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A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek

Hon. Curtis E. von Kann*

I. INTRODUCTION

Conflicts in life are inevitable. They occur in virtually every sphere—between employers and employees, labor and management, buyers and sellers of consumer goods and services, business allies and enemies, even between lovers (or so the poets tell us). While the incidence of conflicts sometimes can be reduced by well-conceived conflict-avoidance strategies, many conflicts persist.

The real question is not whether conflicts will occur but rather how they can best be resolved. Thus, business entities entering into transactions generally include provisions for the resolution of potential disputes in the contracts. Such provisions often mandate mediation (or negotiation between executives, then mediation) as the initial dispute resolution process; a substantial percentage of conflicts get resolved through such methods. For conflicts not settled through negotiation or mediation, some form of adjudication is necessary. Trial by combat having been outlawed centuries ago, the choice is chiefly between litigation and arbitration. Each process has advantages and disadvantages. Those involved in each process would benefit by periodically assessing the quality of the process in which they participate. This article assesses the arbitration process currently utilized for the resolution of disputes between business entities in the United States.1

Appraising quality is often a tricky and subjective exercise. Arbitration, in which merit is frequently in the eye of the beholder, is no exception. The most appropriate way to assess the quality of the present commercial arbitration process is to determine the benefits

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1. Similar assessments could be made of arbitration in the much different contexts of employment, consumer, labor, and international business disputes, but such efforts are beyond the scope of this article.
sought by the parties engaged in domestic commercial arbitration, and the extent to which these benefits are actually achieved. Part II identifies the ten principal benefits parties seek to achieve through commercial arbitration. Part III considers how well the current commercial arbitration process delivers on those benefits, and assigns a grade for each perceived benefit. Part IV renders an overall assessment of the quality of commercial arbitration as of 2009, and proposes solutions to current problems.

II. WHAT BENEFITS DO USERS OF COMMERCIAL ARBITRATION SEEK?

In the last few years, commercial arbitration, once the darling of the business community, has lost some of its allure. Some have predicted a decline in the resolution of disputes through arbitration because its use is said to take as long and cost as much as litigation. Whether such asserted parity is accurate is considered below. However, if the cost and duration of arbitration and litigation are equal, then neither factor can support a rational choice of one method over the other. Instead, other attributes of the processes will determine which method to employ.

The principal reasons traditionally cited for choosing arbitration, listed in the approximate chronological order in which they are experienced, are:

1. The ability to choose the decision-maker;
2. The ability to adapt the process to the needs of each individual case;
3. Flexibility in the adjudicative process;
4. Privacy of the adjudicative process;
5. Accessibility of the decision-maker;
6. Efficient, user-friendly case administration;
7. Fair and just results;
8. Finality of the decision;

2. Commercial arbitration in this article is defined as arbitration between U.S. commercial entities.


9. Lower costs than litigation; and
10. Quicker results than litigation.

Some elaboration of each of these benefits aids in determining how well the perceived benefit is (or is not) currently being achieved in practice.

A. Choosing the Decision-Maker

Parties litigating disputes generally have little ability to choose who will decide them. In most state and federal courts, cases are randomly assigned to a particular judge. This judge may have been an accomplished civil litigator with extensive experience in business disputes, or a former criminal attorney with virtually no experience in such matters. The attempts of some litigators to get the judge they want through various "judge-shopping" strategies are successful only sporadically as courts (and litigation opponents) generally seek to thwart such efforts. In cases decided by juries, parties can exercise challenges for cause and peremptory challenges to exclude from the jury a limited number of persons believed (whether or not correctly) to be unsympathetic to a party's position. However, litigants are restricted to eliminating jurors from the pool that confronts them; they have no ability to add the people they would like to decide their case to that pool. Arbitration reputedly offers parties a greater ability to choose their decision-maker.

B. Customizing the Process for Each Case

Any civil case currently litigated in an American state or federal court is conducted under the same rules of procedure and evidence as every other civil case in that court. These standardized rules establish a "level playing field" for all litigants, provide a predictable process, and give rise to a body of publicly available precedents interpreting those rules. The disadvantage of standardized rules is that the parties and tribunal are precluded from customizing the adjudicative process to suit the particular circumstances and needs of their individual cases. Since arbitration is wholly a creature of party agreement, arbitrating parties are said to have the opportunity to prescribe in their agreement the exact procedures to be followed in resolving their disputes.

C. Flexibility of the Adjudicative Process

Adjudicating disputes at the courthouse has some built-in limitations. The hearing must be held where the court sits. If the case is being tried to a jury, the hearing must generally be conducted on successive business days (with perhaps a day or two off if the judge has a
conflicting matter scheduled); it is not possible to recess a jury trial for some weeks or months and later resume the trial. Even in non-jury trials, judges are under pressure to promptly dispatch their cases and clear their dockets, and it is the rare case in which a bench trial can be suspended once or more for extended periods of time. Arbitration is supposedly a more flexible process.

