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## Opening Statement:

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by **Scott Atlas**

Chair  
Section of Litigation

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# Opening Statement



## Have You Ever Tried to Make Up Your Mind—About Arbitration?

by **Scott Atlas**

Chair, Section of Litigation

Is there a problem with arbitration? It seems as if every time I mention the word to a client who has arbitrated or a lawyer who has represented clients in arbitration, they want to tell me a story about some recent, unpleasant experience with the process. I have encountered similar complaints across a broad range of disputes—from domestic consumer, commercial, financial, and employment matters to international business disputes.

I have long been a fan of arbitration and other forms of alternative dispute resolution. As litigation has become increasingly complex, potential damage awards have increased, and legal representation has become costlier, arbitration seemed almost like a panacea. What client would refuse a less intrusive, faster, cheaper, and more predictable way to resolve disputes, especially when the parties could select the decision-maker and the process seemed less prone to the kind of emotional appeals that can sometimes lead to awards that clients consider grossly excessive?

While arbitration (like anything else) has never been free from criticism, the nature and principal source of the complaints seem to have changed in recent years. During the early days of the arbitration movement in the 1980s, plaintiffs' lawyers and consumer groups were the main critics. Much of their dissatisfaction seemed to be generated by the perception of unfairness based on the non-voluntary manner in which claimants were brought into the system, including the adhesive nature of many arbitration agreements and the unequal bargaining power of the parties. These concerns were compounded by industry control of the process, the composition of the arbitrator pool, the perceived bias of arbitrators, the funding of the arbitrating system, and other potential for conflict of interest.

Critics argued that arbitration clauses

too often were buried in the fine print of large, boilerplate documents. Even when aware of the provision, consumers frequently insisted that they felt they had no choice but to accept arbitration provisions. Most broker-dealer agreements with customers, for example, traditionally have required arbitration of disputes. Few options were available to customers who wanted to invest funds without forfeiting their rights to a jury trial and appeal, to court procedures designed to provide fairness, and to those who wanted to seek punitive damages. Most brokerage companies included mandatory arbitration provisions in their customer agreements.

Moreover, customers complained that they were forced to select arbitrators from a list skewed in favor of the industry. Arbitration administrators generally did not deny this tilt; in fact, they justified it based on the putative need for the arbitrators to bring special knowledge to the process. Proponents of arbitration believed that it was preferable to put complex matters in the hands of industry professionals who could bring their commercial wisdom to bear on business issues, instead of untrained, unsophisticated judges or juries. But customers tended to distrust the impartiality of industry insiders, and the secrecy of the proceeding and lack of written opinions reinforced this suspicion of pro-industry bias.

An increase in the number of arbitrations during the last 10 to 15 years involving sensitive social issues such as employment discrimination claims appears to have increased charges of potential arbitrator bias. As arbitration expanded into regulatory matters and other statutory claims, there was a greater need for arbitrators who understood the underlying law, instead of merely relying on their business experience. Many arbitrators, however, lacked even rudimentary training in arbitration

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law or the relevant substantive law and rules. In addition, I heard frequent complaints that limited discovery restricted claimants' ability to prove the validity of their claim, uncover wrongdoing, or investigate what went wrong. These deficiencies were said to increase the likelihood of unreliable results. Moreover, there were many complaints that arbitration inherently favored repeat defendants, either because their experience allowed them to develop strategies for subsequent cases or because non-industry claimants feared that the prospect of future work from corporations who are repeat users of arbitration would consciously or subconsciously affect the decisionmaking of many arbitrators who hoped to receive future business from the corporate parties.

In response to these criticisms, organizations that provided arbitration services began to change their arbitration rules. First, they made arbitration provisions in contracts more conspicuous—often printed in bold letters larger than the rest of the terms and placed near the signature lines. Second, the new rules began to allow greater discovery. Third, occasionally the arbitrators even awarded punitive damages. Fourth, to overcome the perception of arbitrator bias derived from connections with the affected industry or with repeat business from the defendant, arbitration groups (and several states) began (1) adopting ethical standards that require disclosure of arbitrators' personal and financial relationships with the parties and that prohibit acceptance of gifts from likely future parties, (2) increasing disclosure of arbitrator history and providing parties more choices of arbitrators, and (3) promoting the use of three-arbitrator panels, which are selected in myriad ways. Sometimes each side selects an arbitrator who together choose the third. Other times, an arbitration service, for a fee, provides a list of qualified candidates, with each side making unlimited "strikes" and then ranking the remainder in order of preference. This process usually produces a match.

These changes did not completely alleviate the problems. Moreover, they

also led to unintended consequences, most predominantly, unexpectedly sizable cost increases. Arbitration parties now complain that the process has become too complicated, slow, and expensive. They argue that the expansion of discovery and the use of three arbitrators have created many inconveniences, dramatically increased the cost, and lengthened the time to complete the hearing and issue a decision. Further, the availability of punitive damages has increased the risk. Even the requirement of more disclosure by arbitrators of their relationships carries a cost. Some arbitrators complain about the added burden and worry that nondisclosure, no matter how inadvertent and immaterial, will prompt a legal challenge to the finality of the award and thereby further increase parties' costs.

