

# NONCONSENSUAL + NONBINDING = NONSENSICAL? RECONSIDERING COURT-CONNECTED ARBITRATION PROGRAMS

*Amy J. Schmitz\**

*Policymakers have adopted programs mandating parties to submit their disputes to court-connected arbitration hoping to garner efficiency benefits commonly associated with contractual Federal Arbitration Act (FAA) arbitration. Mandatory nonbinding arbitration, however, is ill-equipped for this task because it lacks the consensual core and finality of FAA arbitration. Instead, it often adds an inefficient layer to the litigation process and may harm those least able to protect themselves from coerced settlements or burdens of protracted litigation.*

## I. INTRODUCTION

Is nonconsensual and nonbinding court-connected arbitration nonsensical?<sup>1</sup> Policymakers established mandatory arbitration programs on the wings of the pro-arbitration movement that fueled courts' eager enforcement of arbitration agreements under the Federal Arbitration Act ("FAA").<sup>2</sup> They hoped that court-con-

---

\* Associate Professor, University of Colorado School of Law. I thank the Cardozo Journal of Conflict Resolution and all the participants in the "Whither Arbitration" symposium. I also thank Tom Carbonneau, Christopher Drahozal, Mark Loewenstein, and Jean Sternlight for their comments, and Aaron Clippinger and Leanne Hamilton for their research assistance.

<sup>1</sup> Originally this article was entitled "Oxymoronic Arbitration" to highlight the contradictory character of nonconsensual/nonbinding arbitration. See Wiktionary, *Oxymoron*, <http://en.wiktionary.org/wiki/oxymoron> (last visited Sept. 16, 2008) (defining "oxymoron" to include a "contradiction in terms" and "paradoxical juxtaposition of two seemingly contradictory words"). However, I later learned that I am not the first to raise the question of whether nonbinding arbitration is an oxymoron. See Kathryn L. Hale, *Nonbinding Arbitration: An Oxymoron?*, 24 U. TOL. L. REV. 1003, 1003–26 (1993) (discussing the *Shaefer v. Allstate* court's refusal to enforce an insurance contract arbitration clause allowing for *de novo* appeal if the arbitration award exceeded a certain amount, and noting how this may impact court-administered nonbinding arbitration).

<sup>2</sup> Federal Arbitration Act, 9 U.S.C. § 2 (2008) (requiring arbitration only if the parties have contractually agreed to arbitrate their disputes); see also Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1589–92 (1995) [hereinafter *Half Full*] (discussing the history of court-connected Alternative Dispute Resolution ("ADR") programs in the wake of the rising

nected arbitration programs would garner the same sorts of efficiency benefits and process satisfaction that have been associated with contractual and final FAA arbitration.<sup>3</sup> Arbitration had gained a reputation for producing efficient “justice” through a faster and cheaper dispute resolution process than parties enjoyed in trials. The problem is that design flaws of court-connected arbitration programs generally prevent them from purveying “justice.”<sup>4</sup>

Court-connected arbitration is not designed to achieve its goals of efficiency and fairness.<sup>5</sup> It is truly “mandatory” arbitration in the traditional sense.<sup>6</sup> Mandatory programs require parties to participate in dispute resolution proceedings pursuant to government order, without the parties’ contractual consent. This is unlike FAA arbitration, which is traditionally justified by its predicate requirement of an agreement to arbitrate.<sup>7</sup> This also means that mandatory programs must allow for trial *de novo* in order to preserve parties’ trial rights.<sup>8</sup> In contrast, FAA arbitration is, argua-

---

use of FAA commercial arbitration and how ADR images “blurred” as ADR moved into the courts).

<sup>3</sup> See John P. McIver & Susan Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 JUST. SYS. J. 123, 123–26 (1991) (noting aims of mandatory programs); see also Court-Ordered Arbitration Program Chart, last updated Jul. 1, 2008 (attached hereto as an appendix with backup on file with author) (gathering data and legislative or court rule citations for mandatory ADR and arbitration programs) [hereinafter Arbitration Program Chart].

<sup>4</sup> Providing “justice” can often be like a sausage-making process we would rather not watch so long as it produces good results. As Otto von Bismarck, Germany’s first Chancellor, known for his socially progressive legislation in the late 1800s, said, “[p]eople who love sausage and people who believe in justice should never watch either of them being made.” See Quotations About Justice, available at <http://www.quotegarden.com/justice.html> (last visited Sept. 7, 2007). The problem is court-connected arbitration is often like a flawed sausage-making process that produces nothing but bad sausage ripe for recall.

<sup>5</sup> See Hensler, *Half Full*, *supra* note 2, at 1591–95 (noting program problems and imprecise use of ADR in equating processes that vary significantly in terms of party control).

<sup>6</sup> See McIver & Keilitz, *supra* note 3, at 123–24 (stating that at the time of the article, twenty-four states and ten federal districts had adopted such mandatory programs); Roselle L. Wissler & Bob Dauber, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes*, J. DISP. RESOL. 65, 65 n.1 (2007) (stating eighteen states and three federal districts have mandatory court-annexed arbitration schemes and citing personal communication with Donna Stienstra, Senior Researcher, Federal Judicial Center, July 6, 2005).

<sup>7</sup> FAA arbitration’s legitimacy is also subject to debate, but discussion of this on-going and complicated debate is beyond the scope of this paper. See Michael Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462–64, 518–19 (2007) (noting litigation’s justice-providing function and concerns about arbitration); *Grafton Partners L.P. v. PriceWaterhouseCoopers L.L.P.*, 116 P.3d 479, 490–93 (Cal. Super. Ct. 2005) (breaking from the majority of courts in refusing to enforce a pre-dispute jury waiver).

<sup>8</sup> See U.S. CONST. amend. VII (providing for right to jury trial only in certain civil cases). See also Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional*

bly, efficient due to its finality and limited judicial review.<sup>9</sup> The Supreme Court recently confirmed FAA arbitration's finality in reducing parties' powers to expand judicial review of arbitration awards under the FAA.<sup>10</sup> It opined that limited review of arbitration is "needed to maintain arbitration's essential virtue of resolving disputes straightaway," while allowing for "full-bore" judicial appeal would add an inefficient layer to the process.<sup>11</sup>

There are different types of arbitration, and court-connected varieties may be useful in some contexts. Progressive dispute resolution programs can further public goals. However, this Article focuses on nonconsensual and nonbinding arbitration programs, and how they have failed to the extent that they do not serve the goals of efficiency and justice. Nonconsensual and nonbinding arbitration programs often seek to feed off of FAA arbitration's momentum, but they are fundamentally different from FAA arbitration. These court-connected programs force parties to participate in arbitration proceedings in lieu of litigation when they have not contractually agreed to the process. Furthermore, court-mandated programs' allowance for trial *de novo* thwarts their efficiency goals, often producing a muddy mix of arbitration and court procedures.<sup>12</sup>

Evidence supports the conclusion that nonbinding arbitration programs often add an inefficient layer to the litigation process. Furthermore, costs and burdens of layered dispute resolution processes often fall hardest on those who have the least power or litigation resources.<sup>13</sup> At the same time, while programs better

---

*Issues*, 68 OR. L. REV. 487, 502–20 (1989) (discussing constitutional arguments against mandatory arbitration programs).