D. Privacy of the Adjudicative Process

Many business entities are not eager to have their disputes aired and resolved in public. Businesses fear that such publicity may have various adverse consequence, such as depressing the value of their stock, discouraging other businesses or customers from dealing with them, damaging their public image, or encouraging other parties to sue them concerning similar or related matters. In nearly all civil litigation today, every paper filed in the case is a matter of public record, and every trial and hearing is open to the public. Absent national security risks or other compelling circumstances, most state and federal courts are unwilling to seal records of civil litigation, even if requested to do so by all parties. Courts are publicly funded governmental institutions exercising the government's power to resolve disputes, and most judges believe that the interests of transparency and accountability in the performance of governmental functions outweigh the desires of private litigants to keep their affairs private.

Those choosing to resolve their disputes in court, at the taxpayer's expense, effectively give up the right to keep their disputes private. Arbitration, on the other hand, is a private dispute resolution process funded by the participants. Proponents of arbitration claim that it affords much greater privacy than litigation.

E. Accessibility of the Tribunal

In arbitration and litigation, particularly in complex cases with multiple claims and parties, many pre-hearing issues may arise that can substantially delay resolution of the matter. Discovery disputes can bog down a case. Medical complications can require the rescheduling of hearings or trials. Difficulties in obtaining necessary evidence from non-parties may prolong proceedings. New developments may require the adjustment of existing schedules or arrangements. The cost and duration of a case can be affected by how quickly counsel can communicate with the tribunal about such matters and get them resolved. Arbitration supposedly provides the parties with greater accessibility to the tribunal than litigation.
F. **Responsive and Helpful Case Administration**

Whether in litigation or arbitration, a case must be administered to be adjudicated. Claims and defenses need to be filed and served. Filing fees need to be paid. Conference calls and hearings need to be scheduled and arranged. Decisions need to be transmitted to affected parties. Parties who frequently are already stressed over the substance of their disputes do not relish being further stressed by incompetent, unresponsive, or surly administrative personnel. Thus, many users of commercial arbitration seek the ability to obtain responsive and helpful case administrative services from the organizations providing arbitration services (usually referred to as "providers").

G. **Fair and Just Results**

Many businesses do not see juries as the optimum vehicle for resolving business disputes. They believe, with some justification, that while jurors may be well-suited to applying common sense (and a good nose for lying) to criminal cases and simple civil cases, they are less well-suited to deciding complex cases involving numerous technical and sophisticated issues, voluminous evidence, intricate jury instructions, and long trials which may impose financial and scheduling burdens. The parties read of "runaway juries" and verdicts that seem grossly disproportionate to the actual damages at issue. And they recognize that many everyday citizens, who compose the bulk of juries, are often unsympathetic or downright hostile to large corporations.

Even having judges decide disputes via non-jury trials is unappealing to business entities. Many judges in state and federal courts had little or no experience with civil disputes before taking the bench. Many have overwhelming dockets and inadequate time to carefully sift through large volumes of evidence or explore complex or novel legal issues. Some judges have no law clerks or access to heavy-duty legal research. Parties who are uncomfortable entrusting their fate to juries but want multiple minds to hear and reflect on the evidence and engage in collaborative decision-making cannot achieve that goal in court, where bench trials are usually decided by a single jurist.

A survey conducted by the American Arbitration Association ("AAA") in 2002 found that, among commercial clients and attorneys, the most important reason for choosing arbitration was the expectation of fair and just results. That expectation related not only to the actual outcome but also to how it was reached—in essence, getting a right result in the right way.

H. Finality

Ever since Charles Dickens described in *Bleak House* the seemingly interminable Chancery Court case of Jarndyce and Jarndyce, parties have been frustrated by the public court system's apparent inability to end civil litigation. Appeals, remands, retrials, and more appeals have stretched litigation to ten years or more. While this characteristic of the court system springs from a salutary desire to greatly reduce the incidence of error, expedition and finality are sacrificed. For some parties, particularly business entities that need to get on with their business, that price is too high. To obtain a prompt and final end to their disputes, such parties are willing to accept some risk that the decision-maker will get it wrong. Since the parties pick the decision-maker, they believe the risk is tolerable.

Thus, a principal selling point for arbitration has always been that, after a full and fair hearing, an award is rendered which brings the dispute to a close. Unless the parties choose to include a provision in their arbitration agreement under which that award can be reviewed by an appellate panel of arbitrators, which is seldom done, the arbitration proceedings are over. Vacatur of the award by a court is possible but has historically happened in only a small percentage of cases.

