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Building a More Perfect Beast: Rethinking the Commercial Arbitration Agreement

Stephen L. Hayford

I. INTRODUCTION

My views on drafting the commercial arbitration agreement are shaped in large part by two experiences. In 1994, I co-authored an article for the *Ohio State Journal of Dispute Resolution* entitled *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue* (hereinafter “*Commercial Arbitration in Evolution*”).¹ That article urged commercial arbitration practitioners and public-policy makers to undertake a deliberate evaluation of the process, and the neutrals who oversee it, with an eye toward producing a dispute resolution model that would be truly cost-effective, procedurally predictable and fair, and capable of consistently producing accurate and correct results in a wide array of controversies.² For the most part, save the good work in recent years by the College of Commercial Arbitrators, there has been precious little progress regarding the matters I attempted to put into play in that article fifteen years ago.

My second formative experience was the four years I served, along with my good friend Tom Stipanowich, as Academic Advisor to the National Conference of Commissioners on Uniform State Laws’ Drafting Committee charged with fashioning the Revised Uniform Arbitration Act (hereinafter “RUAA”).³ The RUAA Drafting Committee was also advised and observed by a broad array of attorneys from the various sections of the American Bar Association and other organizations interested in the form and content of the RUAA. I was at times puzzled by what seemed to me to be a rather incomplete, perhaps even unrealistic, view of commercial arbitration reflected in the comments made and positions taken by some of those advisors.

I perceived that the embrace of commercial arbitration on the part of some of the RUAA Drafting Committee advisors and observers was less than complete. There was a lot of feigned support for com-

1. Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343 (1995).

2. *Id.*

3. UNIF. ARBITRATION ACT (2000).

mercial arbitration, accompanied by a displayed reluctance to forego the myriad procedural protections of traditional civil litigation in exchange for a faster, less expensive, and more client-friendly/comprehensive means of resolving legal controversies. In particular, there was substantial reluctance to accept an arbitration model that relies on a simplified adjudication scheme entrusted to the supervision of a corps of bona fide neutrals, in which unfavorable outcomes (the awards) are essentially immune to judicial vacatur.

I am further alarmed by the far too frequent inattention of the transactional lawyers who draft commercial arbitration agreements and of the litigators who implement those agreements to the needs of their business decision maker clients (who are the end-users and the underwriters of the process). Some twenty-five years after the U.S. Supreme Court definitively signaled its endorsement of commercial arbitration,⁴ there is a recurring disconnect between that judicial sanction and the drafting and hearing behavior of arbitration counsel.

I submit to you that this failure to effect the kind of paradigm shift I called for in my article, *Commercial Arbitration in Evolution*, threatens the long-run viability of commercial arbitration. Attempts to restrict the reach and enforceability of the commercial arbitration agreements process will almost certainly grow during President Obama's administration. Senator Russ Feingold's Arbitration Fairness Act (hereinafter "AFA") likely will not be the last proposed federal statute intended to limit the enforceability of commercial arbitration agreements.⁵ Strong, articulate advocacy of the process by the business community will be a key to ensuring that the momentum building behind the AFA and its successors does not hobble the bilateral, business-to-business arbitration mechanism that is our subject today.

I have been waiting for an arbitration messiah for over a decade and because one has not appeared, I have decided to speak once again. Admittedly, my outlook is affected by my background as a long-time labor arbitrator and a professor at a top-fifteen business school. Those experiences have left me with a clear vision of how arbitration can and should work in the business-to-business realm. They have also crystallized in my mind the distinct differences that often arise between the interests and concerns of business decision makers and the attorneys who craft the arbitration agreement and represent the business in arbitration.

4. See generally *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (collectively known as the "Mitsubishi Trilogy").

5. See S. 1782, 110th Cong. (2007).

Business decision makers are accustomed to taking risks. In the context of a contractual or legal dispute, they are concerned not only with winning, but with delay and opportunity costs and with controlling process and outcomes. In contrast, most litigators are highly risk-averse, obsessed with winning, and not overly attuned with their clients' delay costs or the time value of money. In law school, we lawyers were not trained to think in these terms and only a few of us learn to do so consistently in the course of our practices.

Consequently, I am convinced that the majority of deliberately negotiated, non-adhesion commercial arbitration agreements are drafted primarily to serve the interests of the attorneys who represent the business client, such as minimizing risk and achieving every possible tactical advantage at hearing. That is a big mistake that must be remedied.

