Whither Arbitration?
What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill-Affects

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INTRODUCTION

It is frequently mused upon that ours is a litigious age; that the slightest dispute is a trigger to send persons to court demanding damages. This aphorism may be true. However, it is also true that a mark of civilization is a society that establishes ready and efficient means by which its citizens may resolve disputes between and among themselves. The United States of America has established many levels of courts so that public and private disputes may be resolved efficiently, and the litigation in those courts creates a just manner by which disputes may be decided and harms redressed.

In the last half of the Twentieth Century, arbitration has become prevalent as a means to take many disputes out of the courts. However, arbitration is under attack by those who seek its benefits, but abhor its supposed risks and limitations. Parties and their counsel desire a fast, flexible and binding means of dispute resolution, yet they cannot release their grip on litigation devices that give them such comfort and security---expansive discovery, formal rules of evidence, and the shining promise of appellate review. Conflicted, they seek a marriage of convenience between arbitration and litigation, the result of which is "arbigation": a process in which parties use litigation tools to navigate the arbitral arena.[2] This effort compromises arbitration's goals of effective, fair and efficient relief.

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[1] I was assisted in the preparation of this paper by my colleagues, Raymond Dean Jones, Esquire, (Judge Ret.), Daniel J. Hillis, Esquire and Felicia G. Euell, Esquire.

[2] It is unclear when the term "arbigation" was coined. It has at least been in circulation since Jeffrey W. Stempel's Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication, 3 Nev. L.J. 305, 314 (2003) (using term "arbigation"). That article did not define "arbigation" in the manner it is used here.

I. If Perceptions Dictate . . . (Why It's Important to Address Concerns About Arbitration Regardless of the Evidence)

Parties, counsel and critics alike have criticized arbitration for becoming too much like litigation. Based on anecdotal information, they perceive that arbitration is becoming as costly and time consuming as litigation. There is limited empirical evidence demonstrating the cost of arbitration.[3] However, evidence suggests that arbitration remains less expensive than litigation.[4]

Still, the very perception of arbitral inefficiency is cause for concern. If parties perceive that arbitration is flawed, expensive and time-consuming, they are more apt to believe these criticisms and refrain from arbitrating claims. Unfounded complaints may also give rise to ill-considered reform initiatives by under-informed business and political forces. Thus, it is important to address misperceptions and sort them out from legitimate concerns. In this way, arbitration can be improved and, if necessary, changed.

II. Arbitration is an Invitation, Not a Command Performance[5]

Despite the presence of an arbitration clause in a contract, parties spend an enormous amount of time and money arguing about whether their dispute requires arbitration, how the

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[3] *See* Christopher R. Drahozal, Arbitration Costs and Forum Accessibility: Empirical Evidence, 41 U.Mich. J.L. Reform 813, 815 (Summer 2008) (noting that, as other have commented, "empirical evidence on the cost of arbitration is limited), *cf.* Mark Budnitz, The High Cost of Mandatory Consumer Arbitration, 67-SPG Law & Contemp. Probs. 133 (2004) (finding the cost of mandatory consumer arbitration is often prohibitively high because consumers cannot afford to prosecute claims or the costs outweigh the benefits).

[4] *See, e.g.*, Lisa Brener, Cost and Value of Arbitration, 14 World Arb. & Mediation Rep. 111, 114 (2003) (finding that firms claimed an average of 32% savings in arbitration. They further estimated that 45% of their case preparation time in litigation was spent on discovery, but only 17% of their preparation time in arbitration was spent on discovery).

[5] This excludes occasions where arbitration results from "adhesion" contracts. *See, e.g.*, Geraldine Szott Moohr, Opting In or Opting Out: The New Legal Process of Arbitration, 77 Wash. U. L.Q. 1087, 1093 (1999) (discussing unfairness of arbitration in nonmerchant contexts); Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 686-93 (1996) (corporations' use of arbitration clauses in consumer contracts disadvantages consumers). Adhesion contracts are not addressed in this article and the drafters' comments do not pertain to those types of contracts or terms.

matter should be arbitrated, and how and whether the arbitration award should be enforced once it is issued. These three areas deserve attention when considering how to reduce arbitration costs and to keep it free from litigation's worst vices because all three factors can lead parties back to the courts and courthouse practices.

Therefore, a discussion of how to help arbitration avoid the negative factors replete in litigation should begin by asking whether a party's needs are better served by arbitration or litigation. To answer this, parties and their attorneys need to examine how arbitration and litigation differ and know how to tailor contracts to ensure that disputes are heard in the correct forum. Because arbitration clauses are freely entered into, this simple act can go a long way toward keeping unwilling participants from poisoning the arbitral process with litigation antics.

The attorneys who draft agreements and represent parties during disputes may have little or no arbitration experience. Their knowledge of dispute resolution may be limited to litigation, and they may assume that arbitration will proceed just as a case would in the trial court. The parties they represent may have the same limited perspective and false expectations. Before an arbitration clause is ever inserted into a contract, counsel need to know with certainty that their client is aware that an agreement to arbitrate is an almost irrevocable commitment and that the arbitrator's decision is going to be enforced absent very rare circumstances. If a party knows and accepts this before agreeing to an arbitration clause, there is a higher probability of avoiding challenges to arbitrability[6] and the arbitration award. Such knowledge of the arbitration process can save untold sums and years of litigation. In fact, it would be wise to consider a simple chart that identifies parameters of the arbitration process such as the following:

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[6] *See AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (holding that questions of arbitrability are "undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

Stages of Arbitration	Issues & Actions
Stage 1: Education	Consider and understand the differences between litigation and arbitration, and make a determination of the appropriate dispute resolution procedure to be included in your agreement. Litigation is formal and provides an array of due process protections, but can be inefficient, slow and more expensive than arbitration. Arbitration is more informal, flexible, quicker, accessible, specialized and provides confidential results. Unlike litigants, arbitrants have great control when deciding who will decide their dispute. Parties need to understand an arbitrator's authority, ability to depart from precedent, informality of evidentiary rules, and extremely limited appellate rights for arbitration awards. Parties must decide whether arbitration or litigation best suits their needs and they should compare different arbitration laws (FAA, RUAA, *etc.*) and rules (AAA, IBA, JAMS, *etc.*) to ensure proper criteria-based selection. Consider how many arbitrators to use, whether to have a standard or reasoned award, and whether to contract for an arbitrated appeal.
Stage 2: Drafting	Define the dispute(s) to be arbitrated and commit arbitrability of all issues to the jurisdiction of the arbitrator(s). Decide which law and rules will govern and what (if any) procedural rules to apply. Decide availability of attorney fees, type of award that is needed, and whether to contract for an arbitrated appeal. Consider if the parties wish to impose any limit on the available types of remedies, damages or other type of relief that will be available.
Stage 3: Dispute	Bring dispute to proper venue (avoid risk of being sued for breach of contract term). Provide clear concise Statement of Claim and Counterclaims (be as complete as possible to avoid unnecessary amendment).
Stage 4: Pre-Hearing	Accurately gauge the real or likely discovery needs of the parties and consider the best approach to the type of hearing preparation that is likely to be needed with a view towards avoiding protracted and costly pre-trial activities. Accurately assess anticipated length of case based on evidentiary expectations to avoid scheduling difficulties, continuations and expensive postponements. Arbitrator should set tone and encourage communication throughout dispute. Be creative!
Stage 5: Hearing	Jointly amend arbitration terms, as needed, to improve hearing process. Resist litigation impulses (*i.e.* evidentiary objections). Stipulate as necessary, bifurcate if sensible, have experts confer to minimize their disagreements, submit direct testimony in writing (to the extent possible), group witnesses topically to shorten hearing, use joint exhibits in lieu of witness testimony and engage in conference calls instead of hearings when issues arise. Be creative!
Stage 6: Post-Hearing	Do not seek an attorney fee hearing or call fee experts, unnecessarily. Before contesting confirmation or filing an appeal, consider whether a court has jurisdiction and gauge likelihood of success. Be aware of possible sanctions.

