



THE
AMERICAN
REVIEW OF
INTERNATIONAL
ARBITRATION



2012/Vol.23 No.2

GREAT EXPECTATIONS: MEETING THE CHALLENGE OF A NEW ARBITRATION PARADIGM

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*We look at the present through a rear-view
mirror. We march backward into the future.***

Courts, commentators and arbitration organizations have observed that the hallmark of arbitration is that it is “a speedy, efficient, and less expensive alternative to court litigation.”¹ Business users complain that arbitration is no longer faster and cheaper than litigation.² In fact, it has taken on many of the time-consuming and negative characteristics of litigation – including expensive discovery, motion practice and tactical delaying stratagems – as practiced especially in the United States.³ One commentator has observed that “[b]y the beginning of the twenty-first century . . . it was common to speak of U.S. business arbitration in terms similar to civil litigation – ‘judicialized,’ formal, costly, time-consuming, and subject to hardball advocacy.”⁴

Arbitration organizations have taken notice. At the Orlando AAA Neutrals Conference held on November 5, 2010, William Slate, President and CEO of the American Arbitration Association, in his keynote address entitled *All Hands on*

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** MARSHALL McLuhan, *THE MEDIUM IS THE MESSAGE* 73-74 (2001).

¹ *Westridge Investment Group v. McAtee*, 968 S.W. 2d 243, 245 (Mo. CA 1998); *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (“Arbitration is designed . . . to avoid the complex, time-consuming and costly alternative of litigation”); *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’”).

² In response to the expressed concerns, corporate counsel of the largest multinational companies formed an advocacy organization in 2006 called Corporate Counsel International Arbitration Group. The Group’s “principal goal is to ensure that international arbitration provides its users with a robust, flexible, timely and cost-effective procedure for the resolution of international disputes.” *Available at* <http://www.cciag.com>.

³ See Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARB. 3 (2008).

See also *The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Provider Institutions*, The CCA College of Commercial Arbitrators (2010).

⁴ Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 ILL. L. REV. 1 (2010).

Deck, stated: “Indeed, ‘cost and delay’ as an issue is the single biggest challenge – the most formidable concern facing arbitration today both domestically and internationally.”⁵ While he lamented that the “concerns expressed are often the result of anecdotes, which should not be confused with empirical evidence,” they have become “accepted wisdom” in the user community.⁶

Users are telling arbitration organizations that “[w]e are looking for arbitrators with teeth,”⁷ sometimes expressed as a desire for “muscular arbitrators.” But, for at least some users, such muscularity has not necessarily produced the desired outcome.

It is not uncommon for arbitrators to speak about “battling” lawyers who are jointly seeking extensive discovery that the arbitrators do not believe should be granted; or for arbitrators to indicate at the preliminary conference that they do not believe that depositions are appropriate or that there should not be more than two or three.⁸ The arbitrator who expresses a belief on the propriety of depositions in arbitration proceedings has a clear view, presumably on the need for expedition. However, it is less clear why an arbitrator believes that two or three depositions are appropriate, especially at such an early stage of the proceeding.⁹

In many arbitration proceedings, the tribunal is required to rule on a host of procedural issues in addition to the number or propriety of depositions, including: the extent of documentary discovery, submission of testimony by fact witnesses, dispositive motions, issuance of subpoenas, and the use and length of pre-hearing and post-hearing briefs. In an international proceeding, the arbitrator is often additionally required to consider and balance procedural standards developed in civil-law and common-law jurisdictions, including different laws and ethical standards affecting document retention and production, preparation of witnesses, oral presentation of evidence, and cultural norms and biases. However, because there is no universally recognized arbitral model, arbitrators and users bring diverse and often contradictory views and expectations to all of these issues. This diversity, sometimes interpreted as flexibility, has come to be seen as a virtue of

⁵ William Slate, *Keynote Address*, Orlando AAA Neutrals Conference, Nov. 5, 2010, available at <https://apps.adr.org>.

⁶ *Institutional ADR Today: The Comprehensive, Cost-Effective Alternative* (Editor’s Interview with William Slate), 19(8)THE METROPOLITAN CORPORATE COUNSEL (Aug. 2011), available at www.adr.org.

⁷ Slate, *supra* note 5.

⁸ Rule 17(b) of the JAMS Comprehensive Arbitration Rules & Procedures allocates one deposition to each party. Additional depositions are subject to arbitrator discretion.