Therefore, I suggest a radical, iconoclastic approach to drafting the commercial arbitration agreement, centered upon creating a clear alternative to traditional litigation that contemplates the business decision maker end user's tolerance for risk, desire for expeditious resolution of disputes, and need for a comprehensible, transparent, and cost-effective mechanism for alternative dispute resolution (hereinafter "ADR"). That emphasis on the client's perspective and needs will require a paradigm shift on the part of the attorneys who draft and implement commercial arbitration agreements.

I want to emphasize once more that the arbitration venue I am addressing is the business-to-business sphere. Given this focus, we need not tackle the myriad procedural and substantive unconscionability concerns that provide most of the rationale for those who oppose other forms of adhesion arbitration agreements which are not the product of consensual negotiations between relative co-equals, such as consumer and employment arbitration agreements. It is my hope that moving past the adhesion arbitration conundrum will enable us to improve, and bring to bear, clarity in this inquiry.

II. THE GENESIS OF THE CURRENT DYSFUNCTION: "WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE"

Successful business decision makers are not risk-averse and do not expect a guarantee of success when confronted with uncertainty. Delay and opportunity costs are very important in the business world. Commercial arbitration will remain a viable alternative to traditional litigation only if the business end users who pay for it are convinced that the process appropriately balances these factors. At present, it does not.

Much of the under-drafting or over-drafting that lead, respectively, to latently ambiguous, incomplete arbitration agreements or to the more cumbersome, "litigation-light" provisions that needlessly complicate the process results from the failure of both transactional and litigation counsel to fashion the negotiated process around an objective and accurate assessment of the client's true needs. Far too often commercial arbitration clauses are written from the attorney's perspective, so they are based on those things with which the attorney is familiar and comfortable. I propose remedying this error.

III. THE MINDSET UNDERLYING THIS APPROACH

In recent years, there have been some useful articles setting out checklists of the issues that should be considered for inclusion in the well-drafted commercial arbitration agreement.⁶ Among the most useful of these is John M. Townsend's 2003 *Dispute Resolution Journal* article, *Drafting Arbitration Clauses Avoiding the 7 Deadly Sins*.⁷ It is not my purpose to revisit that well-plowed furrow. Instead, I will assume the role of provocateur in the hope of propelling counsel to consider shifting to a more client-centric approach to drafting the commercial arbitration agreement.

Business decision makers must rely on counsel to skillfully frame the commercial arbitration process because, with rare exception, they are not familiar with the law and civil process. That reliance gives rise to a duty on the part of counsel to ensure that the agreements they fashion are centered on the client's true needs. Too often, that is not the case.

There are many examples of the tone deafness of counsel to their clients' true needs. Thus, it cannot be denied that many transactional lawyers view the arbitration provisions of the commercial contracts they negotiate as an afterthought, a non-material term of the broader, substantive contract. Mere designation of a neutral arbitration provider (e.g., the Judicial Arbitration and Mediation Services, Inc. (hereinafter "JAMS") or the American Arbitration Association (hereinafter "AAA")) and the concomitant accession to the proper variant of that provider's commercial arbitration rules is the norm.

6. See generally Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, 51 DISP. RESOL. J. 17 (1996); JEFFREY BARIST, *COMMERCIAL ARBITRATION LAW AND CLAUSES: A DRAFTER'S GUIDE* (Prentice Hall Law and Business 1994); Jason C. Blackford, *Arbitration Provisions for Business Contracts*, 48 ARB. J. 3, 47-52 (Sept. 1993).

7. 58 APR DISP. RESOL. J. 28, 30-34 (Feb.-Apr. 2003). The seven sins of drafting identified by Townsend are: equivocation; inattention; omission; over-specificity; unrealistic expectations; litigation envy; and overreaching.

That is problematical because, while they are skillfully drawn, the AAA and JAMS rules are drafted primarily from a legal perspective. The type of thoughtful, end-user-focused draftsmanship I advocate requires something more from counsel—start with a clear assessment of the client’s business, needs, and desires and envision the type of arbitration process that best serves those needs.

Transactional lawyers charged with negotiating the broader, substantive contracts within which the commercial arbitration agreement resides usually possess substantial knowledge of their client’s business and attendant interests. Litigation counsel know arbitration and are familiar with its various substantive and procedural features which can secure the interests identified by transactional counsel. Often, however, neither type of counsel possesses both types of information, making effective interaction and communication between the two imperative.

Notwithstanding the reality just described, there is scant evidence in the practice of routine, in-depth, truly meaningful consultation between the transactional lawyers who negotiate the contractual arbitration device and the litigators who execute it. Where that drafting stage interface does occur, its results often appear predicated more on mimicking a civil trial than with fashioning a strategy for facilitating a time- and cost-effective ADR mechanism that achieves optimally accurate and correct adjudications for the client.

