Arbitration v. Litigation – A True Hobson’s Choice?\(^i\)

The subject of arbitration versus litigation is a widely debated topic. Arbitration has been used as an alternative dispute resolution procedure for centuries. It is generally believed to be far less costly and lengthy than traditional litigation in the court systems. But an analysis of the nature and characteristics of arbitration in comparison with those of litigation may not support such a concrete conclusion. Indeed, often litigants may be left with a choice between two, equally objectionable alternatives. And that choice depends upon several questions, the answers to which are unique for each litigant.\(^ii\)

Authors:
John M. Riccione, Co-Managing Member at Aronberg Goldgehn
William J. Serritella, Jr., Litigation Department Chair at Aronberg Goldgehn
Amy M. Rapoport, Litigation Associate at Aronberg Goldgehn

Aronberg Goldgehn
330 N. Wabash, Suite 1700
Chicago, IL 60611
(312) 828-9600
www.agdglaw.com
Moderator

John M. Riccione: John Riccione is the current co-managing partner of Aronberg Goldgehn. He specializes in complex business and commercial litigation, including matters involving sales commissions, unfair competition, trade secrets, discrimination claims, wage and hour disputes, restrictive covenants and distribution agreements. John’s strengths include his ability to make the very complex understood in the simplest form and his mastery of negotiation skills. John may be reached at jriccione@agdglaw.com or 312.755.3188.

Panelists

William J. Serritella, Jr.: William Serritella, Jr., is the chairman of Aronberg Goldgehn’s litigation department. He focuses his practice on complex commercial, appellate, bankruptcy and creditor’s rights litigation for clients in state and federal courts throughout the country. In the past few years, Bill has tried and arbitrated disputes involving deceptive trade practices, breach of employment agreements, and breach of AIA construction contracts. Bill may be reached at wserritella@agdglaw.com or 312.755.3136.

Amy M. Rapoport: Amy Rapoport is an associate in Aronberg Goldgehn’s litigation department. Amy’s areas of practice encompass a diverse range of commercial litigation matters including, without limitation, contract litigation, shareholder disputes, real estate litigation, computer fraud, misappropriation of trade secrets, employment litigation, representing creditors in bankruptcy matters, construction litigation, insurance coverage disputes, and business torts including, defamation and breach of fiduciary duty. Amy has experience litigating matters in state and federal court and through administrative agencies such as, the Illinois Department of Human Rights, Illinois Department of Labor, Illinois Human Rights Commission and Equal Employment Opportunity Commission. Amy also has experience resolving disputes through alternative dispute resolution and recently participated in an arbitration involving claims for breach of an AIA construction contract and fraud. Amy may be reached at arapoport@agdglaw.com or 312.755.3154.

Gina Beredo: Gina Beredo manages all litigation for American Greetings Corporation and its international subsidiaries as well as matters pending before government regulatory agencies such as the Consumer Product Safety Commission, the Federal Trade Commission and the Occupational Safety and Health Administration. She also leads the company’s ethics and compliance program and is responsible for ensuring that all products are compliant with federal, state and local laws and regulations and retailer and licensor requirements. American Greetings Corporation is a creator and manufacturer of social expressions products including greeting cards, gift wrap and gift bags and generates over $1.7 billion in annual revenue. Gina may be reached at Gina.beredo@amgreetings.com or 216.252.7300 x 4313.

Judge Julia Nowicki: Judge Nowicki presided for more than twenty-two years in several divisions of the Circuit Court of Cook County, Chicago, Illinois, where she resolved a variety of matters including commercial disputes; corporate governance matters, nationwide and statewide class actions; insurance coverage disputes; torts; employment-restrictive covenant and executive termination cases; injunctive matters; trust disputes; administrative reviews; and real estate matters. She has been an arbitrator with JAMS for six years where she hears arbitrations of all sizes, but primarily complex commercial disputes. She also has a substantial mediation practice. Julia may be reached at julianowicki@sbcglobal.net or 312.655.0555.
I. Why Consider Arbitration? – the Perils of Litigation in the Court System

a. Excessive Costs of Litigation

Litigation can be an expensive proposition. Throughout the course of a typical lawsuit, attorneys for the parties make several court appearances, engage in motion practice, participate in fact and expert discovery, draft and argue dispositive motions, prepare for trial and try the case, sometimes over the course of several weeks, months or, more often, years. The median time from filing a complaint to completing a trial in a federal district court is now more than two years.1 The average time in state courts is frequently even longer.2 Under those circumstances, it is easy to imagine that the total attorney, expert and court reporter fees incurred during the pendency of a lawsuit can be substantial.

