution mechanisms, and few empirical studies on arbitration). See also Middleton, Arbitration "Not Magic" But Cures Some Ills, 68 A.B.A. J. 785, 786 (1982) (quoting ADR expert Frank Sander as saying we know too little about arbitration).
29. For a discussion of published studies on arbitration and of data recently collected by the AAA, see infra text accompanying notes 251-98.
30. For a discussion of conflicting perceptions of arbitration based largely on the personal experiences and views of commentators, see infra text accompanying notes 34-176.
31. See infra text accompanying notes 177-82.
32. See infra text accompanying notes 183-250. The survey data is then compared to results of other studies. See infra text accompanying notes 251-98.
33. See infra text accompanying notes 299-341.
and finality. On the other hand, a growing number of critics challenge these perceptions. These critics question whether arbitration offers real advantages over litigation. To fully appreciate the value of the ABA arbitration survey, it is important to explore and understand these contrasting views of the commercial arbitration process.

A. Perceived Advantages of Arbitration

1. Flexibility and Informality

As a creature of contract, arbitration is essentially what the parties make it. Thus, depending upon the terms of the agreement to arbitrate, the process may be informal or may incorporate certain features of formal litigation. Parties choosing an informal process may avoid lengthy pre-hearing motion practice and discovery. The parties may opt for hearings before one or more arbitrators of their choice, or forego hearings entirely and submit evidence in written form. Regardless of the process chosen by the parties, hearings may be scheduled without reference to crowded court dockets and may be held at any location upon which the parties can agree. Formal rules of evidence and

34. See infra text accompanying notes 36-92.
35. See infra text accompanying notes 93-176.
36. See Coulson, supra note 7, at 1037. See also Carlston, Theory of the Arbitration Process, 17 LAW & CONTEMP. PROBS. 631, 635-36 (1952) ("Arbitration is a chameleon word, assuming varying significance as the social setting in which it takes place varies."); Faure, supra note 1, at 210. The dichotomy of arbitration lies in the fact that although arbitrators derive their power from private contract, they serve to impart justice as a surrogate for the courts. See generally Isaacs, Two Views of Commercial Arbitration, 40 HARV. L. REV. 929 (1927) (providing a thorough analysis of both the "agency" and "judicial substitute" theories of arbitration).
37. See infra text accompanying notes 47-52.
38. Sergi, supra note 4, at 44. Much of the time, effort, and expense of civil litigation is directly related to discovery. The use of discovery in arbitration might tend to undermine the goals of speed and economy, particularly in small cases. C. Peterson, supra note 21, at 107.
39. Sergi, supra note 4, at 45. See also Commercial Rules, supra note 24, ¶ 11, 21.
trial procedure may be avoided; attorneys need not be present. Arbitrators may have considerable flexibility in the formulation of remedies within the scope of the arbitration agreement. They may tailor relief to fit the circumstances, unbound generally by legal or equitable principles save their own sense of justice and fairness.

Of course, for arbitration to be effective the parties must establish some specific guidelines for the process. However, few contracting parties have the time or the inclination to draft their own rules. Thus, for reasons of convenience, many types of commercial agreements incorporate the rules of the American Arbitration Association.

The AAA Rules are exemplary arbitration provisions which attempt to accommodate the desire for flexibility within a workable procedural framework. They provide guidelines for submitting disputes to arbitration and for selecting arbitrators, but they avoid setting rigid rules for prehearing motion practice. The AAA Rules do not prohibit prehearing discovery; however, they do not make specific provision for arbitrator-ordered exchange of documents or other discovery prior to the commencement of hearings. The

41. One commentator observes that since rules of evidence evolved to deal with the problem of communicating with a jury, they are inappropriate in arbitration. Carlston, supra note 36, at 650. Carl Taeusch insisted that businesspersons want arbitrators to listen to evidence that an attorney or judge might deem irrelevant, and leave to the arbitrators the task of deciding what is important and what is not. Taeusch, supra note 4, at 159. The UAA merely requires that both parties be given an opportunity "to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." UNIF. ARB. ACT § 5(b), 7 U.L.A. 1, 99 (1985).

42. The UAA gives arbitrating parties the right to be represented by counsel, and forbids pre-hearing waiver of such right. UNIF. ARB. ACT § 6, 7 U.L.A. 1, 113 (1985). Traditionally, however, a number of trade associations have forbidden the use of attorneys in arbitration of disputes between members. See Menischikoff, supra note 2, at 859. On the other hand, the AAA encourages participation by members of the bar as advocates and arbitrators. Id.

43. See generally Stipanowich, supra note 1, at 978-82 (discussing the broad power of arbitrators to fashion remedies).

44. See generally Braden, Sound Rules and Administration in Arbitration, 83 U. PA. L. REV. 189 (1934) (emphasizing the need for rules in arbitration).

45. See id. at 190.

46. See Letter from Constance O'Sullivan, AAA Director of Marketing, to author (Sept. 1, 1987).

47. See COMMERCIAL RULES, supra note 24. In an effort to further reduce the time and expense associated with resolution of minor disputes, the AAA generally applies special "expedited procedures" in cases where no party's total claim exceeds $15,000. Id. §§ 7, 54-58. Recently the AAA developed optional procedures for dealing with large or complex claims in construction cases. AMERICAN ARBITRATION ASSOCIATION, GUIDELINES FOR EXPEDITING LARGER, COMPLEX CONSTRUCTION ARBITRATIONS (July 1987). See also infra note 319 (explaining new guidelines).

48. The AAA Commercial Rules provide that arbitrators "authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." COMMERCIAL RULES, supra note 24, § 31, at 11. In those cases where a pre-hearing conference (without the arbitrators) is held, the parties may arrange among themselves "for an exchange of information." See C. PETERSON, supra note 21, at 111-12. In large or complex cases where a preliminary
Rules contain few strictures on the conduct of the hearings or the admission of evidence, leaving such matters largely to the discretion of the arbitrator. Accordingly, the AAA authorizes the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . . ."

By incorporating a degree of informality into the process, the AAA Rules strive for several goals. Proponents of arbitration assert that businesspersons are more comfortable with informal processes than with litigation, and that they are therefore more likely to accept a result of an informal arbitration process. A more informal, relaxed atmosphere may also be conducive to a spirit of goodwill between the parties, a goal which may be important when the parties share an ongoing commercial relationship. Keeping the case out of court may also avoid unwanted publicity for one or both of the parties. Finally, and perhaps most importantly, the lack of formalities may mean speedier, less expensive justice.

2. A Knowledgeable and Experienced Trier of Fact

While the civil justice system often selects its triers of fact on the basis that they know little or nothing about the subject of dispute, a hallmark of hearing is scheduled before the arbitrators, the arbitrators and the parties may "arrange for the production of relevant documents or other evidence." However, the Rules are unclear as to whether the arbitrators may subpoena documents or otherwise enforce discovery prior to actual hearings. AAA President Robert Coulson has been quoted as saying that arbitrators rarely permit discovery. Meyerowitz, supra note 7, at 80. But see infra notes 319, 322.


50. "The parties may offer such evidence as is relevant and material to the dispute . . . ."

Commercial Rules, supra note 24, § 31.

51. The Rules provide that "[t]he 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." Commercial Rules, supra note 24, § 31. Arbitrators thus have broad authority to limit the evidence. See Poppleton, The Arbitrator's Role in Expediting the Large and Complex Case, 36 ARB. J., Dec. 1981, at 6, 9. They also have considerable discretion to proceed forward with hearings in the absence of a party, provided that party has been given notice and fails to obtain an adjournment or to appear without good reason. Commercial Rules, supra note 24, § 30. See generally Blutrich & Cuomo, The Discretion of Arbitrators to Grant or Deny Adjournments, 38 ARB. J., Dec. 1983, at 36 (emphasizing the judicially-recognized authority of arbitrators to control arbitration schedules).

52. Commercial Rules, supra note 24, § 43. The Rules also permit the Arbitrator to "assess arbitration fees and expenses in favor of any party . . . ." Id.

53. See Jones, supra note 13, at 525 (noting that the arbitration process is often more readily comprehensible to clients than civil litigation). See also Taeusch, supra note 4, at 148-51 (describing the businessperson's "instinctive fear" of litigation).

54. Rosenthal, supra note 13, at 140. But see S. Lazarus, supra note 1, at 56 (indicating that goodwill is often not of paramount concern to businesspersons by the time a dispute reaches arbitration).

In construction contracts, arbitration may be a means of successfully resolving disputes while the work continues. Goldstein, supra note 4, at 79-80. See also Fabyanske & Halverson, supra note 21, at 288. As the author can attest from personal experience, however, adversarial processes of any kind may have a negative impact on an ongoing job.

55. S. Lazarus, supra note 1, at 53; Rosenthal, supra note 13, at 140.

56. See infra text accompanying notes 74-92.
arbitration is the presence of one or more decisionmakers with pertinent knowledge or experience. The theory is that an individual familiar with the commercial context of the dispute, including industry customs and vocabulary, is better suited to dispense justice than laypersons who might be hampered by their relative lack of business experience and understanding of trade practices.

At the hearing stage, arbitrator knowledge and experience may be critical in a number of ways. Expert arbitrators should require little in the way of education on technical points, thereby saving valuable hearing time. Moreover, a pertinent technical or legal background should enhance the ability of the arbitrator to identify the significant issues in a particular case and to sharpen the focus of the hearing to deal with those issues. A knowledgeable arbitrator may be able to prevent unnecessary delay where an advocate's ignorance or lack of preparedness leads to unhelpful lines of questioning.

57. See Lyons, supra note 20, at 107 (quoting AAA President Robert Coulson as saying that "people choose arbitration mainly to have something resolved in a private setting by people who are knowledgeable . . . [so that] the parties can get an award that is final and binding"). See also Rosenthal, supra note 13, at 140.

58. See Bernstein, The Impact of the Uniform Commercial Code upon Arbitration: Revolutionary Overthrow or Peaceful Coexistence?, 22 ARB. J., Aug.:1967, at 65, 82 (observing that businesspersons and others often distrust the law and judges, and would prefer to depend upon the judgment of businesspersons and other experts); Goldstein, supra note 4, at 80; Note, supra note 4, at 1028 ("Because of their expert knowledge of trade practices, arbitrators are regarded as more competent finders of fact than jurors."); Phillips, A Practical Method for the Determination of Business Fact, 82 U. PA. L. Rev. 230, 234 (1934) (observing that even if jury trials were speedier, many would still prefer to have disputes resolved by an expert arbitrator); Taeusch, supra note 4, at 158-59 (asserting that businesspersons prefer a quick, fair and final disposition of controversies by arbitrators). See also Ferguson, The Adjudication of Commercial Disputes and the Legal System in Modern England, 7 Barr. J.L. & Soc. 141, 142-44, 147 (1980) (discussing concerns of English business interests with the unpredictability of jury verdicts, and the movement toward arbitration before expert arbitrators); Scheinholtz & Miscimarra, The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration, 40 ARB. J., June 1985, at 55, 57 (noting the importance and value of having knowledgeable and experienced arbitrators in labor disputes).

59. See Solove, supra note 21, at 134; Taeusch, supra note 4, at 150.

60. The ability of the arbitrator to define issues may be critical in the absence of extensive preliminary discovery and motion practice. See Barrett, Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel, 41 ARB. J., Dec. 1986, at 15, 18-19; Mentschikoff, supra note 1, at 705-06. According to a number of decisions, an arbitrator who has been selected for his familiarity with and knowledge of the specific subject matter of the arbitration may rely heavily upon his own expertise in reaching a decision. See Horowitz, supra note 13, at 82. See also Isaacs, supra note 36, at 937 (observing that arbitrators may draw upon their own technical knowledge and expertise in arriving at a decision); Mentschikoff, supra note 1, at 701 (describing the expansion of "judicial notice" made possible by arbitrator expertise); Phillips, supra note 58, at 241-42.

61. See Horowitz, supra note 13, at 83 (noting the propensity of some arbitrators to question witnesses themselves). See also Construction Experts Assess Arbitration's Changing Tenor, 54 Civil Eng./ASCE, Sept. 1984, at 16 (concluding that construction arbitration requires careful preparation and understanding of technical points of case because arbitrators are experts in the field).
Arbitrator expertise should reduce the possibility that the final decision will be arbitrary or ill-informed. Arbitrators with pertinent commercial background and understanding should also be less susceptible to lawyer artifice or to emotion. And while arbitrators may pay heed to principles of substantive law, they may elect to forego a strict contractual interpretation which, given their own experience, is inconsistent with justice in the instant case. An arbitrator's expertise in a case is usually not an accident. The parties typically participate in selecting the arbitrator or arbitrators and they may establish criteria which the panelists must meet. The role of the parties in the selection process thus permits the fashioning of a tribunal appropriate to the case. It may also stimulate greater faith in the process and lessen the chance of appeal of the final award.

Although arbitrating parties may select their own panel without outside assistance, they frequently resort to an institutional selection process such as:

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62. Mentschikoff concluded that a factor enhancing the predictability of arbitration was arbitrator awareness of trade meaning of contract terms and the significance of various aspects of performance under the contract. Mentschikoff, supra note 2, at 853. See also Jones, supra note 13, at 525 ("It is one thing to offer the testimony of competent expert witnesses [as in court]; it is quite another to infuse the decision-reaching with such expertise.").

63. See S. Lazarus, supra note 1, at 52. See also Bernstein, supra note 58, at 82 ("Nonexpert judges can be misled about questions of business practice . . .").

64. Studies indicate that commercial arbitrators generally pay attention to, if not follow, applicable legal precedent. See Mentschikoff, supra note 2, at 861; Note, supra note 4, at 1024, 1027; infra text accompanying note 258. Although arbitrators do not have judges to instruct them in the law, they may be informed of pertinent legal norms by counsel. Mentschikoff, supra note 2, at 867-68.

65. See Bernstein, supra note 58, at 84 (observing that while it is to be expected "[t]hat arbitrators frequently seek guidance from the law . . . [e]qually, it is to be expected that they not feel constrained by it"); Lippman, Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives, 24 Me. L. Rev. 215, 218 (1972) (concluding that parties selecting arbitration are choosing a forum in which they believe "fundamental equities" will prevail over technical precedent); Solove, supra note 21, at 137 (noting that arbitrators may "develop private principles of decision or remedial devices which, while satisfactory to the parties, would not normally be administered by the courts"). See also Goldstein, supra note 4, at 79-80.

Professor Mentschikoff observed that while legal precedent did have a meaning in arbitration, arbitrators were free to use other criteria as the basis of their decision and to retest pertinent rules of law on the basis of their "inherent soundness." Mentschikoff, supra note 1, at 701-03. She concluded that courts often achieve these same goals by subterfuge. Id. See also infra note 154.

66. See Solove, supra note 21, at 137.


68. See Coulson, supra note 67, at 675; Solove, supra note 21, at 137.
as that established by the AAA Rules.69 The AAA maintains nationwide panels of arbitrators for selection in various kinds of cases, including commercial disputes and construction-related controversies.70 Theoretically, the panelists are individuals with pertinent technical or legal knowledge, education or experience.71 Because it is often difficult to find individual panelists incorporating all of the personal and professional strengths that may be important to the resolution of a dispute, the AAA Rules permit the use of a three-member panel in appropriate cases;72 in construction cases, such panels are frequently composed of a contractor, a design professional and an attorney.73

3. Speed and Efficiency in the Arbitration Process

In a period of increasing dissatisfaction with the delays of the judicial system, arbitration purportedly offers a more expeditious and efficient method of resolving civil disputes.74 This advantage is theoretically obtained through a combination of factors at various stages of the process. The relative absence of pre-arbitration motion practice or discovery may be the single most important factor in reducing the length of arbitration.75 There is generally no opportunity for attorneys to consume months or years exchanging lengthy and detailed pleadings, making and arguing technical motions involving points of law, and conducting extensive discovery.

Moreover, in arbitration there is no need to put up with the delays and uncertainties of a court docket; in many cases it is possible to begin hearings

69. The standard arbitrator selection procedure used by the AAA involves the submission to the parties of lists of potential arbitrators from the appropriate AAA pool. See infra text accompanying notes 133-34.

70. See generally F. KELLOR, supra note 23, at 31-36 (describing the administration of AAA panels). See also Meisel, supra note 13, at 8 (discussing national AAA construction panel and specialty panels).

71. See Meyerowitz, supra note 13, at 79.

72. AAA President Coulson believes that the panel approach offers a "collective expertise" that might not be obtainable in a single individual. Coulson, supra note 67, at 675. Since August 1987, the AAA has a policy of appointing three arbitrators in cases involving claims in excess of $100,000. Telephone interview with George H. Friedman, AAA Vice President for Case Administration (Nov. 24, 1987).

73. See Aksen, supra note 13, at 158-59 (describing the efforts of the AAA and the National Construction Industry Arbitration Committee, which jointly developed the multidisciplinary concept to foster expertise and fairness). Compare Smiley, Stockbroker-Customer Disputes: Making a Case for Arbitration, 23 Ga. St. B.J. 195, 198 (1987) (discussing multidisciplinary structure of panels in arbitration under the auspices of the National Association of Securities Dealers and various securities regulatory organizations).

74. See Aksen, supra note 13, at 158; Jones, supra note 13, at 525; Max, supra note 4, at 311; Mentschikoff, supra note 1, at 703; Meyerowitz, supra note 13, at 80; Rosenthal, supra note 13, at 139; Sergi, supra note 4, at 43; Tauesch, supra note 4, at 150 n.7; Note, supra note 4, at 1022; Note, Litigation or Arbitration, supra note 3, at 255.