<sup>9</sup> The United States Supreme Court recently emphasized FAA arbitration's efficiency-promoting streamlined process in holding that the FAA preempts state-required administrative hearings as a pre-condition to contractual arbitration. *Preston v. Ferrer*, 128 S. Ct. 978, 979–88 (2008) (confirming FAA arbitration's private and stream-lined process).

<sup>10</sup> *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402–06 (2008) (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency).

<sup>11</sup> *Id.* at 1405.

<sup>12</sup> See *Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co.*, 82 Cal. Rptr. 2d 16, 18 (1999) ("Arbitrations provide an *alternative* method of dispute resolution to legal proceedings . . . Mixing the two only produces mud—not the sort of stuff we willingly tread in."); see also Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 123–28 (2002) (stating this quote at the outset and discussing the finality of FAA arbitration).

<sup>13</sup> *Parker v. Am. Family Ins. Co.*, 734 N.E.2d 83, 84–86 (Ill. App. Ct. 2000), *cert. denied*, 738 N.E.2d 928 (Ill. 2000) (holding *de novo* review provision of the arbitration clause in an insurance contract defied public policy due to its impact on the insured).

promote efficiency by imposing strong disincentives to seek trial *de novo*, they also place troubling burdens on parties' trial and due process rights. Programs must be careful to minimize the total cost of the dispute resolution system instead of simply seeking to maximize the settlement rate.<sup>14</sup>

Arbitration's familiarity or reputation does not justify continuance of mandatory arbitration programs.<sup>15</sup> The program's allowance of trial *de novo* is a necessary "evil" in that it is needed to preserve those trial rights parties have not contractually waived through an arbitration agreement. However, court-connected arbitration's lack of finality often produces unfairness and inefficiency through forcing parties to shoulder the burdens of not only participating in mandatory arbitration proceedings, but also defending costly and time-consuming *de novo* attacks on nonbinding awards. Moreover, the disproportionate burdens of such protracted litigation perpetuate power imbalances.

In light of these concerns, this Article explores the propriety and efficacy of these mandatory arbitration programs, focusing particularly on their lack of consent and finality. Part II of this Article describes the persistence of nonbinding mandatory arbitration programs premised on providing efficiency benefits like those flowing from private arbitration governed by the FAA. Part III juxtaposes this court-connected arbitration with FAA arbitration in order to highlight design flaws of nonconsensual and nonfinal court-connected arbitration. Part IV questions the survival of court-connected mandatory arbitration programs. As some evidence has indicated, these programs often fail to serve their goals of efficiency and justice. In light of these considerations, Part V concludes with the suggestion that policymakers revise or abandon

---

<sup>14</sup> See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 368–69, 388–89 (1986) (discussing proper policy objectives of court-connected ADR programs and explaining how programs which induce settlement may cause an increase in overall long-run dispute resolution costs).

<sup>15</sup> I am not the first to call for the reexamination of court-connected arbitration. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2252–53 (1993) (concluding that the federal courts' mandatory arbitration program was not geared to foster private or social benefits, and calling for an end to further experimentation with such court-annexed arbitration). However, this article aims to reignite this examination often neglected in the fray of the current debate focused on FAA arbitration. See Symposium, *Rethinking the Federal Arbitration Act: An Examination of Whether and How the Statute Should Be Amended*, 49 S. TEX. L. REV. 1, 1–473 (2007) (including articles from varying perspectives regarding possible FAA reforms).

these programs in favor of more efficient and less burdensome programs.

## II. COURT-CONNECTED NONBINDING ARBITRATION PROGRAMS

Arbitration, mediation, and other processes are often well-suited for efficient and beneficial dispute resolution where parties have agreed to participate in the process, or the process is geared for a specialized or communal context. Hoping to harness similar benefits, policymakers have instituted court-connected programs requiring parties to participate in nonbinding arbitration proceedings without the parties' consent. Policy makers have premised these statutory or court-ordered programs on fostering public and private efficiencies by easing court dockets and assisting parties to quickly resolve disputes without costly litigation.<sup>16</sup> They tout these programs' goals as decreasing courts' and litigants' dispute resolution costs, increasing case resolution speed, and thinning courts' overall caseloads.<sup>17</sup> Although these programs vary, this Article focuses on those programs which perpetuate nonconsensual and non-binding arbitration, and as such are ill-suited to serve policy goals.

Policymakers began establishing court-connected mandatory arbitration programs in the late 1970s and have continued to create and condone these programs despite legitimacy and efficiency concerns.<sup>18</sup> Congress first authorized three federal district courts to create mandatory arbitration programs in 1978. It then expanded this authorization and funding to cover additional courts through the 1980s with support from the Attorney General and other policymakers. It was hoped that these programs would capture the efficiency and justice benefits believed to flow from private contractual arbitration.<sup>19</sup> Courts then used this authorization to institute programs fueled by the alternative dispute resolution ("ADR") revolution, amidst popular calls for the use of ADR to ease crowded court dockets and address overly litigious lawyers' abuses of the judicial process.<sup>20</sup>

---

<sup>16</sup> McIver & Keilitz, *supra* note 3, at 123–24; *but see* Keith O. Boyum, *Afterward: Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244, 244–47 (1991) (explaining how administrators, litigants and lawyers may not all want the same things from court programs).

<sup>17</sup> Wissler & Dauber, *supra* note 6, at 65–66.

<sup>18</sup> McIver & Keilitz, *supra* note 3, at 123–29 (discussing mandatory arbitration programs).

<sup>19</sup> *See* Bernstein, *supra* note 15, at 2174–75 (describing establishment of federal court-connected arbitration programs).

<sup>20</sup> *Id.* at 2174–76 (noting the ADR movement's role in fostering these programs).

Court-connected arbitration programs have expanded since that time and continue to exist in state and federal courts.<sup>21</sup> While some courts have repealed their programs, others have instituted new ones.<sup>22</sup> My recent tally indicated that twenty-eight states have programs requiring or allowing judges to mandate litigants' participation in nonbinding arbitration.<sup>23</sup> In addition, at least ten federal district courts have adopted programs which allow them to order nonbinding arbitration.<sup>24</sup> These court-connected programs apply where parties have not contractually agreed to submit their disputes to private, binding arbitration under the FAA.

Court-connected programs do not all simply require arbitration. Instead, many programs are more nuanced and incorporate mediation and other facilitative processes.<sup>25</sup> Some programs also seek to enhance parties' control over the dispute resolution process by allowing them to choose from among various ADR processes.<sup>26</sup> Programs may allow parties to combine facilitative and evaluative processes through a program called Med/Arb, which effectively transforms unsuccessful mediation into arbitration.<sup>27</sup>

---

<sup>21</sup> See *id.* at 2173–75 (noting the persistence of these programs in 1993); Arbitration Program Chart, *supra* note 3 (gathering data and citations for programs requiring use of nonbinding arbitration in state and federal courts).

<sup>22</sup> For example, Colorado repealed its Mandatory Arbitration Act. See COLO. REV. STAT. § 13-22-401 *et seq.* (1991) (covering certain civil actions seeking damages of \$50,000 or less, although the statute had survived constitutional attack). See *Firelock v. District Court*, 729 P.2d 1090 (Colo. 1989) (denying a challenge under the Colorado Constitution). Meanwhile, the Superior Court of Delaware recently revised its rules to continue to allow judges to order compulsory use of ADR, although it also gives parties power to choose the process. Del. Ct. Order 03 (Feb. 5, 2008) (repealing Rule 16.1 and amending Rule 16).