It simply cannot be denied that it is the lawyer’s legal-centric view of commercial arbitration that typically drives the drafting process. While these matters surely merit attention, they seldom bring the business decision maker’s interests to center stage. My goal is to once again urge the commercial arbitration bar to change that dynamic, by supplementing the legal dimension of the drafting process with a reality dimension founded on the client’s point of view and concerns.

At the end of the day, it is counsel’s responsibility to ensure that commercial arbitration adds value for the business decision maker as a vehicle for resolving contractual and legal disputes. If it does not, commercial arbitration will never meet its true potential as an alternative to traditional litigation.

IV. BUILDING A *MORE* PERFECT BEAST

Drafting a commercial arbitration agreement must be an exercise in assessing and balancing risk in search of an optimally balanced ADR device that produces outcomes which are accurate on the facts, pertinent law, and contract, as well as cost-effective and timely. That can happen only if the client takes an active role in the system design ef-

fort, and the client's interests are made the top priority. Consequently, the crux of the remainder of this article will challenge attorneys to remember: "This is not your process—it belongs to the client."

The starting point for the model we will construct is the presumption that only meritorious cases in which the client has a reasonable chance of winning will be arbitrated. Arbitration works best when it is a straightforward, uncomplicated search for the truth. Procedural and legal machinations that can serve to conceal material facts or make their discovery excruciatingly difficult, time-consuming, and inordinately expensive have no place in a client-centered commercial arbitration clause. If the client's case is a weak one, he or she should be urged to settle. Failure of counsel to ensure a robust reality check by the client before it embarks on the path to a commercial arbitration proceeding is a breach of the duty owed the client. If the client's case is indeed righteous, fair process will produce a positive outcome. If it is not, no amount of procedural and legal machinations will produce a win in arbitration.

The analysis and commentary that follows will not address a number of the elements of a well-drafted commercial arbitration agreement. Matters like venue, choice of law, damages, joinder, severability, enforceability, and the like, while important, are straightforward matters of law and procedure that can in most cases be handled effectively by invoking the commercial arbitration rules of the chosen provider, by citing the relevant provision of the RUAA in adopting states, or by adapting or tweaking either.

I will identify several areas where I am convinced an end user focus in the agreement drafting process, coupled with an active integration of the client in that effort, would greatly increase the attractiveness and ultimate utility of commercial arbitration to business decision makers. The areas I will touch upon are meant to be illustrative of the ameliorative effects of a client-centered approach to drafting the arbitration agreement. They are not held out as an exhaustive, complete list of those issues. The commentary will proceed in a roughly chronological order, as they arise in the typical arbitration proceeding.

A. *Scope of the Arbitration Agreement*

This is pretty straightforward; the focus is enabling the client to maintain the maximum control over the impact of the arbitration mechanism on its business. It should be predicated on a brief conversation to identify the core subject matter of the transactions governed by the underlying contract where the arbitration agreement will reside and an identification of the issues, organizational units, people, or

other matters (e.g., proprietary information) the client wishes to shield from the scrutiny of outsiders.

In addition to the subject matter of arbitration, the scope clause can be used to limit the remedial authority of the arbitrator, either by barring or limiting certain remedies (e.g., punitive damages, injunctive relief). The scope clause can also establish a statute of limitations, of sort, defining the time frame within which a timely claim may be brought in arbitration.

In the bilateral negotiated agreements being considered here, these desires would of course be subject to the wishes of the other party to the arbitration agreement. Nevertheless, there can be little doubt as to the value of bringing the business decision maker into the loop when the reach of the arbitration device is being determined.

B. *The Choice of Service Provider*

I am confident the concerns and interests of the client are seldom the driving factor in deciding whether to employ an arbitration service provider or to self-direct the process through a set of negotiated rules. Instead, the decision typically turns on the preferences of counsel. While counsel's desires are not irrelevant, the client's needs must again be the touchstone for this choice.

Among the factors that must be considered through the eyes of the client are the following: (1) the adequacy of the service provider's rules templates vis-à-vis the type and complexity of controversies that are likely to arise in the course of the client's business; (2) the depth, breadth, and quality of the provider's pool of available arbitrators (they are not equal); (3) the experience, expertise, and general quality of the provider's case managers; and (4) the provider's hearing facilities, technological resources, and related support services.