b. Burdens of discovery, especially e-discovery

Discovery in litigation is often a long, tedious, and drawn out process. Most jurisdictions allow written discovery in the form of interrogatories, requests to produce and by subpoena to third parties. Typically, once written discovery is completed, parties begin to take depositions and conduct expert discovery. Depending on the complexity of a case, it may take several years to complete discovery.

Electronic discovery, as provided by the Federal Rules of Civil Procedure and some state court rules, can impose even more extraordinary burdens on litigants.3 In 2004, it was estimated that approximately 95 percent of all documents were created by electronic means.4 The ease with which electronically stored information is created, distributed, duplicated, and stored has resulted in exponentially greater volumes of data that must be assembled, analyzed, and produced in litigation.5 The more data that must be assembled, analyzed and produced can substantially increase the burden, financial and otherwise, on litigants. According to one conversion table, which was provided as an iPhone app by Blue Star Case Solutions, 100 gigabytes of information equates to approximately 1.2 million e-mails or 10 million pages. That may cost approximately $1 Million for a first level attorney review of the electronic files for responsiveness and privilege!

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1 A Hobson's choice is a free choice in which only one option is offered. As a person may refuse to take that option; the choice is, therefore, between taking the option or not: "take it or leave it". The phrase is said to originate with Thomas Hobson (1544–1631), a livery stable owner in Cambridge, England. To rotate the use of his horses, he offered customers the choice of either taking the horse in the stall nearest the door or taking none at all. What we are really talking about here is a Morton’s Fork. A Morton's Fork is a choice between two equally unpleasant alternatives. It is said to originate with the collecting of taxes by John Morton, Archbishop of Canterbury, in the late 15th century, who held that a man living modestly must be saving money and could therefore afford taxes, whereas if he was living extravagantly then he was obviously rich and could still afford them. Wikipedia, last modified, June 1, 2012.

2 The scope of this document is limited to arbitration and litigation within the United States. While domestic and international arbitration and litigation share some of the same qualities, international
methods of dispute resolution involve a distinct set of laws, rules, regulations and nuances which will not be discussed herein.

c. Unwanted publicity

In certain situations, parties may desire to litigate matters outside of the public spotlight. These may include suits between large corporate competitors, disputes with customers, claims involving sensitive subjects such as sexual harassment or discrimination, or disputes involving trade secrets or other commercially sensitive information. Litigation is generally a matter of public record and, therefore, may not be the desired forum to litigate such matters.

d. Unpredictability of outcome, especially in jury trials

Determining the probable outcome of a lawsuit is often difficult. This is especially true when the case will be tried before a jury because it is difficult to anticipate the future reactions of a group of laypersons. Even in a bench trial, if the case involves a complex or technical issue, there is a risk that the judge may not fully understand the issues in the case.

e. Net result of all of the above – almost all disputes settle without reaching the merits.

A very small percentage of civil lawsuits are ever tried. Litigation is a process of discovery and motion practice designed to eliminate claims that clearly have no merit and to reveal extensive factual information about the claims that survive so that the parties can make sound judgments about their value and settle them.6

II. Arbitration – is it the Panacea and does it Eliminate Litigation Perils?

a. Is the arbitration process actually less expensive?

Determining whether arbitration is less expensive than litigation is not an easy task. The analysis must take several factors into consideration including, without limitation, the amount of administrative fees, the complexity of the case, the number of parties involved, the amount in controversy, the amount of discovery that will be required and the number of days necessary for the arbitration hearing.