<sup>23</sup> Arbitration Program Chart, *supra* note 3.

<sup>24</sup> *Id.*

<sup>25</sup> Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 584–92 (2008) (discussing varied programs and some movement toward mediation, but noting that arbitration is also commonly ordered).

<sup>26</sup> See MASS. GEN. LAWS ANN., S.J.C. ch. 1(b)(iv) (2008). These rules state “[i]nformed choice of process and provider” is a guiding principle for the program and allow parties to choose from among the approved ADR programs established, but it also give courts power in making final process determinations despite another proviso that parties' participation must remain voluntary. *Id.*

<sup>27</sup> See U.S. Dist. Ct. Rules N.D. Ala., ADR Plan (current with amendments through Feb. 1, 2008), available at [http://www.alnd.uscourts.gov/local/adr\\_plan.html](http://www.alnd.uscourts.gov/local/adr_plan.html) (last visited Oct. 22, 2008) (seeming to give the arbitrator the power to refer cases to the “Med/Arb Track” in the courts' ADR program, but leaving the ultimate decision of pursuing this track to the parties). It seems the parties would have to consent to Med/Arb in light of confidentiality and other concerns flowing from a mediator's conversion into a more evaluative arbitrator.

Still, parties' preferences remain a secondary concern in most court programs.<sup>28</sup> Many programs mandate nonbinding arbitration for specified cases, or give judges broad discretion in sending cases to court-connected arbitration.<sup>29</sup> Therefore, court-connected arbitration programs continue to survive and, in some courts, thrive.

Most court-connected programs target specified classes of civil cases, and many of them are limited to claims for damages under stated dollar amounts.<sup>30</sup> My recent review of programs revealed jurisdictional limit amounts ranging from roughly \$6,000 to \$150,000.<sup>31</sup> Although these jurisdictional limits vary widely, most programs target small civil claims for money judgments on the theory that these cases generally have fewer complicating factors and are the most ripe for expedited resolution procedures.<sup>32</sup> Presumably, policymakers have targeted these small dollar cases in an effort to save parties and courts from litigation time and costs, which may effectively preclude plaintiffs from seeking or obtaining remedies in these cases. Nonetheless, many programs apply to a broad range of civil and other claims.

Mandatory programs also tend to leave it to the judges' discretion to use court power to order mandatory ADR as a precursor to any litigation.<sup>33</sup> They focus on judicial needs, seeking to save the parties' and courts' time and resources without jeopardizing parties' access to justice.<sup>34</sup> To that end, most programs require that an ordered arbitration hearing, or other ADR process, must take

<sup>28</sup> See Shestowsky, *supra* note 25, at 589–600 (discussing evidence that parties often have little or stifled voice in choosing an ADR method).

<sup>29</sup> See, e.g., CONN. GEN. STAT. § 52-549u-aa (2008); Sup. Ct. Civ. R. § 23-61 (2007) (giving courts discretion to order cases to nonbinding arbitration where the expected judgment is less than \$50,000 and a claim for a trial by jury and a certificate of closed pleading has been filed).

<sup>30</sup> Wissler & Dauber, *supra* note 6, at 68 n.17 (also noting that some states do not prescribe a dollar limit).

<sup>31</sup> Arbitration Program Chart, *supra* note 3. The New York programs' limit was particularly low at \$6,000 (except \$10,000 in N.Y. Civil Court), while \$150,000 was the limit in most of the federal district court programs. *Id.*

<sup>32</sup> See e.g., N.J. STAT. ANN. §2A:23A-20 (2007) (requiring personal injury cases to be submitted to arbitration where the amount in controversy is \$20,000 or less, and permitting in §2A:23A-20(b) consensual submission to arbitration of such cases regardless of amount if “the court determines that the controversy does not involve novel legal or unduly complex factual issues”). See also McIver & Keilitz, *supra* note 3, at 124–25 (summarizing program data reported at a Law and Society Association meeting in 1989).

<sup>33</sup> See WIS. STAT. § 802.12(2) (1994) (giving judges discretion over which cases to refer to ADR and which ADR processes to order).

<sup>34</sup> See e.g., MO. R. S. CT. R. 17.01(a) (stating the ADR program's purpose as permitting courts to order ADR procedures “for disposition before trial of certain civil cases with resultant savings in time and expense to the litigants and to the court without sacrificing the quality of justice.”).

place within a stated time from the submission order. Such time limits generally range from forty-five to 120 days following an arbitrator's appointment.<sup>35</sup> Program rules also may specify that an ordered arbitration procedure must not begin before a stated number of days following a submission order to give parties time to prepare their cases. For example, New Jersey's mandatory arbitration program for personal injury claims requires that hearings not begin earlier than forty-five days following a notice of submission, and not before the end of an applicable discovery period.<sup>36</sup> Arbitration hearings must not take place later than sixty days following the expiration of that waiting period.<sup>37</sup>

Rules for arbitration programs also often require speedy awards after hearings have closed. They generally require that arbitrators must issue an award within a stated number of days, ranging from three to 120 days after the close of hearings. Rules also limit parties' time for rejecting an award and seeking trial *de novo*. This usually ranges from ten to thirty days.<sup>38</sup> Parties must accept the awards they do not challenge within the stated time. Furthermore, some states also provide that parties automatically lose their right to challenge an award or seek trial *de novo* if they fail to appear at the arbitration hearing.<sup>39</sup>

Courts establish programs with the hope that the parties will accept nonbinding arbitration awards, or voluntarily settle disputes based on awards as evaluations of likely trial outcomes.<sup>40</sup> Many programs reinforce this hope by imposing disincentives for demanding trial *de novo*.<sup>41</sup> These *de facto* penalties for seeking trial

---

<sup>35</sup> See McIver & Keilitz, *supra* note 3, at 125–30 (providing charts based on several studies); Wissler & Dauber *supra* note 6, at 71–72 (focusing on Arizona's program but also providing comparative data).

<sup>36</sup> N.J. STAT. ANN. Part IV, Rules of Ct., R. 4:21A-1(d) (2007) (stating time frames for scheduling arbitration hearings).

<sup>37</sup> *Id.*

<sup>38</sup> Wissler & Dauber, *supra* note 6, at 65–66.

<sup>39</sup> See Suzanne J. Schmitz et al., *Survey of Illinois Law: Mandatory Arbitration*, 23 S. ILL. U. L.J. 843, 848–55 (1999) (summarizing rules and law regarding Illinois program requirements eliminating a party's right to reject an award if she fails to attend arbitration hearings).

<sup>40</sup> See, e.g., N.J. STAT. ANN., Part IV, Rules of Ct., R. 4:21A-5 (2007) (requiring a written award be filed within ten days following completion of an arbitration hearing, and stating that the award must include notice of parties' right to "request a trial *de novo* and the consequences of such a request as provided by" rules requiring the party demanding trial to pay certain costs).

<sup>41</sup> See, e.g., N.J. STAT. ANN., Part IV, Rules of Ct., R. 4:21A-6(c) (2007) (requiring a party that demands trial to pay the court \$200 toward the arbitrator's fees and possibly the non-demanding parties' costs and attorney's fees if that party does not obtain a verdict at least 20% more favorable than the arbitration award or at least \$250 if the award had denied money damages).

