



Optimizing Private Adjudication

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Resolving disputes fairly and efficiently is one of mankind's most important, and universally sought, objectives. Everywhere, in varying degrees, litigation in the courts of nation states is plagued by excessive delays, costs, incompetence, and corruption. Alternative methods of dispute resolution ("ADR") are widely used, especially in the US, as substitutes for judicial proceedings. Mediation currently resolves more disputes than any other ADR method, with considerable savings of time and cost, and results that are by definition acceptable to all parties.¹

Arbitration has also grown rapidly as a substitute for court proceedings, with different types of arbitration systems in use in various industries, often with high levels of success and satisfaction. Arbitration has failed, however, to deliver on its full potential as a substitute for the courts in commercial and other high-stakes litigation. In part, this is because many of the potential advantages of arbitration have eroded over time or have never been fully exploited. It is also because arbitration has some disadvantages compared to litigating in court, and too little has been done to overcome those disadvantages by modifying arbitration accordingly.

An effort to optimize adjudication by combining the advantages of arbitration and litigation is long overdue. Much can be accomplished through such an exercise. But changes in the procedural rules and options available in arbitration will not ensure that those potential improvements will in fact be implemented effectively. To ensure that changes to improve arbitration are actually made will require establishing a system in which arbitrators are required to commit to complying with the rules and party preferences, as well as a mechanism for enforcing those commitments in a practical and fair manner. These changes will transform private adjudication into a cost effective, consumer-responsive service that delivers fair results at predictable cost.

I. Realizing the Advantages of Arbitration.

Private adjudication has long been used by a variety of industry groups to resolve disputes. Many reasons have been advanced for using such arrangements, instead of the courts, including cost, speed, informality, expertise, and finality. In the Federal Arbitration Act, the US government formally approved arbitration as an alternative to litigation in the federal courts of the US. State legislatures followed suit. In general, these laws allow parties to agree to have their disputes privately resolved, and they authorize enforcement in the federal and state courts of awards issued by the arbitrators whom parties retain for this purpose. To be valid and enforceable an arbitration award must be mutual, final, and definite, and issued by an independent tribunal after a fair process that gives each party an equal opportunity to present its case.² But these requirements leave parties far more flexibility in shaping the terms of an adjudication of their disputes than they are allowed in courts. Parties are potentially able to agree (among other things) on how, where, by whom, and in accordance with what law, their disputes should be resolved.³ They are also free to arbitrate virtually any

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¹ Arbitration systems generally also offer mediation services. Federal Arbitration, Inc. offers mediation alone, and also as an adjunct to arbitration, so that the parties can settle aspects of a dispute even in situations where they are unable to settle disputes in their entirety. See FedArb Rule 18. All FedArb Rules cited hereafter can be found at: www.fedarb.com.

² 9 USCA, secs.2, 10(a)(1)-(4)

³ In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court upheld an agreement between two commercial entities to have their disputes resolved by an expert tribunal in London, even though they were respectively American and German companies, and regardless of where the dispute arose. Enabling parties, subject only to overriding public policy, to select the arbitrators, place of arbitration, applicable law, and governing procedures is a precondition to the creation of a meaningful and effective market for arbitration services.

issue, including matters bearing on important public policies, such as claims under the antitrust, securities, and environmental laws.⁴

The FAA and its favorable reception by the courts have created a market for adjudication services. As one would expect in any market, the number and variety of offerings has increased over time, thereby increasing the power of parties to choose, based on price, procedural needs or preferences, and efficiency. The American Arbitration Association (“AAA”) and other organizations have offered parties a variety of arbitration systems, each with its own rules, practices, and costs. While some organizations administer their cases, others, such as the International Institute for Conflict Prevention and Resolution (“CPR”), assist parties in selecting arbitrators, but then require the arbitrators to manage the process. Arbitration procedures conventionally did not include opportunities to conduct extensive discovery, or to make motions to dismiss or for summary judgment, or to take appeals on the merits of arbitrator determinations. But such practices are increasingly available, because parties want them in some cases, and the law now allows their use.