It is true that access to the courts typically costs a one-time nominal fee in the range of approximately $100 to $400. Access to arbitration, on the other hand, includes a filing fee and arbitrator fees. These fees depend upon the amount in controversy as well as the number of arbitrators. For instance, the current fees to file a commercial demand with the American Arbitration Association (“AAA”) range from $775 for cases claiming less than $10,000, all the way up to $12,800 for claims in the amount of $10,000,000.7 Arbitrators typically charge a minimum of $200 an hour. This includes time charged not only during the hearing, but also outside of hearing when there are other activities that require the arbitrator’s time and attention.8 AAA’s review of 100, large, complex cases (those with over $500,000 in claims) revealed that the longer a case lasts, the more non-hearing arbitrator costs the parties incur.9 The use of more than one arbitrator necessarily increases these costs.10
While the fees involved with arbitration are significantly higher than the fees associated with litigation, they cannot be viewed in a vacuum. Rather, they must be viewed in light of the total cost of the proceeding, including attorney’s fees. For arbitration to be cheaper than litigation, the parties’ savings on attorney’s fees and other litigation costs must exceed the difference in forum fees.\(^{11}\)

Some argue that arbitration is more likely to have cost-savings in larger cases, where the difference in attorney’s fees and costs will more than outweigh the increased arbitration fees.\(^{12}\) On the contrary, others argue that, if a case is complex, it may require extensive discovery and, therefore, defeat any cost savings. While arbitrators do not typically permit extensive discovery, they are generally given discretion to allow the parties to conduct discovery when warranted.\(^{13}\) And, when the parties agree to broad discovery, the arbitrator will typically honor that agreement.\(^{14}\) Choosing an arbitrator with a reputation for adhering to rigorous enforcement of discovery rules may assist in limiting discovery expenses.\(^{15}\)

The number of parties involved in the arbitration may also impact its cost. Naturally, as the number of parties increases, the likelihood that there will be a necessity for extensive discovery, lengthier proceedings and the possibility of delay also increases.

Though there does not appear to be any definitive statistical studies which compare the costs of litigation and arbitration, it has been argued that, on balance, arbitration generally appears to be cheaper.\(^{16}\)

\(b\). Do disputes in arbitration end in resolution on the merits sooner?

As explained above, the time period from filing a complaint to completing a trial in a federal district court or state court is now more than two years.\(^{17}\) In contrast, according to AAA, the median time from the filing of a demand for arbitration to an award is thirteen months.\(^{18}\) Thus, as compared with both federal and state court systems, arbitration seems to afford significant time savings for a majority of cases.

Arbitration is also likely to settle quickly after the demand is filed due to the threat of an immediate trial.\(^{19}\) One study showed that 37 percent of business to business cases filed with AAA settled early, prior to incurring costs in arbitrator compensation.\(^{20}\)

Arbitration may also reach the merits sooner due to the flexible nature of the process. Because arbitration is a species of contract law, parties can draft the terms by which a dispute will be handled and schedule the hearing at their convenience.\(^{21}\) This type of flexibility is not possible in litigation due to court procedures and overcrowded dockets.\(^{22}\)

On the contrary, there are many factors that can play a role in reducing the speed of the arbitration, such as when the arbitrator fails to firmly manage case progress.\(^{23}\) Neither the AAA nor JAMS rules include strict rules or deadlines for case progress and leave scheduling largely to the discretion of the arbitrator.\(^{24}\)

\(c\). Can arbitration proceedings be truly private?
Arbitration hearings, as opposed to court trials, are generally private and additional confidentiality can be agreed to by the parties.\textsuperscript{25} Arbitration hearings are held in private settings and are attended by those designated by the parties and their counsel. While some arbitral institutions have specific rules regarding confidentiality of proceedings and awards,\textsuperscript{26} some recommend that the parties to an arbitration agreement include a confidentiality provision and incorporate any institutional confidentiality rules into the agreement.\textsuperscript{27} An order from the arbitrator requiring that the proceeding be private and confidential can be key in preventing against future disclosures.\textsuperscript{28}

These measures, however, do not guarantee that the arbitration will remain confidential. For instance, if the arbitration agreement is only one-way – i.e. when company A is required to arbitrate any disputes with company B, but the agreement is silent as to company B’s obligation to arbitrate any disputes with company A – company A may be forced to litigate with company B.\textsuperscript{29} This is because company B retained its right to sue in court.\textsuperscript{30} Also, if crucial documents or testimony must come from a third party, court litigation may be necessary to enforce a subpoena.\textsuperscript{31} Similarly, if a party refuses to honor an arbitration award, the prevailing party cannot enforce the award without an order from a court that enforces the award.\textsuperscript{32} These would not be confidential proceedings.

d. Are arbitration awards really more predictable than jury trials?