Identifying arbitration's parameters helps manage expectations and encourage good initial planning. By starting with a positive management approach, there is a much better chance that people will be committed to the arbitration process.

The process of establishing parameters will further improve if litigators adapt to the arbitration process instead of trying to bend it to their will. As arbitration has grown, the types of attorneys and others who arbitrate have dramatically changed. Arbitration is no longer a process engaged in by attorneys who specialize in the field. The advent of the full service law firm has ushered in a host of lawyers eager to expand their firm's business. The great majority of these attorneys are talented and capable litigators. Lamentably, they often have no arbitration experience and lack the wits of an arbitration advocate. When they enter the new sphere, they bring the litigation skills that were the bedrock of their success and their client's satisfaction. Falling back on these old skills vexes arbitration by bringing too much adversarial advocacy and too little soul for practical resolution. The parties and the arbitration process suffer as a consequence. The ability to maintain a business relationship once the dispute ends can be threatened by this new style of arbitration. In the bargain, parties are cheated of one of arbitration's goal of fostering continued commercial interaction, while timely and practically resolving disputes.

Furthermore, when lawyers retreat to tried and true litigation methods, arbitrators can get swept right along. This may cause the arbitration process to become bastardized into litigation in practice if not in name. Deposition requests multiply and discovery becomes a full-blown debacle. When the case is finally concluded, no one---sometimes not even the winner---is happy because the benefits of arbitration never materialized. The inclination is to blame the arbitrator, but this is often unfair because the arbitrator merely effectuated the parties' wishes. Indeed, the arbitrator's accession to the parties' whims may make him or her culpable at least to some extent. Avoiding this scene of discontent is possible if the arbitrator constantly reminds the arbitrants of the principles of arbitration, provides strong and competent leadership, and assists

the parties to keep their adversarial actions to a minimum. If a concerted effort seems difficult to maintain, the arbitrator will have to be that much more assertive lest the process become a rudderless disaster.

III. Any Old Arbitration Clause Won't Do (Consider Your Terms)

Once parties evince the desire to participate in the arbitral process, they must create an agreement defining the issues they are going to arbitrate and giving the arbitrator authority to determine all issues of arbitrability.[7] This may require more finesse than simply including an arbitration clause from a standard form contract. While such clauses can be perfectly adequate for many situations, a more specific, finely tuned agreement may sometimes be necessary. It is important for attorneys to appropriately draft an agreement based on the subject matter and the parties' expectations. These may seem like basic considerations, but the digests are teeming with opinions concerning omitted terms or ill-defined clauses. The resulting expense and years of litigation can be cruel lessons to those who *intended* to arbitrate. Given the reoccurrence of these issues, parties are wise to have an attorney fee provision that allows a prevailing party to recover reasonable attorney fees and costs immediately upon resolution of arbitrability contests rather than at the conclusion of the entire dispute, such as when the arbitration may be included inside of a trial process. In this way, early stage expenses can be immediately recovered and used to fund the rest of the case.

Attention must also be paid to which arbitration laws govern, since subpoena power and subject matter differ dramatically between the Revised Uniform Aarbitration Act (the "RUAA") and the Federal Arbitration Act, 9 U.S.C. § 7 (2000) (the "FAA"). While the RUAA allows

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[7] *See* Laurence Craig, Rusty Park and Jan Paulsson, International Chamber of Commerce Arbitration, § 9.02 (2000 Oceana Publications) (discussing how drafting issues can actually increase a dispute's expense as parties contest whether their contract compels them to arbitrate).

arbitrators to issue nonparty subpoenas, an arbitrator's authority to issue enforceable nonparty subpoenas is the subject of a three-way split in the United States Court of Appeals. In *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999), the Fourth Circuit held that courts may enforce arbitral subpoenas for prehearing proceedings when there is "special need". The court reached this conclusion through a nuanced interpretation of the FAA. However, the court did not define "special need" and the FAA's text provides no reference.[8]

Subsequent to the Fourth Circuit's opinion, the Eighth Circuit considered similar issues in *Sec. Life Ins. Co. v. Duncanson & Holt, Inc. (In re Sec. Life Ins. Co.)*, 228 F.3d 865, 870-71 (8th Cir. 2000). The court found that while the "unambiguous text" of § 7 does not explicitly authorize arbitrators to compel nonparties to produce evidence prior to a hearing, the "interest in efficiency" supports prehearing document production. Following the Eighth Circuit's decision, the Third Circuit decided *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 411 (3d Cir. 2004). The Third Circuit employed a strict textual reading of the FAA to hold that arbitrators lack authority to compel nonparties to produce documents prior to arbitration hearings.[9]

The decisions in *COMSAT Corp., Security Life Ins. Co*. and *Hay Group, Inc.* cannot be reconciled. While the Supreme Court can resolve the issue, doing so will require it to disregard the strict text of the FAA or its legitimate efficiency interests. Since neither result is satisfactory, determination of an arbitrator's power to order prehearing discovery from nonparties will be left to legislatures. While Congress has not yet acted, states have taken measures to ensure arbitrators' authority over nonparties.[10]

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8 *Id.* at. 276.

9 *Id.*

10 *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 7309(a) (West 2007).

For states that have adopted the RUAA, venue is appropriate in any county where an adverse party resides or has business (barring, of course, a venue clause in the parties' arbitration agreement). If no adverse party resides or has a business in the state, relief is appropriately sought in any court in any county within the state. *See* RUAA § 27. Section 10 of the FAA permits a party to move to vacate an award in the district court where the award was issued. Venue is determined in accordance with 28 U.S.C. § 1391. *See Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 195 (2000).