A. The Importance of Choice.

The most fundamental advantage of arbitration is the power of parties to choose. Advocates of arbitration, and some arbitration services, have strong predilections as to what arbitration should mean. This is a mistake. Arbitration should mean what its users need it to mean. While most parties who use arbitration want it to be faster and cheaper than litigating in court, other considerations are sometimes paramount, including the need for discovery, or the desire that decisions be based on the applicable law rather than the arbitrator’s sense of justice. To fully realize the advantages of arbitration a system should deliver to parties the process that the parties believe is best. It follows that, whatever rules or procedures a particular service provider offers its customers, the system should leave sufficient room for those customers to shape the process and the rules to satisfy their particular preferences. These preferences include at least the following: limited discovery; mandated time limits; confidentiality; the shifting of fees and costs; and the constructive use of experts. Current arbitration systems insufficiently exploit the potential efficiencies of technology.

B. Other Potential Advantages of Arbitration.

Limited Discovery. A trend is underway to expand discovery in arbitration, regardless of the parties’ agreed understanding. Some parties in arbitration want broad discovery, and should be able to agree to have it. But where an agreement is made to arbitrate under a set of rules that limits discovery, the agreed limits should be enforced.

The ability of parties to agree to limit discovery is a major advantage of arbitration. To fail fully to implement such agreements therefore diminishes the utility of arbitration as a vehicle for limiting the cost of adjudication. Procedures should be established that curb the power of arbitrators to expand discovery beyond agreed parameters, in a manner that does not make the award itself vulnerable to attack over an issue likely to have little bearing on the merits.

Mandated Time Limits. Parties to an arbitration agreement are able to set limits on the time within which a hearing must be held, an award issued, or some other aspect of the process completed. Some service providers’ rules contain such limitations, which are potentially jurisdictional in their effect. In theory, if an arbitrator issues an award after the date by which the parties agreed the award must be issued, it should have no legal force, because the arbitrator loses his/her authority to act after the parties’ established deadline.⁵

The power to set time limits is a major advantage of arbitration over the courts. While judicial rules and standards commonly provide for deadlines within which various actions must be taken, such rules are in effect advisory in nature and rarely if ever deprive a court of the power to act long after they were supposed to have acted. A recent report of the

⁴ Mitsubishi Motors Corp.v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust); Shearson/American Express Inc.et.al.v. McMahon et al., 482 U.S. 220 (1987) (securities); Alum. Co. of America v. Beazer East, Inc. 124 F.3d 551 (3rd Cir. 1997) (environment).

⁵ All AAA rules hereafter can be found at: www.adr.org/sp.asp?id=22440 E.g., AFSME, Council 4 Local 704 v. Dep’t of Public Health, 832 A.2d 106 (Conn. 2003); AAA Rule 41.

Administrative Office of the US Courts listed 22 federal district court judges who have motions pending for over six months; 13 judges each had more than 100 civil cases pending for over three years.⁶ Parties with motions or cases pending beyond the periods within which they are supposed to have been decided have no effective remedy against such delays; even complaining about such situations risks alienating the judge.

Unfortunately, the potential advantage of having enforceable deadlines in arbitration is seldom realized. Where the parties are all agreed that a deadline should be waived, that is their choice, which arbitrators should respect. Often, however, arbitrators are excused for breaching such rules, without the parties' consent.⁷ Even more often arbitrators avoid deadlines by asking the parties for more time. This puts parties that would prefer to insist on the deadline in a difficult position. If one party promptly agrees to a delay, the other party or parties feel pressured to go along, if only to avoid antagonizing the arbitrator. In a major, recent arbitration, the arbitrator took about a year longer to issue his final decision than the deadline on which the parties had agreed, and which he accepted in taking on the case. Both parties were distressed at the arbitrator's delays, but neither was willing to risk his wrath by insisting on enforcement of the terms of his retention.

Deadlines in arbitration remain more meaningful than those that apply in litigation. But that is largely because trial judges are generally able to disregard deadlines. Little if anything can be done to change this reality in the courts. But a mechanism could be established in arbitration to ensure that deadlines are met, absent true consent of the parties, or on a showing to some supervising authority of good cause.⁸

Confidentiality. One of the most significant advantages of arbitration is that, under most sets of rules, the entire process is supposed to be kept confidential.⁹ This rule is often violated, however, and usually with impunity. Parties, or witnesses, or persons with access, can "leak" evidence or information to the press, or to others. The party adversely affected by leaks usually complains about it, but arbitrators can do little to prevent or punish such conduct. Rarely is it possible to establish that a particular party is responsible for an improper disclosure, and even more rarely do such disclosures compromise the arbitration process itself, for example by affecting the result. The inability of arbitrators to deal with such offenses is, nonetheless, eroding a valued component of private adjudication. Mechanisms are needed to prevent improper disclosures, to identify violators, and to apply reasonable sanctions when improper disclosures occur.