Arbitration awards generally are believed to be more conservative.\textsuperscript{33} Arbitrators tend to be driven less by emotion than the average juror, perhaps because some of them have legal training and expect more concrete proof of damages.\textsuperscript{34} Also, because arbitration is based in contract, the parties can reduce their exposure by agreeing to restrict the type or amount of the potential award. For instance, JAMS Rule 32 allows the parties to, at any time before issuance of the arbitration award, agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate.\textsuperscript{35} With this procedure, the arbitrator is not informed of the parties’ agreement, renders an award and the award is adjusted, if necessary, pursuant to the parties’ agreement.\textsuperscript{36}

The plethora of information readily available to the public may also assist parties in predicting the outcome at arbitration. Before choosing an arbitrator, parties are able to conduct research as to the arbitrator’s educational background, legal experience, experience as an arbitrator and locate previous awards entered by the arbitrator. Arbitral institutions with knowledgeable case managers can also provide valuable information in the selection process.\textsuperscript{37} Additionally, with some arbitral institutions, such as AAA, parties are able to view prior awards (with party names redacted) to better analyze the potential outcome of their current case. Referrals by outside counsel or colleagues to a particular arbitrator can also be helpful.\textsuperscript{38}

Others disagree that arbitration is more predictable and cite the fact that arbitrators are not restricted by legal precedent and have more flexibility in their decision-making authority than do judges.\textsuperscript{39} Some even caution that arbitrators tend to “split the baby” –i.e., are less likely to decide strongly in favor of one side or the other – even when not warranted.\textsuperscript{40} In response to that caution, the AAA conducted a study of 111 of its awards in 2009.\textsuperscript{41} The study found that 7 percent of decisions awarded approximately half (41 to 60 percent) of what was claimed, 41 percent awarded more than 80 percent of the amount claimed, and 19 percent denied claims.

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completely. While these figures do not seem to support the “split the baby” theory, some remain skeptical because of beliefs that full-time arbitrators are interested in repeat business, that they do not want to upset either party or gain a reputation for making lopsided decisions and because arbitrators, who are not always lawyers and former judges, may not always be accustomed to making difficult decisions.

III. The Ills or Benefits of Arbitration

a. Limited discovery vehicles

The hidden cost of arbitration can be the lack of discovery. In litigation, the case is governed by strict discovery rules and procedures pursuant to which the parties may use a variety of discovery vehicles to obtain information from their opponent and non-parties. In arbitration, this is seldom the case because there are very few discovery rules or clear procedures. This is done purposefully in order to give the arbitrator some leeway in ordering the discovery that he or she considers necessary. For example, the AAA commercial arbitration rules provide for the exchange of documents but are silent on whether other discovery devices, such as interrogatories or depositions, are available. Under this rule, it is within the arbitrator’s discretion to determine the type and extent of discovery permitted.

Despite this seemingly limitless discretion, broad discovery is seldom permitted in arbitration. With that being said, arbitrators tend to be extremely hesitant to significantly curtail discovery out of fear that such restrictions will create an argument in support of vacating the award. Indeed, some have noted a recent trend whereby arbitrators are now more willing to allow the kind of extensive document discovery, including electronic discovery, that formally occurred only in litigation.

b. Loose evidentiary rules

Arbitration generally does not require the parties to follow rules of evidence during the hearing. This permits evidence to be presented in a simpler, less technical manner. Testimony during arbitration may also be presented in a narrative fashion or through affidavits, distant witnesses may testify by telephone, and opposing experts may testify at the same time, taking turns answering the same questions or responding to each other’s positions. Of course, these alternatives do not always save time nor are they always the most appropriate or persuasive method for presenting evidence. It is almost never a good idea to present important testimony by telephone or in writing. Having the witness testify in person and letting the arbitrator observe the witness’ demeanor is usually essential.

The lack of evidentiary rules may also lead to the introduction of evidence for which a proper foundation has not been laid or which has not been properly authenticated, a disorganized presentation of a case, and admission of irrelevant evidence which may confuse the arbitrator or needlessly complicate the proceeding.

c. Loss of appeal rights

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Arbitration is usually binding. This means that the decision of the arbitrator is as final as a decision by a judge. The losing party may challenge the award, but only on very limited bases.\textsuperscript{52} Parties to arbitration should be cognizant of, and accept the fact that, by choosing to arbitrate, the arbitrator’s award will be final and there will be no right to appeal, even if there are gross errors in law or fact.