I. Less Cost than Litigation

A major claimed benefit of arbitration is its ability to deliver dispute resolution at a lower cost than litigation. While the payment of arbitrator and provider fees and expenses adds cost items not present in litigation, those items usually comprise a modest portion of the total cost of the adjudication. In both arbitration and litigation of business disputes, the biggest cost item by far is attorney's fees and costs. A process reducing that cost item, even if partially offset by payments to the arbitrators and administering organization, is much less costly than litigation. Arbitration is thought to deliver such a process.

J. Faster Results than Litigation

For most of the same reasons discussed in the preceding section, commercial arbitration has traditionally been thought of as producing a resolution faster than litigation. This is regarded as a significant complimentary benefit for users.

III. ARE CUSTOMERS GETTING THE BENEFITS THEY SEEK?

Providing a report card for commercial arbitration is not an easy task. The quality of decisions and administrative services, flexibility of the adjudicative process, and accessibility of the decision-maker are inevitably subjective. Even for claimed benefits capable of objective measurement (e.g., lower costs or faster results than litigation), no such measurements have been published. Surveys of users of commercial arbitration (typically consisting of questionnaires completed by general counsel or outside counsel) have been published, but the statistical significance of the results is unclear. Many articles discuss what particular authors see as problems, but these articles are frequently based on limited experience and individual "pet peeves." Consequently, until better data becomes available, assessments (like this article) are inevitably impressionistic and personal.

So readers can decide how much weight to give the conclusions reached in this article, the author notes this article is based upon various surveys and articles deemed to be perceptive and sound as well as his professional experience. This experience includes sixteen years as a civil litigator with several large law firms, ten years as a judge on the busy general jurisdiction trial court for Washington, DC, and twelve years as a full-time arbitrator and mediator with JAMS, the nation's largest Alternative Dispute Resolution company. This article is also informed by the author's previous discussions with other Fellows of the College of Commercial Arbitrators, a select society composed of nearly 200 leading commercial arbitrators from North America.

A. Choosing the Decision-Maker (Grade = A)

No one has seriously questioned that arbitration affords parties a much greater opportunity to choose their decision-maker than litigation. If arbitrating parties can agree that their dispute should be decided by a particular person or persons willing and available to do so,

7. For example, International Arbitration: Corporate Attitudes and Practices 2008, a Price-WaterhouseCoopers study published by the University of London's Queen Mary School of International Arbitration reported that "86% of participating counsel said they are satisfied with International Arbitration." Michael McIlwrath, general counsel of a leading international company, immediately challenged that finding as completely contrary to the widespread dissatisfaction expressed by numerous corporate counsel with whom he had spoken. See Michael McIlwrath & Roland Schroeder, International Arbitration: In Dire Need of Early Resolution, 74 ARBITRATION 3-11 (2008).

then it will be. Even if they can't agree on the identity of a decision-maker or makers, they often can agree to limit the universe of potential arbitrators to individuals with particular characteristics, such as, "member of the North Carolina bar," or "retired federal judge," or "licensed architect," or "ten years of employment in the casualty insurance industry." A time-tested strategy for giving parties some control over who decides their dispute is to allow each party to appoint one arbitrator, and have those two arbitrators choose a third; the parties can also specify in their arbitration agreement whether such party-appointed arbitrators will be neutral or non-neutral. The major national providers, such as AAA, JAMS, and the International Institute for Conflict Prevention and Resolution (CPR) (formerly know as the Center for Public Resources), as well as many regional and local organizations, maintain extensive panels of accomplished attorneys, retired judges, and other professionals.

Those providers typically have procedures in which the parties are given a list of multiple available arbitrators along with their curriculum vitae. Each party can strike a specified number of candidates and rank the remainder in order of preference. Candidates with the highest composite preference rankings are appointed as arbitrators.

Biographies for most arbitrator candidates are publicly available, often online. In many cases, parties can search databases of arbitrators by fields of expertise, languages spoken, professional experience, and bar memberships. Upon request, providers usually furnish references for each potential arbitrator. Many large law firms maintain databases recording the firm's past experience with various arbitrators. Even in firms without such databases, partners generally seek comments on potential arbitrators from other attorneys.

In short, arbitrating parties can and do choose the decision-makers, or at least make informed choices among the neutrals offered by providers on "strike-and-rank" lists.

B. Customizing the Process for Each Case (Grade = B)

Parties in commercial arbitration have the ability to tailor the arbitration for each individual case. While all major providers have at least one set of rules for commercial arbitration, all of these organizations allow parties to supplant those rules with their own, party-agreed procedures. 