Fee Shifting. A major advantage of arbitration is that parties in commercial relationships can agree to use the English Rule concerning attorneys' fees, under which the loser pays the winner's fees, rather than the American Rule, which has each side pay its own fees. The American Rule is firmly part of U.S. law and practice, though many specific statutes and some procedural rules provide for some shifting of fees to the loser in some types of litigation. Many parties and their counsel believe, however, that the American Rule encourages litigation too greatly, and that imposing the costs of litigation on the loser (whether plaintiff or defendant) reduces costs overall and deters frivolous positions.

Fee shifting is far more prevalent in arbitration than in litigation. American arbitrators are insufficiently rigorous, however, in enforcing the agreement of parties to have the loser pay. The tendency in arbitration to seek consensus, especially among three-member panels, often leads to compromises, particularly when it comes to imposing costs and attorneys' fees. To some degree, this is because the language used in arbitration agreements and the rules of service organizations leaves the arbitrators with discretion over cost-shifting issues. In no small part, however, the compromises on costs and fees stems from a lack of rigor in applying agreements and rules that clearly reflect the parties' intention to shift costs and fees to the loser.

⁶ Joe Palazzolo, The Slowest Federal Judges in the Land, Legal Times, Jan. 14, 2008, pp. l,6. See Table c-5, U.S. District Courts – Median Time Intervals from Filing to Disposition of Civil Cases Terminated. www.uscourts.gov/caseload2007/tables/C05Mar07.pdf.

⁷ See 136 A.L.R. Fed 183, Sec. 9, noting several cases where courts refused to vacate awards issued later than the deadline set by the parties.

⁸ See FedArb Rule 10.06.

⁹ The FedArb Rules provide for confidentiality. Rule 10.03

Arbitration services should offer rules that enable parties to specify their choices with regard to the main elements of costs and fees in arbitration. At least three options should be provided with regard to each element: prohibit shifting; mandate shifting; and leave the issue to the tribunal to decide.¹⁰ Where the parties mandate the shifting of costs and/or fees, the failure of a tribunal to implement that policy should be considered an abuse of discretion that should be corrected by the arbitration service through an appropriate mechanism. Fee shifting is an important tool for optimizing private adjudication, and its availability to parties who choose to apply it should be assured.

Expert Testimony. Arbitration services in particular industries have developed methods for using experts that are rational and effective. Too often, however, arbitrations become the scene for battles between experts in law, economics, accounting, and areas of technology that are wasteful and unhelpful in resolving difficult issues. Arbitration services and arbitrators should more forcefully resist allowing practices that lead to biased and partisan expert testimony. They should consider using panel-appointed experts instead of allowing parties to choose experts of their liking, or should consider using the British system that encourages greater objectivity from experts by requiring them to commit to assisting the court, and to meet with the expert for opposing parties and attempt to agree on the relevant issues or explain their disagreements.

Exploiting Technology. A private system of adjudication has more freedom than judicial systems to exploit technological advances to enhance the adjudicative process. Telephone conferences have already replaced in-person meetings in most arbitration, and email communication has become routine. These methods should be mandated, unless the parties agree on other methods. The websites of service providers should offer extensive information about the services available, and the background of all arbitrators. Systems are now available, moreover, for electronically filing, exchanging, and storing legal briefs and evidence in a secure manner. Electronic methods could be developed to protect confidentiality more effectively by restricting access and tracing the source of leaks.

A major problem in implementing new technologies in arbitration is the relative lack of familiarity that some arbitrators have with such methods. Service providers should require arbitrators to disclose whether they are willing, for example, to correspond by email. This would lead most if not all arbitrators to learn how to do so. Another, exasperating reality is the fact that parties and even service providers often use new technologies without giving up old ones. They will, for example, send an email message on a matter, follow it up with a fax, and then mail or express the same message. At hearings in major cases, arbitrators are often provided with computers that contain all the evidence and briefs, but are then nonetheless provided with paper copies of everything, and often with additional copies of the exhibits that are to be used in the examination of particular witnesses. Service providers should help parties to use new technologies effectively, and to give up outdated and costly practices.