75. See C. PETTERSON, supra note 21, at 107; Sergi, supra note 4, at 44; Note, Litigation or Arbitration, supra note 3, at 256.
as soon as the arbitrators are appointed. In litigation, the advent of evidentiary hearings prompts many parties to negotiate their differences; if the same holds true in arbitration, the prompt scheduling of hearings may bring the parties to the bargaining table all the more quickly. Therefore, in addition to hastening the ultimate conclusion of formal dispute resolution, the lack of pre-arbitration procedure may in some cases stimulate more rapid settlement of controversies.

At the hearing stage, the absence of formal rules governing the admission of oral testimony and documentary evidence may reduce hearing time. Testimony may be given in narrative form, and occasionally by affidavit. Cumulative or redundant testimony may be restricted or forbidden, while photocopies of documents may be routinely admitted as evidence. Objections will probably be discouraged. Furthermore, in the interest of bringing the hearings to a more rapid conclusion, arbitration sessions may continue into the evening hours. Under the AAA Rules, an arbitrator may press forward with scheduled hearings even in the absence of a party who, after having been given due notice, fails to be present or obtain an adjournment.

The arbitral award is generally assailable only on very limited grounds such as fraud or denial of a hearing. Courts typically will not pry into the factual or legal conclusions of arbitrators. Even when undertaken, judicial review is difficult because arbitrators' decisions seldom contain any supporting rationale; the AAA encourages its commercial arbitrators to limit their award to a statement of relief given and to avoid a lengthy explanation.

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76. See Sergi, supra note 4, at 44.
77. See Lempert, supra note 10, at 2, col. 1 (noting the success of court-annexed arbitration in stimulating earlier settlement of actions in federal district courts).
78. See Solove, supra note 21, at 137.
79. See Poppleton, supra note 51, at 8. The AAA Rules permit the arbitrator to receive and consider affidavits, which are to be given "only such weight as the Arbitrator deems it entitled to after consideration of any objections made to its admission." Commercial Rules, supra note 24, § 32.
80. See Faure, supra note 1, at 210-11.
81. See Poppleton, supra note 51, at 7.
82. See Sergi, supra note 4, at 44-45 (suggesting that arbitrations may be conducted after business hours so as to avoid interference with work).
83. See supra note 51.
84. See generally Stipanowich, supra note 1, at 982-86 (offering a general treatment of judicial review of arbitration awards). Judicial review is generally restricted to limited grounds described by state or federal statutes. See id. at 984. See also Jones, supra note 13, at 547-51. Although Wilko v. Swan, 346 U.S. 427, 436-37 (1953), is cited for the proposition that arbitral awards may be vacated for "manifest disregard of the law," that standard is rarely applied to overturn an award. See Stipanowich, supra note 1, at 985. See also Sergi, supra note 4, at 44-45. The same is true of the judicially-declared standard of "complete irrationality." See Jones, supra note 13, at 551; Stipanowich, supra note 1, at 985.
85. See Stipanowich, supra note 1, at 983-84.
86. See id. at 983. The AAA seems to have adopted the principle of Occam's Razor—that is, that the least possible explanation is the best. See C. Rembar, The Law of the Land 105
These limitations on review are consistent with the notion that, for better or worse, the parties have bargained for arbitral justice without judicial intervention. They serve to put an effective end to dispute resolution, preventing a case from dragging on for months or years in the appeal stage.

4. Economies of the Arbitration Process

Arbitration provides several perceived economic advantages over the civil justice system. For example, abbreviated prehearing practice, shorter hearing time, and limited opportunities for successful appeal in arbitration may result in smaller expenditures for legal services than the litigation of a similar controversy. Likewise, arbitration may provide an economic savings to a business because it diverts fewer internal resources; particularly in small companies which depend upon the productive efforts of a few key personnel, preoccupation with lengthy litigation may have a serious impact on company business.

Another potential economic benefit of arbitration relates to interest on amounts claimed. A shortcoming of the civil justice system is that aggrieved parties are rarely fully compensated for the loss of the use value of money owed. Unless claims are fully liquidated, no interest on sums owed will accrue until judgment; even then, the statutory rate of interest may not approximate the investment value of the principal. To the extent arbitration shortens the time to an enforceable judgment, it reduces the lost interest factor.

Finally, the use of consensual arbitration also represents cost savings to the public. Cases which would otherwise have burdened the court system are effectively channeled into a private process of dispute resolution. The costs of arbitration are borne by the parties.
B. The Other Side of the Coin: Concerns Regarding the Arbitration Process

Critics of arbitration have observed that arbitration often fails to meet popular expectations. Others see its purported attributes as serious deficiencies, with dire consequences for the establishment and enforcement of societal norms. Even adherents of the process acknowledge that the perceived blessings of arbitration may occasionally prove to be a bane. As a system founded on private agreement, largely independent of the judicial process, arbitration has built-in limitations which must be recognized and addressed whenever it is considered as an alternative form of dispute resolution. Some limitations, such as those associated with procedural or multiparty issues, are a by-product of arbitration's roots in contract. Other less foreseeable limitations may arise as a result of the flexibility inherent in the process and the degree to which it depends upon the cooperation of the parties and the personal qualities of those who administer the case.

1. Problems of Formality and Procedure

   a. Preliminary Hurdles

   Regardless of the care with which an arbitration agreement has been structured, getting to arbitration may prove a major hurdle. Resort to judicial processes may be necessary to address various preliminary issues. These issues include the enforceability of the arbitration provision, the arbitrability of the dispute, compliance with preconditions to arbitration, waiver of the right to arbitrate, and problems relating to multiparty disputes.

93. See Bayer & Abrahams, supra note 20 (enumerating the "many well-tested and time-honored protections [which] are not available in arbitration"); Hart, supra note 20 (depicting arbitration as an inferior and disadvantageous means of resolving construction disputes); Lyons, supra note 20 (detailing a marathon arbitration which failed to provide any of the advertised benefits of the process); Phillips, supra note 20, at 239 n.35 (labelling much of the literature favorable to arbitration as "propaganda"); Phillips, supra note 20 (cautioning that arbitration is a specialized process of limited utility, and not a wholesale substitute for the judicial process); Poor, supra note 20, at 676 (suggesting that many cases are more appropriate for litigation).

94. Professor Kronstein expressed the concern that if courts "abdicate their power in favor of private tribunals," it would be impossible "to maintain any legally established policy or order" in domestic or international commerce. Kronstein, supra note 2, at 699. See also Mentschikoff, supra note 2, at 868 (questioning the ability of arbitrators to maintain appropriate behavioral norms through personal notions of equity).

There is substantial agreement that as a system unbound by precedent and largely free from judicial oversight, arbitration may be better suited to resolution of factual disputes than cases turning on subtle legal theories. See Fabianske & Halverson, supra note 21, at 288-89; Phillips, supra note 20, at 41. See also Horowitz, supra note 13, at 75-76.

95. See generally Horowitz, supra note 13 (offering a practicing attorney's concerns with the process). See also Lurie, supra note 4, at 9.
A common preliminary hurdle for the party desiring to arbitrate is the other party's refusal to participate in the process. While modern arbitration statutes generally provide a means for enforcing agreements to arbitrate by authorizing courts to stay related litigation, compel arbitration or both, there are bases upon which a court may refuse to do so. If it can be demonstrated that the agreement to arbitrate was induced by fraud, misrepresentation, or duress, or if the agreement would operate in an unconscionable manner, or would otherwise be unenforceable under general contract principles, arbitration may be avoided. Moreover, courts may refuse to enforce arbitration of particular kinds of contract-related claims, including statute-based antitrust and securities claims, on grounds of public policy.

"Arbitrability" may be challenged on the grounds that particular claims or controversies fall outside the scope of the parties' arbitration agreement.

96. Both at the prehearing stage and later in the process, lack of cooperation may frustrate the goals of speed and economy. Bayer & Abrahams, supra note 20, at 30 ("Nonjudicial dispute resolution requires cooperation . . . at a time when there is likely to be no cooperation."); Lennard, Arbitrating Without Litigating, 40 Cal. St. B.J. 692 (1968) ("Non-participation may stymie arbitration at one or all of three stages: selecting the neutral arbitrator, appearing and proceeding before him, and complying with his award."); Middleton, supra note 28, at 785-86 ("[People] have to want to arbitrate. If people [do not] have the commitment, the process is really less effective than [judicial resolution] . . . .") As in litigation, experienced attorneys may find numerous opportunities to delay the process through interposition of technical arguments. Horowitz, supra note 13, at 70; Phillips, supra note 20, at 38; Poor, supra note 87, at 669-70. As one judge observed: "Arbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration." Standard Chlorine, Inc. v. Leonard, 384 F.2d 304, 305 (2d Cir. 1967). For a thorough discussion of "tiers" of pre-arbitration procedural delay under federal and state statutes in Pennsylvania, see Comisky & Comisky, supra note 13, at 460-92.


98. The Federal Arbitration Act provides generally for the enforceability of agreements to arbitrate, "save upon such grounds as exist at law or in equity for the revocation of any contract." 14 U.S.C. § 2. The Uniform Arbitration Act contains a similar exception. UNIF. ARB. ACT § 1, 7 U.L.A. 1, 5 (1985). See DOMKE, supra note 1, at 89-102. See also Arbitration Is Simpler Than Litigation: Myth or Reality?, 4 Franchise L.J. 10 (1985) (noting procedural challenges to arbitration in franchise cases). But see Note, The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act, supra note 2, at 571 (observing that "[t]oday, the legal and equitable defenses available to a party seeking to avoid a contract are partially or entirely unavailable to a party attempting to defend himself against a motion to arbitrate").

99. See generally Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CaroDoZo L. Rev. 481, 542-43 (1981) (addressing the various circumstances in which courts have considered public policy challenges to enforceability of arbitration agreements). In light of the strong public policies favoring broad enforcement of arbitration clauses, however, courts are reluctant to deny such enforcement except in the presence of exceptional countervailing policies. Stipanowich, supra note 1, at 988-89. Recent decisions by the Supreme Court have resolved a number of significant arbitrability issues in favor of arbitration. See supra note 3.

100. See generally DOMKE, supra note 1, at 151-59 (discussing arbitrability issues). See Brenner, Arbitration: Compulsion and Avoidance, 17 Forum 656, 664-65 (1982) (observing that arbitration provisions of limited scope invite litigation). See also Arbitration Is Simpler Than
Moreover, parties sometimes include in their contracts certain preconditions to arbitration;\textsuperscript{101} a failure to comply with these preconditions may be asserted by a party wishing to avoid arbitration.\textsuperscript{102} Yet another basis for challenging the right to arbitrate is waiver by the party seeking to enforce arbitration.\textsuperscript{103}

Gaps in the arbitration agreement may require judicial intervention. For example, occasionally the failure of the parties to agree upon an arbitrator or upon the process by which the arbitrator shall be selected requires a court to step in to resolve the issue.\textsuperscript{104}

A far more common procedural problem, judging by the number of reported cases, arises in the presence of multiple parties to the dispute.\textsuperscript{105} While modern rules of court serve to accommodate multiparty controversies,\textsuperscript{106} arbitration statutes and rules do not generally address the procedures to be followed in such cases.\textsuperscript{107} Because most jurisdictions routinely enforce arbitration agreements even if they fail to bind all of the disputants, the likely result will be multiple proceedings.\textsuperscript{108} Even if all parties have arbitration clauses in their contracts, there is no guarantee that they will be directed to a single forum.\textsuperscript{109}

b. Problems at the Hearing Stage

Once arbitration begins, the informality of the process may produce frustrations for those who are accustomed to traditional civil process. The relative

\textsuperscript{101}Litigation: A Myth or Reality, supra note 98, at 10 (discussing scope issues under arbitration provisions in franchise agreements).

\textsuperscript{102}In order to minimize scope-related arbitrability questions, the AAA generally recommends incorporating a “broad-form” arbitration clause in commercial agreements that mandates arbitration of “[a]ny controversy or claim arising out of or relating to” the contract. COMMERCIAL RULES, supra note 24, at 2. Some commentators, however, believe that the risk of challenges to arbitrability are outweighed by the need to specifically tailor such provisions to limit the scope of arbitration to those types of disputes which arbitrators are best equipped to resolve. See, e.g., S. Lazarus, supra note 1, at 118-20, 187.

\textsuperscript{103}In the absence of pertinent contract language there may be confusion as to the proper forum for resolution of scope-related arbitrability questions. Courts tend to reserve to themselves questions regarding the scope of arbitration agreements in the absence of contract language giving such authority to the arbitrators. Domke, supra note 1, at 152-55.

\textsuperscript{104}For example, many contracts set forth specific time limits for submitting a demand for arbitration. See Domke, supra note 1, at 229-34.

\textsuperscript{105}See id.

\textsuperscript{106}See id. at 275-81.

\textsuperscript{107}See id.

\textsuperscript{108}See id. at 275-81.

\textsuperscript{109}See id. at 275-81.

\textsuperscript{101}See id. at 275-81.

\textsuperscript{102}See id. at 275-81.

\textsuperscript{103}See id. at 275-81.

\textsuperscript{104}See id. at 275-81.

\textsuperscript{105}See id. at 275-81.

\textsuperscript{106}See id. at 275-81.

\textsuperscript{107}See id. at 275-81.

\textsuperscript{108}See id. at 275-81.

\textsuperscript{109}See id. at 275-81.
absence of prehearing discovery and detailed pleadings may mean that a party comes to the hearings without a complete understanding of the character of the opposition's case, let alone knowledge of what documents are to be relied upon or what witnesses are to be called. In such cases, arbitration threatens to become "trial by surprise"—a situation reminiscent of litigation in the days before the Field Code.

The failure to define disputed issues at the prehearing stage may have a dramatic impact on the presentation of evidence and the final resolution of the dispute. The parties may, through inadvertence or ignorance, introduce considerable evidence on irrelevant or extraneous points while failing to address important issues. The arbitrators, having had little or no opportunity to familiarize themselves with the dispute prior to the hearing, may understandably be reluctant to limit the evidence in any way because of the fear of excluding what may turn out to be material evidence. In some cases, confusion may even permeate the arbitrators' final award.

Difficulties may also arise when arbitrators are required to deal with procedural issues which are not specifically addressed by the arbitration rules. Particularly where the arbitrators are without experience in other forms

110. See Bayer & Abrahams, supra note 20, at 31 (observing that arbitrating parties have little opportunity to understand or limit the issues prior to hearings); Meyerowitz, supra note 13, at 80 (noting that some attorneys are concerned that lack of discovery may make it more difficult for some clients to prove their case in arbitration).

Also, because discovery frequently stimulates settlement by revealing to parties the weaknesses of their own position and the strengths of their opponent's argument, the relative absence of discovery in arbitration may be at least partly responsible for the lower rate of prehearing settlement in arbitration. See Manual for Complex Litigation, Second 164 (1985) (discussing the importance of discovery as a stimulus to settlement in litigation); Kritzer & Anderson, supra note 21, at 11 (comparing prehearing settlement rates in litigation and arbitration).


111. The absence of discovery causes some attorneys to perceive the outcome of arbitration as less predictable than litigation. S. Lazarus, supra note 1, at 116. One commentator recently cautioned that many owners are avoiding arbitration because of the difficulty of trying to defend against contractor claims without access to contractor cost records through discovery. Wilkinson, The Decline and Fall of Arbitration, 4 KC-News, Apr. 1987, at 2. See also Lurie, supra note 4, at 9.

112. Especially in large or complex cases, the complete absence of discovery often tempts attorneys to use cross-examination as a substitute for depositions; they may also feel compelled to request a continuance in order to conduct document discovery. See infra notes 165-66 and accompanying text.

113. A refusal to hear relevant or material testimony may constitute grounds for vacating the arbitration award. Aksen, supra note 13, at 160. See 9 U.S.C. § 10(c); U.N. A.B. Act § 12(a)(4), 7 U.L.A. 1, 140 (1985). See also infra notes 162-64 and accompanying text. One experienced attorney/arbitrator posits that "it is . . . far more effective . . . to volunteer complete and all-encompassing discovery [prior to hearings] in order to minimize the hearing time for the arbitrators (and your client)." Foster, supra note 67, at 341.

114. See Mentschikoff, supra note 2, at 865 n.32. See also infra notes 154-56 and accompanying text.
of hearings, matters such as the issuance of subpoenas, the handling of third party claims, and the admission of evidence may present considerable difficulty.\textsuperscript{115} 

c. Lawyer-Injected Formalities

While attorneys tend to complain about certain formal inadequacies of arbitration, many in the business community feel that the most significant problem with modern arbitration is the increasing formalization of the process brought about by the legal profession.\textsuperscript{116} Many charge that in their zeal to make arbitration a carbon copy of traditional litigation, lawyers have robbed the process of its essential attributes.\textsuperscript{117}

It is to be expected that, even in arbitration, persons with training in case presentation in the courts would rely upon their experiences as advocates. Indeed, there are certain features of litigation which, when transferred to arbitration, further the basic goals of arbitration by lending order and efficiency to the process.\textsuperscript{118} On the other hand, there is evidence that lawyer-induced prearbitration motion practice, insistence upon the observance of technical rules of evidence, and confrontational mindset have caused many to resent the presence of attorneys.\textsuperscript{119} Some have gone so far as to suggest that attorneys be banned from arbitration,\textsuperscript{120} a procedure long followed by certain trade groups.\textsuperscript{121}

d. The Problem of Arbitrator Remedies

Although arbitrators generally are authorized to grant any relief appropriate to the circumstances (within the limits of the parties' arbitration

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\textsuperscript{115} Such concerns have prompted the AAA to encourage the participation of attorneys in arbitration. See infra note 118 and accompanying text.