⁹ Many of the leading arbitrators in the United States are readers of one or more “Listserve,” on-line discussion forums allowing for a lively exchange by a good cross-section of arbitrators in the U.S. on the most current topics and court decisions affecting arbitrations. To any daily subscriber, it quickly becomes clear that there is no unified view among arbitrators of an ideal arbitration procedural model. Of the 600 or so participants in any one particular listserve, there will be almost as many opinions expressed as to how the participants would handle a particular arbitral issue.

arbitration. Ironically, it is also the source of much of the discontent expressed by users today.

Historically, arbitrations were conducted under rules that were implicitly understood and accepted by all participants. If there is no longer such a common understanding, it is because the environment in which arbitrations take place has undergone a paradigm shift. Arbitration is increasingly being used as a dispute resolution model of choice for both domestic and international business disputes. Many of the disputes that are arbitrated today are more complex than the relatively simple commercial cases that were arbitrated in the past; and the number and diversity of participants in the arbitral process – whether parties or arbitrators – has dramatically increased.

The absence of a common understanding of procedural rules not only causes confusion and uncertainty, but also creates a vacuum that participants fill in a variety of ways. Often, users seek to avail themselves of procedures that are used in court-litigated disputes, with resulting increased arbitration costs and allocated time. This, in turn, has fueled an effort to have “muscular” arbitrators resurrect a bygone era when arbitration was in fact less expensive and time-consuming than court litigation, without recognizing arbitration’s metamorphosis and addressing evident structural deficiencies.

As this paper will argue, encouraging arbitrators simply to be more assertive and to focus primarily on “time and costs,” without more, compounds the problem instead of ameliorating it, because such an approach often will be in conflict with the fundamental expectation of the parties that arbitration, like any dispute resolution process, be fair. To be sure, efficiency, in terms of both time and costs, plays a very real and necessary role in arbitration as it does in any system. However, touting efficiency without presenting a clear alternative procedural model is less than optimal.

In keeping with the consensual nature of arbitration, arbitrators should be guided by the wishes and intentions of the parties. Thus, while it is necessary for arbitrators to firmly and efficiently enforce a structured, rule-based process, this disciplined approach can only be used effectively if, at the outset, the parties agree on the procedures that will govern or, in the absence of such agreement, the parties are provided with a fair and transparent set of procedures, whether in the form of institutional default rules, or rules fashioned by the tribunal.

I. THE MODERN ERA OF ARBITRATION IN THE UNITED STATES

Modern arbitration law in the United States can be traced back to the 1920s. New York was the first State to enact an arbitration law in 1920 followed by enactment of federal arbitration legislation in 1925.¹⁰ The Federal Arbitration Act¹¹ (the “FAA”) corrected a long-standing judicial hostility to arbitration,¹²

¹⁰ See FRANCES A. KELLER, *AMERICAN ARBITRATION, ITS HISTORY, FUNCTION & ACHIEVEMENT* (1948).

¹¹ 9 U.S.C. § 1 *et. seq.*

which dated back hundreds of years and originated under English common law.¹³ Arbitration provisions governing future disputes were not enforceable and parties could withdraw from the arbitration proceeding at any time prior to the final award.¹⁴ By enacting the FAA, Congress sought to place arbitration “upon the same footing as other contracts, where [they] belong”¹⁵ and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.¹⁶ Under the new law, agreements governing future disputes relating to a contract became legally valid, enforceable and irrevocable, save as to the way any other contract is revocable.¹⁷

The disputes envisioned as suitable for arbitration were business-to-business disputes that required quick and efficient resolution¹⁸ – precisely the type that had been privately resolved long before arbitration agreements were officially blessed by legislators. These were often trade disputes, which the parties agreed to have

¹² See *AT&T Mobility LLC v. Vincent Concepcion*, 131 S. Ct. 1740, 1745 (2011); see also *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

¹³ The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H. R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

See also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985); Preston D. Wigner, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present and Future of Section 2*, 29 U. RICH L. REV. 1499 (1995).

¹⁴ KELLER, *supra* note 10, at 11.

¹⁵ H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). See also *The Federal Arbitration Act: Background and Recent Developments*, Aug. 2003, CRS Report for Congress, Jon O. Shimabukuro, Legislative Attorney, American Legal Division [hereinafter CRS Report on FAA].