Thus, the parties may determine in their arbitration agreement the:

- specific disputes or kinds of disputes which are (or are not) arbitrable;
- sort of arbitration to be used (i.e. standard, high/low, or final offer arbitration);
- number of arbitrators to hear the case;
- neutrality of these arbitrators;
- rules of procedure to be followed;
- law to govern the arbitration process;
- law to govern the merits of the dispute;
- applicable rules of evidence (if any);
- scope of discovery (if any);
- motions to be permitted (if any);
- setting (time and place) of the arbitration hearing
- time afforded to each party at the hearing;
- witnesses or kinds of witnesses to be called (or not permitted);
- type of direct testimony to be presented (either orally or in writing);
- exhibits to be permitted;
- remedies the arbitrators may or may not award;
- nature of the award: either a statement of reasons (a reasoned award), or only the amount or type of relief awarded (a bare award);
- deadline for issuance of the award;
- whether attorney's fees may be or must be awarded;
- allocation of the fees and expenses for the arbitrators and provider organization;
- ability to appeal the award; and
- other details of the arbitration process.

Unfortunately, in a high percentage of cases, parties do not take advantage of this opportunity to customize the arbitration process. Rather, most commercial contracts contain a "plain vanilla" off-the-shelf arbitration clause providing few details as to how the arbitration will be conducted. This typically happens because the transactional lawyers finalizing the deal are not well-informed about the arbitration process or do not want to derail the deal by dwelling on potential disputes. Thus, these attorneys throw in an arbitration clause from some other contract at the last minute. This leaves the selected arbitrator(s) with the unenviable job of filling in the blanks concerning the discovery and motions to be allowed, the date and length of the hearing, and other process details.

If the parties appear at the preliminary conference with a joint agreement for an expansive process with extensive discovery, as frequently happens, the arbitrators are forced to accept that agreement unless they can persuade the parties to scale it down. If the parties disagree as to how the arbitration should proceed, as also happens
frequently, the party with the most expansive requests usually ends up getting all or most of what it wants. (The result occurs because the Federal Arbitration Act (FAA) and most state statutes provide for vacatur if the arbitrator refuses to consider material and pertinent evidence.10 Thus, counsel will argue (with some force) that if they are denied the opportunity to gather evidence, then they will have been effectively denied the opportunity to present that evidence to the arbitrators.)

Assigning a grade to how well this benefit is achieved is problematic because the opportunity for customization is clearly available but rarely utilized. Fair minded parties, on pondering this truth, might admit, as did Cassius, that "the fault, dear Brutus, is not in our stars, but in ourselves."11 However, since providers have contributed to this problem by not offering parties enough templates to choose from, a B is the most appropriate grade.

C. Flexibility of the Adjudicative Process (Grade = A)

The adjudicative process in commercial arbitration is much more flexible than in litigation. Arbitrators can and do hold hearings in multiple locations. This facilitates the receipt of evidence from non-party witnesses, and witnesses within the employ or control of the parties, when numerous important witnesses are located in various places (e.g., when the parties' offices or production facilities are situated in different states). Arbitration witnesses can and do testify by phone from remote locations. (The author, sitting as an arbitrator at hearings in Washington, DC, has received telephonic or videoconference testimony from witnesses in North Carolina, Texas, California, Japan, Switzerland, and Korea.) Arbitrators can and do employ other techniques seldom used in litigation, including: receipt of direct testimony in writing; sequencing hearings; receiving testimony from related witnesses through group presentations; requiring experts to testify in the presence of each other and respond to questions from their opposite number; and suspending hearings for substantial periods to allow parties to gather evidence on unanticipated issues or developments. Arbitration clearly deserves an A for achieving this benefit.

D. Privacy of the Adjudicative Process (Grade = A)

Parties can certainly achieve greater privacy in arbitration than in litigation. In arbitration, unlike litigation, no public record is available

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10. 9 U.S.C. §§ 1-16.
for inspection by anyone who asks. Arbitration hearings are not open to the public. Moreover, if arbitrating parties choose to restrict the extent to which their proceedings may be divulged to non-parties, those contractual agreements are enforceable by arbitrators and courts in the same manner as other parts of their contract.

However, the parties do have to agree on such restrictions. Unlike mediation, in which the confidentiality of the process is often decreed by statute, no such statutes regarding arbitration exist. Neither the FAA,12 nor the Uniform Arbitration Act (UAA),13 nor the Revised Uniform Arbitration Act (RUAA)14 mandates that arbitration proceedings be private or confidential. Thus, privacy of the adjudicative process, unobtainable in litigation, is obtainable in arbitration if the parties make it part of their arbitration agreement, as they often do. Arbitration gets an A on this item.