There is no need to buy your client a "Cadillac" if the client only needs a "Chevy." In fact, the client may not even require a "Chevy." Thus, for example, if counsel can agree on a qualified, mutually acceptable arbitrator (or a panel of mutually acceptable potential arbitrators) and can further agree that the framework provided by the carefully drafted, comprehensive terms of the RUAA are sufficient, they could decide to forego the engagement of a service provider to supervise the process. This is an especially viable option in light of the plenary discretion the RUAA grants the arbitrator to oversee and manage the process from front to back.⁸

8. See UNIF. ARBITRATION ACT § 15 (2000).

The suggestion that it may not be necessary to incur the expense and related machinations involved in selecting and working through an arbitration service provider may seem radical to most practicing attorneys. It is not. Sophisticated, experienced commercial arbitration counsel are perfectly competent to negotiate these matters, once they get a clear read of the client's interests. At the same time, the RUA is undoubtedly a sufficient starting point for an expeditious effort at fashioning a workable rules framework for the process. These matters are addressed further below.

C. *The Criteria for Arbitrator Selection*

The business decision maker's interests are best served by ensuring that the person selected to serve as arbitrator is a well-qualified, true neutral with expertise in the client's line of business and proven abilities to conduct a fair hearing and write a cogent award. Admittedly, my attitudes regarding arbitrator qualifications and arbitrator selection are impacted by my experience as a labor arbitrator for over thirty years. In labor arbitration, a well-established arbitral paradigm, counsel largely forego the maddening calisthenics associated with arbitrator disclosure and the endless efforts to "psych-out" the likely predispositions and possible prejudices of the arbitrator candidates. Instead, they focus the selection decision on the just-articulated indicia of arbitrator competence, choosing from a relatively small group of well-known full- or part-time arbitrators (numbering some 500 or 600 nationwide) who do not serve in an advocacy role of any sort.

In the labor arbitration world, the hearing conduct and award writing skills of the stable of mainline arbitrators who do the vast majority of the significant work are well-known. That information regarding the arbitrators' respective reputations is transmitted largely by word of mouth among the labor arbitration bar and by a small number of arbitrator rating/evaluation services. The imprimatur of competence, neutrality, and widespread acceptability signaled by a labor arbitrator's election to the prestigious National Academy of Arbitrators also simplifies the selection decision. Further evidence of the hearing conduct and award writing skills of the neutrals can be found in the large corpus of easily obtainable labor arbitration awards maintained by several on-line and traditional reporting sources (most particularly the Bureau of National Affairs and Commerce Clearing House).

The failure of the commercial arbitration bar to devise a reliable vehicle for obtaining the kind of quality information necessary to effectively judge, *a priori*, the hearing conduct, award writing, and other skills of potential arbitrators is puzzling. Instead of creating devices

that would make that information generally accessible, the commercial arbitration bar instead places primary reliance on the traditional conflicts check devices their firms use at the client engagement stage.

Arbitrator selection in the commercial arbitration-sphere is greatly complicated by the absence of an adequate corps of qualified, experienced arbitrators of unchallengeable neutrality. Although I cannot empirically verify the assertion, I am confident that the majority of commercial arbitrators today have a foot (or two) still firmly planted in an advocacy practice. Undoubtedly, it is this reality that has led to the fixation on conflict checks even when those mechanistic determinations do little to evaluate arbitral competence and at the same time often result in the striking of individuals who are highly qualified and capable of serving in a neutral capacity. This emphasis on the appearance of a conflict, instead of demonstrated arbitral skills, is the inevitable fallout of the tangled web of relationships that arbitrators who retain an advocacy practice bring to the arbitral station.

Conflict checks are not irrelevant to arbitrator selection, but they are not a reliable indicator of the relative merit and abilities of an array of unfamiliar arbitrators. The inordinate focus on conflict checks (some might say that it is an obsession in California) is largely the result of the fact that the vast majority of persons holding themselves out as commercial arbitrators also continue their advocacy law practices. Conflict checks are a relatively minor matter in labor arbitration because, in that venue, assumption of the neutral mantle requires one to forego advocacy work.

I do not have a definitive answer to this conundrum. Until a sufficient corps of full-time commercial arbitrators, who are not affiliated with a law firm and do no advocacy work, emerges, the commercial arbitration bar will have to devise a means for centering the arbitrator selection process on the candidate arbitrators' demonstrated abilities to manage the process, conduct a fair hearing, and draft a cogent, thoughtful award that is accurate on the facts and correct on the contract and the law. Wasting time, effort, and the client's money on futile efforts to achieve tactical advantage by selecting a third party who has never been personally or vicariously (through their law firm) involved with either party and/or whom they believe is predisposed to view their case and their client favorably is not justifiable.