\textsuperscript{116} A number of commentators have remarked upon the trend toward greater formality in commercial arbitration, a tendency generally attributed to the influence of the bar. See S. Lazarus, supra note 1, at 22, 66; Angel, The Use of Arbitration Clauses as a Means for the Resolution of Impasses Arising in the Negotiation of, or During the Life of, Long-Term Contractual Relationships, 28 Bus. Law. 589 (1973); Middleton, supra note 28, at 786.

\textsuperscript{117} Notions that attorneys tend to delay the arbitration process are supported by empirical data from several sources. See infra notes 253, 256 and accompanying text.

\textsuperscript{118} The AAA generally employs attorneys as arbitrators because of their knowledge of the law and experience with dispute resolution procedures. It also encourages their use as advocates in arbitration. See Gotshal, A Symposium on Arbitration, 10 Vand. L. Rev. 649 (1957). AAA President Robert Coulson has observed that while attorney-arbitrators are often accused of bringing unnecessary formality to the process and of being overly domineering, lawyers with pertinent expertise in the subject area of the dispute may be valuable because of their familiarity with the hearing process and their relative impartiality. Coulson, supra note 67, at 674.

\textsuperscript{119} See Arbitration Agony, supra note 4, at 59 (describing concerns among members of the construction industry with attorney-arbitrators); Keep Arbitration Simple, Eng. News Rec., Mar. 3, 1983, at 64 (observing that attorneys without pertinent technical expertise were finding their way onto construction panels, and turning arbitration into “pseudo-court” proceedings).

\textsuperscript{120} See Arbitration Agony, supra note 4, at 59.

\textsuperscript{121} Mentschikoff, supra note 2, at 857. See also Coulson, supra note 67, at 674 (discussing arbitration in the textile trade).
situations exist in which a court will refuse to enforce an arbitral award even though the same remedy might have been available in court. For example, in some jurisdictions punitive damages are not recoverable in arbitration. Likewise, a number of state arbitration acts prohibit arbitrators from awarding attorney's fees in the absence of specific agreement by the parties.

Another set of concerns stems from the fact that arbitrators usually do not have the authority to enforce their own awards. Ambiguities in the award may make it difficult for a court to enforce, particularly in the case of orders of specific performance or injunctive relief.

Finally, questions arise as a result of the requirement that the award of the arbitration panel be "final" before a court will enforce it. If an arbitration panel considers it necessary or appropriate to issue an interim order enjoining certain actions by a party or upholding the status quo under a contract, the "finality" requirement raises concerns regarding the enforceability of such an order.

122. According to the AAA Commercial Rules, an "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." COMMERCIAL RULES, supra note 24, § 43. For a general discussion of the remedy-making authority of arbitrators and related limits on judicial review of awards, see Stipanowich, supra note 1, at 978-88.

123. The trend of recent decisions, however, appears to be in the direction of permitting arbitrators to frame such awards. See Stipanowich, supra note 1, at 983. See also Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (discussed supra note 3); Ex Parte Cost & Head Atrium Ltd., 486 So. 2nd 1272 (Ala. 1986).

124. The Uniform Arbitration Act provides that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." UNIF. ARB. ACT § 10, 7 U.L.A. 1, 131 (1985). The New York arbitration statute contains almost identical language. N.Y. CIV. PRACT. L. & R. § 713 (McKinney 1980). Arguably, under such statutes attorney's fees are not awardable by arbitrators except where the parties have specifically provided for such awards in their arbitration agreement. DOMKE, supra note 1, at 535-39. An exception may be made where it can be demonstrated that there exists separate statutory authority for such awards. See, e.g., Kamakazi Music Corp. v. Robbins Music Corp., 684 F.2d 228, 231 (2d Cir. 1982) (permitting recovery of attorney's fees under the authority of the Copyright Act, reasoning that the New York arbitration act did "not bar the award of attorney's fees; it merely [did] not grant authority to do so").

On the other hand, since arbitration awards are frequently for less than the amount claimed and rarely contain an itemization of damages, attorney's fees may be included in the award without the parties knowing it. Richter & Kozek, Construction Arbitration Procedures: Basic Principles and Guidelines, No. 78-5 CONSTRUCTION BRIEFS (Federal Publications, Inc.) at 10 (1978) (supplement to The Construction Contractor and The Government Contractor). See, e.g., Island Creek Coal Sales Co. v. City of Gainesville, 764 F.2d 437 (6th Cir. 1985), aff'd with exception and condition noted, 729 F.2d 1046 (1984), cert. denied, 474 U.S. 948 (1985). For a discussion of this topic, see Stipanowich, supra note 3, at 348-53.

126. See generally DOMKE, supra note 1, at 421-22 (discussing employment of a "full settlement" clause in awards).

127. Although the AAA Commercial Rules do not generally empower arbitrators to order relief in the nature of a temporary injunction, arbitrators may "issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration . . . ." COMMERCIAL RULES, supra note 24, § 34.
e. Concerns Regarding the Preservation of Privacy

While arbitrations are less likely to be the subject of press coverage than civil litigation, publicity may attend preliminary court proceedings or judicial appeals of arbitration awards.\(^{128}\) And while members of the press may be excluded from arbitration hearings, they still have opportunities to gather information if a dispute is particularly newsworthy; there is nothing to keep a party who wishes a controversy to be made public from going to the news media with details of the dispute. Moreover, although a party may be protected to some degree from the collateral estoppel effects of an award in third party litigation,\(^{129}\) it may still be possible for third parties to obtain transcripts of sworn testimony from the arbitration for use in later proceedings.

2. Concerns Regarding Arbitrator Selection and Competence

a. Concerns Regarding the Selection Process

Although decisionmaking by party-appointed experts is perceived as a significant advantage of arbitration,\(^{130}\) critics assert that in many cases, the selection process fails to produce capable arbitrators.\(^{131}\) While it is possible for parties to agree among themselves on the designation of one or more individuals as arbitrators, a more common approach is to depend upon institutional selection procedures.\(^{132}\) Under the AAA Rules, the preferred process involves selection of arbitrators from panels developed by the Association.\(^{133}\) The AAA forwards a list of names to the parties with a brief description of each individual's background and expertise and the parties each strike all potential arbitrators they deem unsuitable. If the parties are unable to agree upon mutually acceptable panelists, the AAA administrator may forward another list of candidates to the parties or unilaterally appoint arbitrators to fill out the panel.\(^{134}\)

Unfortunately, AAA panelists vary considerably in experience and ability. It is possible that an individual whose name appears on the AAA panel was

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\(^{128}\) Phillips, supr a note 20, at 39; Solove, supra note 21, at 137.

\(^{129}\) See generally Domke, supra note 1, at 452-55 (discussing the res judicata effect of an arbitration award); Res Judicata in Arbitration, 3 LAW. ARB. LETTER 1-5 (1979) (summarizing pertinent cases).

\(^{130}\) See supra notes 57-73 and accompanying text.

\(^{131}\) See Bayer & Abrahams, supra note 20, at 31; Middleton, supra note 28, at 785. See also I. N. Doncan Wallace, supra note 20, at 269-70, 396.

\(^{132}\) See supra note 24.

\(^{133}\) COMMERCIAL RULES, supra note 24, § 13. See also id. §§ 14, 15 (setting forth alternative methods of selection including direct appointment by the parties).

\(^{134}\) Id. § 13.
appointed to the list on his or her own motion without training or experience with arbitration.

Although the parties are given summary biographical information about panel members, that description is based on information provided by the would-be arbitrators and is not subject to routine verification by the AAA. The description may thus misrepresent a person's pertinent background and qualifications: for example, a panelist described as a "construction lawyer" may be a real estate expert without experience in construction-related matters. Also, because the AAA has not routinely updated arbitrator records, the information on the card may be out of date. Finally, the data card may reveal little or nothing about the individual's history as an arbitrator.

The AAA admonishes parties to perform their own investigations of prospective arbitrators. This can be a costly and time-consuming process, however, particularly when the individuals being investigated live and work in distant places. Moreover, discussions with colleagues or acquaintances may answer few questions about the effectiveness of a particular person as an arbitrator; without names of parties or attorneys who have such information to share, personal investigations may reveal relatively little pertinent data.

Another potential difficulty with the selection process is the AAA tribunal administrator—the person charged with responsibility for overseeing the selection of arbitrators and forwarding of communications between the parties and the panel. It is the administrator who receives the initial case filings from the parties and selects names of potential arbitrators for their approval. If the parties are unable to agree upon arbitrators, the choice is ultimately made by the administrator. Unfortunately, the administrator may have no training in the subject area of the dispute and have little or no understanding of the substantive and procedural issues involved in a particular case. The administrator may also be overburdened with cases.

Finally, the quality of a panel may suffer as the result of the unavailability of experienced arbitrators. This is particularly true in complex cases which demand considerable time and attention from an arbitrator. All of these

135. While potential arbitrators are asked to complete forms describing their academic and work background and experience, the AAA has as a rule devoted little or no time to checking those qualifications. See S. Lazarus, supra note 1, at 75-77.
136. See Keep Arbitration Simple, supra note 119, at 64.
137. See C. Peterson, supra note 21, at 74 (observing that AAA data sheets are "insufficient to determine the more subtle (and important) qualifications" of an arbitrator).
138. See Bayer & Abrahams, supra note 20, at 31; Coulson, supra note 67, at 676.
139. See Bayer & Abrahams, supra note 20, at 31 (observing that parties do not typically have the time or resources to do a thorough job of checking out prospective arbitrators).
140. See Commercial Rules, supra note 24, § 4.
141. Id.
factors reduce the possibility that the selection process will produce arbitrators with the necessary or desirable qualifications.142

b. Problems with the Unqualified Arbitrator

Arbitrators have potentially greater control over the procedure and outcome of the dispute resolution process than either judges or juries.143 Arbitrators may establish and enforce hearing schedules,144 determine the extent of discovery,145 frame issues,146 establish priorities for admission of evidence,147 question witnesses,148 perform their own investigations,149 and tailor remedies according to their own sense of justice.150 Where arbitrators lack requisite knowledge and experience, the process and the product are likely to be unsatisfactory.151

An arbitrator without appropriate technical knowledge will require education in the commercial fundamentals just as a judge or jury would.152 Inexperienced arbitrators may have difficulty in narrowing the issues and clarifying matters in dispute, thus opening the way for the introduction of irrelevant and extraneous evidence.153

142. If arbitrating parties are dissatisfied with the results of the selection process, they may be more likely to question the fairness of the final award. See Middleton, supra note 28, at 785.
143. In discussing commercial arbitration, Professor Mentschikoff observed that "the adversary model presupposes that the system of selecting deciders produces men who are capable of understanding the nature of the issues, data and arguments to be presented, and who have... or can obtain from the parties the knowledge necessary to make a wise decision." Mentschikoff, supra note 2, at 847. See also S. Lazarus, supra note 1, at 66 (reasoning that "it is on the competence of the arbitrator that commercial arbitration must stand or fall"); Barrett, supra note 60, at 23 (concluding that guidelines and procedures are less critical to the outcome of arbitration than the personalities of the arbitrators); Carlston, supra note 36, at 651 (concluding that the success of arbitration depends upon the expertise and skill of the arbitrator). See also Lyons, supra note 20, at 108 (quoting AAA President Robert Coulson as saying, "[p]eople choose arbitration mainly to have something resolved in a private setting, by people who are knowledgeable"); Phillips, supra note 20, at 40, 47.
144. See Coulson, supra note 67, at 678; Poppleton, supra note 51, at 7.
145. See Callahan, supra note 110, at 4-5.
146. Barrett, supra note 60, at 18-19; Mentschikoff, supra note 1, at 705-07.
147. C. Peterson, supra note 21, at 115, 133-48; Blutrich & Cuomo, supra note 51, at 38.
148. S. Lazarus, supra note 1, at 73; Faure, supra note 1, at 210.
149. See, e.g., Commercial Rules, supra note 24, § 33.
150. See supra note 122.
151. See Coulson, supra note 67, at 674. Keep Arbitration Simple, supra note 119, at 64.
152. See I.N. Duncan Wallace, supra note 20, at 396 (questioning the true expertise of panelists in construction arbitration in the United Kingdom); Bernstein, supra note 58, at 82 (noting that nonexperts may be misled regarding questions of business practice).
153. See supra notes 112-13 and accompanying text. In a much-quoted article dealing with the problems of arbitrating large and complex disputes, Allen Poppleton admonishes arbitrators to "manage the conduct of the proceedings with a firm hand;" among other things, he advocates establishing and enforcing hearing schedules and limiting the evidence. Poppleton, supra note
More importantly, the inability to come to grips with the fundamental issues in a case may lead to a poor decision. It is often charged that an arbitrator's ignorance or inexperience leads to unjustifiable compromise in the award. This result is arguably facilitated by the absence of a written rationale accompanying the decision and by limitations on judicial review.

3. Concerns Regarding Speed and Scheduling

Despite popular depictions of the process as a fast, efficient method of dispute resolution, arbitrations are sometimes described as "monuments to error." For an arbitrator to take the active role he describes, experience is a prerequisite. On the other hand, some question exists whether it is really advantageous to have "a decisionmaker whose mind is filled with preconceptions regarding industry reputations and procedures." Bayer & Abrahams, supra note 20, at 30. As previously noted, however, the AAA attempts to address the potential problem of experiential and professional bias by requiring multidisciplinary panels in larger cases. See supra notes 72-73 and accompanying text. In the author's experience as advocate and arbitrator in construction cases, moreover, professional labels are not an effective indicator of an individual's probable stance on issues in dispute. See also Phillips, supra note 20, at 49. Knowledgeable, fair-minded arbitrators may be found in the ranks of all construction-related professions.

154. The problem of arbitrator "compromise" is the subject of an ongoing debate among students of arbitration. Some critics of arbitration view compromise awards as the unfortunate result of the inability or unwillingness of arbitrators to come to grips with difficult factual or legal questions, or to render an award wholly for one side or the other. See I.N. DUNCAN WALLACE, supra note 20, at 395; Middleton, supra note 28, at 786. Other writers, like the eminent Scottish philosopher David Hume, have described compromise as a natural and desirable feature of processes which ameliorate the harsh "all or nothing" justice of the courtroom:

Hence it is that in references, where the consent of the parties leave the referees entire masters of the subject, they commonly discover so much equity and justice on both sides as induces them to strike a medium, and divide the difference betwixt the parties. Civil judges, who have not this liberty, but are obliged to give a decisive sentence on some one side, are often at a loss how to determine, and are necessitated to proceed on the most frivolous reasons in the world. Half rights and obligations, which seem so natural in common life, are perfect absurdities in their tribunal; for which reason they are often obliged to take half arguments for whole ones, in order to terminate the affair one way or the other.

Hume, A Treatise of Human Nature, Vol. II, Book III, Part II, Section IV, in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 211 (C. Morris ed. 1959). See also Angel, supra note 116, at 593 (recommending that procedures for compromise are vital for arbitration of disputes in continuing commercial relationships); Solove, supra note 21, at 137 (noting that arbitral compromises "preserve face" for each party); Comment, Predictability of Result in Commercial Arbitration, 61 HARV. L. REV. 1022, 1026 (1948) (reasoning that clear-cut legal alternatives do not make sense in all cases). Others suggest that, regardless of legal proprieties, judges and juries in fact regularly engage in compromise. See Lurie, supra note 4, at 8.

The point has also been made that in complex cases involving numerous disputes, what appears to be a compromise award may really be a division of claims. See Mentschikoff, supra note 2, at 861. See also Foster, supra note 67, at 348-49. The AAA has concluded from in-house surveys that commercial arbitrators "were willing to reach clear cut decisions." See infra notes 297-98 and accompanying text. See also Coulson, supra note 13, at 1042.

155. See supra note 86.

156. See supra note 85.

157. See supra notes 74-88 and accompanying text.
As in litigation, there are numerous opportunities for a reluctant party to frustrate the goals of speed and economy. As previously discussed, a party wishing to avoid arbitration of a dispute may successfully delay commencement of the process by resorting to the courts. Even if the arbitration agreement is ultimately enforced, dispute resolution will have been postponed for months or years.

After the arbitration process has begun, administrative delays may be experienced. Although the AAA Rules are designed to establish outside limits on the time it takes to attend to preliminary matters, an overburdened or incapable administrator may fail to maintain such schedules. Difficulties in finding suitable arbitrators and scheduling hearings may also impede the process.