E. Accessibility of the Tribunal (Grade = A)

For a variety of reasons, counsel in court cases generally do not have quick and easy access to the judge handling their case. Most state and federal trial judges have heavy dockets (the author's was 750 cases in his last civil assignment), spend much of their time in the courtroom, and have little time (or inclination) to confer with counsel between court appearances. Some judges are reluctant to hold conference calls with counsel, feeling uncomfortable with that setting and the absence of a record of the discussion. Some judges hold periodic status hearings with counsel, but these hearings are generally set well in advance and involve time-consuming trips to court. As a result, communications between counsel and the tribunal in litigation generally occur either in the courtroom or through written submissions (e.g., motions, oppositions, briefs, and, for those judges who allow it, letters). Some judges respond very quickly to such communications, while many do not.

Arbitration surely earns an A for delivering greater accessibility to the tribunal than in litigation. Many, if not most, commercial arbitrators discourage formal motions regarding discovery and case management matters, and instead direct counsel to promptly schedule a

13. The Uniform Arbitration Act was promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws. Thirty-five states subsequently adopted it in toto, and fourteen states adopted substantially similar legislation. In 2000 the Commissioners adopted the Revised Uniform Arbitration Act which has, to date, been adopted, wholly or partially, by eighteen states.
conference call through the assigned case manager. Problems often get resolved in this call, with a follow-up order to memorialize the ruling. Even if post-conference-call submissions are required, these submissions can be made and reviewed quickly. Once the arbitrators’ attention is called to a particular obstacle in the path of a final decision, they generally deal with it promptly; arbitrators feel a duty to facilitate the expedited resolution for which they were appointed, and it is not in their self-interest to gain a reputation for slowing down arbitration proceedings by being unreachable or unresponsive.

Arbitration also offers counsel greater “accessibility” during the hearing. Arbitrators’ greater approachability is symbolized by where they sit—usually on the same level as counsel, not on a raised “bench.” During the hearing, arbitrators frequently ask questions of counsel and witnesses, identify matters that require clarification, and ask counsel to focus on particular issues. They may request counsel to supply additional evidence, arguments, or briefs on certain matters. Some arbitrators give counsel a list of questions to address in their final arguments. Some arbitrators draft awards for comment before issuing a final award. The process of arbitration is typically more interactive than litigation, which allows parties to shape their presentations to supply the information the decision-makers need to reach a fair and sound decision.

F. Responsive and Helpful Case Administration (Grade = A)

Regrettably, clerks’ offices in many U.S. courts are staffed with overworked, underpaid, and unmotivated personnel who have little interest in helping counsel determine the number of document copies to be filed, the location of forms for preparing subpoenas, the cost of filing or witness fees, and the location and dates of particular court proceedings. Clerks are, after all, government employees performing tedious and repetitive tasks, often under serious budgetary and time pressures, for an agency that essentially operates without competitors. Complaints about the lack of civility, unresponsiveness, and incompetence of clerk’s offices are unfortunately quite common.

By contrast, arbitration providers pride themselves on delivering top quality administrative services to clients. Case managers and other staff are generally well-paid, and trained and regularly evaluated on their ability to deliver efficient, responsive, and user-friendly administrative services. Like the airline captain who announces “we know you have choices in travel,” providers know their customers have choices. Therefore, the quality of service is a high priority.
While lapses occur, most parties are generally pleased with the administration of commercial arbitrations. For example, JAMS customer surveys consistently show high marks for case administration services. Presumably, other major providers receive similar feedback. The author's own experience observing the performance of clerk's offices versus the performance of commercial arbitration case managers leaves no doubt about the superiority of the latter. A grade of A is warranted here.

G. Fair and Just Results (Grade = A)

Arbitration originated from villagers entrusting their disputes to a group of elders or wise men, and merchant guilds enlisting experienced and knowledgeable members to resolve disputes within their ranks. Today, many parties use arbitration because they think they will get more informed decisions from experienced arbitrators with expertise in their particular industry, trade, or profession. Others choose arbitration because they believe retired judges and distinguished attorneys have the intellectual firepower to understand their cases, and the time and incentive (of attracting future business on the basis of a reputation for outstanding decisions) to render fair, thoughtful, and well-supported awards.

Commentators report that most parties regard commercial arbitration decisions as typically fair and well-supported. JAMS, which conducts a confidential, biannual survey of its customers, consistently receives high marks for the quality of its arbitration hearings and awards. AAA reports similar results from client evaluations.

Of course, occasional awards seem ill-considered or unsound. However, in the author's experience as a civil litigator and judge, the incidence of such decisions is much greater from juries and judges than from arbitrators.

One complaint voiced with regularity is that arbitrators tend to "split the baby" to avoid alienating parties or counsel who might consider using that arbitrator in a future matter. A study published by the AAA reveals that this complaint is unfounded. In that study, 31% of claimants were awarded 0% of their claim and 35% were awarded 100% of their claim. Of the remaining 34% of the cases, the results were widely distributed, with awards ranging from 10% to 90% of the

17. Id.
amount claimed. A similar study of 4,794 awards shows that nearly three out of four claimants were awarded either 0-20% or 81-100% of the amount claimed. Thus, empirical evidence shows that only a small percentage of arbitration cases result in an award near the middle of the amount in controversy.