The issue for those seeking relief in federal court is whether or not the court has subject matter jurisdiction via the existence of a federal question or by way of the court's diversity jurisdiction. *See* 28 U.S.C. §§ 1331, 1332 (2007). Diversity jurisdiction exists so long as there is diversity of citizenship and the amount in controversy exceeds $75,000.[11] Whether federal question jurisdiction exists[12] is a more difficult determination due to the split among the circuits. In *Fox v. Faust*, 239 Fed. Appx. 715, 717 (3d Cir. 2007), the Third Circuit held that a federal question only exists as to vacatur if there is an independent basis for jurisdiction on the face of the complaint. However, in *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 26 (2d Cir. 2000), the Second Circuit determined that if a court were to "look through" the face of a vacatur petition and find that the underlying dispute involved a federal law, federal question jurisdiction exists because disposition "necessarily depends on resolution of a substantial question of federal law". The Supreme Court has granted certiorari to resolve the circuit split.[13] Until the Supreme Court

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[11] In *Mitchell v. Ainbinder*, 214 Fed.Appx. 565, 566-67 (6th Cir. 2007), the court held that the "amount in controversy" is not based on what an arbitrator awards, it is determined according to the damages asserted in a party's statement of claims.

[12] The FAA does not create federal question jurisdiction. *See Hall Street Assoc., L.L.C. v. Mattel, Inc.*, ___ U.S. ___, 128 S.Ct. 1396, 1402, 170 L.Ed.2d 254 (2008).

[13] *See Vaden v. Discover Bank*, 2008 WL 695625 (U.S. Mar. 17, 2008).

decides this issue, subject matter jurisdiction over a vacatur petition will remain a potential pitfall for those invoking the FAA.

The difference between federal and state statutes in regard to subpoena power and subject matter jurisdiction emphasizes the need to carefully think through and compose arbitration terms. Selecting any old standard arbitration clause may cause unexpected and unnecessary struggle.

IV. Some Reasons Why Arbitration Will Never Become Too Much Like Litigation (And Some Ways Parties Can Reduce Arbitration Costs)

Arbitration is a fluid and flexible vehicle for dispute resolution. Its ability to bring specialized knowledge to bear on any dispute, apply new technology, offer unparalleled access and provide confidential results are just some of the ways it differs from litigation. Beyond this, arbitration's status as a party-driven, expert-led process allows it to be uniquely tailored to provide speedy, cost-effective variations that are difficult or impossible for courts. However, unless we take action to address the trend toward "arbigation," arbitration may continue to increase in costs, without any corresponding benefits.[14]

A. Arbitrator Expertise and Available Technology

Disputes involving technical matters demand specialized knowledge and this fact has historically led commercial parties to seek arbitration.[15] As the world grows in complexity, an

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[14] From the perspective of the construction industry neutral and advocate, I do not participate in the process because it promises to always be cheaper. I do so because it offers the opportunity for faster, fairer, more predictable and precise result in construction industry disputes. I also believe that if properly managed from the beginning of the process to the end, by experienced counsel, competent arbitrators, and parties of good will, commercial arbitration has the potential for consistently producing more cost effective dispute resolution than court accessed commercial litigation. Further, commercial arbitration can also consistently provide better results faster decisions and consistently cost effective dispute resolution compared to "arbigation."

[15] Margit Mantica, Arbitrations in Ancient Egypt, 12 Arb. J. 155, 160-61 (1957) (explaining that in arbitrations dating back to 427 A.D., traders sought and accepted the decisions of fellow traders with expertise on a relevant subject to resolve disputes).

arbitrator's expertise continues to be sought after to resolve highly technical disputes.[16] Whenever a dispute requires technical knowledge, arbitration will always be superior to the courts and special masters because arbitrants can choose the learned individual they want to resolve their dispute. Courts simply cannot offer this mix of expertise and choice.[17]

Additionally, arbitrants can seize technology in ways litigants cannot.[18] Procurement and implementation issues often stymie even basic technological advancements in large institutions like the judiciary. Budgetary matters will keep litigants from capitalizing on technology.[19] By contrast, arbitration allows parties to use any new technology the parties own. Moreover, they can create a secure internet site dedicated to each case. Establishing a private, password-protected site allows parties to submit evidence without suffering photocopying and courier costs. A case can be fully portable, and accessible to any party, attorney or arbitrator so long as they have a computer and a password. This reduces costs and promotes faster resolutions.

B. Access and Confidentiality

When parties agree to arbitrate they are, among other things, buying access to their very own tribunal. This important feature is not given due consideration when parties complain about

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16 Camille A Laturno, Comment, International Arbitration of the Creative: A Look at the World of Intellectual Property Organization's New Arbitration Rules, 9 Transnat'l Law, 357, 369-71 (1996) (discussing arbitration as it relates to intellectual property and concluding that arbitration is especially suited for resolving these technical issues); Richard H. McLaren, The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes, 35 Val. U. L. Rev. 379, 381 (2000) (discussing how the International Olympic Committee established an arbitration body for resolving sports disputes).

17 This is not to say arbitrators should decide all complicated issues. Matters of great public concern and social justice are well-served by judicial efforts.

18 While this benefit is equally available to similarly equipped arbitrants, it does create an issue when parties do not have similar access and use of technology. *See* Thomas D. Halket, The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties, 81 St. John's L. Rev. 269 (2007).

19 *See* James P. George, Jurisdictional Implications in the Reduced Funding of Lower Federal Courts, 25 Rev.Litig. 1, 71 (Winter 2006) (discussing inadequate funding's adverse impact on availability of courts' access to technology).

how arbitration is becoming too much like litigation. Whereas courts are open entirely to the public, keep standard hours, and are typically closed during weekends and holidays, arbitrators set their calendars in conjunction and cooperation with the parties. This can include any and all of the periods when a court is closed. Because arbitration is relatively informal, parties can (subject to *ex parte* restrictions) call or email an arbitrator and get immediate answers to their questions. Requests need not be written, will never be placed on a distant motion calendar, and do not result in their counsel's appearance at some court's morning cattle call in a far away county. Since courts are relatively formal and parties worry about prejudicing their case by pestering judges, small disagreements can accumulate in litigation, worsening the dispute. By contrast, arbitration's informal nature promotes ready access. This allows parties to get direction, diffuse issues and keep cases on track.

Moreover, access allows for swift resolutions. Arbitrants can immediately calendar their case and even set the date an award is to be issued. Once civil litigation begins, assuming a non-aggressive judge, there is little that can be done to make a court resolve a dispute, and certainly to resolve the matter within a reasonably short period of time. Court-imposed procedural and discovery rules alone preclude this. Thus, a matter can sit for weeks, months and years on a trial court's docket and then proceed through a similarly paced appeal.

Additionally, an arbitral dispute remains confidential. Parties to arbitrations agree to keep their claims private.[20] Generally speaking, judicial resolutions are matters of public concern and subject to public disclosure. Accordingly, parties necessarily risk surrendering confidential information whenever they litigate.