*de novo* have raised constitutional challenges, but courts generally uphold the penalties by finding that they are not overly restrictive on trial rights.<sup>42</sup> This creates a game of chicken for parties who seek trial in that they must face liability for arbitration fees, trial *de novo* costs and/or non-demanding parties' attorney's fees if the trial does not result in a verdict or judgment that is a stated percentage or amount higher than the arbitration award.<sup>43</sup>

For example, Nevada's mandatory arbitration program includes various measures that have prompted parties to settle or accept arbitration awards in an unprecedented eighty percent of cases entering the program.<sup>44</sup> Nevada's required "[d]isincentives to appeal" non-binding arbitration include admission of arbitrators' findings in any trial *de novo*.<sup>45</sup> Program rules also impose a strict thirty-day limit on filing any request for trial *de novo*, deem failure to pay arbitrators as a waiver of such trial, and entitle the prevailing party at any trial *de novo* to recover arbitration fees, costs, and interest.<sup>46</sup> In addition, a party challenging an award of \$20,000 or less who fails to obtain a judgment that exceeds (if claimant) or lowers (if respondent) the award by at least twenty percent must pay the other party attorney's fees and costs following the request for trial *de novo*.<sup>47</sup> For awards over \$20,000, similar rules apply if the challenging party fails to obtain a ten percent better result in the trial *de novo* than the party obtained in arbitration.<sup>48</sup> Similarly, Arizona's program requires the appellant to reimburse the county for arbitrators' fees and to pay appellee the costs, attorney's fees and expert witness fees in connection with a trial *de novo* that does not result in a sufficiently better judgment.<sup>49</sup>

---

<sup>42</sup> See *Firelock Inc. v. District Court*, 776 P.2d 1090, 1096–97 (Colo. 1989) (upholding states' since-repealed mandatory arbitration program because it allowed for *de novo* review, although it required appellants to pay costs if they do not improve their positions in trial *de novo*).

<sup>43</sup> See *McIver & Keilitz*, *supra* note 3, at 129–31.

<sup>44</sup> See Chris A. Beecroft, Jr. & Wesley M. Ayres, *The State of Court Connected ADR*, NEV. LAW. (Oct. 2007) (reporting these rates, and noting that 54% of these cases assigned to arbitration are settled prior to filing of the award).

<sup>45</sup> NEV. REV. STAT. § 38.250-259 (2005, and current through 2007), available at <http://leg.state.nv.us/NRS/NRS-038.html> (last visited Oct. 22, 2008); NEV. ARB. R. 1-24 (2005 and current through 2007), available at <http://www.leg.state.nv.us/courtrules/RGADR.html> (last visited Oct. 22, 2008).

<sup>46</sup> NEV. ARB. R. 18, 19 (2005).

<sup>47</sup> NEV. ARB. R. 20(B) (2005).

<sup>48</sup> *Id.*

<sup>49</sup> *Wissler & Dauber*, *supra* note 6, at 72. See also Sophia I. Gatowski et al., *Court-Annexed Arbitration in Clark County Nevada: An Evaluation of Its Impact on the Pace, Cost, and Quality of Civil Justice*, 18 JUST. SYS. J. 287, 290–93 (1996) (describing similar trial *de novo* penalties if

The arbitration or other ADR procedures themselves also come with costs regardless of whether the parties seek trial *de novo* after completing the procedures. The parties, or in a minority of programs the state, must pay the arbitrator's hourly, case, or day fees.<sup>50</sup> Although this may be less costly than trial, it is more expensive for parties and courts to resolve disputes in arbitration than through private settlement negotiations.<sup>51</sup> Under Florida's court-ordered nonbinding arbitration program, for example, parties (or upon a showing of indigence, the state) must compensate arbitrators up to \$1,500 per diem.<sup>52</sup> At the same time, parties may incur hefty attorney's fees for legal representation in arbitration proceedings and throughout often elaborate filings and procedures for objecting to arbitration hearings, orders and awards.<sup>53</sup>

Still, arbitration hearings that end the parties' disputes may save them time and money. Parties ordered to arbitrate under these programs may pay less in attorney's fees and other costs in arbitration hearings than they would pay in a court trial. However, these court-ordered arbitrations lack the contractual waiver of trial rights, and thus the finality, of FAA arbitration.<sup>54</sup> This means parties may pay fees and costs of not only the arbitration or other ADR procedures, but also of an eventual trial. In the end, court-mandated programs may result in sizable bills for parties and courts.

---

party's position does not improve); Schmitz et al., *supra* note 39, at 845–46 (noting that the one requesting trial *de novo* must pay a rejection fee as high as \$500).

<sup>50</sup> Wissler & Dauber, *supra* note 6, at 70 n. 31 (noting that case/day fees range from \$75 to \$350 or hourly rates of \$100 to \$150 depending on the jurisdiction).

<sup>51</sup> See Posner, *supra* note 14, at 390–92 (highlighting cost and legality objections to court-annexed arbitration, and noting how many cases ordered to arbitration would have otherwise been settled privately).

<sup>52</sup> FLA. STAT. § 44.103(3) (2007).

<sup>53</sup> See D.C. R. CIV. ARB R. I-XVI (1993) (providing rules for court-connected arbitration program); see also Posner, *supra* note 14, at 391–92 (showing by example how court-annexed arbitration generally do not lower dispute resolution costs).

<sup>54</sup> This mandatory and nonbinding nature of government-mandated arbitration also means that these arbitration proceedings are subject to their own particular rules, and not the law or rules of the FAA or UAA. McIver & Keilitz, *supra* note 3, at 125–28; Wissler & Dauber, *supra* note 6, at 65–66.

### III. ASSENT AND FINALITY FOUNDATIONS OF PRIVATE ARBITRATION

Non-binding arbitration seeks to garner efficiency benefits similar to those in FAA arbitration. However, FAA arbitration is fundamentally different due to its contractual core and efficiency-promoting finality. The FAA requires courts to order parties to comply with their agreements to arbitrate instead of litigate their claims to further freedom of contract, and save parties time and money resolving disputes outside of courts. FAA arbitration thus differs from nonbinding court-connected mandatory arbitration because it is consensual and private. It is also final and subject to very limited judicial review. This finality guards parties from potentially suffering the time, expense, and stress of pursuing their claims twice through court-connected programs: first in arbitration and then in court.

#### A. FAA Arbitration's Contractual Core

Various types of communities have used private arbitration systems to resolve their disputes through efficient and peace-promoting processes.<sup>55</sup> These arbitration systems have flourished both in ancient and modern communities because they are consensual, private and final. In addition, arbitration systems have been especially useful where parties share expectations and understandings of the arbitration process, and of the legal and business norms that arbitrators apply in determining disputes.<sup>56</sup> These mutual understandings also help ensure the parties' voluntary compliance with arbitration agreements.<sup>57</sup>

---

<sup>55</sup> JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 25–38, 115–17 (1918) (recounting arbitration's "purpose of settling (appease) the controversies and differences," and noting arbitrations in various forms in France, Scotland, Denmark, Ireland, Austria-Hungary, Iran, Japan, India, Belgium, Germany, Spain, Italy, Sweden, and Portugal).

<sup>56</sup> Margit Mantica, *Arbitration in Ancient Egypt*, 12 *ARB. J.* 155, 155–59 (1957) (noting arbitration as "an ancient institution" predating state established judicial tribunals); *see also* Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 *U. PA. L. REV.* 132, 144 (1934) (reporting patriarchal tribunals in early societies).