However, one must realize that a decision adopting neither of the outcomes urged by competing parties is not necessarily unwarranted. Frequently, the opposite is true. Many cases reach arbitration following the failure of extensive efforts, through negotiation and mediation, to settle the dispute. Often settlement is not achieved because the dispute is not a "black and white" matter, but rather one in which a good deal of merit exists for each side's position. In such situations, awards lying between the extreme positions advocated by each side may be the soundest decision possible, not self-interested attempts to curry favor with all participants. Parties are less likely to attribute such decisions to "baby splitting" if the award is accompanied by a cogent statement of reasons. Client surveys by JAMS and AAA show that parties and counsel generally respect arbitrators who conduct fair hearings and thoughtfully consider all evidence and arguments, even if the award does not come out as they hoped.

In short, the ability of commercial arbitration to deliver results that its customers generally consider fair and just rates an A.

H. Finality (Grade = B)

Because, under both the FAA and the RUAA, grounds for vacating arbitration awards are very limited and do not include errors of fact or law, the incidence of vacatur is historically extremely low. The result is that arbitration awards are the final and binding outcomes in a very high percentage of commercial disputes. Some erosion in that bulwark began a few years ago as courts declared that, while an ordinary error of fact or law would not support vacatur of an award, a "manifest disregard of law" might result in vacatur. While manifest disregard of law clearly connotes a higher threshold than a mere error of law, exactly how much higher remains unclear. (It is also hard to square this ground for vacatur with the traditional notion that arbitrators, who may be non-lawyers, were not required to decide a dispute precisely as a court would but could employ their common sense and ex-

18. Id.
19. Results cited in Keer & Naimark, supra note 16.
perience to arrive at what they considered a fair result under all relevant circumstances.)

Another recent development affecting finality is the effort by some parties to expand the statutory grounds for appeal by agreeing that other grounds (e.g., errors of law) will warrant vacatur in their case. Initially, federal courts split regarding whether parties arbitrating under the FAA could enlarge its stated grounds for vacatur. However, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that such expansion of the FAA was impermissible, and that manifest disregard of law was not an authorized ground for vacatur.22 Yet, in the same opinion, the Court suggested that vacatur grounds beyond those in FAA § 10 might be available if enforcement of awards was being sought under state statutory or common law.23 And in some states, these grounds are available.24 Manifest disregard of law is still sometimes considered as a possible basis for vacatur.25

It is too early to tell whether the foregoing developments will substantially undermine the traditional finality of arbitration awards. A 2004 study of published state and federal decisions on motions to vacate during a ten month period found that such motions were granted in six out of sixty-one federal cases (i.e., about 10% of the time), while state courts in California, New York, and Connecticut ordered vacatur in nineteen of sixty-four cases (about 30%).26 Compare these numbers to a Department of Justice study which found that, in state court contract cases in which notices of appeals were filed during 2001-2005 in 46 large counties, reversals were ordered in 16.7% of the cases in which plaintiffs were appellants and 22.5% of the cases in which defendants were appellants.27 However, such statistics must be viewed with caution. The vacatur study by Mills et al. involved a very small sample (both in the number of cases and duration of time analyzed), and only considered published decisions; many denials of motions to vacate are likely issued via unpublished orders. Most importantly, neither study discusses the percentage of instances in which a losing

23. *Id.* at 1406.
25. Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009).
party in arbitration or litigation chose not to appeal or seek vacatur, presumably out of a belief that such an effort would be futile.

Given the inconclusiveness of the data available thus far, the most that can be said reliably is that some diminution exists, to an unknown extent, in the finality of arbitration awards. That situation seems most appropriately to call for a grade of B.

I. Less Cost than Litigation (Grade = C)

Until recently, little doubt existed that commercial arbitration was cheaper than commercial litigation. Discovery usually generates the largest part of total attorney's fees in litigation, and arbitration proceeded with little or no discovery. Moreover, arbitration hearings (in which formal foundations and other evidentiary requirements are usually laid aside, exhibits introduced en masse, and testimony taken more quickly through written submissions or streamlined examinations omitting the rhetoric and show often included for jury effect in court examinations) can be concluded more quickly than trial and reduce attorney's fees. As recently as five years ago, a Corporate Legal Times survey of in-house attorneys found that 59% of respondents thought arbitration was less expensive than litigation. A survey of senior corporate counsel conducted by an independent research firm for the Fulbright & Jaworski law firm produced similar results.