II. Importing the Advantages of Litigation.

Litigation has some substantial advantages over arbitration. The most obvious, and often the most illusory, is the fact that access to the courts is virtually free. Filing fees in federal courts run around \$350; in state courts they are often lower. Parties pay nothing for the use of courtrooms, or for the services of judges, magistrates, clerks, and guards, among others. An arbitration costs far more to commence than a lawsuit, and parties must pay arbitrators for their services, their travel costs and expenses, and usually share all the costs related to the hearing. Despite this fundamental difference, parties often choose to arbitrate instead of litigating in court. Many reasons explain this, but perhaps most

¹⁰ See FedArb Rule 15.03, which addresses these options: "Tribunal costs, expenses, and attorneys' fees shall be allocated in accordance with any applicable agreement of the parties. To the extent the parties provide that costs, expenses or fees shall be allocated to the prevailing party, the arbitrator or panel shall allocate all such costs, expenses, and fees they determine to have been properly incurred against the losing party (or in appropriate proportion based on the outcome of all the issues considered), or as agreed by the parties. If the parties provide that costs, expenses, or fees may be allocated to the prevailing party, the Arbitrator or Panel shall allocate such costs, expenses and fees by exercising discretion according to the standards and practices followed in the U.S. federal courts on such issues. In the event the parties fail to specify how the costs, expenses, and/or fees shall be allocated, each party shall bear its own costs, expenses and fees."

important is the fact that, in court, parties cannot choose the judges, venue, law, or procedures that will govern. Parties often conclude, and with increasing frequency, that the costs of arbitrating a dispute are in actuality lower than in court, taking into account the uncertainties and delays of litigation.

Arbitration can be made even more attractive, however, and therefore more often worth any disparity in cost, by incorporating into the arbitration process, as options, those aspects of litigation that parties sometimes prefer to the conventional arbitral process. Among the most significant of these are: comprehensive disclosure of conflicts; robust discovery; motion practice; predictable evidentiary rules; and an appeal on the merits of arbitrator decisions.

Disclosures Concerning Possible Conflicts. The task of screening public judges for conflicts is easier to accomplish effectively than screening arbitrators. Judges are full-time government officials who can be required publicly to disclose all their financial interests. Their professional histories are usually well known and also publicly available. The longer judges are on the bench, the fewer relationships they will have that could raise concerns about their neutrality. Laws, sometimes with criminal penalties, require judges to refrain from participating in any litigation in which they have a financial interest. Arbitrators, by contrast, are seldom full-time decision makers, are often involved in other, commercial activities, including the practice of law, and develop relationships with parties and law firms and other arbitrators that can be important for parties to know about. Furthermore, no system yet exists for public disclosure of the financial interests and relationships of arbitrators. And while sets of ethical rules have been created to govern arbitration, service providers and parties can do relatively little (without incurring substantial costs) to discover information that arbitrators fail to disclose.

The result of inadequate disclosure by arbitrators of conflicts and potentially significant information is apparent from several reported cases in which awards have been vacated by courts, especially in California, which has adopted stringent disclosure rules.¹¹ These and similar problems have made service providers prone to accept without resistance any objection to the selection of an arbitrator or mediator by any party to a dispute.

Service providers could rectify this problem to some degree by requiring substantial disclosures by arbitrators whom they propose or appoint. Currently, disclosures are made in an ad hoc manner, before each prospective appointment. Some providers are compiling records of the information they obtain from all candidates for appointment, however, so it remains available in all future appointments for which the arbitrator is considered. Ideally, service providers should share such information in a system that collects all available information about all arbitrators considered by all the cooperating services. That development would in effect recognize that arbitrators – especially those who regularly engage in dispute resolution activities – have an obligation to allow the parties in matters on which they may sit in judgment to have access to information comparable to the information made available about judges.