<sup>57</sup> *See* William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 *WASH. U. L. Q.* 193, 198–200, 211–12 (1930) (depicting arbitration among mercantile communities); SAMUEL ROSENBAUM, *A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND* 13–14 (1916); Wolaver, *supra* note 56, at 144 (noting how arbitration predates litigation).

Nonetheless, there were cases in which parties sought judicial help in requiring contracting partners to comply with their arbitration agreements and awards. Merchants and attorneys aware of arbitration's prevalence banded together to support legislation that would require courts to specifically enforce arbitration agreements and awards.<sup>58</sup> This became known as the 1925 arbitration enforcement legislation we now recognize as the FAA on the federal level, and the nearly identical Uniform Arbitration Act ("UAA") on the state level.<sup>59</sup>

These Acts require courts to enforce arbitration agreements and limit their intervention in arbitration proceedings and review of awards.<sup>60</sup> Therefore, courts are directed to specifically enforce agreements to arbitrate.<sup>61</sup> In addition, they reinforce parties' compliance with arbitration agreements by providing liberal venue provisions, by allowing for immediate appeals from orders adverse to arbitration, limiting review of awards, and treating of awards as judgments.<sup>62</sup>

FAA arbitration enforcement thus relies on the existence of a valid arbitration agreement. However, the genuineness of the requisite "agreement" has validly become the subject of debate as FAA enforcement of arbitration agreements has expanded from its merchant roots to consumer, employment, and other uneven bar-

---

<sup>58</sup> Daniel Bloomfield, *SELECTED ARTICLES ON COMMERCIAL ARBITRATION* 14 (citing Julius H. Barnes, *International Chamber of Commerce, Digest No. 44* (April 1923)) (noting merchants' reliance on consensual arbitration to facilitate trade); see Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 *J.L. ECON. & ORG.* 479, 491-99 (1995) (proposing attorneys had a significant role in securing adoption of arbitration statutes as a means of ensuring their role in the process).

<sup>59</sup> The states adopted the UAA in its original or substantially similar form, which tracked the FAA. *Unif. Arbitration Act ("UAA")*, 7 *U.L.A.* § 1 *et seq.* (1997). Since then, the National Conference of Commissioners on Uniform State Law ("NCCUSL") proposed a revised UAA that states are now in the process of considering. *Unif. Arbitration Act (amended 2000)* 7 *U.L.A.* 1 (2005); see *The RUA Moves Toward National Passage*, *DISP. RESOL. J.*, 5 (May-July 2002) (noting as of 2002 that forty-nine states adopted the original UAA, while only a handful of states have adopted the 2000 revised UAA). Some have argued that the 2000 version has the potential of undermining the finality core of arbitration. See Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 *NOTRE DAME L. REV.* 551, 556-59 (2008) (supporting this claim with empirical evidence).

<sup>60</sup> Bloomfield, *supra* note 58, at 1-16 (citing Julius H. Barnes, *International Chamber of Commerce, Digest No. 44* (April 1923)).

<sup>61</sup> See Schmitz, *supra* note 12, at 145-56 (discussing enforcement schemes of the FAA and UAA and their development as a means for reversing prior judicial hostility toward arbitration and ensuring efficiency and independence of arbitration proceedings).

<sup>62</sup> See *id.*

gaining contexts.<sup>63</sup> In these contexts, the meaning of “consent” and the line between mandatory and consensual arbitration governed by the FAA is blurred. Some scholars and practitioners question the legitimacy of employees’ and consumers’ “consent” to arbitration when companies routinely include nonnegotiable arbitration provisions in adhesive contracts.<sup>64</sup> The FAA nonetheless places the burden on these employees and consumers to prove the invalidity of these arbitration provisions, while courts apply contract defenses in formulaic and efficiency-focused fashions.<sup>65</sup>

Furthermore, courts applying the FAA generally enforce arbitration provisions in terms that parties must accept as a precondition to trading, participating or working in the New York Stock Exchange (“NYSE”) or National Association of Securities Dealers (“NASD”) markets.<sup>66</sup> Compliance with these arbitration provisions is therefore *de facto* mandatory. However, it is not “mandatory” in the traditional government-mandated sense because it is contractual and one may choose to not work or deal in these markets. Securities arbitration is also publicly regulated to the extent the Securities and Exchange Commission (“SEC”) enjoys regulatory authority over its proceedings, seeking to ensure certain procedural protections.<sup>67</sup>

---

<sup>63</sup> See Jean R. Sternlight, *In Defense of Mandatory Arbitration (if Imposed on the Company)*, 8 NEV. L.J. 82, 82–100 (2007) (highlighting how companies impose pre-dispute arbitration agreements on consumers and employees in the context of proposing legal reform to ensure consumers’ free consent to binding arbitration); Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 453–54, 481–83 (arguing that arbitration agreements in nursing home contracts are essentially mandatory). *But see* Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 741–54 (questioning claims that form arbitration provisions in consumer contracts are unfair); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–51, 485–87 (2002) (explaining why electronic contracts are efficient and not adhesive).

<sup>64</sup> See Sternlight, *supra* note 63, at 82–100; Palm, *supra* note 63, at 453–54, 481–83.

<sup>65</sup> See Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 80 ST. JOHN’S L. REV. 121, 139–44 (discussing courts’ formalistic application of contract defenses to arbitration clauses).

<sup>66</sup> See Edward S. O’Neal & Daniel R. Solin, *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare* (2007) (working paper), available at <http://www.slcg.com/pdf/workingpapers/Mandatory%20Arbitration%20Study.pdf> (discussing compulsory binding arbitration through National Association of Securities Dealers (“NASD”) or New York Stock Exchange (“NYSE”)); see Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOUS. L. REV. 327 (1996) (discussing how arbitration under NASD or NYSE rules has become mandatory under most broker-dealer contracts).

<sup>67</sup> The NASD, for example, is a self-regulatory agency that must act pursuant to the Securities and Exchange Act of 1934 and federal directives of the SEC geared to protect customers from securities fraud. See Press Release, Nat’l Ass’n of Sec. Dealers, NASD Dispute Resolution to Provide Arbitration Awards Online (May 10, 2001), available at <http://www.nasd.com/> (type:

Still, this raises significant questions regarding FAA enforcement of arbitration agreements in uneven or other one-sided contracting contexts. However, that ongoing debate is beyond the scope of this Article. Furthermore, the FAA's contractual core is important. It remains a distinguishing feature of FAA arbitration, and is what legitimizes courts' use of the FAA to strictly enforce arbitration agreements and awards as the parties' waivers of their rights to trial.<sup>68</sup> This contractual core is also subject to contract defenses that may preclude enforcement of arbitration agreements and police their fairness to a certain extent.<sup>69</sup> FAA arbitration is therefore different from court-connected mandatory arbitration ordered despite the lack of an arbitration agreement.

## B. FAA Arbitration's Finality and Limited Court Review

The FAA does not directly define "arbitration."<sup>70</sup> Although courts have taken various approaches to whether the FAA applies to non-binding dispute resolution methods,<sup>71</sup> most have read the FAA to apply only to final and binding arbitration that will "settle" or end a dispute.<sup>72</sup> FAA arbitration is therefore very different

---

"NASD Dispute Resolution to Provide Arbitration Awards Online" into the "search" box, then click on the first available article) (stating how NASD worked with the Securities Arbitration Commentator to make awards readily accessible online and maintain the library of awards).