In situations where the parties want a more comprehensive appeal than is permitted in court, they may agree to have the award reviewed by another arbitrator or a panel of arbitrators, a procedure that many providers of arbitration services currently allow.\textsuperscript{53}

d. Lack of dispositive motion practice

Dispositive motions do not play a significant role in arbitration.\textsuperscript{54} The rules of the AAA do not even provide for dispositive motions on substantive issues. They, instead, require that the parties be given a fair opportunity to present evidence on the merits of their positions.\textsuperscript{55} Arbitrators are far less likely than judges to grant dispositive motions because of the risk of being overturned for failure to hear evidence.\textsuperscript{56} This presents a potential problem for parties in arbitration because it greatly diminishes, if not defeats, their ability to eliminate meritless claims at the outset through motion practice available in the court system.

e. Limited utility in certain types of disputes

Arbitration may have limited utility or be inappropriate in certain circumstances. For instance, if a party needs extraordinary relief, such as a restraining order or an injunction, the arbitration process usually does not provide meaningful relief in these instances. The courts are in a better position to provide that kind of relief. The same is true where the issue involved in the dispute pertains to a new or emerging area of law and in cases in which a party wants to set legal precedent.

Arbitration may also be of limited use when anticipated disputes are likely to involve several parties, some of whom are not party to the arbitration agreement.\textsuperscript{57} There is no way to force those non-parties to participate in the arbitration and, unless they agree to participate, there may be an incomplete resolution of the dispute.

Another example exists in the employer/employee and consumer protection arenas. In some jurisdictions, where an employer requires its employees to arbitrate their disputes, the employer must also pay for all of the arbitrator’s compensation.\textsuperscript{58} Some jurisdictions provide the same protection for consumers.\textsuperscript{59} This factor is likely an important one in considering whether or not to arbitrate.

IV. Can a Carefully Drafted Arbitration Clause Help?

Because the right to arbitrate is contractual, the negotiation and drafting of the arbitration agreement is critical. Many have opined that it is much easier to negotiate the scope and terms of an arbitration agreement before a dispute arises. However, it can sometimes be difficult to determine how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses
may be most productive in situations where the parties have a good idea at the outset of the nature and scope of disputes that might arise.\textsuperscript{60}

Parties contemplating an agreement to arbitrate may want to consider inclusion of the following types of provisions, among others:\footnote{The following list of clauses to consider in drafting an arbitration agreement is not meant to be exhaustive.}

a. A clause providing for negotiation and/or mediation in advance of arbitration. Such clauses often lead to cost-effective, early settlement. They may also have negative effects since they can be a vehicle for delay and can result in required, but empty, negotiations where one or all parties have no intention of settling. These negative effects can be minimized by setting strict guidelines marking the end of the negotiation or mediation.\textsuperscript{61}

b. A statement as to what is covered by the arbitration clause. If the goal is to ensure that the arbitration agreement governs all disputes between the parties, specify that clearly. This would include a statement that the arbitrator has the authority to decide whether the arbitration agreement is valid and enforceable. This saves the parties a trip to court to determine that issue.\textsuperscript{62}

c. Governing law for procedural matters. The parties may wish to include a provision stating that the Federal Arbitration Act governs the procedural aspects of the arbitration. This may be particularly useful in situations where an arbitration agreement may be utilized in a number of different states. The Federal Arbitration Act affords parties the flexibility to structure their agreement, as they see fit, while at the same time provides assurance that the arbitration agreement will be enforced uniformly in different states.\textsuperscript{63}

d. Applicable substantive law. If it is important that an arbitrator apply the substantive law of a specific jurisdiction, state that clearly in the arbitration agreement.\textsuperscript{64}

e. Identification of a reputable arbitration institution with court-tested rules and fees.\textsuperscript{65} The parties should examine the rules of the institution carefully as the rules vary. Some have rules that promote more expeditious and less costly resolution.\textsuperscript{66}