Delays may occur at the hearing stage as a result of uncertainties regarding areas of dispute and arbitrator reluctance to limit the evidence or to set and enforce schedules. In the absence of discovery, attorneys may feel compelled to turn cross examination into a "fishing expedition"—in effect, a deposition with the arbitrators looking on. This "fishing" substantially lengthens hearing time. Alternatively, counsel may seek and receive per-

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158. Standard Chlorine of Del., Inc. v. Leonard, 384 F.2d 304, 305 (2d Cir. 1967).
159. See generally Lyons, supra note 20 (discussing means available to parties who wish to slow the arbitration process). The AAA has dropped its motto, "Speed, economy, justice." In a recent interview, AAA President Robert Coulson stated, "We don't sell arbitration by and large on the basis of speed and economy." Id. at 107. Rosemary Page, Associate General Counsel of the AAA, has described arbitration as "slow but sure." Construction Experts Assess Arbitration's Changing Tenor, supra note 61, at 16. See also Solove, supra note 21, at 137-38 ("The cynical might suggest that . . . arbitration is familiar enough to most lawyers to provide them with an opportunity to reduce its effectiveness."); Arbitration Agony, supra note 4, at 59. Delays are the greatest problem in large or complex cases. See Lyons, supra note 20, at 110.
160. See supra notes 96-104.
161. For example, the AAA Commercial Rules establish timetables for the filing of answers to arbitration demands, for change of claim, and for return of arbitrator lists by the parties. See COMMERCIAL RULES, supra note 24, §§ 7(b), 8, 13.
162. See supra notes 112-13. One commentator recommends that in arbitration of complex cases, the participants plan for a "familiarization period" of one or more days at the commencement of hearings, during which the parties begin presentation of their cases and issues are defined. See Barrett, supra note 60, at 19.
163. The perception that arbitrators "let it all in" is widespread. See Lyons, supra note 20, at 109 (quoting one party as bemoaning the "excruciating fairness" of arbitration). See also Bayer & Abrahams, supra note 20, at 32. It is consistent with the author's general experience.
164. Arbitrators may also take it upon themselves to question witnesses. An experienced panelist may thus be able to reduce hearing time by focusing testimony on essential points. On the other hand, lengthy arbitrator interrogation may extend hearing time without appreciable benefit to anyone.
165. Although one would hope that it is not generally the case, compensated arbitrators who look to arbitration as a source of supplementary income may not exert themselves to push hearings along. See Phillips, supra note 20, at 39.
166. See Poppleton, supra note 51, at 7.
167. See C. Peterson, supra note 21, at 108.
mission to have the hearings continued pending an exchange of documents.\textsuperscript{166}

If an arbitration continues beyond the original hearing schedule, it is often difficult to find additional hearing dates when the parties and the members of the arbitration panel are available. Because arbitrators are frequently businesspersons or attorneys with busy schedules of their own, finding periods of three or four days when all are free to attend hearings can pose a serious problem in large or complex cases involving multi-member panels.\textsuperscript{167} Moreover, a party desiring to delay the arbitration may take advantage of ostensible scheduling conflicts to further impede the progress of hearings. When hearings reconvene, there is inevitably time spent in reeducating the panel regarding the facts of the case.

Further delays may be experienced after arbitration is concluded. Although in arbitration the final award is meant to represent the end of dispute resolution, it may be challenged in court.\textsuperscript{168} While the chances of a successful appeal are slim,\textsuperscript{169} the judicial process may nevertheless result in a postponement of the enforcement of an award.

\textbf{D. Cost-Related Concerns}

Some critics challenge the notion that arbitration is necessarily less expensive than litigation, particularly in cases which involve large amounts of money or complex issues.\textsuperscript{170} In addition to attorney's fees, parties may be required to pay the fees of arbitrators, not to mention institutional administration fees and other arbitration-related expenses. It is argued that lawyer's fees in arbitration may actually exceed fees for litigating a comparable case because, although there is relatively little prehearing practice, actual hearing time and related preparation time may be greater.\textsuperscript{171} Moreover, since many practicing attorneys, including many with substantial litigation experience, still know little or nothing about arbitration, the cost of educating counsel may be a factor.

Under the AAA Rules, the party filing a demand for arbitration is required to pay a filing fee.\textsuperscript{172} The sum is figured as a percentage of the amount claimed;\textsuperscript{173} it may bear no relationship to the complexity of the case, the

\begin{itemize}

\item \textsuperscript{166} Id.
\item \textsuperscript{167} See Fabyanske & Halverson, supra note 21, at 289; Horowitz, supra note 13, at 70.
\item \textsuperscript{168} See Bayer & Abrahams, supra note 20, at 31. See generally Lennard, supra note 96, at 692 (discussing ways to stay out of court). See also supra notes 84-88 and accompanying text.
\item \textsuperscript{169} See Lennard, supra note 96, at 692.
\item \textsuperscript{170} See Coulson, supra note 67, at 681; Foster, supra note 67, at 340; Hart, supra note 20, at 456; Horowitz, supra note 13, at 68-70; Phillips, supra note 20, at 39; Poor, supra note 87, at 677.
\item \textsuperscript{171} See Poor, supra note 87, at 677. See also supra notes 162-66 and accompanying text.
\item \textsuperscript{172} See COMMERCIAL RULES, supra note 24, § 48.
\item \textsuperscript{173} See id. § 48, at 17.
\end{itemize}
number of days of hearing time required, or the administrative time actually
devoted to the case by the Association. On the other hand, the filing fee
may represent a great financial burden to certain claimants who are owed
substantial sums of money by the other party. It should also be noted that
the AAA fee does not cover the arbitrator's fees and expenses\textsuperscript{174} (which may
amount to a considerable sum in a long arbitration) or the cost of a hearing
room. Parties desiring a record of the proceedings must also absorb the cost
of transcripts.\textsuperscript{175} Moreover, there are limits on the shifting of costs and fees
in arbitration. The Uniform Arbitration Act allows arbitrators to grant
awards of related costs, but does not permit the shifting of attorney's fees
in the absence of a contractual provision authorizing such awards.\textsuperscript{176}

The foregoing discussion reveals a wide divergence of opinion regarding
American arbitration. While arbitration continues to hold out the promise
of "a better way to do it," evidence indicates that for many that promise
has not been fulfilled. On the other hand, efforts to evaluate and to improve
the process have traditionally been frustrated by the scarcity of empirical
information from user groups. Recently, however, our understanding and
appreciation of commercial arbitration was dramatically furthered by a major
American Bar Association survey.

II. THE AMERICAN BAR ASSOCIATION ARBITRATION SURVEY

In 1985 and 1986, the Forum Committee on the Construction Industry
and the Construction Litigation Division of the ABA Litigation Section
sponsored a survey of attitudes toward commercial arbitration.\textsuperscript{177} The first
such major independent undertaking since the early 1960's, the survey was
directed to practicing attorneys in an effort to gather detailed information
on their experience with arbitration of construction cases. The primary
emphasis was on the \textit{Construction Industry Arbitration Rules} of the Amer-
ican Arbitration Association.\textsuperscript{178} The questionnaire, which was distributed to
over 3,000 members of the construction bar, also sought feedback on re-
commendations for improving the arbitration process.\textsuperscript{179}

The responses provide valuable insights into the perceived strengths and
weaknesses of commercial arbitration.\textsuperscript{180} The experience of the construction

\textsuperscript{174} See id. § 51. See also Coulson, supra note 67, at 681.
\textsuperscript{175} See Commercial Rules, supra note 24, § 23.
\textsuperscript{176} See supra note 124.
\textsuperscript{177} See infra notes 183-248 and accompanying text.
\textsuperscript{178} See infra Section IIIA.
\textsuperscript{179} See infra notes 210-40, 244-48 and accompanying text.
\textsuperscript{180} Given the extraordinary length of the survey questionnaire and the large number of
responses, the only feasible way to derive full benefit from the survey data was to subject the
results to computer-aided statistical analysis. The author undertook this analysis after being
furnished with all of the completed questionnaires, including 454 from members of the ABA
bar encompasses arbitration of a wide variety of cases, simple and complex, two-party and multiparty, from the viewpoint of advocate and arbitrator. Given the similarity between the *Construction Industry Arbitration Rules* and the more generally applied AAA *Commercial Rules*, the constructive criticisms offered by survey respondents may be effectively applied to arbitration of other types of commercial disputes. When viewed in combination with earlier studies and recent data compiled by the AAA, the ABA survey results furnish a basis for recommending possible reforms to the arbitration process.

Of the 513 ABA members responding to the survey, 90% had participated in or were currently participating in a construction arbitration sponsored by the American Arbitration Association. Approximately 93% of all respondents indicated some form of construction arbitration experience either as advocate or arbitrator. Of the remaining 7%, a majority indicated a familiarity with arbitration, perhaps through arbitration of other kinds of commercial cases. The surveyed attorneys were asked to describe their experience with arbitration and to compare various aspects of arbitration with litigation of similar cases before a judge or jury. The answers reveal much about the effectiveness of arbitration in achieving its goals.

### A. Respondent Perceptions of Arbitrator Selection, Qualifications and Decisionmaking

A number of questions sought information regarding perceptions of arbitrators and arbitral awards. Although the responses were generally positive, the data revealed a diversity of opinion regarding arbitrators and their decisions.

The group was asked to describe the “qualifications” of arbitrators based upon their overall experience in (1) cases involving in excess of $250,000 and (2) cases involving less than $250,000. In both classes of cases most
attorneys rated arbitrator qualifications as "good" or "excellent," although more than a third of those responding characterized arbitrator qualifications as no better than "fair."184 When respondents were questioned regarding the quality of arbitrators on AAA panels, similar results were obtained.185

When asked to rate the adequacy of training of AAA arbitrators, the survey group was more critical: the average rating was only slightly better than "fair."186 Although the questionnaire did not clarify whether "training"

<table>
<thead>
<tr>
<th>Rating of Qualifications</th>
<th>Cases Involving More Than $250,000</th>
<th>Cases Involving Less Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Responses</td>
<td>Percent</td>
</tr>
<tr>
<td>Excellent</td>
<td>63</td>
<td>15.4</td>
</tr>
<tr>
<td>Good</td>
<td>191</td>
<td>46.8</td>
</tr>
<tr>
<td>Fair</td>
<td>121</td>
<td>29.7</td>
</tr>
<tr>
<td>Poor</td>
<td>29</td>
<td>7.1</td>
</tr>
<tr>
<td>Very Poor</td>
<td>4</td>
<td>1.0</td>
</tr>
</tbody>
</table>

Assigning numerical values to each of the responses on a five-point scale, with 1 being "excellent," 2 being "good," 3 being "fair," 4 being "poor," and 5 being "very poor," the group average for cases involving more than $250,000 was 2.32; the average was 2.28 for cases involving less than $250,000. If one were to describe the ratings in terms of letter grades ("A" representing "excellent," "B" representing "good," "C" representing "fair," "D" representing "poor" and "F" representing "very poor"), the average rating for arbitrator qualifications would be a "B-".187

184. The results were as follows:

<table>
<thead>
<tr>
<th>Rating</th>
<th>Numerical Equivalent</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A—Excellent</td>
<td>1.0</td>
<td>132</td>
<td>18.4</td>
</tr>
<tr>
<td>B—Good</td>
<td>2.0</td>
<td>365</td>
<td>51.0</td>
</tr>
<tr>
<td>C—Fair</td>
<td>3.0</td>
<td>168</td>
<td>23.5</td>
</tr>
<tr>
<td>D—Poor</td>
<td>4.0</td>
<td>35</td>
<td>4.9</td>
</tr>
<tr>
<td>E—Very Poor</td>
<td>5.0</td>
<td>16</td>
<td>2.2</td>
</tr>
</tbody>
</table>

Total responses: 716
Group average (on five point scale): 2.22
Letter grade equivalent: B—

185. The question related to respondent experiences with various AAA regional offices, permitting multiple responses by each attorney in the survey. The question did not differentiate between cases involving larger and smaller sums. The results were as follows:

<table>
<thead>
<tr>
<th>Rating</th>
<th>Numerical Equivalent</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A—Excellent</td>
<td>1.0</td>
<td>55</td>
<td>8.1</td>
</tr>
<tr>
<td>B—Good</td>
<td>2.0</td>
<td>254</td>
<td>37.5</td>
</tr>
<tr>
<td>C—Fair</td>
<td>3.0</td>
<td>260</td>
<td>38.3</td>
</tr>
<tr>
<td>D—Poor</td>
<td>4.0</td>
<td>81</td>
<td>11.9</td>
</tr>
<tr>
<td>E—Very Poor</td>
<td>5.0</td>
<td>28</td>
<td>4.1</td>
</tr>
</tbody>
</table>

Total responses: 678
Group average (on five point scale): 2.665
Letter grade equivalent: C+
was intended to refer to formal training by the AAA or to pertinent general
education or experience, arbitrator training was closely linked to arbitrator
quality in the minds of the respondents.\textsuperscript{187}

Respondents gave even lower marks to the AAA in judging the quality
of information supplied with respect to potential arbitrators.\textsuperscript{188} When asked
whether the method by which the AAA describes the background and qual-
ifications of potential panelists was satisfactory, a bare majority responded
affirmatively.\textsuperscript{189} More than 200 respondents registered specific complaints

\begin{table}
\centering
\begin{tabular}{|l|c|c|}
\hline
AAA & Number of & Rating \\
Regional Office & Responses & \\
\hline
Denver & 26 & 2.00 \\
Seattle & 28 & 2.04 \\
Philadelphia & 31 & 2.10 \\
San Francisco & 38 & 2.11 \\
D.C. & 41 & 2.15 \\
Los Angeles & 30 & 2.17 \\
Atlanta & 47 & 2.17 \\
Chicago & 42 & 2.21 \\
New York & 42 & 2.24 \\
Dallas & 41 & 2.24 \\
Charlotte & 47 & 2.30 \\
Minneapolis & 28 & 2.32 \\
Miami & 49 & 2.32 \\
Boston & 24 & 2.42 \\
New Jersey & 20 & 2.45 \\
Detroit & 23 & 2.57 \\
\hline
\end{tabular}
\end{table}

\begin{table}
\centering
\begin{tabular}{|l|c|c|}
\hline
AAA & Number of & Rating \\
Regional Office & Responses & \\
\hline
Seattle & 26 & 2.31 \\
Los Angeles & 24 & 2.38 \\
Denver & 25 & 2.44 \\
Philadelphia & 28 & 2.50 \\
San Francisco & 35 & 2.51 \\
Atlanta & 44 & 2.52 \\
D.C. & 40 & 2.62 \\
Chicago & 40 & 2.63 \\
New York & 42 & 2.67 \\
Charlotte & 46 & 2.67 \\
Minneapolis & 27 & 2.74 \\
New Jersey & 20 & 2.80 \\
Dallas & 39 & 2.85 \\
Boston & 25 & 2.92 \\
Miami & 47 & 3.04 \\
Detroit & 22 & 3.09 \\
\hline
\end{tabular}
\end{table}

187. The perceived relationship between arbitrator quality and training is made clear by a
comparison of survey data for various specific regional offices of the AAA for which twenty
or more responses were received. The rankings indicate relative ratings on a five-point scale
(with 1.0 representing "excellent" and 5.0 representing "very poor"):  

188. Group results for all AAA regional offices regarding quality of information supplied
regarding potential arbitrators were as follows:

\begin{table}
\centering
\begin{tabular}{|l|c|c|}
\hline
Rating & Numerical & Number of \\
Equivalent & Responses & Percent \\
\hline
A—Excellent & 1.0 & 38 & 5.3 \\
B—Good & 2.0 & 198 & 27.7 \\
C—Fair & 3.0 & 325 & 45.4 \\
D—Poor & 4.0 & 125 & 17.5 \\
E—Very Poor & 5.0 & 29 & 4.1 \\
\hline
\end{tabular}
\end{table}

Total responses: 715
Group average [on five point scale]: 2.87
Letter grade equivalent: C+

189. Approximately 52\% of those responding to the question found the AAA biographical
information satisfactory, while 47\% did not. The remainder were uncertain.

Each member of the survey group was also asked whether the cases in which he or she was
regarding the system. Respondent attitudes toward arbitral decisionmaking and awards also reflected a diversity of opinion. The group's assessment of the fairness of arbitrator decisions mirrored perceptions of arbitrator quality: while most described their experience as "good" or "excellent," more than a third of the group described arbitrator decisions as "fair" or worse. Group perceptions regarding the "predictability" of arbitration were less positive.

involved "generally have party appointed arbitrators." The intent of the question was apparently to determine how frequently parties followed the practice of directly selecting one or more of the arbitrators instead of using the standard AAA appointment procedure. Although a majority of those who responded to the question indicated that they did not generally use party appointed arbitrators, almost 40% did use party-appointed arbitrators. This is curious in light of the fact that the AAA generally discourages parties from using party-appointed arbitrators, although the rules do provide for such a procedure. The responses may have resulted from a misinterpretation of the question; a number of respondents specifically indicated that they assumed "party appointed" included appointments through the normal AAA selection procedure, under which lists of arbitrators are forwarded to the parties. See supra notes 133-34 and accompanying text.

190. Criticisms generally focused upon the lack of detail in the biographies. Eighty-seven commenting attorneys wished to have more information on candidates' prior occupations and work experience, while 22 wanted more data on client affiliations or "plaintiff or defendant orientation." Seventy-one respondents called for more specific information on each candidate's experience in arbitration. Thirty-seven complained that the AAA had failed to keep the biographical files reasonably current, while 24 believed that the AAA failed to do investigation of potential panelists or set high enough standards for arbitrators.