<sup>68</sup> See *McCabe v. Dell, Inc.*, No. CV 06-7811-RGK, 2007 WL 1434972, at \*3 (C.D. Cal. Apr. 12, 2007) (finding computer sales contract adhesive but upholding its imposition on the consumer of a duty to arbitrate due to its cost-justification); *Schuman v. IKON Office Solutions, Inc.*, 232 Fed. Appx. 659, 662–663 (9th Cir. 2007) (finding arbitration clause in an employee's sales commission contract was not unconscionable).

<sup>69</sup> See *supra* note 65 and accompanying text (noting the formulaic and limited application of these contract defenses).

<sup>70</sup> *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1207 (9th Cir. 1998). See also *Karthus v. Yllas Y Ferrer*, 26 U.S. 222 (1828) (wrestling with the meaning of arbitration). The revisers of the UAA also opted not to define "arbitration." See Richard E. Speidel, *ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. OF SMALL & EMERGING BUS. L. 167, 189 (2002).

<sup>71</sup> See *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 462–63 (S.D.N.Y. 1985) (holding a nominally non-binding dispute resolution mechanism specifically enforceable under the FAA and the court's "equity jurisdiction" because the procedure in fact would end the dispute); see also *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 749 n.10 (E.D. Va. 2001) (finding the FAA applies to only binding arbitration and characterizing the *AMF Inc.* court's enforcement of the agreement as based not on the FAA but on contract law and the court's equitable powers); see *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 345–50 (3d Cir. 1997) (finding the FAA did not apply to nonbinding dispute resolution mechanisms not likely to end disputes).

<sup>72</sup> See Ian R. Macneil, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 7 (1992) (defining arbitration's characteristics to include "a binding

from court-connected nonbinding arbitration subject to trial *de novo*. The FAA directs that courts may only vacate arbitration awards on limited grounds focused on ensuring procedural and fundamental fairness aspects such as fraud, evident partiality or corruption among the arbitrators, other misbehavior that prejudices a party's rights, or arbitrators' exercise of power beyond their contractual charge.<sup>73</sup> This finality fosters FAA arbitration's efficiency, and saves parties from having to essentially litigate their claims twice: first, in arbitration, and then in court.

The United States Supreme Court has reinforced FAA arbitration's streamlined process and efficiency-promoting finality. Recently, the Court highlighted arbitration's streamlined process in holding that the FAA required television's "Judge Alex" to proceed with arbitration pursuant to his prior agreement without first stopping for an administrative determination of claims by the California Labor Commissioner concerning the California Talent Agency Act ("TAA").<sup>74</sup> Shortly thereafter, the Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), confirmed the finality of FAA arbitration.<sup>75</sup> The Court ruled in a six-three decision that the FAA precludes contractual expansion of judicial review of arbitration awards beyond the limited grounds provided in the FAA §§ 9–11.<sup>76</sup> The majority emphasized that the

---

award" with the arbitrator's decision "subject to very limited grounds of review, final and enforceable by State law in the same manner as a judgment"); *see also* 9 U.S.C. § 2 (2009) (directing FAA's application to written agreements "to settle by arbitration" disputes arising out of transactions involving interstate commerce); 7 U.L.A. § 1 (1997) (prescribing UAA's application to agreements to "submit" disputes to arbitration); Wesley A. Sturges, *Arbitration—What Is It?*, 35 N.Y.U. L. REV. 1031, 1032 (1960) (emphasizing arbitration's role as a conclusive process); 1 GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 1.01 at 1 (3d ed. 1989) (citations omitted) (similarly defining arbitration).

<sup>73</sup> 9 U.S.C. § 10 (2009). The UAA and RUAA provide essentially the same limited grounds for judicial review of arbitration awards. UAA § 12; RUAA § 23(a)(1–6). If the parties do not agree that judgment may be entered on an award, the FAA does not apply to enforcement of the award. *See Oklahoma City Assoc. v. Wal-Mart Stores, Inc.*, 923 F.2d 791 (10th Cir. 1991).

<sup>74</sup> *Preston v. Ferrer*, 128 S. Ct. 978, 979–88 (2008) (discussing Ferrer's alleging his contract to pay Preston for his services was unenforceable under the TAA because Preston had acted as a talent agent without the required license).

<sup>75</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396–1408 (2008) (emphasizing the FAA's limited and exclusive grounds for judicial review of arbitration awards in order to promote arbitration's finality and efficiency). This decision has been subject to scholarly critique. *See, e.g.*, Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 469–511 (2008) (critiquing the *Hall Street* opinion and result, and raising important questions regarding its application in the wake of *Hall Street*).

<sup>76</sup> In *Hall Street*, the Oregon district court had ordered the parties to arbitrate indemnification claims under their agreement, which allowed a court to vacate any award based on erroneous conclusions of law or findings of fact not supported by "substantial evidence." *Hall St.*

FAA's limited review of awards is key to "maintain[ing] arbitration's essential virtue of resolving disputes straightaway," and signaled fear that allowance for more searching or substantive review of awards would render arbitration an inefficient layer within the litigation process.<sup>77</sup>

Courts since *Hall Street* have disagreed regarding available means for avoiding the FAA's strictly limited review.<sup>78</sup> However, FAA arbitration is still essentially final and subject to limited review, which makes it different from court-connected mandatory arbitration. Court-ordered arbitration does not even purport to be based on an arbitration agreement and is subject to trial *de novo*. Ostensibly, policymakers establish these arbitration programs in an effort to promote efficient, amicable and just dispute resolution similar to resolution parties may achieve through FAA arbitration. However, it is questionable whether court-ordered nonbinding arbitration in fact fosters these goals.

#### IV. MISFIT CHARACTER OF NONCONSENSUAL NON-FINAL ARBITRATION

Programs that simply mandate arbitration are giving way to programs that allow for mediation and other forms of ADR.<sup>79</sup> However, even nuanced ADR programs urge settlement based on evaluative nonbinding determinations in lieu of garnering organic resolutions.<sup>80</sup> In addition, courts are given great discretion in or-

---

*Assocs., L.L.C.*, 128 S. Ct. at 1400–02. The Court noted that the prior courts had assumed the parties contemplated FAA arbitration, but that other authority outside of the FAA may allow for more searching review. *Id.* at 1406–07.

<sup>77</sup> *Id.* at 1404–06.

<sup>78</sup> See *Cable Connection, Inc. v. DIRECTV, Inc.*, 82 Cal. Rptr. 3d 229, 233–45 (2008) (finding *Hall Street* left open state law means for expanding review of arbitration awards and that California law permits merits review of arbitration awards pursuant to parties' contracts precluding arbitrator's power to commit errors of law). But see *Acuna v. Aerofreeze, Inc.*, No. 2:06-CV-432 (TJW), 2008 WL 4755749, at 2–3 (E.D. Tex. Oct. 29, 2008) (noting that the Fifth Circuit has indicated that manifest disregard review is no longer available after *Hall Street* and refusing to find the arbitrator exceeded his power by failing to follow Texas law); see *Wood v. Penntex Resources, LP*, 2008 SL 2609319 (S.D. Tex. June 27, 2008) (finding that even if the contract is read to preclude the arbitrator's authority to commit factual error, the court would not review for such merit review under the holding of *Hall Street* because to do so "would result in precisely the 'full-bore legal and evidentiary appeals' that the Court held the FAA precluded").