f. A clause specifying the number of arbitrators. This may be a way to minimize the cost of the arbitration. A study recently conducted by the AAA indicated that the cost savings in cases that utilized one arbitrator versus three were significant.\textsuperscript{67} When parties insist on a panel of three arbitrators, this necessarily triples (if not more) the costs, may lead to postponements, other scheduling problems and lengthen the proceedings. There are, however, types of disputes where three arbitrators may be preferable to one, such as in some large or complex cases.\textsuperscript{68}

g. Qualifications of the arbitrator(s). Depending on the type of potential dispute and subject matter of the contract, the parties may wish to specify the qualifications of the
The parties can select fact finders who have advanced training, experience and credentials on the issues in dispute. With that being said, care should be taken that such qualifications not be too detailed and specific since a highly detailed list of qualifications may result in a narrow pool of candidates who are excessively costly, unavailable or have leanings that are disadvantageous to one party. Specification of arbitrator qualifications often works best in the context of a three-arbitrator panel since it is possible to require one of the panelists to have certain expertise without limiting the entire panel.

h. Confidentiality. The arbitration agreement may include a confidentiality clause providing that the arbitration proceedings and the award will remain confidential, except as may be necessary in connection with a court application for a preliminary remedy, judicial challenge to the enforcement of an award, or unless otherwise required by law or judicial decision.

i. Limitation on discovery. The parties may agree to limit discovery, such as eliminate or limit depositions to one or two per party or limit electronic discovery including, the number of custodians who may be searched. In a three-arbitrator panel, the parties may also wish to provide that a single arbitrator be authorized to rule on discovery issues. This could simplify and shorten the time to resolve discovery disputes.

j. Limitation as to Punitive Damages. The arbitration clause may set limitations as to the type of damages an arbitrator may award. However, in certain situations, such a limitation may render the arbitration agreement unenforceable and permit a party to file suit instead.

k. Expedited arbitration procedures. Some arbitral institutions have expedited arbitration procedures which, among other things, limits the amount of discovery, sets strict deadlines, eliminates dispositive motions and requires the hearing to commence within a certain time period after the case is commenced. These procedures can be incorporated, completely or partially, into an arbitration agreement.

l. Fees and costs to prevailing party. A prevailing party clause tends to discourage frivolous claims, counterclaims, defenses, appeals as well as scorched earth discovery.

m. Appeals. Parties who want a greater right to appeal may include an option to appeal to a second panel of arbitrators.

V. Conclusion – Are companies truly faced with a Hobson’s Choice?

Few will dispute that there are negative attributes to both litigation and arbitration. This can make it difficult to decide between two, arguably, equally objectionable alternatives.

On the one hand, the disadvantages to litigation may include excessive costs, broad discovery, the potential for unwanted publicity, lengthy proceedings, a judge who does not understand the issues in the case, and the inability to predict the outcome, especially in jury
trials. On the other hand, the disadvantages to arbitration may include high administrative and arbitrator fees, limited discovery, lenient (or nonexistent) evidentiary rules, lack of precedent, loss of appeal rights and inability to obtain certain relief. While arbitration offers more flexibility by allowing the parties to create their own restrictions on the proceedings, this may cause the arbitration to closely resemble litigation, thereby negatively impacting any potential cost savings and possibly defeating its utility. The truly best alternative may be neither arbitration nor litigation, but, instead, mediation.

If you would like further information on the benefits and pitfalls of litigation and arbitration, or require assistance in analyzing and deciding which forum is most appropriate for you, please contact us at www.agdglaw.com.

Authors:
John M. Riccione, Co-Managing Member at Aronberg Goldgehn
William S. Serritella, Jr., Litigation Department Chair at Aronberg Goldgehn
Amy M. Rapoport, Litigation Associate at Aronberg Goldgehn

7 This represents only the initial filing fee. If the case reaches hearing, the parties must pay an additional final fee ranging from $200 to $6,000. For cases in excess of $10,000,000, the initial fee is $12,800 plus an additional 0.01% of the amount above $10,000,000, with the fee capped at $65,000. AAA, Commercial Arbitration Rules and Mediation Procedures (Including procedures for Large, Complex Commercial Disputes) (June 1, 2009, fee scheduled amended June 1, 2010), http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.

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9 Id. (noting that 54 percent of total arbitrator compensation was incurred outside of actual hearings in the longest cases whereas non-hearing arbitrator compensation in the fastest cases constituted only 23 percent of total arbitrator compensation).