191. Group results were as follows:

<table>
<thead>
<tr>
<th>Cases Involving More Than $250,000</th>
<th>Cases Involving Less Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rating of Fairness</strong></td>
<td><strong>Number of Responses</strong></td>
</tr>
<tr>
<td>A—Excellent</td>
<td>56</td>
</tr>
<tr>
<td>B—Good</td>
<td>187</td>
</tr>
<tr>
<td>C—Fair</td>
<td>118</td>
</tr>
<tr>
<td>D—Poor</td>
<td>27</td>
</tr>
<tr>
<td>F—Very poor</td>
<td>6</td>
</tr>
</tbody>
</table>

The average rating by the survey group was 2.34, the equivalent of a "B−", for cases involving amounts greater than $250,000. The rating was approximately the same (2.31) for cases involving less than $250,000.

192. Group results were as follows:

<table>
<thead>
<tr>
<th>Cases Involving More Than $250,000</th>
<th>Cases Involving Less Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rating of Predictability</strong></td>
<td><strong>Number of Responses</strong></td>
</tr>
<tr>
<td>A—Excellent</td>
<td>17</td>
</tr>
<tr>
<td>B—Good</td>
<td>174</td>
</tr>
<tr>
<td>C—Fair</td>
<td>131</td>
</tr>
<tr>
<td>D—Poor</td>
<td>47</td>
</tr>
<tr>
<td>F—Very poor</td>
<td>23</td>
</tr>
</tbody>
</table>
Moreover, a significant minority of respondents indicated that in their experience, arbitrators rendered unjustifiable compromise decisions.\textsuperscript{193}

On the other hand, arbitrators compared favorably with juries and judges in perceived decisionmaking capability. Almost 40\% of those responding rated arbitrators as generally fairer than juries, and another 43\% believed they were equally as fair. Twenty-four percent ranked arbitration below bench trial in terms of fairness, but an equal number ranked it higher. The remaining half of the group rated the two equally fair.

Perhaps not surprisingly, respondent perceptions regarding arbitrators apparently affected views on other aspects of arbitration. An analysis of the survey results indicated that the less favorable a person's view of the quality of decisionmakers in arbitration, the more likely that person was to support broader judicial review of arbitration awards\textsuperscript{194} and to insist upon written findings of fact or conclusions of law in support of awards.\textsuperscript{195} Such respondents were also less likely to support rules specifically permitting arbi-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Group No. & Group Perception of Arbitrator Quality & Number of Responses & Percent Favoring More Judicial Control \\
\hline
1 & Less than 2.0 & 83 & 13.3 \\
2 & Greater than or equal to 2.0, less than 3.0 & 230 & 24.3 \\
3 & Greater than or equal to 3.0, less than 4.0 & 140 & 37.1 \\
4 & Greater than or equal to 4.0, less than 5.0 & 19 & 52.6 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{195} For each of the four groups described \textit{supra} note 194, the results were as follows:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Group No. & Percent Favoring Findings of Fact & Percent Favoring Conclusions of Law \\
\hline
1 & 33.8 & 23.6 \\
2 & 49.3 & 32.4 \\
3 & 67.5 & 50.8 \\
4 & 86.7 & 86.7 \\
\hline
\end{tabular}
\end{table}
The arbitrators were more critical of the AAA biographical data on potential arbitrators and the AAA fee structure, and less sanguine about the speed, cost, fairness and predictability of arbitration. Moreover, their clients were less likely to repeat the experience.

196. For each of the four groups described supra note 194, the results were as follows:

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Percent Favoring Rule Permitting Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>40.2</td>
</tr>
<tr>
<td>2</td>
<td>31.2</td>
</tr>
<tr>
<td>3</td>
<td>22.7</td>
</tr>
<tr>
<td>4</td>
<td>26.3</td>
</tr>
</tbody>
</table>

197. For each of the four groups described supra note 194, the results were as follows:

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Percent Favoring Rule Permitting Attorney's Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>72.3</td>
</tr>
<tr>
<td>2</td>
<td>70.0</td>
</tr>
<tr>
<td>3</td>
<td>64.0</td>
</tr>
<tr>
<td>4</td>
<td>63.2</td>
</tr>
</tbody>
</table>

198. For each of the four groups described supra note 194, the results were as follows:

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Percent Finding AAA Biographies Satisfactory</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>77.2</td>
</tr>
<tr>
<td>2</td>
<td>54.7</td>
</tr>
<tr>
<td>3</td>
<td>37.9</td>
</tr>
<tr>
<td>4</td>
<td>16.7</td>
</tr>
</tbody>
</table>

199. For each of the four groups described supra note 194, the results were as follows:

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Percent Concerned About AAA Fee Structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>28.9</td>
</tr>
<tr>
<td>2</td>
<td>41.6</td>
</tr>
<tr>
<td>3</td>
<td>47.9</td>
</tr>
<tr>
<td>4</td>
<td>55.6</td>
</tr>
</tbody>
</table>

200. Exemplary of these trends are following results relating to perceptions of the fairness of arbitration in cases involving more than $250,000. They reflect numerical ratings on a five-point scale (1.0 representing “excellent,” 5.0 representing “very poor”) for each of the groups described supra note 194:

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Rating of Fairness of Arbitration by Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1.54</td>
</tr>
<tr>
<td>2</td>
<td>2.22</td>
</tr>
<tr>
<td>3</td>
<td>2.91</td>
</tr>
<tr>
<td>4</td>
<td>3.60</td>
</tr>
</tbody>
</table>

201. For each of the four groups described supra note 194, the results were as follows:
B. Perceptions Regarding the Speed and Scheduling of Arbitration

The survey attempted to gauge lawyer attitudes regarding the much-vaunted speed and efficiency of arbitration. On average, the respondents indicated, arbitration was a speedier means of dispute resolution than either jury trial or bench trial.202 The results were clearly more favorable in cases involving

<table>
<thead>
<tr>
<th>Group No.</th>
<th>Percent Indicating Clients Would Arbitrate Again</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cases Involving More Than $250,000</td>
</tr>
<tr>
<td>1</td>
<td>71.2</td>
</tr>
<tr>
<td>2</td>
<td>55.0</td>
</tr>
<tr>
<td>3</td>
<td>24.7</td>
</tr>
<tr>
<td>4</td>
<td>7.7</td>
</tr>
</tbody>
</table>

202. The group was asked to compare the average duration of various phases of arbitration and jury trial and bench trial. Unfortunately, no distinction was made in the questionnaire between cases involving various amounts of money. The results for the overall group were as follows:

Comparison With Jury Trial

<table>
<thead>
<tr>
<th>Prehearing time in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than jury trial</td>
<td>393</td>
<td>86.8</td>
</tr>
<tr>
<td>Same as in jury trial</td>
<td>45</td>
<td>9.9</td>
</tr>
<tr>
<td>Slower than in jury trial</td>
<td>15</td>
<td>3.3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Speed of hearings in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than jury trial</td>
<td>280</td>
<td>61.8</td>
</tr>
<tr>
<td>Same as in jury trial</td>
<td>71</td>
<td>15.7</td>
</tr>
<tr>
<td>Slower than in jury trial</td>
<td>102</td>
<td>22.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Speed of dispute resolution in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than jury trial</td>
<td>338</td>
<td>75.4</td>
</tr>
<tr>
<td>Same as in jury trial</td>
<td>66</td>
<td>14.7</td>
</tr>
<tr>
<td>Slower than in jury trial</td>
<td>44</td>
<td>9.8</td>
</tr>
</tbody>
</table>

Comparison With Bench Trial

<table>
<thead>
<tr>
<th>Prehearing time in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than bench trial</td>
<td>345</td>
<td>75.7</td>
</tr>
<tr>
<td>Same as in bench trial</td>
<td>84</td>
<td>18.4</td>
</tr>
<tr>
<td>Slower than in bench trial</td>
<td>27</td>
<td>5.9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Speed of hearings in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than bench trial</td>
<td>193</td>
<td>42.6</td>
</tr>
<tr>
<td>Same as in bench trial</td>
<td>142</td>
<td>31.3</td>
</tr>
<tr>
<td>Slower than in bench trial</td>
<td>118</td>
<td>26.0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Speed of dispute resolution in arbitration is:</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Faster than bench trial</td>
<td>297</td>
<td>66.1</td>
</tr>
<tr>
<td>Same as in bench trial</td>
<td>100</td>
<td>22.3</td>
</tr>
<tr>
<td>Slower than in bench trial</td>
<td>52</td>
<td>11.6</td>
</tr>
</tbody>
</table>
smaller amounts of money, particularly during the hearing stage. Survey comments indicated that in bigger cases, hearings were drawn out because of the difficulty of scheduling sessions at mutually convenient times.

Respondents identified attorneys as the primary cause of delays in arbitration of both small and large cases. Whatever the bases of this perception, respondents were clearly concerned about delays in arbitration. They supported various methods of minimizing delays and disruptions, including giving arbitrators the power to impose attorney's fees or other sanctions in appropriate cases.

C. Perceptions Regarding the Costs of Arbitration

When asked to rate arbitration as an "economical means of dispute resolution," responding attorneys gave it the equivalent of a "C+" for cases involving more than $250,000 and a "B−" for cases involving less than that amount. On average, the survey group rated arbitration as somewhat less costly than litigation; a number of attorneys, however,

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203. The following figures summarize group results on a five-point scale, with 1.0 representing "excellent," and 5.0 representing "very poor":

<table>
<thead>
<tr>
<th>Cases Involving More Than $250,000</th>
<th>Cases Involving Less Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time to first hearing 2.37</td>
<td>2.06</td>
</tr>
<tr>
<td>Speed of hearings 2.73</td>
<td>2.01</td>
</tr>
<tr>
<td>Speed of decision 2.20</td>
<td>1.98</td>
</tr>
</tbody>
</table>

204. When asked to identify any causes of "abnormal delay" in the arbitration proceedings, about 60% of the total survey group responded. The following is a tabulation of the identified causes of delay in order of frequency:

<table>
<thead>
<tr>
<th>Cases Involving More Than $250,000</th>
<th>Cases Involving Less Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorneys (78%)</td>
<td>Attorneys (70%)</td>
</tr>
<tr>
<td>Arbitrators (43%)</td>
<td>Parties (40%)</td>
</tr>
<tr>
<td>Litigation (43%)</td>
<td>Arbitrators (29%)</td>
</tr>
<tr>
<td>Parties (43%)</td>
<td>Administrative problems (24%)</td>
</tr>
<tr>
<td>Type of dispute (31%)</td>
<td>Litigation (23%)</td>
</tr>
<tr>
<td>Administrative problems (25%)</td>
<td>Type of dispute (14%)</td>
</tr>
</tbody>
</table>

205. See infra notes 231-34 and accompanying text.

206. Average group ratings on the five-point numerical scale (1.0 representing "excellent," 5.0 representing "very poor") were 2.68 for cases involving amounts over $250,000 and 2.23 for amounts under that figure.

207. The survey group was asked to compare the economies of arbitration to jury trial and bench trial:

<table>
<thead>
<tr>
<th>How Does Arbitration Compare to Jury Trial as an Economical Means of Dispute Resolution?</th>
<th>Number of Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Better than jury trial</td>
<td>251</td>
<td>56.2</td>
</tr>
<tr>
<td>Same as jury trial</td>
<td>134</td>
<td>30.0</td>
</tr>
<tr>
<td>Worse than jury trial</td>
<td>62</td>
<td>13.9</td>
</tr>
</tbody>
</table>
indicated that if the questionnaire had permitted it they would have reflected different results depending on the size of the case.

Over 40% of those responding indicated that the fee structure of the AAA influenced their recommendations to clients regarding arbitration. Of the 165 attorneys who offered specific comments, all but two indicated that the fees were a negative factor in considering the arbitration alternative. 208

D. Client Perceptions

According to the respondents, their clients' views of arbitration mirrored their own. Like their attorneys, clients were apparently more satisfied with the speed, cost, quality of decisionmaking, and fairness of arbitration in smaller cases. 209 In disputes involving less than $250,000, approximately 62% of responding attorneys indicated that their clients would again choose arbitration; where the amount in controversy was greater, however, only 46% of responding attorneys believed their clients would arbitrate again.

E. AAA Administration

Though rarely mentioned in the literature of commercial arbitration, the AAA case administrator is a critical cog in the arbitration mechanism. When asked to describe the quality of case administration provided by the AAA on the basis of past experience, the results were similar to assessments of arbitrator quality. While almost 70% of those responding described the performance of tribunal administrators as "good" or "excellent," 12% labelled their experience "poor" or worse. However, results varied considerably among the various AAA regional offices.

<table>
<thead>
<tr>
<th>How Does Arbitration Compare to Bench Trial as an Economical Means of Dispute Resolution?</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Better than bench trial</td>
<td>233</td>
<td>53.1</td>
</tr>
<tr>
<td>Same as bench trial</td>
<td>132</td>
<td>30.1</td>
</tr>
<tr>
<td>Worse than bench trial</td>
<td>74</td>
<td>16.9</td>
</tr>
</tbody>
</table>

208. The most frequently made comment was to the effect that the fees were high or excessive, especially in larger cases. Many attorneys complained that the AAA fee structure was unfair, and bore no relation to the administrative burden on the Association; some advocated a fee tied to the number of hearing days. A few unfavorably compared arbitration-related costs and fees to the expense of litigation, while others said that the AAA fees discouraged the use of arbitration (or at least the use of the AAA). Finally, some commented that the preliminary filing fee presented a difficult obstacle for certain claimants and gave defendants an additional strategic advantage.

209. For example, on average the respondents perceived that on a five-point numerical scale (1.0 representing "excellent," and 5.0 representing "very poor"), their clients would assess speed of dispute resolution at 2.47 for arbitrations involving more than $250,000 and at 2.18 for arbitrations involving less than $250,000.
F. Arbitration Procedures: Form and Reform

In addition to being polled regarding their experience in arbitration, members of the survey group were asked many specific questions about arbitration procedures currently employed by the AAA. Their answers, which include many detailed comments, provide valuable insights into the workability of the AAA Rules and suggest possible procedural reforms.

1. Pre-hearing Conferences and Preliminary Hearings

Respondents were asked whether they had “participated in a pre-hearing conference before an AAA representative.” Almost half of those surveyed answered affirmatively. Over four-fifths of that number found such conferences helpful. Written comments by a small number of attorneys underlined the usefulness of such hearings in arranging discovery or document exchange, in scheduling, in defining disputed issues, and in selecting arbitrators. On the other hand, a few attorneys observed that such conferences were more valuable if conducted by one or more arbitrators rather than an AAA representative. There was also some concern that tribunal administrators and other AAA representatives might not have or exercise the authority to compel the parties to cooperate in discovery.

Although fewer respondents had participated in preliminary hearings before members of the arbitration panel, nearly nine-tenths of that group indicated that the meetings with the arbitrators were helpful. The relative few who commented observed that the procedure proved valuable in arranging for discovery, in narrowing pertinent factual and legal issues, or in familiarizing the parties with the panel and the procedures to be followed in the hearings. A small number of respondents suggested that such hearings be limited to large or complex cases while a few others observed that the ultimate effectiveness of such hearings depended on the quality and forcefulness of the arbitrator or panel.

2. Counterclaims, Joinder and Consolidation

Participants responded favorably to the notion that the AAA Construction Industry Arbitration Rules should provide for a “mandatory counterclaim.”

210. Two hundred thirty-nine attorneys, approximately 47% of the entire group, acknowledged participation in such conferences. The question was intended to refer to pre-hearing conferences conducted by the case administrator or other AAA employee. See Construction Rules, supra note 24, § 10. Compare Commercial Rules, supra note 24, § 10. However, comments by a few attorneys indicate that at least some of the respondents may have thought the question referred to what the AAA refers to as a “preliminary hearing,” a meeting chaired by the arbitrator(s). See infra note 211.

211. Two hundred one attorneys, approximately 39% of the entire survey group, acknowledged participation in a preliminary hearing. See Construction Rules, supra note 24, § 10. Compare Commercial Rules, supra note 24, § 10.
Sixty-one percent of those surveyed approved of such a provision, at least where the counterclaim was directly related to the same subject matter as the original claim. The comments underlined the importance which respondents place upon resolving all related claims in a single hearing. The AAA Rules currently permit parties to file counterclaims, but do not mandate such filing.

When asked whether arbitrators should be given the specific power to join parties to arbitration or to consolidate disputes, more than two-thirds of those responding said "yes," regardless of the amount in controversy. On the other hand, nearly all of those offering written comments observed that such power may be wielded by arbitrators only if the affected parties have consented to arbitration. In this regard, a few attorneys noted, the arbitration provisions in standard industry contract documents represent a partial obstacle. For example, the American Institute of Architects' standard forms prohibit the inclusion, "by consolidation or joinder or in any manner," of architects or their employees or consultants in arbitrations involving owners and contractors, except by the specific written consent of all parties. It was also observed that successful implementation of arbitrator-ordered third party practice might require amendments to state and federal arbitration statutes.

3. Discovery

Although the AAA Rules and the AAA Construction Rules provide generally for the issuance of subpoenas by the panel of arbitrators, they do not set forth any guidelines for discovery in arbitration. Such matters have been handled on a case-by-case basis according to the wishes of the parties and the disposition of the arbitrator.