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[20] *See* N. Sue Van Sant Palmer, Lender Liability and Arbitration: Preserving the Fabric of the Relationship, 42 Vand. L.Rev. 947, 967 (1989) (discussing privacy component of arbitration).

C. A Few Words About Discovery

Parties and their counsel seem to tolerate discovery in litigation, but loathe it in arbitration. The fact is, complicated subjects require a corresponding depth of analysis regardless of the type of dispute resolution. Even though arbitration is meant to be a streamlined process, it must not prevent parties from the often time-consuming process of using tools to unearth information necessary to analyze and resolve claims. Thus, discovery may be an essential part of some types of arbitration proceedings regardless of how much one may resent its length and cost. Blindly precluding or excluding some forms of discovery in arbitration or litigation may be prejudicial because it impedes full and fair resolution, and may actually add to the cost of the proceeding. Consider using discovery that is tailored to the needs of the parties, with in the context of the dispute, that is carefully managed and monitored by the arbitrator.

Recognizing this, it seems baseless to make wholesale criticisms about discovery's presence in arbitration or raise alarms about how discovery practices signal creeping litigation. The use of discovery does not necessarily show that arbitration is becoming too much like litigation; however, the unnecessary use of discovery may prove that point exactly. The difficulty, of course, is determining what discovery is needed for a given case. There is no formula. Each case has its own requirements.

Anticipating discovery needs is a bit of a gamble when drafting an arbitration agreement. Importing the broad protection of discovery rules like the entire Federal Rules of Civil Procedure may give parties certainty at the time of contracting, but there is a risk that when a dispute occurs a party may find that the discovery rules are burdensome. They become a handicap to your client and an advantage to the opponent. The opponent will have little incentive to relax its procedural vise-grip and the arbitrator may have to enforce the agreement's discovery rules.

To guard against this strategic disadvantage, parties may find their interests are best served by maintaining flexibility in their discovery terms. By resisting the impulse to adopt highly constricting terms, parties are likely to be on a more even field when it comes time to determine what discovery is appropriate. Whatever possible advantage parties give up at the time of contracting, they make it up by not being on the wrong side of the fence when the dispute comes to the fore.

Arbitration rules give arbitrators authority to manage discovery.[21] Nevertheless, a good arbitrator will be deferential to parties' legitimate discovery needs. The key is to have a reasonable discovery plan that corresponds with the case's complexity. Like most everything else in arbitration, the parties can agree to change the terms at any time to make the process better suit their needs. To avoid disputes in this area, a thoughtful arbitrator might invite the parties to revisit their discovery intentions, and amend them if necessary.

D. Determining the Type of Award That is Best For Your Client

As part of managing costs and expectations, parties and their counsel should be aware of the differences between a standard and reasoned award. They can then consider what kind of award they want and what they hope to accomplish through its issuance. Too often, no thought is given to these issues.

A standard award, stating who prevailed and what they won, is currently the norm in American arbitrations.[22] For relatively simple disputes, a standard award may be adequate. However, since parties' satisfaction with the arbitral process often comes from an explanation of the dispute's resolution as opposed to the resolution itself, standard awards may be quite

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[21] *See* AAA Rule 21, CPR Rule 11 and JAMS Rule 17(c).

[22] *See* Drew M. Gulley, The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence From Arbitration, Modeled on the English Arbitration Act of 1996, 36 Hofstra L. Rev., 1095, 1130 (Spring 2008).

inadequate. If a party opts for a reasoned award, there is a good chance the arbitrator will require that the proceedings be transcribed. The time required for drafting a reasoned award and the transcription expenses will add thousands of dollars to the cost of an arbitration.

To ensure that a reasoned award explicates issues that are essential to the parties, parties must identify specific issues they want the award to address. Once these issues are identified, the arbitrator should draft an award that succinctly sets forth the bases for the decision. A written award should be confined to the essential issues, satisfactorily explained, and limited to the few pages that are necessary for the task. The arbitrator should not produce an award whose length and detail reads like a judicial opinion. Exhaustive findings of fact and legal conclusions rarely have a place in arbitration. Should the written award be less for the party's illumination and more to increase the chance of successfully appealing an adverse decision, the parties should avoid the expense of a reasoned award. A reasoned award is not apt to spell out a basis for vacatur. The bases for vacatur are extremely limited and a competent arbitrator is unlikely to draft an award that provides such grounds. If parties know this, they may decide to save the expense of a reasoned award and have their dispute resolved that much faster and cheaper. Parties need to be counseled so they can make an informed decision.

E. The More the Merrier? (Choosing the Size of Your Panel)

Selecting a good arbitrator is crucial to high-quality results. Many times, parties' arbitration agreements will give them the option of choosing one or a panel of three arbitrators. The conventional wisdom is to choose a panel of three arbitrators for disputes involving significant damages. Parties and counsel comfort themselves in thinking that three arbitrators lessen the chance of an errant decision or a rogue award.

Despite the logic of opting for a three-member panel, there may be good reasons to use a single arbitrator. One skilled arbitrator is better than three incompetent panelists. This is a truism of any arbitration. Moreover, it is easier to vet one arbitrator's reputation, professional background, and (if necessary) interview him about his case management style and expertise, than it is to engage in this process three times over. There is also a better chance that parties can efficiently find one acceptable arbitrator before they find three. The sooner everyone agrees on the arbitrator, the sooner they can move forward on resolving the dispute.

Counsel's experience with a three-member arbitration panel may also serve as a reminder of why less can be more. If you have ever been bombarded by one panelist's questionable questions, ignored by a second disinterested panelist and saved by the diligence and skill of a third panelist, you have probably learned a hard lesson in addition by subtraction. If parties and counsel trust a single arbitrator they know to be fair and able, then it makes sense to use him and forgo the three-member panel. By this simple act, parties can reduce their arbitrator costs by two-thirds and speed their dispute to a competent end. When a single arbitrator presides, attendant benefits include greater ease of scheduling hearing dates and conferences, faster consensus about arbitration procedures, and less chance of a divided panel laboring over an award.

V. Leading the Way (What a Arbitrator Can Do to Promote Efficient Arbitrations)

While the foregoing items discussed ways parties can tailor the arbitration process, there are many instances where an arbitrator increases efficiency by taking initiative and making thoughtful suggestions.

A. Identify Issues and Entertain Summary Judgment Motions

Judges may be reluctant to identify potentially dispositive issues for fear of appearing biased. By contrast, arbitrators are encouraged to reasonably assert themselves by "direct[ing]

parties to focus their presentations on the issues the decision of which could dispose of all or part of the case."[23]

Some contend arbitrators are unwilling to enter summary judgment because arbitrators favor full evidentiary hearings.[24] Absent any survey data about arbitrators' attitudes towards summary judgment, it is impossible to say whether such a contention is justified. Moreover, the confidential nature of arbitrations makes it unlikely that statistical data can ever be had. Without knowing how many summary judgment motions are filed and how many succeed, corroboration is impossible.