Discovery. One often hears criticisms of U.S.-style discovery, and they are weighty. Parties sometimes use discovery as fishing expeditions, to support claims that are speculative, to cause delays, or to force a less well-heeled opponent to capitulate. Yet, U.S. discovery is strongly favored by many parties and their counsel, especially in complex, commercial cases, where large sums are at stake. In major civil litigation, parties would often avoid arbitration if it were not possible to have robust discovery. They sometimes agree in advance to follow the Federal Rules of Civil Procedure, or at least build into their arbitration agreement the right to take depositions or other guarantees of access to information.

Arbitration service providers have responded to this trend, and generally allow parties to use broad discovery methods, even where their rules do not expressly provide for such methods. In a recent ICC case heard in California, the parties agreed to disregard the ICC rules related to discovery (which normally do not contemplate depositions) and to

¹¹ See, e.g., Cal. Code of Civ. Proc., Secs. 1281.9a, 1281.9l; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U.S. and Canada, Local No. 16 v. Charlotte Laughon, 118 Cal. App.4th 1380 (1st Dist. 2004), 6 Cal. Jur. 3d, Arbitration and Award, Sec.8890 (2003); Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), where the court set aside the arbitration award granted to respondent because the U.S. Arbitration Act authorizes vacation of an award where there was evident partiality in the arbitrators.

use the Federal Rules instead. This sort of agreement, or any other arrangement parties choose concerning the scope of discovery, should be respected.

Motion Practice. Arbitration services rarely provide for motions to dismiss, or for summary judgment, or to secure other relief in the pre-hearing process. It is often assumed, in fact, that parties are entitled to a hearing in arbitration, and that dismissing a case as insufficient as a matter of law, or because it lacks evidentiary support to justify a hearing, may be impermissible unless all parties consent in advance to the use of such procedures.¹²

The trend in commercial arbitration with regard to motion practice is, as with discovery, toward the adoption of judicial procedures. Parties in major commercial cases now often agree to allow judicial motion practice, and claims are often disposed of without evidentiary hearings. Including the motion practice of federal or state courts into the framework of an arbitral process seems entirely appropriate for many if not most civil claims. Parties are never required to make motions; but they should be permitted to do so when they agree.

Evidentiary Rules. Arbitrators generally ignore the rules of evidence. They accept virtually all offers of evidence of almost any kind “for what it is worth.” Deficiencies of all sorts are tolerated on the theory that they “go to the weight of the evidence, not its admissibility.” This posture does, in general, move things along at hearings, and usually does no serious harm in that weak or improper evidence that is admitted is generally ignored. Yet, the process has become so undisciplined that it is far from cost free. In particular, admitting unreliable evidence often leads to some form of rebuttal, and the need to be even-handed in administering a hearing leads in turn to allowing parties to introduce worthless or irrelevant evidence for the purpose of refuting evidence that should have been excluded in the first place.

Litigators and arbitrators who handle major civil cases are, in general, familiar with the rules of evidence applied in judicial proceedings. Those rules are flexible enough to allow all relevant and useful evidence to be admitted and considered, while avoiding the waste of time often caused by allowing useless and unreliable evidence to be admitted. Parties in major arbitrations often welcome a reasonably rigorous application of well-known, and long-tested evidentiary requirements. In addition to making the arbitral process more efficient, by making clear that a given set of evidentiary rules applies, the parties expect the arbitrators to follow those rules, which in turn is likely to reduce inconsistency during a particular hearing, or from hearing to hearing depending on the style and preferences of the arbitrators involved.¹³

Appeals on the Merits. Perhaps the most serious objection to arbitration as a method of adjudication is the power of arbitrators to issue decisions that are wrong on the law, or that rely on findings that are clearly erroneous.¹⁴ Parties still occasionally prefer to have the arbitrator make an unreviewable decision, sometimes with no reasoning whatever.

¹² State law may allow motion practice in arbitration. See *Texcel v. Commercial Fiberglass*, 1987 Del.Super. LEXIS 1350, 1987 Westlaw 19717, citing Del. Super. Ct. R. Civ. P 16(c)(5) which states that the parties may serve and file motions and discovery as allowed by the superior court civil rules; provided, however, that in cases subject to arbitration all responses to discovery and motions relating to discovery shall be stayed until a request for a trial de novo is filed as provided by these rules. See also *Barnes v. Washington Mutual Bank*, 835 NYS2d 564 (N.Y. App. Div. 2007), where the court found that the arbitration agreement explicitly empowered the arbitrator to entertain a motion to dismiss and/or a motion for summary adjudication by any party. Thus, the arbitrator did not exceed any specifically enumerated power in entertaining the motion.