The survey indicated that 85% of those responding believed that arbitrators should be given the power to require production of all relevant documents

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212. COMMERCIAL RULES, supra note 24, §§ 7, 8.
213. Two hundred ninety-six attorneys, almost 69% of those responding to the question, favored giving the arbitrators such power in cases involving amounts in excess of $250,000. Two hundred fifty-six attorneys, approximately 65% of those responding to the question, favored such a rule in cases involving less than $250,000.
215. For a discussion of the role of statutes in arbitration of multiparty disputes, see Stipanowich, supra note 105.
216. See CONSTRUCTION RULES, supra note 24, § 31. See also COMMERCIAL RULES, supra note 24, § 31.
217. See supra notes 48, 110 and accompanying text.
prior to arbitration proceedings in cases involving amounts over $250,000.\textsuperscript{218} For the same class of cases, more than 90\% supported a rule giving arbitrators the power to require production of documents which would be introduced at the hearing.\textsuperscript{219} According to the written comments, many respondents were in favor of giving arbitrators even broader discovery power; the majority, however, preferred to keep arbitration-related discovery more limited in scope than discovery in civil litigation.\textsuperscript{220}

Expanded power to order discovery was also a significant concern in cases involving sums less than $250,000. Here, too, there was a clear mandate for implementation of more specific rules on arbitrator-ordered discovery, at least to the extent of document production.\textsuperscript{221}

4. Statement of Claim

Participants strongly supported the requirement of a statement of claim. More than three-quarters of those responding to the question favored a rule requiring parties to file a detailed “pretrial” statement or statement of claim prior to the arbitration hearings in cases involving more than $250,000.\textsuperscript{222} There was, however, substantial difference of opinion as to the degree of detail which should be required of such documents.\textsuperscript{223} In cases involving less

\textsuperscript{218} Three hundred seventy-four of 440 responding attorneys, or 85.0\%, favored such a rule.
\textsuperscript{219} Three hundred ninety-three of 434 responding attorneys, or 90.6\%, favored such a rule.
\textsuperscript{220} While 70 commenting attorneys called for discovery rules modeled on judicial rules, more respondents indicated a preference for more limited discovery. While a number of attorneys failed to define what sort of limits they considered appropriate, more than 60 recommended specific restrictions on numbers of interrogatories or depositions. Another 23 favored the establishment of enforceable time constraints. Nineteen wished to limit arbitral discovery to document production. Finally, more than 40 attorneys preferred to leave the scope and timing of discovery to the discretion of the arbitrator.
\textsuperscript{221} Three hundred eighty-eight attorneys, almost 77\% of those responding to the question, favored a rule authorizing arbitrators to require production of all relevant documents prior to hearings in cases involving less than $250,000. Three hundred forty-five attorneys, nearly 87\% of those responding, supported a rule giving arbitrators the power to require production of exhibits prior to hearings. Written comments were similar to those for cases involving greater sums.
\textsuperscript{222} Three hundred forty-one of 441 respondents, or 77.3\%, favored a rule requiring a pretrial statement.
\textsuperscript{223} According to written comments by 99 respondents, pretrial statements should identify specific claims or defenses and pertinent factual or legal issues. Twenty-eight attorneys believed such statements should include calculations supporting claims for damages and various other kinds of supporting data, 25 called for inclusion of lists of witnesses, and another 18 for lists of exhibits.

While 23 respondents believed the statement of claim should be detailed, and include all supporting evidence, an equal number concluded that the statement should be summary or outline in form. Forty-six attorneys desired filings similar to those required by rules of court, but 16 thought the requirements should be flexible enough to accommodate cases of differing size and complexity. Eighteen attorneys preferred to leave the matter to arbitrator discretion.
than $250,000, over 70% of those responding desired some form of pretrial statement.224

5. Time Limits and Scheduling

Concerns with the speed and efficiency of arbitration prompted many attorneys to recommend limits on the amount or duration of discovery. Substantial support was also evidenced for other controls on hearing time and scheduling. When asked whether specific time schedules or rules should be imposed “so as to further promote prompt resolutions of disputes,” 57% of those who responded answered affirmatively.225 The comments clearly indicated that a number of attorneys believed that the AAA Construction Rules should be amended to set arbitrary time limits in some way.226 However, more attorneys appeared to favor a flexible rule calling for the setting of schedules by agreement of the parties or by arbitrator order; many recommended that this be done at a preliminary hearing.227

The group was less supportive of a rule making arbitration proceedings continuous “even if an arbitrary time limitation on each party is required to complete the proceeding within the available scheduled time.” More than 40% of the respondents thought such a rule was advisable in light of the prejudicial effect of breaks in hearings and the potential for employing stalling tactics.228 Most attorneys, however, seemed to share the concerns of the forty-seven who commented that continuous hearings, while desirable, might not be practical or possible considering the schedules of arbitrators and witnesses, the need to provide both parties a fair opportunity to prepare and present their cases, and the need for flexibility in the handling of claims

224. Two hundred eighty-seven of 403 respondents, or 71.2%, favored a rule requiring a pretrial statement in cases involving less than $250,000. Only 48 respondents offered written comments regarding statements for this class of cases. Of the 48, 14 supported the inclusion of lists of witnesses and 11 others recommended inclusion of exhibit lists. Nine others wanted to include data supporting claims, including calculations as to damages.

225. Two hundred eighty-four of 496 respondents, or 57.3%, were in favor of such measures.

226. Of 177 respondents who offered written comments, 52 called for some form of amendment to the AAA Rules. Although some were not specific as to the form of the amendment, others wanted a rule setting forth a specific number of days or months within which arbitration would begin or end, or requiring a specific number of hours or days of arbitration within a specific time period.

227. Ninety-four of the 177 respondents offered comments to the effect that arbitration schedules should be set on a case-by-case basis. Some preferred leaving the matter to the arbitrators, while others would first permit the parties to set their own schedules. A number of respondents said that schedules should be set at a preliminary conference.

228. Two hundred seven of 473 respondents, or 43.8%, favored such a rule. Of 125 commenting attorneys, 17 supported the rule on the basis that breaks in the hearings were prejudicial to the parties and permitted stalling. Eleven preferred to make continuous hearings a requirement only in smaller, less complex cases, while eleven said there should be continuous hearings but no time limit. Fifteen said that continuous hearings should be a goal but not a requirement in arbitration. Ten others said that arbitrators should be given flexibility in applying the rule.
(particularly where new disputes arise during the course of the arbitration). Attorney concern with the speed and efficiency of arbitration was also reflected in the group’s strong support for imposing attorney’s fees and other sanctions.229

6. Remedies in Arbitration

Approximately two-thirds of the survey group were opposed to amending the Rules to expressly authorize arbitrators to award punitive damages.230 The comments indicated that some respondents had a general aversion to punitive damages; other respondents believed such relief should be the exclusive domain of the courts. A few observed that some arbitrators might be incompetent to frame such awards; others saw a danger of arbitrariness in their decisions. On the other hand, some attorneys believed that arbitrators could award punitive damages if allowed by applicable law.

Interestingly, the survey reflected a very different attitude toward a rule giving arbitrators the power to award attorney’s fees. Two-thirds of the group favored such a rule,231 although there was considerable disagreement as to precisely how it should be structured.232

The attorneys also strongly favored giving arbitrators the express authority to impose sanctions when a party fails to comply with the arbitration rules.233 Although the few comments offered suggest that there was a range of opinion as to the nature of permissible sanctions,234 the group response revealed a strong desire on the part of the construction bar to have arbitrators exert greater control over arbitration and to require parties to cooperate in the efficient and expeditious presentation of the case.

229. See infra notes 231, 233-34 and accompanying text.
230. Three hundred fifty-one of the 502 attorneys who responded, almost 70%, indicated their disapproval of a rule on punitive damages.
231. Three hundred forty-five of the 503 attorneys who responded, nearly 69%, favored such a rule.
232. Of the 224 respondents who offered comments, 45 would permit awards of attorney’s fees in cases where parties invoked frivolous or bad faith claims or defenses; another 17 would shift fees where a party unreasonably delayed the arbitration process. Thirty-six others called for imposition of standards similar to those followed by courts of law. Forty-two respondents would permit attorney’s fees where provided for by the agreement of the parties. Thirty-eight attorneys desired a rule awarding attorney’s fees to the prevailing party, while 10 preferred simply to leave such awards to the discretion of the arbitrator. Twenty-six commented that the matter should be left to local statute or other law.
233. Three hundred seventy-seven of 439 responding attorneys, nearly 86%, supported sanctions in some form in cases involving amounts over $250,000. Three hundred twenty-nine of 398 respondents, nearly 83%, favored sanctions in cases involving amounts less than $250,000. Interestingly, 83% of those who disapproved of a rule permitting arbitrators to award punitive damages favored a rule permitting arbitrators to impose sanctions for violations of the arbitration rules.
234. A few attorneys suggested that the power to sanction should include the authority to render a default judgment.
7. Award and Review

The survey reflected considerable support for a provision in the arbitration rules which would make the decision of the arbitrators "final, binding and conclusive except in cases of fraud, arbitrariness, and capriciousness of the arbitrators." As many commenting attorneys observed, however, the effect of such a provision is unclear because standards of judicial review of arbitration awards are generally governed by federal or state statutes. More puzzling were the comments by some respondents that the proposed rule would be duplicative of existing statutory provisions: such observations reflected ignorance or confusion regarding current standards of review.

Whatever the intentions of those responding to the last question, the construction bar appeared to be generally opposed to further broadening the scope of appeal. Seventy percent said "no" when asked if the arbitration rules should provide for "broader standards of appellate review." Forty-seven attorneys, more than a third of those offering written comments, were particularly concerned with making errors of law reviewable. Another thirty reasoned that a court should be permitted to determine whether an award is clearly against the weight of the evidence, or the product of gross or plain error. Twenty-one respondents even favored subjecting arbitration to standards of review similar to those governing a jury verdict or a court judgment. On the other hand, the majority of the group appeared to have been motivated by the concern that increasing the scope of judicial review would take away a major advantage of arbitration—the finality of the arbitrator's judgment.

As a number of respondents observed, however, broader judicial review could only be effectuated if arbitrators were required to provide a written

235. Three hundred forty-seven of 497 respondents, approximately 70%, favored the rule.
236. See supra notes 84-85 and accompanying text.
237. Both the Uniform Arbitration Act and the Federal Arbitration Act provide for vacation of an arbitration award "procured by corruption, fraud or ... undue means." 9 U.S.C. § 10 (1982); UNIF. ARB. ACT § 12, 7 U.L.A. 1, 140 (1985). They also permit vacation in cases of prejudicial misconduct by an arbitrator. Id. Neither statute, however, contains any reference to reversal on grounds of the arbitrariness or capriciousness of the arbitrator's decision. Research has revealed no general arbitration statute in any of the states containing such language.

The notion that many of the attorneys who responded affirmatively were not consciously supporting a broadening of current standards of review is reinforced by the fact that 19 attorneys in that group offered written comments to the effect that they supported limited review to protect the finality of arbitration awards. Moreover, attorneys who favored the rule making arbitration awards final except in cases of "fraud, arbitrariness and capriciousness of arbitrators" were less supportive of rules requiring arbitrators to provide written findings of fact and conclusions of law than the overall group. The same attorneys were also less supportive of a rule providing for a broader scope of appeal of arbitration awards. See infra note 238.
238. Three hundred fifty of 495 respondents, or 70.7%, were against a rule providing for a broader scope of appeal. Interestingly, an even larger majority (85.2%) of those attorneys who favored a rule making arbitration awards final except in cases of "fraud, arbitrariness and capriciousness of arbitrators" disapproved of a broader scope of appeal.
rationale for their awards. Approximately 55% of those responding indicated that arbitrators should be required to provide written findings of fact in cases involving amounts over $250,000; slightly less than half the respondents supported such a requirement in cases involving lesser amounts.\textsuperscript{239} Judging from the few comments that were received on these issues, attorneys favoring written findings of fact appeared more concerned with insuring a well-reasoned opinion and informing the parties of the bases for the decision than with establishing a basis for appellate review. Some of those opposed to written findings commented that such a requirement would only prolong dispute resolution.

Participants registered considerably less enthusiasm for a rule requiring arbitrators to provide written conclusions of law, particularly in smaller cases.\textsuperscript{240} Comments indicated that respondents were concerned that such a requirement might delay final resolution of disputes by opening the door to unwelcome appeals. In addition, this requirement would impose impossible burdens on arbitrators who do not have legal training.

\textbf{G. The Effect of Experience in Arbitration}

A wide spectrum of arbitration experience was represented in the survey.\textsuperscript{241} Not surprisingly, the results indicate that perceptions of arbitration do change

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of arbitrations & Mean & Median \\
as counsel for a party & 8.44 & 5 \\
Number of AAA arbitrations & 7.10 & 4 \\
as counsel for a party & 2.56 & 0 \\
Number of arbitrations & 2.10 & 0 \\
as arbitrator & & \\
Number of AAA arbitrations & & \\
as arbitrator & & \\
\hline
\end{tabular}
\end{table}

The divergence between the group's mean, or average figures, and the corresponding medians reflects the fact that while practically all responding attorneys had had some arbitration experience, a relatively small number of respondents had arbitrated a disproportionate number of cases (in one or two situations more than a hundred!). Only one in five respondents had served as counsel in arbitration more than 10 times; only one in 10 had been an arbitrator more than five times.

\textsuperscript{239} Two hundred forty-two of 441 responding attorneys, or 54.9%, favored a rule requiring arbitrators to provide written findings of fact in cases involving amounts in excess of $250,000. One hundred ninety-four of 401 responding attorneys, or 48.4%, favored requiring written findings of fact in cases involving less than $250,000.

\textsuperscript{240} One hundred seventy-six of 440 responding attorneys, or 40.0%, favored a rule requiring arbitrators to provide written conclusions of law in support of their award in cases involving amounts in excess of $250,000. One hundred thirty-two of 399 responding attorneys, or 33.1%, favored such a rule where the amount in controversy was less than $250,000.

\textsuperscript{241} The following statistics for the entire survey group indicates the wide range of experience represented in the survey:
somewhat as experience with the process increases. While tending to be more critical of certain aspects of arbitration, more experienced attorneys were generally less supportive of changes to the rules which would make the process more like litigation.

1. Arbitrators, Remedies and Awards

Generally speaking, the more experienced the attorney as advocate or arbitrator, the less favorable were that individual's attitudes regarding the qualifications of arbitrators. Respect for the AAA's biographical information on potential arbitrators also dissipated with increasing experience.

On the other hand, more experienced attorneys did not necessarily lack confidence in the fairness of arbitration awards or the predictability of the process. They were, moreover, less likely to favor a rule requiring arbitrators to support their awards with findings of fact or conclusions of law.

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Group Rating in Cases Involving More Than $250,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>154</td>
<td>2.24</td>
</tr>
<tr>
<td>5-10</td>
<td>132</td>
<td>2.31</td>
</tr>
<tr>
<td>11+</td>
<td>94</td>
<td>2.50</td>
</tr>
</tbody>
</table>

A similar trend was reflected with increasing experience as an arbitrator. Similar data was developed with respect to cases involving less than $250,000.

242. The trend is reflected in a comparison of three groups with different levels of experience as an advocate in arbitration. The group ratings are based upon a five-point numerical scale (with 1.0 representing "excellent" and 5.0 representing "very poor").

243. Exemplary of this variation in attitudes is the following comparison:

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Percent Finding AAA Biographical Data Satisfactory</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>200</td>
<td>57.0</td>
</tr>
<tr>
<td>5-10</td>
<td>138</td>
<td>47.1</td>
</tr>
<tr>
<td>11+</td>
<td>93</td>
<td>45.2</td>
</tr>
</tbody>
</table>

244. For example, consider the following comparison relating to cases involving amounts in excess of $250,000:

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Percent Favoring Rule Requiring Findings of Fact</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>165</td>
<td>63.3</td>
</tr>
<tr>
<td>5-10</td>
<td>134</td>
<td>53.7</td>
</tr>
<tr>
<td>11+</td>
<td>94</td>
<td>34.0</td>
</tr>
</tbody>
</table>

245. For example, consider the following comparison relating to cases involving amounts in excess of $250,000:
to favor a rule establishing a "broader scope of appeal." Finally, they tended to be less hostile toward a rule authorizing arbitrators to award punitive damages.

2. Speed, Efficiency and Economy in Arbitration

A review of pertinent data revealed no direct relationship between arbitration experience and perceptions of the speed and efficiency of the process. However, support for formal rules establishing specific time schedules for arbitration decreased with increasing experience. More experienced attor-

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Percent Favoring Rule Requiring Conclusions of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>165</td>
<td>46.4</td>
</tr>
<tr>
<td>5-10</td>
<td>133</td>
<td>36.8</td>
</tr>
<tr>
<td>11+</td>
<td>93</td>
<td>26.9</td>
</tr>
</tbody>
</table>

246. The following table shows the relationship between number of appearances as counsel in an arbitration and percent of respondents favoring a "broader scope of appeal" from arbitration awards:

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Percent Favoring Broader Scope of Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>205</td>
<td>36.1</td>
</tr>
<tr>
<td>5-10</td>
<td>138</td>
<td>29.0</td>
</tr>
<tr>
<td>11+</td>
<td>95</td>
<td>15.8</td>
</tr>
</tbody>
</table>

247. The following table, which compares number of appearances in arbitration with percentage of respondents favoring a rule specifically authorizing arbitrators to award punitive damages, reflects less hostility towards such a rule among respondents with more arbitration experience:

<table>
<thead>
<tr>
<th>Number of Appearances as Counsel in an Arbitration</th>
<th>Number of Responses</th>
<th>Percent Favoring Rule Allowing Punitive Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>206</td>
<td>25.2</td>
</tr>
<tr>
<td>5-10</td>
<td>140</td>
<td>29.3</td>
</tr>
<tr>
<td>11+</td>
<td>92</td>
<td>41.3</td>
</tr>
</tbody>
</table>

248. The following table, which compares number of appearances in arbitration with percentage of respondents favoring a rule establishing specific time schedules declines with increasing experience, reflects less support for such a rule among respondents with greater experience.
veys also indicated that the costs of arbitration compared less favorably to
jury trial or bench trial, although the averages still reflected a general
preference for arbitration in each case.\textsuperscript{249} Also, the AAA fee structure played
a more significant role in client counseling for experienced arbitration at-
torneys.\textsuperscript{250}

\textbf{H. The ABA Survey in Context}

The ABA survey is a considerable addition to the relatively small body
of data on commercial arbitration. It may be profitably compared to prior
studies of the process and user information recently assembled by the AAA.