¹⁶ *Dean Witter Reynolds*, 470 U.S. at 219-20.

¹⁷ 9 U.S.C. § 2.

¹⁸ “[Arbitration] is a remedy particularly suited to the disposition of the ordinary disputes between merchants as to questions of fact – quantity, quality, time of delivery, compliance with terms of payment, excuse for non-performance, and the like. It has a place also in the determination of the simpler questions of law – the questions of law which arise out of these daily relations with merchants . . . which are complementary to the questions of fact which we have just mentioned.” Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

resolved by a senior and respected member of the trade,¹⁹ effectively opting out of the dispute resolution forum offered by the State. Not only would the dispute be resolved by a third-party neutral in a quick and cost-effective manner, but the third party could be relied upon to make a determination that both parties would accept. The procedure to be utilized for the resolution of the dispute was simple and straightforward and was implicitly understood and accepted by all participants.

While Congress' motivation in drafting the FAA was to place arbitration agreements on an equal footing with other contracts, Congress also recognized the legislation's incidental benefits: easing congestion in the courts, and reducing delay in the resolution of commercial disputes.²⁰ However, these benefits were viewed as merely an ancillary by-product.

Justice Marshall in *Dean Witter Reynolds, Inc. v. Byrd*²¹ highlighted the essential features of arbitration:

The legislative history of the Act [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements.

While recognizing that Congress was not oblivious to the potential benefits of the legislation, namely the expedited resolution of disputes, Justice Marshall emphasized that the “passage of the Act was motivated, first and foremost, by a Congressional desire to enforce agreements into which the parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.”²²

Similarly in *AT&T Mobility v. Concepcion*,²³ Justice Scalia reiterated that the FAA establishes the “fundamental principle that arbitration is a matter of contract”

¹⁹ In the maritime field, commercial disputes have long been resolved by specialist third-party neutrals. For example, the Society of Maritime Arbitrators of New York describes its roster of arbitrators as being comprised of individuals who are “presently employed in or have worked in responsible commercial positions in the maritime industry for at least 10 years.” Available at <http://www.smany.org/sma/maritimefaq.html>.

²⁰ “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.” H. R. Rep. No. 96, 68th Cong. 1st Sess., at 2 (1924), CRS Report on FAA, *supra* note 15, at 3.

²¹ 470 U.S. 213, 219 (1985).

²² *Id.* at 220.

²³ *AT&T Mobility*, 131 S. Ct. at 1745 (internal citations omitted).

and that “courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms.”

The FAA is neutral as to the length of the process, the cost of the process or whether the proceedings are held on the moon or in Calcutta. However, recognizing that the hallmark of arbitration is that it is a creature of contract, “the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.”²⁴

When arbitrators restrict or deny party demands in the “interests of the arbitration process,” they misunderstand their role and exceed their mandate. Arbitrators serve no master other than the parties appearing before them. Party autonomy is paramount. Parties place their trust and faith in an arbitrator and expect the arbitrator to meet their expectations for a fair and reasonable process and outcome. Just as the user community is disillusioned with costly, run-on arbitrations, it will become equally if not more disillusioned with assertive arbitrators who fail to act in accordance with the wishes of the parties.

II. THE NEW ARBITRATION PARADIGM

During most of the 20th century, arbitration was viewed by merchants as a way of resolving relatively simple commercial disputes, or technical ones, by specialist third-party neutrals. Arbitration was seen as a quick and efficient alternative to a cumbersome court system. Parties understood how the dispute would be resolved and the time and effort needed to do so. There was an implicit common understanding of the rules of the game.

Arbitration in the 21st century has entered a new era. It is no longer restricted to the resolution of simple commercial disputes, but often involves complex legal and factual issues, multiple jurisdictions, and participants from diverse legal systems with varying levels of arbitration experience. Arbitration today is big business, with hundreds of millions – and at times, billions – of dollars at stake.²⁵ In fact, this state of affairs prompted Justice Anthony Kennedy to explain why the United States Supreme Court docket is more heavily oriented toward criminal and First Amendment cases: “[t]he docket seems to be changing . . . A lot of the big civil cases are going to arbitration. I do not see as many of the big civil cases.”²⁶

²⁴ *Hall Street*, 552 U.S. at 586.