¹³ The FedArb rules incorporate by reference the Federal Rules of Evidence, which apply unless the parties agree to a different approach. Rule 1.03. See AAA Rules 31 and 32: “conformity to the legal rules of evidence shall not be necessary” and “the arbitrator determines he admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.” Parties can object to evidence and examine and respond to documents admitted.

¹⁴ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986), noting that “manifest disregard of the law” by arbitrators is a judicially created ground for vacating an arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985); *I/S Stavborg v. Natl. Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974).

Finality is a legitimate interest, and in some contexts of overriding importance. But in many cases, especially those involving large claims and complex legal questions, parties want a reasoned decision based on a correct application of the law and defensible fact finding. They are disturbed by the fact that decisions of arbitrators are not subject to review on their merits, in the manner that decisions of trial judges are subject to appeal in the federal and state courts. Appeals not only enable parties to seek to correct error, the very fact that an appeal is available is widely believed to cause trial judges to be more careful in making decisions than where no possibility of an appeal exists.

Arbitration should no longer be seen as requiring parties to forsake appellate review. The AAA, JAMS, and other arbitration services have built optional appeals into their procedures, so parties can obtain a review of the decision-maker's findings and conclusions. While the Supreme Court has disallowed efforts by parties to appeal the merits of arbitral decisions to the federal courts, no valid objection appears to exist to parties using an appellate procedure built into the arbitration process.¹⁵

The claim that appeals would add to the costs of arbitration is exaggerated. One of the results of not permitting appeals on the merits has been the virtually routine use of panels of three arbitrators, instead of one, to hear and decide major disputes. This practice is more costly than having a single arbitrator hear and decide a matter, with the right in reserve for a three-arbitrator appellate panel to review that arbitrator's findings and conclusions. Arbitrators are generally paid by the hour, and they spend far more time processing, hearing, and deciding a dispute than is required to prepare for, hear, and decide an appeal. Furthermore, the fact that a right to an appeal exists does not mean that appeals will be taken. In the federal courts, for example, appeals are actually taken from about 40% of all final trial court decisions.

Allowing appeals from arbitrator decisions will greatly improve arbitration's reputation as a method of adjudication. That arbitration has until recently provided no mechanism to correct decisions that everyone agrees are wrong and therefore unjust has long been an embarrassment for its advocates.¹⁶

III. A Process for Mandating Efficiency.

It is not enough to identify the best aspects of both arbitration and litigation and to design a system based on their use. Those procedures and practices must actually be implemented to achieve the improvements in adjudication that they make possible. Thus, for example, to require arbitrators to decide motions within thirty days of their submission, will not ensure that they do so. Judges are required to rule on motions within established deadlines, but often fail to do so, with no real consequences. Judicial Councils have been established to consider complaints concerning the conduct of federal judges, including their failure to comply with procedural deadlines, and similar institutions exist in the state courts. But these bodies usually lack the power or are unwilling to enforce such standards.

It is far more feasible, however, to establish and enforce deadlines in arbitration than in litigation. Arbitrators are treated like judges and have significant powers and heavy responsibilities. But arbitrators do not hold public office, and are not entitled to – and do not need – the political protections that judges have as the third branch of a constitutional government. Arbitrators are professionals, hired by parties to adjudicate their disputes. They can be required to perform efficiently as a condition of their employment, and the terms of their engagement can be legally enforced without impinging on any rights or privileges. Arbitrators can be bound to perform arbitration services in a particular manner, or consistent with specified standards, by inserting these requirements into the contract pursuant to which arbitrators are hired. The contract should also specify (or incorporate by reference) the remedies available to service providers and parties against the arbitrator for failing to meet those standards. Second, a system for enforcing the commitments

¹⁵ Hall Street Associates, LLC v. Mattel, Inc., 127 S.Ct. 2875 (2007).