If counsel have broadly assumed that summary judgment has no place in arbitrations, this assumption is misplaced. While in arbitration as in litigation, summary judgment is not favored unless the absence of genuine issue as to material facts can be shown, numerous decisions show arbitrators' willingness to allow summary judgment.

I find that it is sometimes appropriate to consider granting dispositive motions on discrete issues or subjects after a certain amount of evidence has been received during the early phases of a long arbitration hearing. I take this approach with the express approval of the parties, after giving them an opportunity to present all evidence on the issue or subject that will be available at trial. This gives the parties the opportunity to fully present all of their evidence, while allowing certain efficiencies to be achieved in shorting the hearing time.

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[23] *See, e.g.*, AAA International Arbitration Rules, Article 16; *see also*, IBA Rules of Evidence, Preamble, § 3 ("Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.").

[24] *See, e.g.,* Christian N. Elloie, Are Pre-Dispute Jury Trial Waivers a Bargain For Employers Over Arbitration? It Depends on the Employee, 76 DEF. COUNS. J. 91, 97 (2009) (alleging this perception exists in employment law cases).

Confirmation of those awards validates the arbitrators' decisions.[25] Moreover, there is case law in which parties have agreed to resolve their dispute by filing cross-motions for summary judgment.[26] These decisions should encourage counsel to submit meritorious summary judgment motions.

Although summary judgment is a drastic tool and should not be allowed unless clearly warranted, both fairness and efficiency support its use in arbitrations. Arbitrants are not stripped of this valuable procedural mechanism simply because arbitration strives to be fair. It would be quite unfair to deny a party's valid summary judgment motion simply because arbitration presumes the admissibility of evidence and favors full hearings. No procedural rule or norm within arbitration requires arbitrators to disregard dispositive facts. Once an arbitrator decides a dispositive issue, the dispute can be significantly narrowed and savings can be obtained. This is fair, efficient, just and final.

B. Effective Evidentiary Gate Keeping & Benefits of Simplified Evidentiary Rules

Arbitrators must allow parties to present their case. This does not mean that an arbitrator must allow the needless presentation of irrelevant or cumulative evidence.[27] It is a disservice to

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[25] *See, e.g., Hereford v. D.R. Horton, Inc.*, 2009 WL 1044666 (Ala. Jan. 9, 2009) (reversing application of "manifest disregard" as basis for vacatur and affirming entry of summary judgment against homeowner on breach of warranty claim); *Cuna Mut. Ins. Soc. v. Office of Professional Intern. Union Local 39*, 443 F.3d 556, 560 (7th Cir. 2006) (affirming sanctions when party frivolously contested arbitrator's disposition of case on summary judgment); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 47 Cal. Rptr. 2d 650 (1995) (upholding arbitral award that was based on summary adjudications); *Marshall & Co., Inc. v. Duke*, 941 F. Supp. 1207, 1211-1212 (N.D. Ga. 1995) (upholding arbitral award analogous to judgment under Fed. R. Civ. P. 52(c)); *InterCarbon Bermuda, Ltd. v. Caldex Trading Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (confirming arbitral award analogous to summary judgment); *Burdette v. FSC Sec. Corp.*, 1993 WL 593997, *4 (W.D. Tenn. Dec. 15, 1993) (same).

[26] *See Cuna*, 443 F.3d at 560.

[27] *See, e.g.*, AAA International Arbitration Rules, Article 16.3 (arbitrators may "exclude cumulative or irrelevant testimony or other evidence").

the parties and the process when arbitrators fail to effectively control the presentation of evidence by allowing everything to be admitted "for whatever it is worth". An arbitrator has a duty to "determine the admissibility, relevance, materiality and weight of the evidence offered by any party."[28] Effectively dealing with cumulative evidence allows the case to proceed without undue delay.[29] Since arbitration is really the parties' process, doubts about evidence's relevance or necessity should be resolved in favor of admissibility. However, an arbitrator cannot become the conductor on a runaway train. If efforts to advise counsel about their excesses fail, the high standard necessary for vacatur should steel an arbitrator against receiving inadmissible evidence.

An arbitrator can satisfy his evidentiary responsibilities by communicating them and consistently administering them. An arbitrator should confer with counsel once they submit witness lists and identify the subjects on which the witnesses will testify. By reviewing these materials as early in the process as possible, arbitrators and counsel can begin to determine what witnesses and subjects are necessary and a timeline for their testimony. A frank discussion with counsel about cumulative and irrelevant witnesses can spur cooperation between parties, reducing not only cumulative and irrelevant evidence but argument about these very things. The entire arbitration process benefits to the extent that disputes are eliminated without parties feeling that they have been dictated to or deprived. In this vein, an arbitrator should also encourage parties to stipulate to facts as much as possible. This can certainly focus the dispute and reduce unnecessary evidence and argument.

Because arbitration is an informal process, arbitrators need not (and usually do not) strictly apply the rules of evidence. Objections can be made on significant issues, but counsel

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28 *Id.* at Article 20.6.

29 *See* AAA Rule 31(b), CPR Rule 12 and JAMS Rule 22(d).

should avoid repeated interruptions that break the pace of the hearings.[30] Because evidence is presumptively admissible, arbitration spares lawyers from authenticating and arguing about every document. Arbitrators who are also attorneys have training and experience that allows them to recognize hearsay and other dubious proof. This lets counsel concentrate on the case without constantly objecting, seeking sidebars and making proffers as they must in litigation.

Failure to object during a trial results in a waiver and an uphill battle on appeal. Furthermore, once inadmissible evidence enters a juror's ears, no limiting instruction can ever fully remedy the issue. A court will direct a jury to disregard a statement, but the presumption of jurors following a limiting instruction protects a verdict more than it does the damaged party. An arbitrator's knowledge of the rules of evidence is far superior protection in the event of inadmissible evidence's utterance. This safeguard allows counsel to focus on presenting their case without the expense of ministering to evidentiary rules or the risk of failing to object.

Additionally, based on the arbitrator's knowledge and skill in presiding, the problems encountered in litigation concerning having to take witnesses out of order, and interrupting one witness to take the testimony of another out of order, do not occur in arbitration. Where juries might be confused and upset by such practices, the arbitrator can be counted on to parse through the differing testimonies, and keep it straight. This enables the parties to save time and resources by taking available witnesses without regard to the order of presentation.

C. Reducing Expert Expenses

The preparation and presentation of expert testimony to a judge and jury may be an expensive undertaking, with limited or unpredictable actual benefits. Experts can command hourly rates as high (or higher) than counsel. Given the considerable cost of having an expert

[30] *See* AAA Rule 31(a), CPR Rule 12.2 and JAMS Rule 22(d).

testify, every hour that a party does not have to pay for an expert's services is a significant savings.

In litigation, there can be expensive wrangling before an expert says his first word to a jury. Motions to strike or limit an expert's testimony routinely lead to hearings where counsel guides his or her expert in a thorough recitation of the expert's educational background, experience and publications. Opposing counsel will then subject the witness to *voir dire*, questioning the expert in the hope of having the expert disqualified.