²⁵ The American Lawyer’s 2011 Arbitration Scorecard (active cases in 2009 and 2010) lists 113 international arbitrations valued at \$1 billion or more. Aspiring international arbitration lawyers were given the following advice: “Bringing a billion dollar claim is no longer enough to stand out in a survey of international arbitration. Nor is it enough to win a measly \$100 million. Attention, arbitration lawyers: What it takes to distinguish yourself is a \$350 million award, minimum.” Michael D. Goldhaber, *The 2011 Arbitration Scorecard: High Stakes*, THE AMERICAN LAWYER, July 5, 2011.

²⁶ Statement made on August 1, 2011 to reporters covering the Judicial Conference, reported by Adam Liptak, N.Y. TIMES, Oct. 1, 2011.

Arbitration can no longer be viewed in a monolithic fashion. It is simplistic to assume that parties choose to arbitrate merely to save time and costs. That is not to say that parties do not want the process to be efficient and cost-effective – of course they do. But they will not trade efficiency for success or the ability to be heard. Parties opt out of the court system for a myriad of reasons²⁷ including: confidentiality, privacy, finality, expertise of decision-maker, convenience of forum, “concierge” or personalized service, and the ability to shape the arbitration proceedings; and additionally, in international proceedings, to avoid bias in a home court jurisdiction or a mismanaged judicial system, and the ability to enforce an arbitration award through the mechanism of the New York Convention. And, of course, arbitration can also be chosen because the parties may in fact be primarily looking for a quick and cost-effective resolution of a dispute.

When critics of arbitration maintain that it is becoming more like litigation, they are quite correct. But the question that is never asked is why? Is it because, as users claim, arbitrators are too lax and are not “flexing their muscle” sufficiently? Or is there another reason? It is suggested that arbitration today resembles litigation because the traditional arbitration model is often not appropriate for the resolution of complex and/or high value cases. That model, including the procedures for presentation of evidence, was simple and straightforward. The parties had a dispute over, for example, the quality of the cloth delivered by a manufacturer to a wholesaler. The parties agreed to have the dispute arbitrated by a neutral. An implicit understanding existed among the parties and the arbitrator on the procedure to be followed – for example, to physically deliver the cloth to the neutral “expert” for inspection, following which the neutral would render an opinion as to which of the two parties to the dispute was correct.²⁸ The point to emphasize is that not only were the procedural rules clear; they were also an implied and accepted term of the arbitration agreement.

However, this model is not appropriate for the resolution of many contemporary commercial disputes, not only because they are higher value and more complex, but also because of continuing advances made by modern society in science, technology and general know-how. Parties to modern arbitration naturally draw upon this ever-expanding knowledge base to support their positions. The same cloth examined by a respected neutral during the earlier part

²⁷ According to a 2011 Rand Institute study, “Business-to Business Arbitration in the United States: Perception of Corporate Counsel,” factors which encouraged parties to use arbitration included: risk of excessive jury award (75%); control of qualification of arbitrators (70%); confidentiality (67%); expertise associated with complex cases and contracts (59%). According to the Queen Mary, University of London PriceWaterhouseCoopers, *International Arbitration Corporate Attitudes and Practices (2006)* survey, [hereinafter Queen Mary 2006 Survey] factors encouraging arbitration are: procedural flexibility, enforceability of awards, privacy of process, and selection of own arbitrators (depth of expertise).

²⁸ For a description of arbitral proceedings in the trades, see Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry* 21 J. LEGAL STUD. 115 (1992).

of the last century might be analyzed today by a party-retained scientific laboratory for, among other things, abrasion (inflated diaphragm, taber abrasion, pilling, Wyzenbeek), colorfastness (crocking, frosting, sublimation), construction (pH of aqueous solution), performance (bond strength, air permeability, coating resistance to release, breaking strength) etc.²⁹ Should arbitrators exclude or restrict expert testimony concerning the cloth because that is not how the dispute would have been handled in the past?

Parties involved with a complex case today approach arbitration with trepidation precisely because there is no common understanding or accepted procedure as to how the case should be prepared and presented. Confronted with this vacuum – a systemic breakdown of a procedural model – parties naturally fall back on the only way they know to present their case to a neutral third party. A lawyer, whether trained in the civil-law or common-law tradition, will look to his training and practice before the national courts of his jurisdiction. And arbitrators, who frequently are experienced litigation lawyers themselves, will accede to court-based procedures. The result is that arbitration *is*, in fact, becoming more and more like litigation.³⁰

III. USER DISSATISFACTION AND FAILED EXPECTATIONS

This brings us back to the original question posed in this paper. Is the user community critical of arbitration only because it has become “judicialized” – costly and time-consuming?³¹ Or is there a more deep-seated dissatisfaction that represents a fundamental failure to meet the parties’ expectation that the arbitration process will be fair?