The goal of the arbitrator selection process is to secure the services of an objective, thoughtful adjudicator who is capable of assuming the neutral station and to whom the client is comfortable delegating the authority to decide the controversy at hand. I have some ideas about how that can be routinely achieved, but for now, I will assert that it is

up to the commercial arbitration bar to focus the arbitrator selection process on the merit and objectivity the neutral brings to the arbitral proceeding. Anything else is surplusage and diminishes the value of the process to the client.

D. *Pre-Hearing Procedure*

The drafting-related dimensions of pre-hearing discovery and motion practice are the subject of much debate. There is undoubtedly a point of diminishing marginal returns regarding discovery that skilled counsel should be able to recognize based upon an objective assessment of the complexity of the factual and legal elements of the typical controversy that will be arbitrated under a given arbitration mechanism and the resources of the client. Similarly, the relative utility of the various pre-hearing motions is a matter to be determined by the nature of the client's business, its resources, and delay and termination costs. These lawyerly concerns are not the key pre-hearing elements for securing the client's best interests.

Business decision makers strongly prefer, and are most comfortable in, circumstances where they exert the maximum control over outcomes. While the legal maneuvers involved in pre-hearing discovery and motion practice make sense to attorneys, they seldom result in the business decision makers we serve gaining any additional control over outcomes. This dubious cost-benefit ratio, the invariable delay costs arising from extended discovery battles, and the reciprocal, almost always futile, motion practice should propel observant counsel to severely limit discovery and curtail or eliminate pre-hearing motion practice—specifically the dispositive motions intended to preclude the need for hearing and award.

Business decision maker's interests would be best served by refocusing the pre-hearing stage away from the standard pre-trial legal skirmishes that cause most of the delay and expense in traditional litigation (and too often in commercial arbitration), and toward ensuring that every attempt is made to negotiate a settlement to the controversy before the arbitration process is fully engaged. The first step in that regard would of course be a scheme that requires negotiations as early as possible after a dispute arises.

Experienced lawyers are well aware that the level of acrimony that often emerges during a rigorous discovery regime can do much to harden the parties' positions and harm their relationships. This happens because the focal point of discovery is to lay the predicate for an argument in arbitration about who is right and who is wrong on the facts, the contract, and the relevant law. Once that invasive, con-

frontational pre-adjudication process is underway, it is often impossible to establish or recapture the mindset and behavior necessary to shift back into an integrative problem-solving mode of behavior based on empathy, trust building, and mutual risk-taking. At the same time, the business client seldom will understand or significantly value the tactical gain sought by pre-hearing motions to limit discovery, dismiss or limit the complaint, or secure a summary judgment without hearing. The harsh reality is that those motions, especially the dispositive, outcome-determinative ones, are seldom granted by the arbitrator. That is why some form of good faith pre-discovery negotiation mandate is a *sine qua non* to a client-centered commercial arbitration agreement.

Counsel must take a proactive role in encouraging negotiations at the earliest feasible stage of a controversy—perhaps before the arbitrator is selected—but certainly before discovery and any pre-hearing motions are filed. In these negotiations, the facts, the contract, and the law will be less important than the respective interests of the parties and the maintenance of what was once, and likely still is, an important business relationship.

This does not mean that counsel should not play an important role at this “pre-legal” negotiation stage. Counsel should help clients assess the legal risk inherent in the controversy and balance that hazard against the business and economic risks that can result from a failure to fully explore all of the options for negotiating a settlement before the expensive and time-consuming hearing preparation and pre-hearing devices so comforting to counsel are engaged. Our task is to facilitate the client in adroitly managing risk and making wise and thoughtful decisions at the negotiation stage.

The value-added aspects of negotiated agreements from the client’s perspective are so considerable as to warrant inclusion of a second bite at the negotiation “apple” in the pre-hearing language of the commercial arbitration agreement. This would take the form of a provision mandating mediation if the un-facilitated negotiation fails to produce a settlement.

Like arbitrator selection, counsel should pay attention to identifying and securing the services of a competent, business-savvy mediator. Rote reliance on one of the neutral service providers is a mistake. Even my limited advocacy experience indicates the ease of identifying a corps of competent, business-wise, fair-minded attorneys in the local legal community who can be trusted to do an effective job of facilitating a rigorous effort at achieving a negotiated resolution. The con-

cerns with potential conflicts are greatly ameliorated in mediation because the mediator has no control over outcomes.