When the expert finally takes the stand, parties spend time by qualifying their witness via the witness' recitation of his education, publications, professional affiliations, etc. Parties will then try to wear away at every aspect of an expert's opinion in order to discredit the expert. Many of counsel's questions have little to do with the ultimate issue on which the expert will opine. However, the questions and answers are meant to have a cumulative effect that shows the expert's opinion cannot be trusted. Knowing this, the expert will try to demonstrate the unassailability of his opinion by contesting every question and issue insinuated by his examiner. Once this is over, counsel for the party who tendered the expert will try to rehabilitate the expert's opinion by asking more questions. If this was not expensive enough, the process will be fully repeated when opposing counsel calls an expert witness.

The 1999 International Bar Association ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules of Evidence") offer a means of reducing the length and expense of expert testimony. Under the IBA Rules of Evidence an arbitrator can require experts to meet and discuss their conflicting opinions prior to testifying. The experts---unaccompanied by counsel---prepare a list of issues on which they cannot agree. As peers, meeting outside the presence of counsel and away from the tribunal, experts are more likely to

agree on issues that might otherwise vex and complicate a hearing. By narrowing these disputes, expert testimony becomes more focused, more easily presented and more digestible.

Benefits can further accrue by scheduling experts to testify on the same day, and having them testify back-to-back. Presenting testimony in this way allows arbitrators to better assess the merits of the experts' testimony by making immediate comparisons. This approach also advantages counsel by allowing counsel to address all the experts' testimony during a single phase of the proceeding. This continuity avoids multiple review and preparation sessions that inevitably occur when expert witnesses testify on different days throughout a hearing.

D. Written Submission of Direct Testimony

Courts prefer live testimony because it gives judges and juries the opportunity to weigh a witness' credibility.[31] However, a tightly scripted direct examination of a well-prepared witness reveals little in terms of spontaneity or credibility. A witness' veracity is really tested through cross-examination.

Instead of devoting hours to witness preparation and the presentation of live testimony on direct examination, counsel could instead submit a witness' direct testimony in writing prior to a hearing.[32] Arbitrators and opposing counsel can review direct testimony and reduce the number of hours a witness spends at the hearing since, at that point, the witness need only answer the arbitrator's questions and those posed via cross and re-direct examination. These questions would allow credibility to be appropriately weighed, so the benefits associated with live testimony would not be lost. There is some expense in writing a statement of this sort, but the

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[31] *See, e.g., United States v. Yida*, 498 F.3d 945, 951 (9th Cir. 2007) (discussing preference for live testimony).

[32] *See* IBA Rules of Evidence, Articles 4.7-4.9.

cost can be less than the total amount of time spent preparing for and then engaging in live testimony. The shorter hearing would result in reduced transcription costs, an added efficiency.

Such a format would be quite workable for many witnesses whose role in a case is akin to a movie's supporting cast. However, it would be ill-suited for a "star witness" type. Live testimony for such witnesses is essential and should not be denied. Nevertheless, because there are relatively few "star witnesses" in any proceeding, written testimony provides much potential for reducing expenses and creating better results. As a caveat, this procedure should only be used with the understanding that a witness whose direct testimony is presented in writing must appear at the hearing if called. The right to confront a witness cannot be abridged for efficiency's sake.

Furthermore, while some parties and arbitrators advocate setting time limits for testimony, those time limits must not prevent the presentation of relevant evidence. Excluding relevant evidence is a basis for vacatur. Thus, time limits can be set, but they will always be aspirational. Moreover, if live testimony is an absolute must, a witness can always be presented telephonically or by video without prejudicing a case. Unlike a jury, an arbitrator will understand the need that gives rise to something other than live testimony. So long as the right content is presented, the form will be of little concern.

E. Reducing Expenses Through Sequencing of Witnesses

When telling the story of a case, counsel will sequence their witnesses to get the maximum effect from the witnesses' testimony. This is especially important in a jury trial, when twelve people (possibly disinterested and likely non-lawyers) are asked to hear and decide a

case. Call witnesses out of sequence in a jury trial and a case is apt to have a *Pulp Fiction*-like chronology without any of the equivalent box office success.[33]

In arbitration, educated panelists are interested in hearing your case and deciding it fairly. This provides significant flexibility in terms of witness presentation. If a witness' unavailability makes it impossible to effectively calendar and present a case in a preferred order, a witness can be taken out of sequence without catastrophic effect. The arbitrator's experience and knowledge allows them to appreciate the need and register the testimony's importance regardless of when it is given. A jury is far less likely to be able to do this.

The flexibility of sequencing witness testimony before a skilled and knowledgeable arbitrator also allows parties to pair fact witnesses. Like expert witness pairings, it can be extremely efficient to pair fact witnesses so that specific subject matter can be heard during a single phase of the proceeding. The arbitrator is once again afforded the chance to assess specific issues at one time. Instead of preparing for a subject on one day and then another (and perhaps another after that), counsel can focus on a subject one time, avoiding multiple preparation and review sessions. Such a format promotes better assessment of the merits, witness credibility, efficiency and economy.[34]

F. A Case for Bifurcation?

If a case is lengthy and there is much uncertainty as to liability, it may be wise to bifurcate the proceedings. The parties can focus on establishing liability and present only the witnesses and other evidence that proves that part of their case. For that matter, it may be useful to structure the hearing so that the parties will present their claims and defenses on one issue (*i.e.*

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[33] As viewers will recall, the movie *Pulp Fiction* used a non-chronological narrative format and dark humor to great commercial and critical success. *See* PULP FICTION (Miramax 1994).

[34] This format has been adopted in IBA Rules of Evidence, Art. 8.1.

a copyright claim) during one part of the liability phase before moving onto some disparate claim (*i.e.* a fraud claim). Since the issues and witnesses may not overlap, it may make sense to arrange hearing days according to topic. A certain number of days can be scheduled for the liability phase of the hearing with the understanding that the arbitrator may then entertain and rule on something akin to a motion for directed verdict.

If liability is established, the parties proceed to the damages phase of the hearing. At that time, the parties can call the fact witnesses, accountants or any other experts necessary to show the amount of their harm. Under the right circumstances, this approach does not amount to needless separation or invite unnecessary motions. However, its benefits depend on the nature of a case, and a properly structured and efficiently followed process.

G. Consider Issuing an Interim Award

Once an arbitrator issues a final award, the award can only be modified to address clerical, typographical, or computational errors.[35] Modification is appropriate when: (1) the award is incomplete and/or ambiguous; (2) the court resubmits an issue to the arbitrator; (3) a mistake is apparent from the face of the award; (4) the parties request to resubmit an issue to the arbitrator.[36] If an error in a final award does not fit within one of these categories, parties are probably stuck with it. This is very disconcerting when, for instance, a reasoned award makes no mention of an important issue or fails to make a key finding of fact. Because the arbitrator loses jurisdiction over the case once a final award is issued and the scope of review for that award is so

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[35] *See, e.g.,* AAA Commercial Arbitration Rules and Mediation Procedures, Rules 46-47.