Curiously, despite frequent representations by arbitration advocates that arbitration costs much less than litigation, the non-profit organization Public Citizen recently reported that no research has ever been attempted to substantiate these claims. "Cost of Arbitration: Executive Summary" at 1 (May 1, 2002) ([www.lawmemo.com/arb/res/cost.htm](http://www.lawmemo.com/arb/res/cost.htm)). Public Citizen argues that, in the vast majority of cases, arbitration will cost more than litigation and that no plausible theory explains how arbitration would be cheaper. Whether or not Public Citizen is correct, it seems self-evident that the higher arbitration costs incurred in contentious disputes with extensive motions and bickering can be used as a weapon against a party with limited financial resources.

It also is unclear whether arbitration produces a "better" result than ordinary court processes. It appears that, above all else, arbitration participants seek a fair and just result. *See, e.g.*, Richard W. Naimark and Stephanie E. Keer, "International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People—A Forced Rank Analysis," 30 *Int'l Bus. Law* 203, 204–05 (2002). Greater risks attend hearings conducted without formal evidentiary rules, which are

designed to minimize use of unreliable evidence, and without a requirement that the arbitrator know and follow the law. Parties typically make less effort to select an arbitrator than they would to appoint or elect judges and select juries. These rules create significant uncertainties that undermine the reliability of the result. The problems are exacerbated by the drastic limits that have always existed on grounds for appeal of an arbitration award in most cases that mean, as a practical matter, the nonexistence of virtually any meaningful judicial review of arbitration awards. Complaints, therefore, have become increasingly vocal.

There have been other changes in the process, some reflecting changes in the type of matters being arbitrated. Some claims subject to arbitration in recent years have increased in size and complexity and raised more time-consuming issues. This has led to arbitrations with problems similar to those in complex litigation: (1) discovery-phase disputes generated by parties refusing to produce requested discovery; and filing frequent, extensive, often last-minute, and sometimes unnecessary or even frivolous motions; resisting discovery orders; and other contumacious behavior, and (2) during hearings, parties presenting repetitive testimony; making repeated, arguably frivolous objections; and unnecessarily quarreling and arguing. In response, some arbitration groups have felt compelled to adopt rules that ironically sound like the Federal Rules of Civil Procedure: more extensive pretrial activities such as automatic exchange of certain standard documents; creation of a mandatory hearing plan early in the case; and a dramatic increase in the number of preliminary or procedural hearings. In matters enforcing contractual provisions mandating arbitration of particularly complex federal statutory claims, some contracts prescribe a level of judicial review that forces creation of tran-

scripts of proceedings and written opinions with findings of fact and conclusions of law.

It is in this backdrop that I have heard a rising crescendo of “horror stories” from many parties in arbitration proceedings. Some have complained about the scope of an arbitration far exceeding anything they have experienced in all but the most complex litigation, with no court relief available. Others have expressed dismay at arbitrators who ignored the law and instead adopted an approach relying more on pure instinct and a unilateral sense of “fairness” that leaves the parties frustrated at the *sui generis* or unpredictable nature of the decisionmaking. For example, often parties accuse arbitrators of wanting to “split the baby” by awarding a plaintiff modest recovery even if, according to the defense, the plaintiff has a claim so weak that most judges would have granted summary relief. Likewise, some plaintiffs complain of obtaining only partial relief for an overwhelmingly strong claim. Occasionally, I hear about arbitrators who awarded punitive damages in the face of contract provisions that supposedly clearly excluded them. I have even heard stories of arbitrators who seemed either incapable of making decisions or were suspected by the parties of deliberately prolonging proceedings to increase their fees. Others complain about the difficulty of obtaining adequate information about potential arbitrators. I am unaware of any bar associations that ask their members to rate arbitrators like many evaluate judges. What particularly seems to irritate complaining parties is that even when they believe that an arbitrator’s preliminary or ultimate decision is a clear abuse of discretion, there is no effective recourse to the courts. The grounds for overturning a discovery ruling or an award on the merits are extremely limited. Parties often complain that the lack of predictability—

and even potential capriciousness—caused by an arbitrator’s ability to ignore the law and the lack of effective review make arbitration no more predictable than litigation.

What I have found impossible to assess from these tales—some of which are inherently contradictory—is whether they reflect mostly the typical scorn or disappointment of a sore loser or something more fundamental. Are there serious structural problems with the arbitration process, or are the issues simply the cost of a process, freely selected (at least by the party who drafted the contract provision), that requires some sacrifice in return for the promise of simplification, cost savings, and relief from crowded court dockets?

The Section of Litigation has decided to analyze whether arbitration, as compared to litigation, satisfies the goals and expectations of the litigants. Three of our most fair-minded, thorough, and thoughtful members—defense lawyer Reece Bader, plaintiffs’ lawyer Carol Mager, and mediator/arbitrator Larry Watson—have agreed to lead a distinguished task force of lawyers to examine this issue. Their tentative plan is to design a statistically valid survey and obtain responses from a random cross-section of plaintiffs and defense attorneys, and inside and outside corporate counsel with arbitration experience. The task force hopes to receive sufficient responses to determine the existence and extent of any widespread concerns. Based on this data and selective interviews, the task force plans to prepare a report that analyzes the arbitration process in practice today and identifies whether litigants and their counsel generally consider arbitration to be cost effective, fair, prompt, outcome predictable, and similar considerations. They may even present a program on the results at the ABA Annual Meeting in San Francisco this August. Stay tuned. ☐