If this emphasis on pre-arbitration negotiation means that disputes are resolved earlier rather than later, the commercial arbitration bar must accept the reduced fees that will result. The upsides of client loyalty and commitment to ADR will be the law firm's reward in the long run. It may well be that in the pre-arbitration negotiation stage, an hourly fee-based compensation system does not make sense for the law firm or the client. Instead, law firms might consider some form of value-added fee arrangement founded on a percentage of the difference between an objectively determined, agreed-upon estimate of what the client stands to lose if the case fails in arbitration and the lesser amount agreed to in a negotiated settlement with the opposing party. This type of compensation arrangement would certainly incentivize counsel to exert the maximum effort at the negotiation stage to produce the best outcome for the client.

At bottom, the nexus between discovery and dispositive motions-related matters is not nearly as clear or direct as the link between a thoughtful negotiated settlement achieved shortly after the complaint is brought in arbitration. Consequently, more attention must be paid to fashioning arbitration agreements that place substantial onus on negotiation, mediated or otherwise.

Adequate discovery rules are necessary. Pre-hearing motions may be appropriate (although personally, I am a big fan of cutting to the chase by centering an entire arbitration mechanism on the hearing). The point is that counsel cannot truly fulfill its duty to the business decision maker client unless it steps outside of the legal comfort zone created by centering pre-hearing process on the litigation, like matters of discovery and dispositive motions. Otherwise, commercial arbitration loses much of its "alternative" patina and becomes a reflection of the traditional litigation model.

E. *Form of the Arbitration Tribunal*

There are three basic variants of the arbitration tribunal: a single arbitrator, three neutral arbitrators, and a tripartite arrangement where two advocate arbitrators join a neutral chairperson. Several factors warrant attention here. The first paramount factor must be ensuring the efficiency of the fact-finding process and the quality of analysis that leads to the arbitral result. My decades of practice leave me convinced that, with one exception, the three-arbitrator schemes do not produce levels of factual accuracy or analytical rigor superior to that provided by a single, carefully chosen neutral.

The one circumstance where the three-arbitrator variants make sense is when the neutral arbitrator can benefit from the subject-matter knowledge and/or technical expertise which he or she does not already bring to the table. However, my firm connection with reality precludes me from accepting the assertion that party-appointed arbitrators, unilaterally selected by each party, can somehow morph into a neutral role. True neutrality requires mutual selection—end of story. Therefore, the subject-matter, technical-expertise scenario justifying the expense and delay inherent in selecting three arbitrators instead of one makes sense only in the tripartite format.

With this single caveat in mind, in most instances, there is no good reason to subject the client to the tripling of expenses and the delay costs inherent in the two multiple-arbitrator models. Serving the best interests of the business decision maker client commands careful attention to this aspect of drafting the arbitration agreement.

F. *Hearing Procedure*

At this point, the divergence between commercial arbitration and traditional litigation should be stark. Unfortunately, it seldom is. More often than not, even experienced arbitration counsel are unable to resist the urge to fall back on their well-honed jury-trial tactics. They seem to forget that the myriad rules and safeguards of civil trial procedure are, in large part, intended to prevent the jury of laypersons from being misled or misdirected from its ultimate tasks—accurately finding facts and correctly applying the relevant law (or contract) to those facts. Experienced litigators are comfortable with this paradigm and find it very difficult to view commercial arbitration through a different lens.

Constrained by this one-dimensional perspective of the adversarial process, the commercial arbitration bar has shown little inclination to simplify the hearing process to take optimal advantage of the expert adjudicators they should be selecting to oversee the arbitration proceeding. Thus, despite the lip service often paid to the utility of stipulations of facts and the issues to be decided by the arbitrator—the advisability of simplified rules of evidence, limitations on expert witnesses, and the like—I seldom see such devices incorporated in the commercial arbitration agreement or effected at the hearing. Similarly, few commercial arbitration agreements sanction measures like expedited scheduling of the hearing, limitations on the length of the hearing or the number of witnesses, or oral closing arguments in lieu of post-hearing briefs where appropriate, or maximum brief lengths.

Arbitration is a search for the truth and anything that obstructs or overcomplicates that search has no place in the process. It is up to the commercial arbitration bar to discern what steps should be taken to ensure that the arbitration agreement effectively streamlines the arbitration hearing while still securing for the client the fundamental guarantees of substantive and procedural due process, all within the context of an expertly-led and supervised proceeding.