However, the last five years have witnessed acceleration of a trend in which parties in more large commercial arbitrations, particularly so-called "bet the company" cases seek to arbitrate the matter in essentially the same way they would litigate it, with wide-ranging (sometimes massive) discovery; extensive motions practice, including multiple summary disposition motions; protracted hearings including thousands of pages of exhibits; and post-hearing briefs that are hundreds of pages long. In essence, such parties seek to combine the first eight benefits of arbitration discussed above with federal court procedures that allow for virtually unlimited discovery and presentation of evidence.

The driving forces behind this trend and its many consequences are considered in a variety of publications. The best analysis appears in a forthcoming article by Thomas Stipanowich, former CPR President and now William H. Webster Chair in Dispute Resolution and Aca-

28. Burr, supra note 4, at 45.
demic Director of the Straus Institute for Dispute Resolution of Pepperdine University Law School. One consequence of the trend is an increase in the cost of commercial arbitration. While no reliable data about the exact magnitude of that increase is available, a significant portion of arbitration participants and observers believe arbitration now costs about as much as litigation.

Despite some predictions of arbitration's imminent demise, no convincing evidence demonstrates that increases in the cost of commercial arbitration have led to a decline in its use vis-à-vis litigation. The 2008 Fulbright & Jaworski litigation study reports that the number of U.S. companies that were parties to arbitrations involving more than $20 million declined from 13% in 2007 to 7% in 2008. However, one data point does not necessarily indicate a trend, and the study also fails to report whether the percentage of companies with arbitrations below $20 million increased or decreased from 2007 to 2008. Moreover, a different study shows a decline during this period in the number of trials in state and federal courts. The explanations for these findings are far from clear. One potential explanation is that the veritable explosion in the use of mediation to settle commercial disputes has reduced the volume of both arbitration and litigation.

Without attempting to characterize its true extent or predict its possible effects, a widespread perception exists that the costs of commercial arbitration and litigation are now essentially equal. Assuming arguendo that this perception is true, the grade for the benefit of reduced costs is C.

J. Faster Results than Litigation (Grade = B)

The same trend increasing the cost of commercial arbitration has also increased the time it takes to get from filing to award in many cases. Parties believing that arbitration and litigation cost the same also believe that it takes the same amount of time to reach a decision in each. Again, no published data supports this belief. However, as

in the preceding section addressing costs, the author will assume this belief is true. Even so, as discussed above,\textsuperscript{36} despite some erosion in the finality of arbitration awards, arbitration awards are still the end of the line in more cases than trial court judgments. In cases where a motion to vacate is entertained, it takes less time for a single trial judge to decide such motions than it does to assemble a trial record and briefs and wait for three or more judges (in a busy appellate court) to decide an appeal in litigation.

Hence, even if the time to award or judgment is equal, the total time to a final resolution in the aggregate of commercial arbitrations is undoubtedly less than the time to a final resolution in the aggregate of commercial litigations. Thus, a grade of B for this benefit is most accurate.

IV. THE OVERALL REPORT CARD

The assessments in Part III yield the following composite results:

- 6 A's
- 3 B's
- 1 C

Reasonable observers should regard those grades as constituting a pretty good "Report Card" for any decisional process involving a widely disparate group of (sometimes contentious) persons seeking to resolve complex disputes with high stakes. Indeed, in a university that weights grades D through A with the numbers 1 – 4, respectively, these grades would give commercial arbitration a Grade Point Average of 3.5 and a place on the Dean's List!

Yet, there is clearly room for improvement. What might be done to bring the B and C grades up to A's?

A. Customizing the Arbitration Process

While most arbitration participants recognize the value of arbitrating cases according to procedures best suited to each case, some participants feel that customization while the dispute resolution procedure is being written into the transactional contract is an unrealistic goal. These participants suggest it is better to make these process decisions once a concrete dispute arises, so everyone knows the exact dispute at issue and can customize the process in the most informed way. The trouble with this approach is that by the time a concrete

\textsuperscript{36} See supra Part III.H.
dispute arises, the parties are furious with each other, highly suspi-
cious of anything suggested by the other side, and very reluctant to
give up any procedural options that might later come in handy. More-
over, once a concrete dispute exists, the parties may have very differ-
ent interests in how the arbitration is conducted. Parties seeking
damages want little discovery and the earliest hearing date possible.
Defending parties want lengthy discovery and are in no rush to have a
hearing that could cause them to part with money in their possession.

Thus, while experienced and knowledgeable counsel on both sides
can sometimes get their clients to agree to reasonable and expeditious
arbitration procedures once they are embroiled in a dispute, often
they cannot. Sometimes the parties do reach agreement but the agree-
ment is for needlessly expensive, wasteful, and ill-suited procedures
for the case at hand.