[36] *See Red Star Express Lines v. Brotherhood of Teamsters, Local 170*, 809 F.2d 103, 106-08 (1st Cir.1987).

narrow, an aggrieved party may have no means of getting relief.[37] For that matter, an error may affect all the arbitrants with everyone wanting a chance to alter the award.

To avoid such a scenario, the parties can request (or an arbitrator issue separately) an interim award. American Arbitration Association ("AAA") Rule 46 allows arbitrators to issue interim awards "in addition to the final award" and arbitrators have authority to substantially modify interim awards.[38] By issuing an interim award, the parties receive an opportunity to review the award for any errors before the award becomes final. If an error is something other than clerical, typographical or computational, it can be brought to the arbitrator's attention and the arbitrator can modify the award before it becomes final. The procedural ease of such a method is compelling. Moreover, it helps ensure a correct award and eliminates costly confirmation contests and appeals.

H. Resist Attorney Fee Hearings and Require a Good Brief Instead

A prevailing party is often inclined to request a hearing to argue in support of the fees and costs accrued because of the arbitration. The losing party will want to argue that the fees and costs should not be awarded or should be reduced for whatever reason. This expensive practice is common, but it is often times unnecessary.

Since the arbitrator just presided over the hearing, saw counsel's efforts and determined the merits of the case, there is probably no need to have a hearing devoted to attorney fees and costs. Live testimony or argument will serve little purpose given that the arbitrator has had the

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[37] This loss of authority is well summed up in Michael Cavendish's Fortress Arbitration (An Exposition of *Functus Officio*"), 80-Feb Fla. B.J. 20 (2006) (explaining the intended limitations via the doctrine of *functus officio*---literally "a task performed"--- but noting judicial hostility and numerous exceptions to the ancient rule).

[38] *See, e.g., BFN-Greeley, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo.App. 2006), *cert. denied* (arbitrators had authority under AAA rules to issue an interim award which included an escrow provision and then delete that provision in a final award).

chance throughout the hearing to weigh the credibility. Thus, the parties' arguments should be confined to written submissions. If the parties desire an explanation of fees and costs, they should include proposed findings of fact and conclusions of law for the arbitrator's consideration. In doing so, they increase the chance of having the desired award issued. Furthermore---and this cannot be emphasized enough---it is rarely necessary for counsel (despite their irresistible urge) to present the expert testimony of an attorney to justify fees and costs. An experienced arbitrator has the requisite knowledge to decide fees and costs without expert testimony.

VI. Appealing An Arbitration Award

With all the hard work that goes into a case and all that is lost once a final award is issued, attorneys and parties naturally want to have another chance to show why they should win. Before giving into the urge to file an appeal, it is wise to gain some critical distance, consult the law and reconsider your burning desire before sanctions are at issue.

A. Valid Bases for Vacating Arbitration Awards

The standard of review for an arbitrator's award is perhaps the narrowest type of review. As the Seventh Circuit once stated: "Judicial review of arbitration awards is tightly limited; perhaps it should not be called 'review' at all."[39] In response to the extraordinarily limited standard of review, parties have attempted to enlarge courts' authority to review awards for errors beyond those specified in arbitration statutes.[40] In *Hall Street Associates,* the United States

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[39] *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) In that opinion, Judge Posner defended the relative loss of due process by commenting that it is acceptable because the parties accept arbitration's procedures when they contract for arbitrated resolutions. *Id.* at 709.

[40] For example, the Federal Arbitration Act provides four statutory grounds for vacating an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the

Supreme Court invalidated such efforts by holding that the grounds listed in the FAA, 9 U.S.C. §§ 10 and 11, are the exclusive grounds available for reviewing an arbitration award.[41]

The *Hall Street Associates* decision was limited to FAA procedures and it emphasized that parties could seek review under state statutes and common law[42] where a different scope of review is arguable.[43] However, common law procedures for vacatur have been largely engulfed by the FAA and the Uniform Arbitration Act and the RUAA.[44] Moreover, since the Supreme Court acted, some state courts began to immediately abandon traditional extra-statutory bases for reviewing arbitration awards.[45] Given the strong preference for enforcing arbitration and courts'

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arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; and (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *See* 9 U.S.C. § 10(a)(1)-(4).

41 *See Hall Street Associates, LLC*, 128 S.Ct. at 1401-02.

42 This does not exclude arguments based on public policy. The Supreme Court has recognized a narrow public policy exception that allows a reviewing court to refuse to enforce arbitration awards that contravene "explicit public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). The "public policy, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* (quoting *Muschany v. United States,* 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945)). Successful application of the public policy exception is rare, but it does exist. An example is the Eighth Circuit's decision in *Iowa Electric Light & Power Co. v. Local Union 204,* 834 F.2d 1424 (8th Cir.1987). There, the court declined to enforce an arbitration award that would have reinstated the job of a union member at a nuclear power plant after he was fired for violating regulations for containing radiation in the event of a disaster. The violation was a "strong public policy" that required the court to refuse enforcement of the arbitration award. *Id.* at 1427-28. Nonetheless, most attempts to invalidate an award based on public policy fail. *See, e.g., Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F. 2d 775 (11th Cir. 1993) (finding vacatur unwarranted when broker's failure to register in accordance with law was not willful, as violative of public policy and award did not compel action which contravened public policy).

43 *Id.* at 1406.

44 *See Restatement (Second) of Contracts*, § 345(f) (1981), cmt. e.

45 *See, e.g., Hereford*, 2009 WL 1044666 (Ala. Jan. 9, 2009) (exercising state court's concurrent jurisdiction under the FAA, but citing *Hall Street Associates* to find that manifest disregard of the law is no longer a valid basis to modify an arbitrator's award under the FAA). Not all states have followed *Hall Street Associates*. *See, e.g., Cable Connection, Inc. v.*

burgeoning dockets, extra-statutory review may become a trend. This would make parties' attempts to contract for more expansive judicial review meaningless.

The prospect of such a limited scope of review leads some parties to conclude that arbitration is too risky. They are concerned that they will be saddled with a rogue award and have little ability to contest it. Rogue awards are, by definition, infrequent. This rarity makes rogue awards a dubious basis for criticizing or foregoing the arbitral process. When a rogue award occurs, it is unfortunate for the parties and the process alike. However, there is little reason to believe that a rogue award is any more likely in arbitration than it is in litigation. Judges and juries are every bit as capable of a rogue award as an arbitrator. Still, if parties need some manner of protecting themselves against this risk, they can contract for second round of arbitration as their mechanism for an appeal.[46] A post-award process of "appellate" arbitrators could review an award before a final award is issued. This would increase an arbitration's

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DIRECTV, Inc., 44 Cal. 4th 1334 (Cal. Aug. 25, 2008) (declining to follow *Hall Street Associates* decision on state law grounds).