G. *The Arbitration Award and Post-Award Procedures*

Imagine the reaction of a business decision maker when told that to minimize the likelihood of judicial reversal of the alternative dispute resolution result which he has been encouraged to embrace, it is necessary to forego a reasoned award explaining the findings of fact, the interpretation of the contract and relevant law, and the application of the contract and law to the facts that led to that result. Remember, business decision makers are accustomed to taking risks. Balancing risk and return is what the business client does for a living. It is no wonder these clients so often find the world of law and lawyers to be alien.

The point is that a carefully fashioned arbitration agreement that strikes an optimal balance between expediency, costs, and rigor should make the business decision maker client comfortable with the risk of an adverse outcome in arbitration. The business clients we serve “pay their quarters and take their chances” on a daily basis. They do not seek absolute certainty of result or perfection of process. Instead, they relate to manageable risk and the opportunity to get a fair shake in the adjudicatory forum.

Given the client’s perspective in this regard, our lawyerly fear of losing and our compulsion to always leave open an avenue of appeal, no matter how futile, requires recalibration. Surely, careful design of the arbitration apparatus and thoughtful selection of the arbitrator who sits at its helm will provide at least as sound an assurance of a fair process and an equitable result as that provided by conventional civil litigation. If that is true, there is no good reason to forego the requirement of a reasoned arbitration award.

Nothing holds the arbitrator’s feet to the fire more than the realization that, upon completion of the hearing, he will be obliged to accurately articulate the material facts, correctly define the issues to be decided, clearly summarize the respective arguments of the parties, and build a cogent theory upon which the award ultimately rests. The knowledge that one’s attention span at the hearing, grasp of the principles of contract interpretation, knowledge of the law, and analytical

skills will become part of a permanent written record is a sobering prospect for all who aspire to the arbitral office.

This is exactly the kind of gauntlet that our business decision maker clients face every day in the competitive marketplace. It speaks in resonant tones to accountability, reward of merit, and punishment of incompetence. To deny the client a window into the arbitrator's mode of decision because counsel desires to further minimize the already remote prospect of judicial vacatur of a favorable award does not comport well with the client's interests.

Notwithstanding the preceding commentary, there is a rational basis for seeking to provide the client with a reasonable quantum of protection against what one of my colleagues on the RUAA Drafting Committee often referred to as the "bonehead arbitration award." In the course of the Drafting Committee's deliberations regarding vacatur, I frequently asserted that the best protection against a bonehead award is to not select bonehead arbitrators. Because I earlier addressed arbitrator selection, I will forego further discussion of that dynamic here.

The RUAA Drafting Committee considered including in the Act an explicit statutory sanction of appellate arbitral review as an alternative to the standard resort to a petition for judicial vacatur of an unfavorable arbitration award. Ultimately, the Drafting Committee concluded that because the authority to contract for such a review mechanism is inherent and because such provisions can differ significantly depending upon the needs of the parties, there was no need to include a specific provision within the statute. Although the appellate arbitration device was not explicitly sanctioned by the RUAA, it is an option that warrants consideration in the course of drafting the commercial arbitration agreement.

To preclude full re-litigation of the parties' cases-in-chief in the appellate arbitration proceeding, it makes sense to limit the scope of the appellate device to questions of contract and/or law and application of contract and law to fact. No witnesses should be permitted, and the appellate proceeding should be limited to oral arguments based on the findings of fact made by the original arbitrator. Any attempt to overturn the facts found by the initial arbitrator should be expressly prohibited.

The parties are of course free to specify the grounds for reversal of the original award. Nevertheless, the business decision maker client's interests are best served by narrowing those grounds for reversal. As an unapologetic advocate of arbitral finality, I assert that the grounds for reversal of a challenged award in the appellate arbitration forum should be founded squarely on, and limited to, the four narrow crite-

ria set out in Section 10(a) of the Federal Arbitration Act.⁹ Full closure and definitive finality can be achieved by a provision barring any further review, judicial or otherwise, of the appellate arbitral result. As to the number of arbitrators at the appellate level, I again come down on the side of one good, mutually acceptable arbitrator.

I am convinced that any business client that makes an informed decision to agree to the arbitration of future disputes which may arise under a contract will consider the back-end features of the process just described a sufficient hedge against the risk of an errant, unjustified decision at the initial arbitration stage. This is true because those elements of the arbitration agreement will: (1) illuminate the arbitral decision making process by obliging the arbitrator to reveal the mode of decision; (2) provide a rigorous cost and time efficient second bite at the apple in the event of an initial loss; and (3) ensure a definitive termination of the process that does not permit resort to the courts by the ultimate loser in arbitration.