Thus, in this author's view, the better time to customize the arbitra-
tion process under a business contract is before any particular dispute
arises, and before the parties know whether they will be a claimant or
a respondent and whether they would profit most from an expansive
or restrictive process. At that juncture, the parties do not know whose
ox will be gored and are less able to game the system in their favor.
However, the parties can predict with reasonable confidence the prin-
cipal kinds of disputes that may arise. Then, with a little maturity and
some bargaining, they should be able to arrive at a process or multiple
processes that both sides consider fair and efficient for the kinds of
disputes identified.

For the customization of commercial arbitration to substantially in-
crease, three things need to happen.

First, the education of transactional attorneys and business persons
concerning the adverse consequences of not detailing, before disputes
arise, the arbitration process they want must increase. These arbitra-
tion customers need to understand, as one corporate general counsel
recently put it, "[i]f you simply provide for arbitration under [standard
rules] without specifying in detail . . . how discovery will be handled
. . . you will end up with a proceeding similar to litigation."37

Second, providers need to develop and make available a broad ar-
ray of template arbitration clauses that can easily be adapted for use
in multiple types and sizes of disputes. At a minimum three templates

37. James Bender, General Counsel, Williams Company, Remarks at The Torch Is Passed,
Corporate Counsel Panel Discussion, Annual Meeting, CPR Institute for Dispute Resolution
(Jan. 29-30, 2004), cited in Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth
and Impact of "Alternative Dispute Resolution", 1 J. EMPIRICAL LEGAL STUD. 843, 895 n.202
(2004).
should be available: one providing for a very expansive arbitration process, one for a very restrictive process, and one for something in between.

Third, companies need to have the willpower to look at the available templates (or a design of their own) and chose which template to include in their contracts. That choice could even include prescribing different arbitration models for disputes of different types or sizes.

B. Finality

The Supreme Court's decision in the *Hall Street Associates* case discussed above should make clear to all federal courts that they may vacate arbitration awards only on the grounds set forth in FAA § 10.\(^{38}\) Thus, at present, inroads on finality are likely to occur primarily in arbitrations conducted under state statutes. State legislators could block such inroads by placing explicit statements in their statutes that the state courts may vacate arbitration awards only on the grounds set forth in their statute. State judges could strictly enforce such provisions. Even where a state statute contains no such express exclusion of vacatur grounds not included in the statute, as, indeed, the FAA does not, state judges could follow the Supreme Court's lead and construe their statutes to effect such exclusion.

Of course, state legislators and judges are unlikely to take these actions unless they recognize that arbitration is a process involving different tradeoffs than litigation. Legislators and judges must appreciate that if finality (one of its key characteristics) is taken away, many matters now being arbitrated are likely to come pouring back into the courts again, thereby setting back years of efforts in this country to reduce civil litigation delay and backlog. This message needs to be widely communicated by those engaged in commercial arbitration, law school professors, legal scholars, and commentators. Judges and legislators who believe that strict finality may be appropriate (even salutary) in arbitration between commercial entities but troublesome in adhesion contracts imposed on consumers, employees, and similar parties need to be taught that it is possible and appropriate to make distinctions between such different kinds of arbitrations. It is not necessary to "toss out the baby with the bath water" when seeking to protect the interests of those who did not freely elect to utilize a system in which finality is an important cornerstone.

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C. Reducing the Time and Cost of Arbitration

Achieving the improvements in finality and customization discussed above will greatly reduce the time and cost of commercial arbitration. Better training of arbitrators (particularly the chairs of tribunals in complex cases) in managing arbitrations efficiently and effectively, and working with counsel to trim unnecessarily costly and time-consuming procedures will also effect major improvements in this area. A discussion of all of these management techniques is outside the scope of this article, but helpful guidance is available in various practice guides. In addition, many organizations such as the ABA, the College of Construction Lawyers, various law schools, and providers (like AAA, JAMS, and CPR) offer training programs and conferences to increase awareness of current issues in commercial arbitration and techniques for addressing these issues.

Beyond such worthwhile steps lies the question of whether the model of commercial arbitration currently practiced, with some modifications to fit particular cases, should be substantially rethought. Are there ways in today’s era of instant communication, corporate consolidation, and economic belt-tightening to reinvent commercial arbitration or make bold changes in the way it operates? In October 2009, the College of Commercial Arbitrators will host a “National Summit on Business-to-Business Arbitration” that will bring together distinguished members of the four main constituencies in arbitration (parties, advocates, providers, and arbitrators) to develop protocols that each group can employ to make such arbitration dramatically more expeditious and economical.

V. Conclusion

Oliver Wendell Holmes stated the life of the law is not logic but experience. Now that parties have considerable experience in this country with commercial arbitration, the opportunity to improve an already very good process even further lies at the doorstep. Hopefully, we will take up this challenge, and preserve an important and distinctive mode of dispute resolution for years to come.