¹⁶ See the thoughtful treatment in Erin E. Gleason, International Arbitral Appeals: What Are We So Afraid Of?, 7 Pepp. Disp. Resol. L.J. 269 (2007). See also William H. Knull, III and Noah D. Rubins, Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option? 11 Am. Rev. Int'l Arb. 531 (2000).

arbitrators make must be established that is fair, efficient, and separate from the courts. These steps will make it possible for service providers and their customers to anticipate with a much higher degree of accuracy than is currently possible the time and cost required for each proceeding.

Establishing Arbitrator Obligations . Arbitrators are routinely required by arbitration services, before being appointed, to sign forms in which they commit themselves to apply the service's rules as well as any particular requirements of the parties. Even in ad hoc arbitration, arbitrators explicitly or implicitly agree to apply the rules parties choose to govern the disposition of their dispute. These arrangements rarely make clear, however, that the arbitrator's obligations to abide by the rules and the particular requirements of the parties are conditions of employment, the breach of which can result in remedial action, including removal. These obligations and the possible consequences of breaching them should be made explicit in all retention agreements.

Arbitrator obligations must be designed to ensure they cannot be evaded. To be effective, for example, the critically important requirement that arbitrators comply with deadlines for decision-making must prevent arbitrators from pressuring parties to agree to extensions against their wishes. The rules should inform arbitrators in advance that any request for an extension of time to decide a motion or to issue an award must be made through the service provider. Case managers must assure parties in conveying such a request that the arbitrator will not be informed which party or parties refused to agree to extend a time limit. At the same time, the service provider must retain the power to approve an extension of time for good cause, such as illness, regardless of the parties' positions. Service providers must be prepared to remove arbitrators who fail to abide by these rules, and to absorb the costs of delays such arbitrators cause. Parties in ad hoc arbitrations should consider establishing a procedure that enables them to reject requests for extensions in an anonymous manner.

Making deadlines effective in arbitration is unlikely to lead to any major problems. Professional arbitrators will comply rather than risk embarrassment. The quality of exposition in decisions might suffer to some degree, but that would be a small price to pay for the important efficiencies that would result. Even this adverse consequence seems unlikely. Decisions issued in major commercial arbitrations on motions and awards have become needlessly formal and repetitive, and strict enforcement of deadlines might cut back on pointless, ritualistic repetition of the historical and procedural facts.

Another area in which arbitrators should be required to agree in advance to abide by the rules or suffer appropriate consequences is in disclosing information that parties may regard as significant in deciding whether to appoint them. Arbitration services lack the power and resources to regulate the relationships and holdings of arbitrators, as noted above. They should therefore make clear to arbitrators that any failure to disclose information on relationships or other ethical issues that is later determined to be serious enough to result in vacating an award will constitute a breach of contract, with the usual remedies for such breach. Under this approach, an arbitrator may be held legally responsible for the costs of an entire proceeding if, as has occurred in some recent cases, the arbitrator's improper failure to disclose information leads to the vacating of an award. The very possibility of such a consequence would cause arbitrators to take their disclosure obligations more seriously.

Enforcing Arbitrator Obligations. Every system of administered arbitration should be able to ensure that arbitrators are performing their duties. Often, however, case managers are far too junior to the arbitrators, and too busy, to be in a position to intervene in the arbitral process, let alone to insist on compliance with rules. It would be dangerous, moreover, for the service provider to become an enforcement body for its own rules, and it would be counter-productive to be litigating or arbitrating disputes with arbitrators over whether they have complied with their contractual commitments in managing an arbitration. One promising solution is for the service provider to establish an

independent, distinguished panel of arbitrators to be available on a continuing basis to hear and resolve issues that arise concerning the service provider's rules in a prompt, fair, and final manner.¹⁷

The most obvious analogy for this purpose is the Judicial Councils established to oversee the conduct of federal judges. Another such body, though with more limited functions, is the ICC's Court of Arbitration in Paris. The service provider and its arbitrators must agree to submit to such a body, for speedy and final resolution, all disputes between them concerning the meaning and application of the system's rules. This Arbitration Council, if you will, should be composed of individuals who have no financial interest in the service provider, and who are paid for their work. Given the expertise, experience, and independence of this body, it could also be called upon to review and approve all changes in the service provider's rules. A system of private adjudication with a Council that possesses real authority, and a supervisory function that goes beyond the commercial motivations of both the arbitrators and the service provider, has great potential for providing enhanced supervision.