As earlier discussed, commercial arbitration has undergone a paradigm shift. Yet, like parents who fail to recognize that their child has grown up, we continue

²⁹ See generally, services offered by textile laboratories such as the New World Textile Testing Laboratory.

³⁰ Not only is arbitration becoming more like litigation but, ironically, and one may add unwittingly, arbitrators are sometimes perceived to be exceeding their authority by acting like common-law judges. In overturning the arbitrators’ ruling in *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), Justice Alito admonished the arbitration community not to exceed the arbitral mandate of resolving disputes in accordance with the private contractual agreement of the parties; and came down hard on what he perceived to be the arbitrators’ venture into the realm of formulating public policy: “Rather than inquiring whether the FAA, maritime law, or New York law contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation . . . The conclusion is inescapable that the panel simply imposed its own conception of sound policy.”

³¹ The CCA College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, *supra* note 3, used the term “failed expectations” to refer to the expectations of the user community for speed, economy and efficiency in arbitration.

to view arbitration through the prism of the past. The Canadian philosopher, Marshall McLuhan, famously stated that society understands the present through its view of the past: “The past went that-a-way. When faced with a totally new situation, we tend always to attach ourselves to the objects, to the flavor of the most recent past. We look at the present through a rear-view mirror. We march backward into the future.”³²

What is the expectation of parties who engage in arbitration today? Is it that the dispute will be resolved quickly and inexpensively, be drawn-out and costly, or even something in between? How are the parties going to present their case? Who is going to decide and on what basis? While users may be uncertain as to how the arbitration will be conducted, their overriding expectation is not in doubt – the parties want a fair hearing.

Users of arbitration often express their disappointment with the arbitration process due to its lack of efficiency. However, in a comprehensive study conducted by the American Arbitration Association of both parties and attorneys who participated in actual arbitrations during a defined period, different user expectations were discerned. In the period between January 1 and November 30, 2000, participants were asked to rank in order of importance eight criteria: speed, privacy, receipt of monetary award, fair and just outcome, finality, arbitrator expertise and continuing relations with opposing party. The authors concluded:

The most significant result of the forced-ranked survey is that an overwhelming majority of the parties ranked fair and just result as the most important attribute, even above receipt of a monetary award, speed of outcome, cost or arbitrator expertise . . . The differential in rankings was quite significant, with 81 per cent of those surveyed ranking a fair and just result as most important . . . while receipt of monetary award, speed of outcome, cost and arbitrator expertise were ranked most important . . . by between 41 per cent and 46 per cent of the participants.³³

This result is in accord with the 2010 Queen Mary Survey³⁴ where 68% of respondents cited open-mindedness and fairness as the most important factor in the selection of an arbitrator. Ultimately, after all the discourse, what users want and expect in an arbitration proceeding is a fair process.

In his famous work, *The Morality of Law*,³⁵ Professor Fuller outlined eight ways in which a legal system can fail to be moral. First, is the failure to achieve rules at all, so that every issue must be decided on an *ad hoc* basis; second, the

³² MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* 73-74 (2001).

³³ Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration, Expectations and Perceptions of Attorneys and Business People: A Forced-Ranked Analysis*, 30 INT’L BUSINESS LAWYER 203 (2002).

³⁴ 2010 International Arbitration Survey: Choices in International in International Arbitration, Queen Mary, University of London/White & Case Survey at 25.