12 See id. at 817, 831, n. 79.

13 JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases (Jan. 6, 2010), p. 4., http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discov ery_Protocols.pdf (“where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision” and “[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.”); AAA, Commercial Arbitration Rules, supra note 7, at R-21.

14 JAMS Recommended Arbitration Discovery Protocols, supra note 12.

15 Nowicki, supra note 10.


17 Administrative Office of the United States Courts, supra note 1.

18 Christopher Lovrien, et al., Thinking Critically About Arbitration For Complex Civil Cases, Bloomberg Law Reports, Corporate Counsel, Litigation Management (Oct. 12, 2011).

19 Marinello, supra note 6.


22 National Arbitration Forum, supra note 19; Lovrien, supra note 16.

23 Lovrien, supra note 16.

24 Id.


28 Id.


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30 Id.
31 Id.
32 Id.
33 Lovrien, supra note 16.
34 Id.
35 JAMS Comprehensive Arbitration Rules, supra note 24, at Rule 32.
36 Id.
37 Nowicki, supra note 10.
38 Id.
41 AAA, Splitting the Baby: A New AAA Study (Mar. 9, 2007), http://www.adr.org/sp.asp?id=32004.
42 Id.
43 Douglas Shontz, supra note 36, at pp. 11-12.
45 AAA, Commercial Arbitration Rules, Supra note 7, at R-21.
46 New York State Bar Association, Report by Arbitration Committee of Dispute Resolution Section: Arbitration Discovery in Domestic Commercial Cases, Unanimously Approved by NYSBA Executive Committee and House of Delegates (Apr. 2009) (“Guidance for Arbitrators in Finding Balance Between Fairness and Efficiency”); JAMS Recommended Arbitration Discovery Protocols, supra note 12 (“[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.”); AAA, Commercial Arbitration Rules, supra note 7, at R-21 (“(a) [a]t the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information.”)
47 Lovrien, supra note 16.
48 JAMS Comprehensive Arbitration Rules, supra note 24, at Rule 17; JAMS Recommended Arbitration Discovery Protocols, supra note 12; Evan A. Davis, et al., Which is More Expensive, Litigation or Arbitration?, Litigation & Arbitration Report (Nov. 2009), www.cgsh.com (follow “news & publication” hyperlink; then type “arbitration” in “keyword” box).
49 1 Alt. Disp. Resol. § 8:60 (3d Ed.) (West 2011); AAA, Commercial Arbitration Rules, Supra note 7, at R-31 (noting that conformity to legal rules of evidence shall not be necessary); JAMS Comprehensive Arbitration Rules, supra note 24, at 22(d).
50 Marinello, supra note 6.
Under the Federal Arbitration Act, an award may be vacated (i) where it was procured by corruption, fraud or undue means; (ii) where there was evident partiality or corruption in the arbitrators or either of them; (iii) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior which prejudiced the rights of any party; or (iv) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made. 9 U.S.C. § 10(a) (West 2008); Hall Street Assoc., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1403 (2008) (discussing the limited grounds for challenging an arbitration award). The Uniform Arbitration Act, which has been adopted by most states, provides essentially the same grounds for challenging an arbitration award. Unif. Arbitration Act §23. The reported case law illustrates that the courts take these limitations seriously and confirm arbitration awards in all but the rarest circumstances. Marinello, supra note 6.


Marinello, supra note 6.

Id.

Id.; Lovrien, supra note 16.


Davis, supra note 44, citing Cole v. Burns Intern. Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (“we find that employees cannot be required to pay for the services of a ‘judge’ in order to pursue their statutory rights.”) (emphasis in original); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (case-by-case analysis of potential impact on similarly situated litigants should be used for determining whether cost-splitting provision in arbitration agreement is enforceable).


JAMS Recommended Arbitration Discovery Protocols, supra note 12, at p. 5;


Id.

Id.

Id. at p. 9.

Sussman, supra note 14, at 22.


Marinello, supra note 6.

JAMS Clause Workbook, supra note 57, at p. 3.

Lovrien, supra note 16.

Id.; JAMS Clause Workbook, supra note 57, at p. 3.

JAMS Clause Workbook, supra note 57, at p. 3.

Id. at p. 4.

75 Sussman, *supra* note 14, at 22


79 *Id.* at p. 5; Marinello, *supra* note 6.