Remedial Flexibility. Only limited remedies are currently available for arbitrator misconduct, or in response to an arbitrator's failure to abide by a rule or a requirement requested by the parties. An award may be denied enforcement, but that is a drastic remedy that will be granted only if the misconduct or breach of the rules establishes a ground for denial. The enforcement mechanism established to deal with arbitrator misconduct or disregard of rules should expressly include authority to grant a range of remedies, including damages against the service provider or arbitrator for the extra costs caused, injunctive relief in the form, for example, of a ruling disallowing some activity the parties intended to prevent, or removal of an arbitrator followed by replacement or a new proceeding. Having remedies short of refusal to enforce an award available to a service provider, or to the sort of decision-making Council contemplated by FedArb, will enable the parties or the service provider to secure relief for actions that undermine the intentions of the parties but are not serious enough to warrant jeopardizing the enforceability of an award.

Fixed-Price Arbitration. An arbitration system that establishes and enforces deadlines will be able to offer a new and potentially significant product: the fixed-price arbitration. Once effective control is established over the time periods needed to complete the stages of arbitration, service providers will be able to offer parties the option of a fixed fee for each case (or type of case), much as lawyers sometimes offer parties the option of paying a flat fee for a particular service. This type of arrangement has advantages for all concerned. It enables parties to know how much their case is going to cost to adjudicate and by when it will be over. It enables attorneys to set flat fees for their own services. And it enables the service provider to know in advance the total amount needed to pay the costs of arbitrators and for administering the process.

An essential prerequisite for this sort of arrangement is the ability to plan every fixed-price arbitration from start to finish: number and type of motions; extent of discovery; number of conferences; number of hearing days; and the deadline for issuance of the award. To establish reliably the cost of an arbitration, the service provider must be able to rely on its arbitrators to process each stage of the proceeding in a timely manner, at agreed fees, and for controlled costs. Significant departures from deadlines by arbitrators, or from the estimates provided by the parties, such as an extra hearing day, would necessarily result in additional charges for the additional work; alternatively, either the parties or the service provider would have to accept the risk of unanticipated costs, which might be reasonable if a sufficiently large pool of cases were being processed under a fixed-price arrangement.

Some disputes are too complicated to permit detailed planning in advance. In most cases, however, experienced counsel and service providers will be able to plan with a high degree of accuracy for the orderly disposition of most commercial arbitrations if rules and deadlines are properly applied. Contractual provisions should enable parties to increase (or even to decrease) the amount of time and effort required in exchange for an additional payment (or

¹⁷ This is what FedArb has done in establishing the FedArb Council. Its current members are: Hon. William Webster, Chairman; Hon. Charles Renfrew; Hon. John S. Martin; Hon. George C. Pratt, and Hon. Ralph G. Thompson. See FedArb Rule 7.05 (FedArb Council granted authority to decide the disqualification of an arbitrator); Rule 10.06 (When one or more parties refuse to agree to a requested extension of time, FedArb Council given authority to grant or deny extension of time); FedArb Rule 17.04

discount). Nor would such arbitrations be handled in a mechanical and unintelligent manner. As any experienced judge or arbitrator knows, each case has its own special characters and its own surprises. Designating reasonable periods of time within which each drama unfolds is entirely consistent with individualized justice.

IV. Conclusion.

Arbitration already plays an indispensable role in commercial adjudication in the U.S. and throughout the world. It has an even more important future. Increasingly, parties and service providers are realizing that the law enables them respectively to demand and to provide adjudication services that are fashioned to the great variety of customer needs and preferences.

The power to choose is an essential guide in exploiting this opportunity. So long as parties are able to select the rules and procedures that govern their adjudications, the incentive will exist for service providers to offer options that satisfy their needs, whether for a clearly defined and limited process, or for one that allows full-scale litigation. In high-stakes commercial arbitration, the options should include rules and procedures that enhance efficiency, reduce costs, and deliver the highest possible level of justice. While the measures available in such cases will not be affordable in many other types of arbitration, the ultimate objective should be the same: a private system of adjudication that delivers justice to parties efficiently and fairly, but in accordance with the procedures and methods they choose as appropriate for their particular disputes.