These sources tend to reinforce the dominant themes of the ABA survey
data. On the positive side, these include the relative speed and efficiency of
arbitration, particularly in smaller cases, and arbitrator expertise. Prominent
concerns include attorney-caused delays, inadequate arbitrator selection
methods and consequent variations in arbitrator quality, the absence of
written opinions accompanying arbitral awards, and high administrative costs.

\begin{table}[ht]
\centering
\begin{tabular}{|c|c|c|}
\hline
Number of Appearances & Number of & Percent Indicating \\
as Counsel in an & Responses & Arbitration Is Less \\
Arbitration & & Costly Than Jury Trial \\
\hline
1-4 & 183 & 61.2 \\
5-10 & 137 & 51.8 \\
11+ & 88 & 51.1 \\
\hline
\end{tabular}
\end{table}

\begin{table}[ht]
\centering
\begin{tabular}{|c|c|c|}
\hline
Number of Appearances & Number of & Percent Indicating \\
as Counsel in an & Responses & Arbitration Is Less \\
Arbitration & & Costly Than Bench Trial \\
\hline
1-4 & 180 & 54.4 \\
5-10 & 135 & 53.3 \\
11+ & 88 & 46.6 \\
\hline
\end{tabular}
\end{table}

249. The following table compares number of appearances in arbitration with percentages
indicating arbitration is less costly than jury or bench trial. It reveals that as a group, more
experienced attorneys tend to be less certain that arbitration offers cost advantages over liti-
gation.

250. The following table compares number of appearances as counsel in an arbitration with
percentages indicating that they were affected by the AAA fee structure in counseling clients
regarding arbitration.
1. Comparison to Prior Studies of Commercial Arbitration

   a. University of Chicago Study

   In the mid-1950s a University of Chicago survey of 545 commercial cases
   administered by the AAA led researchers to conclude that AAA arbitration
   was generally a faster method of dispute resolution than the courts. This
   finding was essentially corroborated by the ABA survey. The study also
   indicated that the use of attorneys fostered delays. This, too, is not in-
   consistent with current survey results describing attorneys as the most im-
   portant factor contributing to delays in arbitration.

   b. Mentschikoff Study

   Attorney-caused delay was also a major theme of a wide-ranging survey
   of attorneys, arbitrators and businesspersons engaged in commercial arbi-
   tration. These results were published by Soia Mentschikoff in 1961. Professor
   Mentschikoff concluded that the presence of attorneys created delays
   in the selection of arbitrators and resulted in more frequent postponements
   of hearings; attorney participation often "not only failed to facilitate the
   decision but was so inadequate as to materially lengthen and complicate the
   presentation." On the other hand, Mentschikoff recognized that trained
   counsel might perform an important function in informing arbitrators as to
   appropriate legal norms and standards which should be considered in reaching
   their decision.

   Pertinent legal standards were important to arbitrators in the Mentschikoff
   survey. Most arbitrators thought that they ought to reach decisions consistent
   with principles of substantive rules of law, although most also said they
   would ignore the law if they believed justice so required. Mentschikoff
   also found that because of the extensive use of experts, arbitration panels
   were more likely to be informed as to important commercial "fact-finding
   norms" than a judge or jury.

   The arbitrators studied in the Mentschikoff survey insisted that they did

251. See Smith, supra note 24, at 10, 17-18.
252. See supra note 202 and accompanying text.
253. See Smith, supra note 24, at 17.
254. See supra notes 204-05 and accompanying text.
255. See Mentschikoff, supra note 2, at 859.
256. See id.
257. See id. at 859, 868.
258. According to Professor Mentschikoff's findings, 80% of the arbitrators surveyed believed
   that they ought to render awards in accordance with principles of substantive law, although
   nearly 90% thought they were free to ignore these rules in the interest of doing justice. In this
   respect, concluded Professor Mentschikoff, arbitrator attitudes curiously paralleled those of
   appellate courts. Id. at 861.
259. Id. at 868.
not compromise: in half of the cases the full award was for one side or the other, and partial awards often represented a division of claims.\textsuperscript{260} The current ABA survey, however, found a good deal of support for the notion that arbitrators reach unjustifiable compromise decisions.\textsuperscript{261}

c. Harvard Business School Study

In 1965, the American Mercantile Management Association published the results of another extensive study of commercial arbitration. Degree candidates at the Harvard Business School conducted this survey of businesspersons, arbitrators, and attorneys.\textsuperscript{262} The result was a generally positive but balanced view of the process.

All of the groups surveyed were generally convinced that commercial arbitration was usually faster and more economical than litigation;\textsuperscript{263} respondents believed the absence of extensive pretrial practice was a major factor contributing to this difference.\textsuperscript{264} On the other hand, respondents recognized that arbitration, like litigation, was susceptible to delaying tactics,\textsuperscript{265} and that attorneys tended to be associated with more expensive cases.\textsuperscript{266} As in the ABA survey, attorneys were sensitive to a variety of factors which might lengthen arbitration proceedings, especially in complex cases.\textsuperscript{267} Interestingly, they did not always consider speed to be of paramount importance—particularly in large commercial cases.\textsuperscript{268}

The study concluded that the single most important factor in commercial arbitration was the competence of the arbitrator.\textsuperscript{269} While all groups saw arbitrator expertise as an advantage of arbitration,\textsuperscript{270} there were criticisms of the lack of consistent arbitrator quality.\textsuperscript{271} The authors of the study laid considerable blame on the arbitrator selection methods employed by the AAA, which according to the authors "[did] not guarantee qualified [arbitrators]."\textsuperscript{272}

Businesspersons, arbitrators and attorneys all described occasional prob-

\textsuperscript{260} See Mentschikoff, supra note 2, at 861. See also Smith, supra note 24, at 13-17, 20.
\textsuperscript{261} See supra note 193 and accompanying text.
\textsuperscript{262} See generally S. LAzarus, supra note 1 (discussing the study and evaluating the potential use of commercial arbitration in resolving disputes).
\textsuperscript{263} Id. at 46-49, 84, 104-05.
\textsuperscript{264} Id. at 106.
\textsuperscript{265} Id. at 49.
\textsuperscript{266} Id. at 22, 50-51, 95.
\textsuperscript{267} Id. at 104-05.
\textsuperscript{268} Id. at 105-06. The notion that speed may not always be of paramount importance to arbitrating parties is consistent with recent pronouncements on behalf of the AAA. See supra note 159.
\textsuperscript{269} S. LAzarus, supra note 1, at 22, 66-68.
\textsuperscript{270} Id. at 47, 51-52, 84, 113.
\textsuperscript{271} Id. at 46, 76-79, 188.
\textsuperscript{272} Id. at 76-79. See also id. at 114.
lems with poor or unfair decisions. Moreover, as in the current study, many attorneys thought the lack of a written opinion was a negative factor. Nevertheless, all groups saw the finality of arbitration awards as a virtue of the process.

d. Kritzer-Anderson Study

More recently, in 1983, Professor Herbert Kritzer and attorney Jill Anderson conducted another arbitration survey. Kritzer and Anderson compared case processing time and expense, using as the basis 147 AAA cases and case dispositions in three federal district courts. The study reinforced the conclusion that arbitration was a faster means of resolving disputes than litigation. This was true even though a higher percentage of court cases were settled prior to hearing.

On the other hand, Kritzer and Anderson's survey data indicated that arbitration was not necessarily any less expensive than litigation. Except in cases involving less than $5,000, the cost of legal services tended to be as high or higher in arbitration. Unlike the current AAA study, Kritzer and Anderson's survey did not account for AAA administrative fees or arbitrator fees and expenses.

2. Recent Data Compiled by the AAA

a. AAA User Survey

For some time, the American Arbitration Association has sought feedback from parties at the conclusion of arbitration. Beginning in 1987, the AAA Department of Case Administration began collecting and analyzing completed ratings surveys. Through June 1987, the AAA results tended to be much more positive than the ABA survey data, but in many respects the AAA and ABA results were consistent.

AAA clients were asked to rate the performance and demeanor of the
arbitrator, the quality of the list of arbitrators furnished by the AAA, and
the AAA administrative services. In each case, the ratings were considerably
higher than corresponding results of the ABA survey. For example, over
70% of those responding to the AAA post-arbitration survey rated the
performance and demeanor of the arbitrator as "excellent";282 nearly nine
out of ten described the quality of the AAA list of arbitrators as "excellent"
or "good."283

When asked which aspects of arbitration they liked the most, AAA clients
most frequently alluded to the speed of arbitration, the quality of the
decisionmaker, and the relative informality of the process.284 Cost savings
and fairness were also mentioned as advantages.285

Ironically, but not surprisingly, delays to the process headed the list of
complaints among AAA users.286 Like the ABA survey respondents,287 some
AAA clients believed the process could be even speedier.288 Some AAA clients
also expressed concern about the lack of rules of evidence,289 the absence
of reasoned awards,290 the lack of arbitrator familiarity with the law,291 and
high AAA fees.292 These concerns are mirrored in the ABA survey.

b. Survey of Closed Cases

Records of four hundred closed AAA construction cases for each of the
years 1982 to 1986 revealed that during that five year period, 55% of the
cases surveyed progressed to award; the remainder were settled or with-
drawn.293 The average time from filing to award was 200 days;294 the average
time to settlement or withdrawal was 179 days.295 While these figures exceed

that users tended to be more candid when revealing impressions of the process to an independent
body. Even though the AAA funnels user comments through its New York headquarters, parties
may be sensitive to the fact that their criticisms will find their way back to AAA personnel
and arbitrators with whom they may again have dealings.

283. Id.
284. Id.
285. Id.
286. Id. at 3.
287. See supra notes 202-05 and accompanying text.
288. Analysis, supra note 281, at 3.
289. Id.
290. Id.
291. Id.
292. Id.
293. AMERICAN ARBITRATION ASSOCIATION, CONSTRUCTION ARBITRATION TRIBUNAL REPORTS,
294. Id. Survey figures for 1986 indicate that for the 2,096 AAA cases which progressed to
award in that year, the average number of days from filing to award was 238. AMERICAN
ARBITRATION ASSOCIATION, SURVEY OF CLOSED CASES—1986.
295. Id.
the average case disposition time attributed to the AAA by earlier surveys, they reconfirm that as a general proposition, arbitration is speedier than litigation.

c. "Compromise" Study

In 1986, the AAA conducted a study to determine whether or not commercial arbitrators compromised. AAA officials examined 100 randomly selected commercial cases concluded in 1986. They determined that in over half those cases, arbitrators awarded more than 60% of the amount claimed and in another 34% of those cases, arbitrators awarded less than 40% of the amount claimed. Thirteen percent of the awards were in the range of 40% to 60% of the amount claimed. These results were taken as proof that arbitrators do not "split the baby," but tend to resolve the case in favor of one party or the other.

III. RETHINKING ARBITRATION IN THE "POST-MODERN" ERA

The ABA survey demonstrates that, in general, arbitration is a more than satisfactory alternative to the courts. But the research also indicated that for many, arbitration failed to provide efficient, economical, and expert justice. Having taken its place beside the civil justice system as a primary mechanism for dispute resolution, arbitration must continue to mature and evolve so it can better meet public needs and expectations. This is the challenge of the "post-modern" era of arbitration.

There are attorneys, including a number of respondents to the ABA survey, who would prefer to remake arbitration in the image of civil litigation. Likewise, there are businesspersons who want to rid arbitration of lawyers and lawyer-injected formalities. But if arbitration is to retain its separate identity (which it must), and if attorneys are to remain involved in arbitration (which, at least under the AAA method, they likely shall), the answer must lie somewhere between these choices. As AAA decisionmakers increasingly recognize, user input and other empirical data on arbitration provide valuable guidelines for the future.
A. Improving Arbitrator Performance

The success of arbitration, generally and in the individual case, is directly dependent upon the personal qualities and abilities of the arbitrator. In a very real sense, the arbitrator is the process. Efforts to improve arbitrator performance must have a dual focus. First, the AAA must take greater care to ensure that its national panels of arbitrators contain only individuals of proven professional competence and ability. Second, the AAA must make greater efforts to give the parties a real choice in arbitrator selection.

1. Improving the Pool: Selection and Training

Today there are undoubtedly persons on the AAA's national commercial and construction panels who do not belong there. To improve the quality of the arbitrator pool and ensure greater consistency of performance, the AAA should take greater care in accepting individuals for panel membership. As a general rule, no person should be accepted unless he is nominated by one or more current members and until the AAA investigates evidence which can corroborate that individual's autobiographical information, at least insofar as it relates to claimed professional knowledge and expertise. Undoubtedly, the AAA may wish to avoid these formalities in cases involving persons with a strong professional reputation and considerable arbitration experience, but nomination should only be made with the concurrence of the regional vice president and, preferably, the pertinent industry advisory group.

All nominees should be required to attend training sessions within a specified period after their nomination. Even those with prior arbitration experience may benefit from a review of pertinent rules and recent court cases addressing the powers of the arbitrator with regard to such matters as discovery, admission of evidence, scheduling, final and interim decisions, and remedies. They may also learn from the experiences of others through case studies of actual arbitration.

300. See supra notes 57-73, 143-56 and accompanying text.
301. George Friedman, AAA Vice President for Case Administration, says that regional committees of the NCIAC are currently active in reviewing qualifications of construction arbitrators with regional AAA offices. Letter from George H. Friedman to author (July 31, 1987). A recent resolution of the NCIAC parent committee requires that members of NCIAC regional advisory councils pass upon all regional nominations to the AAA construction panel. Telephone interview with George H. Friedman, AAA Vice President for Case Administration (Nov. 24, 1987).
302. According to Vice President Friedman, the AAA continues to place greater emphasis on arbitrator training. For example, Friedman notes that the AAA is committed to provide at least one construction arbitrator training program in each region annually. In 1986, there were about 60 training programs of this kind; in 1987 the AAA planned 78 training sessions. New arbitrators are invited to attend an orientation and training session. When an arbitrator com-
Obviously, some aspects of the arbitrator’s role may only be learned through experience. New arbitrators should first be assigned to three-member panels with more experienced arbitrators, one of whom would be the panel chairman. After at least one experience of this kind, the arbitrator would be better prepared to handle a case singlehandedly.

Professional knowledge and experience do not guarantee that an individual will be an effective arbitrator. To determine whether an arbitrator has the personal qualities necessary to properly perform the arbitral role requires performance data; such information may be derived from tribunal administrators and arbitrating parties. The current AAA user survey model is a step in the right direction.\(^{303}\) If the record reveals that a particular arbitrator habitually delays proceedings, demonstrates a general inability to control the progress of hearings, or is otherwise incompetent, the AAA should remove that individual’s name from the pool.\(^{304}\) At the very least, user feedback might offer helpful lessons for future arbitrator training sessions.\(^{305}\)

Finally, we must be more realistic about the cost of attracting the kind of professional people who will be effective arbitrators. While the AAA is correct in describing the role of the arbitrator as a public service function and not a livelihood,\(^{306}\) many individuals undoubtedly feel constrained from serving because of the AAA rule that each arbitrator must render a day of free service to each new case. This burden may be particularly onerous if arbitrators are also required to attend initial training sessions. Ultimately, it is submitted, arbitrators should receive a per diem for each day served. Alternatively, the organized bar and other professional organizations should recognize and give some form of credit for the valuable public service performed by attorneys and other professionals as arbitrators.

2. Selecting an Arbitrator for the Case

One of the purported advantages of arbitration is the ability of the parties to select their own decisionmaker. This choice is restricted in jury trials and non-existent in bench trials. In arbitration, the parties’ choice is limited by

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\(^{303}\) See supra note 281 and accompanying text.

\(^{304}\) It is currently the policy of the AAA to remove panelists who are the subject of repeated complaints by parties and/or administrators. Telephone interview with George H. Friedman, AAA Vice President for Case Administration (Nov. 24, 1987).

\(^{305}\) See infra note 302.

\(^{306}\) See AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR CONSTRUCTION INDUSTRY ARBITRATORS 4-5 (November 1985).
the list provided by the tribunal administrator and the information which
the parties have about the potential arbitrators.

In the first place, the parties should be encouraged, if not required, to
supply enough information about the case to the AAA to permit the tribunal
administrator to select appropriate individuals for the list. The very general
form of notice pleading now required by AAA demand forms may offer
the tribunal administrator no clue as to the specific expertise which might
be valuable in choosing an arbitrator. One way of improving the present
system might be to ask both parties to describe the qualifications they desire
in an arbitrator.307 In larger or more complex cases, a pre-hearing conference
with the AAA representative charged with administering the case may offer
the best means of communicating this information.308 Also, in cases involving
large amounts of money and tripartite panels, arbitrator availability can have
a significant effect on the speed of dispute resolution.309 Therefore, the parties
should candidly appraise the anticipated duration of hearings.