<sup>79</sup> See Shestowsky, *supra* note 25, at 585–90 (noting prevalence of mediation, but acknowledging that arbitration is also common and there is great variance in programs).

<sup>80</sup> See *id.* at 585–95, 624–25 (noting the great latitude courts have in choosing what procedure to order and highlighting the surprising lack of attention to parties' preferences).

dering ADR and continue to mandate arbitration despite program design defects based on unproven assumptions and mixed or problematic research.<sup>81</sup> Court-ordered arbitration's nonconsensual nature and allowance for trial *de novo* thwarts its legitimacy and efficiency. Evidence suggests that instead of promoting just and efficient dispute resolution, court-ordered arbitration proceedings are often inefficient and expensive stops on the way to litigation.

#### A. Lack of Consensual Core

Court-connected mandated arbitration has raised constitutional and other concerns due to its involuntary nature. Courts have entertained challenges of mandatory programs on grounds that they violate federal and state jury trial, due process, court access, equal protection, and separation of powers rights.<sup>82</sup> From these challenges, arguments based on federal and state constitutional rights to a jury trial on legal causes of action have carried the most weight.<sup>83</sup> Furthermore, such state constitutional challenges may be stronger than such federal challenges due to the states' jury access provisions.<sup>84</sup> These challenges have produced a rule requiring that court-ordered arbitration of legal claims traditionally tried by a jury must be subject to trial *de novo*. The government cannot

---

<sup>81</sup> See Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 80–95 (2007) (noting the variance and discretion of courts in order ADR, and questioning the lack of research and considered judgment regarding courts' use of ADR programs); see also *State Farm Mut. Auto Ins. Co. v. Broadnax*, 827 P.2d 531, 534–41 (Colo. 1992) (upholding since repealed statute that required compulsory arbitration of personal injury protection insurance benefits, as part of a program to foster efficient dispute resolution).

<sup>82</sup> See Golann, *supra* note 8, at 493–502 (discussing constitutional challenges of mandatory ADR programs); see also William T. Hudgins, *The Fragile Right to a Civil Jury Trial in Colorado*, 27 COLO. LAW. 49 (Jan. 1998) (warning attorneys regarding “the fragile right to a civil jury trial in Colorado”).

<sup>83</sup> *Id.* at 502–15 (discussing these claims and explaining the application of jury trial rights to legal causes that would have allowed for a jury at common law).

<sup>84</sup> See Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution?*, 75 FORDHAM L. REV. 2685, 2689–90, 2720–30 (2007) (noting state court challenges based on jury trial rights); see also *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479, 482–83 (Cal. 2005) (discussing state constitutional rights to a jury trial that may be stronger than parallel federal rights).

force parties to forego trial rights.<sup>85</sup> This means these arbitrations are nonbinding and beyond the purview of the FAA.<sup>86</sup>

Nonbinding arbitration programs have nonetheless been attacked on jury access grounds where they impose unreasonable penalties or burdens on a litigant's access to trial *de novo*.<sup>87</sup> For example, litigants have challenged mandatory program provisions that require parties who demand trial *de novo* to pay arbitration costs and opponents' attorney's fees if they do not obtain sufficiently more successful results in trial. They argue that high costs and fees effectually preclude their realistic and constitutionally protected access to trial.<sup>88</sup>

These challenges have been largely unsuccessful. Most courts have been fairly tolerant of such limitations on *de novo* review of court-connected arbitration, viewing limits as necessary vehicles for easing court caseloads. For example, most courts agree that cost or fee-shifting provisions are permissible as reasonable limitations on trial rights.<sup>89</sup> They also justify such penalties as consistent with the traditional English rule that shifts counsel fees to the losing party in litigation.<sup>90</sup> Furthermore, courts strictly enforce short time limits on post-arbitration requests for trial *de novo*.<sup>91</sup>

Despite these hurdles to seeking trial *de novo* of court-connected arbitration, one may argue that these programs are still less burdensome than FAA arbitration on parties' judicial access in light of the FAA's preclusion of substantive court review of arbitration. However, the FAA only applies where parties have contractually agreed to arbitrate. In contrast, court-connected arbitration lacks that consensual core.<sup>92</sup> Parties also may use and accept arbitration provisions in their contracts due to shared un-

---

<sup>85</sup> See Golann, *supra* note 8, at 502–15. Some binding arbitration programs have been upheld with respect to statutory claims that do not involve jury rights, such as claims under no-fault insurance statutes. *Id.* at 504–05.

<sup>86</sup> See Parrott, *supra* note 84, at 2720 (explaining that court-annexed arbitration must allow for trial *de novo* to survive constitutional challenges); see also Schmitz, *supra* note 12, at 124–32 (discussing the meaning of finality under the FAA).

<sup>87</sup> See Golann, *supra* note 8, at 505–07.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 507–10.

<sup>90</sup> *Id.* at 510.

<sup>91</sup> See Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, 81 FLA. B.J. 18–20 (2007) (discussing the perils of nonbinding arbitration in Florida).

<sup>92</sup> See Berstein, *supra* note 15, at 2250–51.

derstandings and respect for the process, which is generally lacking in court-mandated arbitration.<sup>93</sup>

In essence, court-connected programs may force parties to settle or accept nominally nonbinding arbitration decisions where parties face penalties such as imposition of costs and attorney's fees if they fail to end disputes without litigation. These penalties create a *de facto* fee for demanding trial, despite the absence of statutory support for such a fee generally.<sup>94</sup> Moreover, penalty risks of seeking trial *de novo* may disproportionately burden the poorer litigants and those with small dollar claims.<sup>95</sup> These parties' fear of the risk of appeal may force them to accept an unfavorable award or the more powerful parties' settlement terms. Parties with legal and economic resources also may take advantage of these fears and inability to bear litigation costs in challenging arbitration awards they view as unfavorable.

At the same time, the involuntary nature of court-connected arbitration may thwart organic settlement processes or even spark antagonisms of parties who resent being forced to pursue such processes. Some evidence suggests that these court-ordered programs are less likely to foster settlement than are arbitration processes pursuant to voluntary agreements.<sup>96</sup> In a study of Assistant U.S. Attorneys' use of ADR in civil cases from 1995 to 1998, researchers determined that seventy-one percent of cases using voluntary ADR settled as compared to fifty percent of cases using court-ordered processes.<sup>97</sup>

The evidence also suggested that court-ordered ADR may heighten already constrained relations in particular contexts poorly-suited for mandatory ADR, such as employment discrimination cases.<sup>98</sup> More research is nonetheless needed to assess the functionality of court ADR programs, as well as their effects, suc-

---

<sup>93</sup> See Schmitz, *supra* note 65, at 126–27, 154–59 (discussing the generally “intra-communal” understandings and acceptance of arbitration provisions in commercial construction contracting).

<sup>94</sup> See Posner, *supra* note 14, at 391 (noting legality concerns with court-connected arbitration).

<sup>95</sup> See Bernstein, *supra* note 15, at 2170–75, 2229–38 (noting court-connected programs' impacts on parties' litigation decisions).

<sup>96</sup> Lisa B. Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes* (May 1, 2008), available at <http://ssrn.com/abstract=1127878> (reporting results of a study of civil cases completed by assistant U.S. attorneys during 1995–1998, and comparing findings regarding use of voluntary versus involuntary ADR).

<sup>97</sup> *Id.* at 33–34.