[46] As a further means of risk-shifting, some critics have called for the imposition of arbitrator liability to give arbitrants another avenue of relief. *See, e.g.*, Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, 49 Duke L.J. 1279 (2000) (arguing for arbitrator liability). Although the RUAA has an unwaivable provision barring arbitrator liability for conduct taken in the course of an arbitration, the premise of arbitrator liability warrants comment.

In essence, arbitrator liability is an attempt to balkanize a party's risk by foisting potential harm onto another entity and creating a new avenue for recovery. What the concerned party gains in this regard may be offset by the cost of a new dispute, the uncertain prospects of the new claim, and the lack of finality sought when their arbitration originally began.

Allowing arbitrator liability is not a panacea for the potential ill of arbitrator malfeasance. With potential liability looming over every decision, an arbitrator's decisiveness would be badly impacted. Every scheduling issue, discovery matter, evidentiary ruling, and order could turn into grounds for a disaffected party to seek financial recovery. The arbitral process would be slowed and additional disputes would be spawned from effort to resolve the existing one. Similar considerations led to the implementation of broad immunity for judges and court personnel long ago. Those considerations are unshakable support for a continuing policy of arbitral immunity. This is to say nothing of higher fees that arbitrators' would command to pay insurance for potential claims.

expense and duration, but it would also provide the review some parties desire. The speed of such an appeal would likely be much greater than anything that could be had in civil litigation.

B. You Can Appeal, But Do You Have a Non-Frivolous Basis?

If a party elects to appeal an arbitrator's award, counsel must consider whether there is a non-frivolous basis for the appeal. There is "clear and emphatic" precedent that directs courts "to uphold sanctions in a broad spectrum of arbitration cases. The 'filing of meritless suits and appeals' in arbitration cases warrants Rule 11 sanctions."[47]

In the Seventh Circuit case of *Cuna Mut. Ins. Soc. v. Office of Professional Intern. Union Local 39*, the parties agreed to resolve a dispute about a Collective Bargaining Agreement (the CBA") by having the arbitrator rule on cross-motions for summary judgment.[48] After the arbitrator decided that CUNA's outsourcing violated the CBA, CUNA moved the district court to vacate that part of the arbitration award.[49] CUNA also argued that the arbitrator erred by retaining jurisdiction to address damages issues.[50] The Union reciprocated by moving the district court to sanction CUNA under Rule 11(c) of the Federal Rules of Civil Procedure because the vacatur effort was frivolous.[51] The district court obliged, awarding the Union $9,132.50 in attorneys' fees.[52]

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47 *See Cuna*, 443 F.3d at 561.
48 *Id.* at 560.
49 *Id.*
50 *Id.* at 564.
51 *Id.* at 559-60. Rule 11(c) of the Fed.R.Civ.P. allows courts to impose sanctions on a party if the requirements stated in Rule 11(b) are not satisfied. Rule 11(b)(2) requires that "the claims and defenses, and other legal contentions [of filings] are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." *See* Fed.R.Civ.P. 11(b)(2).
52 *Id.* at 560.

On appeal, CUNA abandoned any argument about the arbitrator's ability to retain jurisdiction.[53] Instead, CUNA contended that sanctions were inappropriate because its vacatur effort was not a challenge to the award, but an argument about whether the outsourcing was an arbitrable issue.[54] Since questions of arbitrability are always issues for judicial determination (absent the parties' clear agreement to the contrary), CUNA cagily contended that its vacatur motion was nonfrivolous.[55]

The Seventh Circuit, like the district court, immediately saw through CUNA's argument. It found that "there was not a true question of arbitrability in this case. Instead CUNA 'dresses up its arguments about the scope of the arbitrator's authority in arbitrability clothing.'"[56] As for CUNA's abandoned argument about the arbitrator's ability to retain jurisdiction to resolve any controversy regarding the implementation of the arbitral award, the Seventh Circuit held that "[t]he case law on this issue is clear, and that CUNA's counsel 'should have known that [its] position is groundless.'"[57] The court stated that "[t]he fact that CUNA's lawyers did not discuss this claim in its appellate brief suggests they knew this argument was flawed. The aborted claim further justifies the district court's decision to apply Rule 11 sanctions to CUNA."[58] Thus, the court affirmed the sanctions.[59]

In *B.L. Harbert International LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006)(overruled as to manifest disregard by *Hall Street Assoc.*, 128 S.Ct. at 1402), the Eleventh

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53 *Id.* at 562.
54 *Id.* at 562-63.
55 *Id.* (citing *AT&T Techs.*, 475 U.S. at 439 (holding that questions of arbitrability are issues for judicial determination unless parties have agreed otherwise).
56 *Id.* at 563 (citing *Cuna Mut. Ins. Soc. v. Office of Professional Intern. Union Local 39*, 2004 WL 2713088, at *6, 2004 U.S. Dist. LEXIS 24120, at *15 (W.D.Wis. Nov. 29, 2004)).
57 *Id.* at 565 (citing *Nat'l Wrecking Co. v. Int'l Bhd. Of Teamsters, Local 731*, 990 F.2d 957, 963 (7th Cir. 1993)(additional citation omitted).
58 *Id.*
59 *Id.*

Circuit was on the cusp of sanctioning a party *sua sponte* for a frivolous appeal, but decided instead to use the opinion to put every attorney who appears before it on notice.[60] "The notice [the opinion] provides, hopefully to even the least asute reader, is that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards. The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy, we are ready, willing and able to consider imposing sanctions in appropriate cases."[61]

The *Cuna* and *Harbert* opinions serve as stern warnings to any arbitrant that courts will not tolerate disgruntled parties' baseless appeals. Regardless of what an attorney calls a client's motion, *Cuna* provides that Rule 11 sanctions are in play if the motion is essentially a frivolous attempt to contest an award. The *Harbert* opinion is even more foreboding in that it broadly announces an entire circuit's willingness to issue sanctions *sua sponte*. Counsel and parties alike need to take heed.

CONCLUSION

Unnecessary litigation and hardball antics can best be avoided when parties and counsel are willing participants in the arbitration process. While litigation devices such as extensive discovery will be necessary in complicated cases, the arbitral process need not and should not be overtaken by courthouse conduct. Litigators would do well to stop leaning on old familiar ways when they arbitrate cases. Embracing arbitration's creativity and efficiency will encourage change, but experienced arbitrators and counsel must commit to help lead the way. Inasmuch as attorneys cannot castigate arbitration for the drafting defects and nasty litigation practices attorneys cause, arbitrators cannot be complicit by allowing deleterious litigation practices to

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60 *Id.* at 914.

61 *Id.*

erode arbitration's interests. Ensuring an effective arbitration process is the responsibility of all. If we commit ourselves, the "holy grail" of making arbitration consistently better, cheaper and faster can be achieved.