³⁵ LON L. FULLER, *THE MORALITY OF LAW* (1964, revised 1969).

failure to make available to an affected party the rules he is expected to observe; third, the abuse of retroactive legislation; fourth, the failure to make rules understandable; fifth, enactment of contradictory rules; sixth, rules that require conduct beyond the affected party; seventh, introducing such frequent changes in the rules that the subject cannot orient his action by them; and eighth, failure to achieve congruence between the rules as announced and their actual administration. Professor Fuller posited that “[a] total failure in any *one* of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.”³⁶

A legal system fails when the expectation of fairness is not met. Enacting a law, without providing clear rules and procedures by which the law will be enforced, is akin to having no law at all. It is like inviting parties to participate in a sporting event where the referee tells the players that he will make up the rules of the game as the game develops. A game without rules is no game at all; it is the process of complying with a set of understood rules in a competitive fashion that is the essential feature of a sporting event. It matters not whether the objective is putting a puck or ball in a net, hitting a ball over a barrier, or playing American football outdoors on a field that measures 100 yards or indoors in an arena designed for ice hockey. Satisfaction is derived from competing within the boundaries of a set of understood rules. Losing – or winning for that matter – without knowing why you lost (or won), is not satisfying at all; and, in fact, is meaningless.

So, too, in an arbitration proceeding, the parties need to know the rules of the game. Arbitration today offers no rules of procedure, and when faced with the procedural vacuum, parties naturally adopt the only rules they know – those of their home jurisdiction. When an arbitrator acts “assertively” in the “interest of the arbitral process,” at a minimum, he creates confusion; at worst, the participants will perceive the arbitration as unfair and surely their expectations will not be satisfied. Encouraging arbitrators to be more assertive in the absence of an accepted set of rules of procedure for the hearing creates the very opposite of what it is meant to accomplish.

Expectations can fail equally with a short hearing as with a long one; an assertive arbitrator or a passive one. Some users of the arbitration process may very well look to arbitration for a speedy and inexpensive resolution of the dispute. If the arbitration process is bogged down in cumbersome discovery and legal wrangling and ends up costing the user a lot of money, the user will be disappointed. If, however, the user is involved in a complex commercial dispute requiring extensive discovery and the arbitration panel denies the parties’ wishes in the purported defense of the “integrity of the arbitration system” the user will be equally disappointed.

It cannot be assumed as a matter of course that the parties have decided to forego the State dispute resolution system in order to save time and costs, or that this is the essence of arbitration. The only “interest” of the arbitration process that

³⁶ *Id.* at 39 (emphasis added).

arbitrators and institutions alike *should* recognize is its unique contractual nature. The intentions of the parties are paramount. An arbitration agreement is no different from any other contractual arrangement. First and foremost, the arbitrator must ascertain the parties' intentions and *then* effectively enforce them. As Justice Alito explained in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*:

Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.³⁷

IV. MANAGEMENT OF THE PROCESS

Satisfaction with the outcome of an event, whether in sports or in arbitration, depends above all on meeting expectations. The task of arbitral institutions and arbitrators alike is to determine how best to fulfill user expectations. But first, it is important to understand what those expectations really are. As young Pip in *Great Expectations* eventually discovered, one can spend a lot of time chasing after "great expectations" that do not materialize.³⁸

Notwithstanding the emphasis that has been placed on "time and costs," users ultimately expect a process that is fair. In the context of arbitration – a creature of contract – a fair process must at a minimum be founded on implementing the intentions of the parties. However, those intentions may not be readily discernable, as general arbitration clauses do not typically include comprehensive procedural steps for the resolution of the dispute. Nor do current institutional rules offer a commonly understood or accepted set of procedures. Without the traditional "common understanding" of how arbitrations are to be conducted, the absence of explicit procedures has led to confusion and uncertainty, which ultimately leads to the breakdown of the arbitration system.

The most obvious and simplest way of solving this problem would be for arbitration organizations to develop a set of procedural rules. Users and arbitrators alike would have a clear understanding of the "rules of the game," which could then be enforced effectively by the arbitrator. This idea is not new, and was presented more than a decade ago by Professor Park in his Freshfield Lecture, through a proposed set of default procedural administrative rules. "These directives," he wrote, "would explicitly address questions such as

³⁷ *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (citations and internal quotation marks omitted). See also Judge Posner's comments in *Edstrom Industries v. Companion Life Ins. Co.*, 516 F.3d 546, 553 (7th Cir. 2008): "But precisely because arbitration is a creature of contract, the arbitrator cannot disregard the lawful directions the parties have given them. If they tell him to apply Wisconsin law, he cannot apply New York law."