As the ABA survey results make clear, the AAA must improve the bio-
ographical data which it supplies.310 At the time of nomination, the AAA
must check the essential accuracy of the information provided to the panel
by the would-be arbitrator. In addition, the AAA should do a better job
of keeping arbitrator records up to date.311 The biography should also include
more pertinent details, including lists of representative client affiliations or
projects and information on prior experience as an arbitrator. While the
privacy of the parties might require the latter information to be restricted
to descriptions of the type and subject matter of the arbitration, the names
of parties and their counsel might also be listed if both sides consent. Such
information would provide arbitrating parties and their counsel with a much
better picture of an arbitrator's actual experience and, perhaps, sources of
further information regarding that individual's past performance as an ar-
bitrator.312 The AAA has already taken the first steps in this direction with

307. The AAA should also solicit information regarding the relative importance of speed in
dispute resolution. For example, speed may be particularly critical if the claimant alleges material
breach and seeks immediate release from further performance of its contract. The likely duration
of the case should also be assessed prior to arbitrator selection; scheduling concerns should be
one of the major criteria in arbitrator selection. Fabyanske & Halverson, supra note 21, at
289; Horowitz, supra note 13, at 70; supra text accompanying note 167; infra text accompanying
note 309.

308. See Commercial Rules, supra note 24, § 10. See also Construction Rules, supra note
24, § 10. Such conferences are also a feature of the AAA's new nonmandatory guidelines for
complex cases. American Arbitration Association, Guidelines for Expediting Larger,
Complex Construction arbitrations (July 1987) [hereinafter Complex Construction Ar-
bitrations].

309. Fabyanske & Halverson, supra note 21, at 289; Horowitz, supra note 13, at 70; text
accompanying supra note 167.

310. See supra notes 188-90, 243 and accompanying text.

311. The AAA's National Panels Department currently maintains a policy under which
arbitrator records are updated at least every three years. Telephone interview with George H.
Friedman, AAA Vice President for Case Administration (Nov. 24, 1987).

312. Because many former parties will wish to preserve their privacy, and in light of concerns
regarding the preservation of arbitrator impartiality, it may not be practical to implement a
the development of a more detailed arbitrator biographical information summary and a computerized record system. Although the suggested improvements may result in higher administrative costs to the AAA, they may be more than offset by time and expense saved in investigative time by the parties.

Finally, the AAA must emphasize the role of the AAA tribunal administrator, the person who is responsible for assembling lists of potential arbitrators and, frequently, for selecting the arbitrators if the parties fail to agree on nominees. Given the sensitive nature of the tribunal administrator's role, the AAA must view the job as something more than clerical. Such individuals require training in the demands of the job, preferably through an apprenticeship with an experienced administrator who is familiar with local attorneys and arbitrators. They also need the ability to communicate effectively with the arbitrating parties' counsel and to be forceful when the situation requires it. Moreover, their performance should be assessed and monitored with the assistance of user surveys. Finally, they should be paid in a manner commensurate with their true role.

B. Improving the Speed and Efficiency of Arbitration

Generally speaking, speed is a desirable goal in dispute resolution. However, given the wide range of disputes—small and large, simple and com-

system whereby arbitrating parties are provided with the names of "references" who have arbitrated before a particular panelist and are familiar with that arbitrator's personality and capabilities. However, because those with firsthand experience are an invaluable source of information about a potential arbitrator, the AAA might explore the possibility of accepting references on a volunteer basis. See Lawson, Arbitrator Acceptability: Factors Affecting Selection, 36 ARB. J., Dec. 1981, at 22, 25 (indicating that in labor cases, users indicated that they generally relied on the opinions of their colleagues in selecting arbitrators).

The AAA has recently developed a new data sheet for potential commercial and construction arbitrators. Among other things, the form requests information on occupation, past employment, professional licenses or registrations, academic qualifications, membership in professional or trade organizations, types of construction expertise (including dollar value of construction projects and description of recent significant construction projects and activities), past arbitration experience and related training. See, e.g., AMERICAN ARBITRATION ASSOCIATION, CONSTRUCTION PANEL DATA SHEET (Mar. 1987) (on file in the offices of the INDIANA LAW JOURNAL). A similar form for attorney panelists requires specific information about the individual's law practice, including types of clients and cases. See AMERICAN ARBITRATION ASSOCIATION, PANEL DATA SHEET—ATTORNEY (Mar. 1987) (on file in the offices of the INDIANA LAW JOURNAL).

AAA Vice President Friedman also notes recent efforts by the AAA to monitor and manage its national panel of arbitrators. This summer, a computerized filing system was implemented by the AAA. The system permits the Association to keep track of the number of times a particular arbitrator is listed by ten of the AAA regional offices. It also enables AAA personnel to search for particular arbitrator qualifications on a "key word" basis. Letter from George H. Friedman to author (July 31, 1987).

Bayer & Abrahamson, supra note 20, at 31; Coulson, supra note 67, at 676; text accompanying supra notes 138-39.
plex—that find their way into arbitration, there is a danger in establishing universally applied timetables or schedules by formal rule. Speed and efficiency must be furthered by guidelines which are flexible enough to permit the arbitrator to meet the exigencies of the particular case, but which clearly empower the arbitrator to establish and enforce schedules.

1. The Preliminary Hearing and the Arbitration Order

Particularly in big cases, arbitration may be prolonged, delayed or disrupted as a result of the failure of arbitrators to set schedules for arbitration. Related problems include the absence of pre-hearing discovery and the relative lack of issue definition prior to hearings. All of these problems may be addressed by requiring the parties and arbitrators to have a preliminary hearing or other pre-hearing communication culminating in an arbitration order.

In larger cases, the procedures should require parties to meet or communicate with one or more arbitrators to discuss the case. This would permit the parties to discuss and perhaps to narrow the disputed issues, to stipulate uncontested facts or issues, and to request pertinent documents. It would also provide an opportunity to describe the case to the arbitrators and to offer estimates of presentation time. The arbitrators would then issue an order (preferably on a standardized form) establishing dates for exchange of requested documents, if any, and for submission of more definitive statements of the case, witness lists and exhibit lists. The order would also establish definite time schedules for presentation of the case.

Such a procedure, which was strongly supported by the responses to the ABA survey, would make it less likely that either of the parties would be surprised by unanticipated documents or testimony at the hearing. On the

315. This was recognized by the majority of attorneys responding to the ABA survey. See supra notes 227-28 and accompanying text.
316. See Poppleton, supra note 51, at 7.
317. See supra notes 165-66 and accompanying text.
318. See supra notes 162-63 and accompanying text.
319. New guidelines for larger, complex commercial and construction arbitrations establish such a procedure. They provide that "unless the parties agree otherwise," the arbitrators may conduct a preliminary hearing with the parties. Although the guidelines are not explicit, such a hearing may presumably be called at the arbitrators' own motion, or at the request of one or both parties. Among other things, the arbitrators may request the parties to describe the issues in dispute and to specify amounts claimed. Parties are admonished to agree on uncontested facts and present their stipulations to the panel at the conference.

The panel may establish the scope and scheduling of exchange of documents, including experts' reports, and require the exchange of lists of witnesses and outlines of their testimony. The arbitrators are expected to solicit the parties' estimates as to the number of hearing days required to present their cases, and may establish a hearing schedule on that basis. The arbitrators may also require briefs and establish schedules for their submission. Finally, the arbitrators are expected to describe the "ground rules" for hearings. See, e.g., COMPLEX CONSTRUCTION ARBITRATIONS, supra note 308.
320. See supra notes 210-11 and accompanying text.
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other hand, it would also place greater responsibility on attorneys to cooperate with their opponent and to have their case fully and efficiently organized at hearing time; time extensions or continuances would be given only upon a showing of good cause.

2. Pre-hearing Discovery

A traditional weakness of the AAA Rules is the absence of any specific provision for arbitrator-ordered discovery prior to hearings.\(^{21}\) Besides creating the potential for loss of important documents or witness testimony, this absence often results in delays at the hearing stage. Thus, while care must be taken to avoid the extensive pretrial practice of litigation, the AAA Rules should be amended to make it clear that the arbitrators may order discovery as they deem it appropriate prior to the actual hearings, at least insofar as documents are concerned.\(^{22}\) The provision might also permit the arbitrators to order depositions in cases of necessity.

3. Sanctions for Delay or Non-cooperation

The ABA survey reflected considerable support for arbitrator-imposed attorney's fees and other sanctions for violations of the arbitration rules.\(^{23}\) While the AAA Rules currently permit awards to include the costs of arbitration,\(^{24}\) empowering arbitrators to award attorney's fees would add considerably to the coercive force behind the power to schedule. Parties who misuse the process by asserting frivolous claims or defenses, fail to cooperate in exchange of documents, or otherwise frustrate the process would face the same consequences that similar behavior would bring about in court.

4. Counterclaims, Joinder and Consolidation

In assessing the speed of dispute resolution one must consider the presence of related claims or disputes, including counterclaims and claims by third parties. While the former may be addressed by an amendment to the rules of arbitration,\(^{25}\) the latter demand a more complicated solution.

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321. See supra notes 110-11, 165-66 and accompanying text.
322. While the need for arbitrator-ordered discovery prior to evidentiary hearings will in many cases be met by the new guidelines for complex cases, see supra note 319, the basic Commercial and Construction Arbitration Rules should be modified to make specific the authority of the arbitrators to order and schedule discovery, at least to the extent of document exchange. In cases involving smaller amounts where a full-fledged preliminary hearing might involve undue expense, a conference call with the arbitrator (or head arbitrator, in the case of a three-person panel) might accomplish the same goal.
323. See supra notes 231-34 and accompanying text.
324. See supra note 122.
325. It should be noted, however, that concerns regarding the res judicata effect of an
Resolution of multiparty disputes in arbitration may be a desirable end. Because no party may be required to arbitrate in the absence of consent, however, arbitrator-ordered joinder of parties or consolidation of claims may require something more than a simple amendment to the AAA Rules. In addition to modifications to federal and state arbitration statutes previously proposed by this author, careful drafting of all pertinent contracts is essential to establishing the framework for joint arbitration.326

C. Economic Concerns

It is clear that arbitration is sometimes more expensive than litigation, particularly in larger cases.327 To the extent that such expense is a function of the length of hearings, reforms directed toward making the process more efficient may result in cost savings. On the other hand, the ABA survey revealed considerable displeasure with the administrative fee imposed by the AAA.328 While there is no evidence that the AAA administrative fees are generally excessive, setting the fee as a percentage of the amount claimed offers no guarantee that the fee will bear any relation to the services actually rendered in a given case. While some have recommended tying the fee to the number of days of hearing time, AAA insiders insist that that method will probably be no better at gauging the actual administrative burden.

A possible improvement might be the development of a system which required AAA to keep a daily record of services devoted to each case, just as law firms and other purveyors of services do, and bill against the assessed fee. At the conclusion of the case, AAA would refund any remaining portion of the fee or assess an additional amount, if necessary. While such a system would entail the development of a more sophisticated accounting system within the AAA, it would directly tie the cost of arbitration to the needs of the case or the desires of the parties.

D. Concerns Regarding the Award: Remedies, Rationale and Review

Arbitrators now have broad authority to render justice, and to do so without significant oversight by courts of law.329 The extent of the remedial power and the breadth of judicial review are two of the most fruitful sources of disagreement regarding arbitration.

326. See Domke, supra note 1, at 452-55.
327. See generally Stipanowich, supra note 1, at 521-27.
328. See supra notes 207, 279-80 and accompanying text.
329. See supra notes 170-76 and accompanying text.
1. Arbitrator Remedies
   a. Punitive Damages

   The ABA survey group registered a firm "no" when asked if the Construction Industry Arbitration Rules should specifically permit arbitrators to assess punitive damages.330 To the extent that the response conveys a desire to eliminate punitive sanctions from commercial arbitration entirely, it may stem from the notion that such awards are inconsistent with contract remedies or from concerns regarding the lack of reviewability of arbitration awards. It may also reflect more general limitations on punitive damages which are a prominent feature of recent tort reform.331 On the other hand, a number of recent cases have acknowledged the authority of arbitrators to award punitive damages.332 If public sentiment and public policy ultimately require that arbitrators be prevented from giving punitive damages, the answer must lie in statutory reform on both state and federal levels.333

   b. Attorney's Fees

   Attorneys gave overwhelming support to an arbitration rule permitting arbitrators to award attorney's fees.334 There appears to be considerable merit in such a rule. Arbitrators have awarded attorney's fees where required by statute or where the parties specifically permitted such awards. If the arbitration rules incorporated a more general provision on attorney's fees the rules would permit policing of bad faith claims and defenses and of unreasonable delays and disruptions to the arbitration process.

2. The Award Rationale

   If arbitrators were required to write opinions in support of their awards, some might find the task difficult and some might even be discouraged from serving as panelists. It would require the arbitrators to spend additional time considering and preparing the award, and this would result in higher costs to the parties. Most importantly, it would probably increase the likelihood of appeal and judicial review of the award. On the other hand, such a

330. See supra note 230 and accompanying text.
331. See generally Greengard, Is the Tort System Heading for a Crash?, BARRISTER 9 (Winter 1987) (discussing the recent passage of tort reform measures by the ABA House of Delegates and various states).
332. See supra note 123.
333. In light of recent judicial pronouncements regarding the extreme breadth of the federal substantive law of arbitrability, punitive damages claims may be arbitrable despite state legislative enactments prohibiting arbitration of such claims in cases under the FAA. See Stipanowich, supra note 1, at 991-92 n.217. In such cases, therefore, it may be that only an amendment to the FAA as well as to state arbitration acts will be effective.
334. See supra notes 231-32 and accompanying text.
requirement would force arbitrators to consider their decision more carefully and provide the parties with information regarding the arbitrator’s rationale. It would form a basis for appeal of improper awards and for resolution of collateral controversies.

Given the strong division of opinion over this issue, it may be appropriate for AAA procedures to accommodate both points of view. If for any reason parties mutually desire a reasoned opinion, they should be permitted to agree to have one. Moreover, while the assumption under the AAA rules may continue to be that no written opinion will be issued, AAA procedures might go further in causing parties to consider the issue and to exercise a conscious choice in the matter. The decision should be made prior to arbitrator selection, as it might affect the ultimate choice.

3. Judicial Review of the Award

The topic of judicial review of arbitration awards has stimulated much academic interest and considerable argument. While a thorough treatment of this subject is beyond the scope of this writing, it is appropriate to address the subject of an arbitration rule dealing with review.

First of all, there is a question as to whether the scope of judicial review, a matter regulated by statute, could be affected by amending the rules of arbitration.

Second, the results of the ABA survey are sufficiently ambiguous that it is unclear whether or not the survey group desires to widen present statutory standards of review. Given the strong public policy in

335. See supra notes 235-37 and accompanying text.
336. While the survey indicated greater support for a rule requiring written findings of fact than for a requirement regarding written conclusions of law, it is difficult to see how such a distinction would work in practice. It is submitted that in preparing a written rationale for the award, commercial arbitrators would be disposed to deal not only with issues of simple fact, but inferences to be drawn from those operative facts and applicable norms (be they personal, contractual, or statutory) by which the ultimate decision will be reached. In the strict sense, then, the opinion would transcend mere factfinding.

Although the AAA does not encourage the writing of opinions, current AAA policy permits opinions when requested by both parties. Telephone interview with George H. Friedman, AAA Vice President for Case Administration (Nov. 24, 1987).

337. This goal might be accomplished by a minor revision to the standardized form by which parties demand arbitration. The claimant could be required to indicate his or her preference for a written rationale on the demand. In the event the claimant indicated such a preference, the respondent could be given a certain number of days to object to the procedure. Of course, the parties should be forewarned that the requirement of a written opinion may increase the cost of arbitration and the likelihood of appeal and judicial review.

338. In such cases, the parties will probably desire at least one attorney on the panel.
339. See supra notes 235-37 and accompanying text. While it is presumably not within the power of parties to contract to expand the statutorily-confined scope of review (as by an amendment to incorporated arbitration rules), the parties may accomplish the same goal indirectly. A court may vacate an award on the basis that it exceeds contractually established limits on the arbitrator’s powers. See UNIF. ARB. ACT § 12(a)(3), 7 U.L.A. 1, 140 (1985).

340. See supra notes 235-40 and accompanying text. It is arguable that the “arbitrary and capricious” standard imposes a “rational basis” test which is already applied by some courts
favor of the finality of arbitral awards, the author reserves judgment on the issue until there is more persuasive evidence of support for broader rights of appeal.

CONCLUSION

Arbitration has been called upon to play a major role in domestic and international dispute resolution—a role far broader than its early proponents might have anticipated. While few have ever perceived arbitration as a panacea, it is now widely accepted as an appropriate alternative to civil litigation of commercial and contractual controversies. The struggle for acceptance at an end, arbitration must now come to grips with its success.

In her comprehensive history of the early years of the American Arbitration Association, Frances Kellor emphasized the need for constant adaptation and improvement of arbitration rules and procedures. In this “post-modern” era, arbitration demands continued effort by the AAA and other institutional sponsors to shape the process to more consistently achieve its defined goals. User information such as the ABA arbitration survey needs to be an integral part of this effort.


341. See supra notes 87-88 and accompanying text.

342. F. KELLOR, supra note 23, at 66.