V. CONCLUSION

The purpose of this article is not to provide a comprehensive checklist for competent drafting of a commercial arbitration agreement; rather, the objective is to propel the commercial arbitration bar to come more clearly to grips with the need to reconcile our lawyerly view of what constitutes a properly constructed arbitration mechanism with the world as the clients see it.

Business decision makers are not wired the same as lawyers. When they consider the possible benefits of an alternative to traditional litigation, they do not think in terms of a foolproof, fail-safe device intended to eliminate virtually all risk of losing. Rather, they seek a value-added proposition, a process which will enable them to maximize the control over outcomes and produce objective, rational, and fair results in the shortest possible period of time and at the lowest possible cost.

9. Federal Arbitration Act, 9 U.S.C. § 10(a). Those four grounds for vacatur are:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Exactly where that Pareto Optimality frontier lies in the interface between the lawyer's and the business decision maker client's views of process can only be determined on a client-by-client basis. Because business clients typically do not comprehend what they perceive to be the many mysteries of the legal world, it is counsel's duty to explain those things to them and lead them through the maze they create.

Fulfilling that duty requires counsel to achieve a paradigm shift of a sort that embraces the measured tension that a thoughtfully designed alternative dispute resolution procedure, culminating in arbitration, can produce. That tension consistently drives the parties to take the risks and make the hard decisions necessary to achieve outcomes that they control, turning their fates over to an outsider for decision only when all reasonable efforts at achieving a negotiated settlement have been exhausted.

If counsel devises or permits her transactional lawyer colleagues to create a commercial arbitration mechanism which the client does not understand or that leads the client to believe it will always be able to escape an unfavorable arbitral outcome, the client will be ill-served. In the pre-arbitration steps the business decision maker will not be motivated to push past its resistance points and begin thinking in terms of what it needs, as opposed to what it wants. Clients and the attorneys who advise them must learn to objectively assess the relative value of the "bird in the hand" of settlement with the "bird in the bush" of arbitration. If that juxtaposition results in more settlements early in the process that are good for the client but bad for the law firm's bottom line, so be it. It is counsel's duty to put the client first.

At bottom, if counsel and its informed clients are not willing to tolerate the risk inherent in a carefully crafted alternative dispute resolution scheme culminating in binding arbitration, counsel should pass on ADR and proceed to the civil justice system. Trying to further reduce or eliminate the reasonable quantum of risk inherent in a competently-fashioned and skillfully-led commercial arbitration proceeding by unnecessarily burdening the enabling agreement and the process with features intended either to minimize (beyond the point of diminishing marginal returns) the risk of an unfavorable award or to preserve an appeal is counterintuitive in a system intended to serve as a true viable alternative to litigation in a civil justice system so plagued by delay, cost, and artifice.

One thing lawyers do not understand about the business world is that outcomes that are digestible and preserve relationships are much more important to our clients than achieving victory by being affirmed as having been right in an adjudicatory forum. At times, it is necessary

to resort to adjudication to determine who is right. When that happens, the interests of the business decision maker client commands that the adjudicatory process adopted as an alternative to traditional litigation be transparent, efficient, and capable of consistently producing results that are accurate on the facts and correct on the contract and relevant law. That is counsel's mission in drafting, or interacting effectively with the drafters of the commercial arbitration agreement.

It is time for a gut check. Counsel must ask themselves whether they really believe in commercial arbitration as a means for resolving disputes that is riskier, less remunerative, and less-programmed than the traditional litigation paradigm in which lawyers were trained to live, and in which they have prospered. Or, are counsel just pretending to love arbitration, as long as it is really conventional litigation in disguise?

I cannot answer that question on behalf of anyone else. I can suggest that until attorneys shift out of the lawyer-centric, risk-averse comfort zone they grew up in professionally, and get more in the shoes of the business decision makers who pay their bills, attorneys will not truly understand the dynamic this article has described.

Done properly, commercial arbitration offers the business client a very valuable alternative to civil litigation in a court of law. Done wrong, it only adds to the mystery and opaqueness of the law and the civil justice system most business executives find when forced to foray into our world. Because the process unfolds on counsel's turf, business clients are compelled to rely upon counsel to explain and rationalize that world for them. That reliance gives rise to a duty to become acquainted with the full range of the client's interests and to construct commercial arbitration instruments that truly serve those needs.

If attorneys do not ensure that the business decision maker client's interests are the starting and ending points of the arbitration agreement drafting process, then they are failing the client and ignoring their duty.