³⁸ "Now, I return to this young fellow. And the communication I have got to make is, that he has great expectations." CHARLES DICKENS, *GREAT EXPECTATIONS* (1861).

documentary discovery, privilege, witness statements, order of memorials, allocation of hearing time, burden of proof and the extent of oral testimony.”³⁹ In a subsequent paper, the author described the reception that his proposal received as follows: “At dinner following the lecture, several friends made clear that they greeted this proposal with the same enthusiasm normally reserved for ants at a Sunday school picnic.”⁴⁰

This response to the proposal for a suggested set of rules, even in a default form, is not totally surprising. One of the attributes of arbitration is its flexibility. The arbitration community prides itself on the fact that arbitration is flexible, allowing the parties to mold the process to fit their needs.⁴¹ However, this implies that participants have the experience and knowledge to be able to make wise choices among alternatives. Arbitration’s growing popularity means an ever-expanding group of participants – parties, counsel and arbitrators.⁴² As more and more participants, often with varying levels and types of experience and different cultural backgrounds, engage in the arbitration process, the benefits of flexibility are less apparent and its disadvantages more prominent. Indeed, the general dissatisfaction with the arbitration process expressed by the user community is in part a commentary on the exponential growth of arbitration. It is for this reason that users of arbitration have gravitated toward a handful of experienced and respected arbitrators, which brings with it its own set of problems.

How long the arbitration community can avoid instituting arbitral rules of procedure is open to debate.⁴³ It should be emphasized, however, that such rules need not be the type that are found in judicial rules of procedure. Recognizing the fundamental principle that arbitration is contractual, arbitral rules must allow parties’ wishes to be implemented, at least to the extent that the parties are in agreement. Thus, the rules would effectively operate as default rules in the event that the parties cannot agree on how the arbitration is to be conducted. Moreover, the default rules would be crafted to permit maximum flexibility so that parties,

³⁹ William W. Park, 2002 Freshfields Lecture – *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 *ARB. INT’L* 279, 283 (2003).

⁴⁰ William W. Park, *Procedural Default Rules Revisited*, in *ARBITRATION INSIGHTS – TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION, SPONSORED BY FRESHFIELDS, BRUCKHAUS DERINGER* 360 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007).

⁴¹ 2006 Queen Mary Survey, *supra* note 27, at 6 (“Flexibility of procedure was the most widely recognized advantage [of international arbitration]”).

⁴² The AAA itself administers approximately 150,000 cases per year and boasts a panel of approximately 8,000 registered arbitrators. Statement of Ethical Principles for the American Arbitration Association, *available at* <http://www.adr.org>.

⁴³ The CPR International Institute for Conflict Prevention & Resolution recently developed a set of suggested protocols to assist in dealing with discovery and the presentation of witnesses. CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration. *See also IBA Rules on the Taking of Evidence in International Arbitration*, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

together with the arbitrator, can fashion a proceeding that is consistent with the expectations of the parties and the nature of the dispute being arbitrated.

In the interim, arbitrators should approach arbitrations on the basis that there is a new arbitration paradigm where the traditional “common understanding” of the arbitration process may be absent. This means that at the outset of the arbitration, a set of acceptable rules should be put in place: that is, rules that, if not agreed to by all parties, are at least clear and understood by all concerned.⁴⁴ If the parties are unable to agree on some or all of the relevant rules of procedure, the arbitrator, together with the parties, will need to fashion a set of rules, taking into consideration all relevant factors applicable to the specific arbitration at hand and ascertained intention of the parties.

In a fair hearing, time and cost issues naturally resolve themselves. An unsatisfactory proceeding, no matter how short and inexpensive, is always too long and expensive. The challenge faced by arbitration today is to meet the parties’ fundamental expectation that the proceeding will be conducted fairly in an ever more complex environment, while at the same time preserving the true hallmark of arbitration as a negotiated agreement designed to privately resolve disputes in lieu of the State’s legal process.

A contest is meaningful and ultimately satisfying only if it proceeds under rules that are understood and accepted by the participants and consistently enforced. An arbitrator will be seen to be effective if he firmly enforces rules that are transparent and either determined by the parties themselves or at least acknowledged by them as a set of rules that will govern the arbitration. While the outcome of a contest, whether in sports or arbitration, is always better with a victory, ultimate satisfaction is derived from a belief that the contest was hard fought and fair.

⁴⁴ Article 24(1) of the Rules of Arbitration of the International Chamber of Commerce (2012) requires parties and the arbitrator “to convene a case management conference to consult the parties on procedural measures that may be adopted.” As a matter of course, AAA arbitrators in large cases conduct a prehearing management conference.