<sup>98</sup> *Id.* (discussing study results indicating lower settlement through court-ordered ADR in employment discrimination versus tort cases).

cesses and failures.<sup>99</sup> Furthermore, it is not surprising that those who voluntarily choose to use an ADR process are more likely to settle than those ordered to go through the process.

The nonconsensual nature of court-ordered processes raises constitutional questions and may thwart parties' court access. Furthermore, these programs' lack of consensual core creates an awkward push-pull towards or away from more organic or amicable settlement. On the one hand, they may push parties, especially those with less litigation resources, to settle or accept arbitration awards due to fear of protracted litigation costs and penalties of pursuing trial *de novo*. On the other hand, these programs may pull parties away from negotiations or other voluntary settlements by fanning adversarial flames and resentful feelings toward court pressures.

## B. Allowance for *De Novo* Review

Like court-connected programs' lack of consent, their allowance for trial *de novo* similarly has contradictory and often detrimental effects on efficiency and justice of dispute resolution. Allowance for trial *de novo* arguably is necessary to preserve due process rights that parties have not waived in an arbitration agreement. Furthermore, it may provide an escape hatch from rogue or unwarranted arbitration decisions. However, that escape hatch also hinders dispute resolution efficiency where it transforms arbitration into a costly layer on an already exhausting litigation process. Moreover, costly burdens of such prolonged processes generally fall hardest on those with the least financial and litigation resources. This makes court programs allowing trial *de novo* both a blessing and curse.

### 1. Inefficiency of the Trial *De Novo* Escape-Hatch

Court-connected arbitration's nonbinding nature raises significant questions regarding its efficiency.<sup>100</sup> As noted above, these arbitration programs may hinder dispute resolution efficiency by pushing parties away from the bargaining table, and derailing the

---

<sup>99</sup> *Id.* at 40–41 (noting lack of research).

<sup>100</sup> See Bernstein, *supra* note 15, at 2170–75, 2250–53 (discussing how mandatory ADR programs are unable to provide benefits of ADR pursuant to parties' contractual commitments suited to their disputes and relationships, and concluding that these programs in the federal courts are unwarranted due to their failure to produce private or social benefits).

possibility of organic early settlements.<sup>101</sup> This may occur, for example, where courts use these programs to force participation in a court-connected process by parties with grudges or other negative feelings that need lag time to subside to a level that allows for negotiated settlement. Evidence has indicated that ordered participation in an ADR process may hinder parties' private negotiations, thereby increasing dispute resolution costs overall.<sup>102</sup>

Parties who are already fearful of appearing "weak" also may assume more defensive postures during the arbitration process and refuse out-of-hand any nonbinding arbitration decisions.<sup>103</sup> These parties cannot "blame" acceptance of arbitration decisions on a pre-dispute contract requiring them to accept any award as binding and subject to limited review under the FAA. Instead, the nonbinding nature of court-connected programs leaves parties free to employ inefficient and often expensive posturing by challenging awards and beginning the litigation processes anew.<sup>104</sup>

Some programs allow parties to hinder the process at several junctures along the way. First, some programs allow parties to stymie the process from the start by challenging orders to participate in nonbinding arbitration or another ADR process. For example, the District of Columbia has elaborate Civil Arbitration Program rules that allow parties to halt arbitration while they pursue motions challenging a judge's assignment of their case to the program.<sup>105</sup> Parties also may put the proceeding on hold while they contest appointed arbitrators.<sup>106</sup> Furthermore, even after the arbitration proceedings get underway, the parties may stall the process with requests for continuance.<sup>107</sup> The parties may then follow proceedings with demands for trial *de novo*, and send the case back

---

<sup>101</sup> See Wissler & Dauber, *supra* note 6, at 95–97 (concluding that evidence suggested that Arizona's court-connected arbitration program was not fostering its efficiency goals).

<sup>102</sup> John Barkai & Gene Kassebaum, *Pushing Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 135–37, 145–46 (1991) (noting survey findings that the majority of cases sent to arbitration settled outside the arbitration or would have settled earlier without the program in place, therefore raising questions whether arbitration is worth the extra costs).

<sup>103</sup> At the same time, parties' fear of signaling weakness also may hinder them from suggesting or voluntarily agreeing to participate in ADR after a dispute arises. Bernstein, *supra* note 15, at 2191.

<sup>104</sup> *Id.* at 2192–97 (discussing how parties may use the nonbinding nature of these programs to inflict delay costs on those who may lack the requisite resources).

<sup>105</sup> See District of Columbia Rules of the Civil Arbitration Program, D.C. R. CIV. ARB. R. I-XVI (current through Feb. 1, 2008) (detailing elaborate motion, hearings and determination procedures for the program).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at R. I-IX.

through the litigation gauntlet. This results in an inefficient labyrinth of arbitration and court procedures that are more onerous than simply allowing the parties to litigate their claims as they sought to do in the first place. Parties waste time and money navigating through this labyrinth, while courts expend needless resources overseeing proceedings, dealing with motions, and sometimes struggling to determine whether parties have complied with duties to participate in good faith.<sup>108</sup> Challenge and motion procedures also leave room for parties to capitalize on power and resource imbalances.

To be fair, this inefficient picture of the process is not reality in all cases. As noted above, Nevada's program has been fairly successful in terms of ending eighty percent of cases entering the program and gaining acceptance among parties and attorneys over time.<sup>109</sup> Furthermore, it seeks to foster well-informed decisions by using two panels of arbitrators: tort and non-tort.<sup>110</sup> The ADR Office also strives to move cases along, reporting that an average case takes between six and seven months to complete.<sup>111</sup> Similarly, North Carolina reported in the early 1990s that its carefully planned court-ordered arbitration program reduced disposition time and cut the trial rate from twenty to seven percent for the eligible cases.<sup>112</sup>

Nonetheless, as Judge Posner has noted, ADR programs may be inefficient even if they induce settlement.<sup>113</sup> ADR programs that cut trial rates still may increase overall dispute resolution costs by providing government-paid assessments of parties' cases where they could have settled privately, without usurping public time and

---

<sup>108</sup> See Golann, *supra* note 8, at 492–94.

<sup>109</sup> See *supra* notes 44–48 and accompanying text (discussing Nevada's arbitration program).

<sup>110</sup> See E-mail from Chris Beecroft, Nev. ADR Comm., to Amy J. Schmitz, Associate Professor, U. Colo. L. Sch. (Oct. 21, 2008) (on file with author).

<sup>111</sup> *Id.*

<sup>112</sup> See Clarke et al., *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction*, 14 *JUST. SYS. J.* 154, 154–80 (1991) (reporting results from pilot program for suits for damages not exceeding \$15,000, and highlighting the importance of careful planning and implementation of the program as aiding its success). It should be noted that the study did not account for the costs of the planning and implementation of the process in assessing "success" and whether the program reduced overall dispute resolution costs. See *id.*

<sup>113</sup> See Posner, *supra* note 14, at 386–89 (discussing how ADR programs do not decrease overall dispute resolution costs even if they induce settlement); see also Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, *U. CHI. LEGAL F.* 399, 409–10 (1990) [hereinafter *Alternative View*] (highlighting how assessment of arbitration programs' overall efficiency must account for the costs of the planning and implementation of the arbitration processes themselves).

money.<sup>114</sup> Evidence indicates that ADR programs may only stall parties' settlements, and parties may simply use case evaluations from nonbinding procedures in their own settlement negotiations.

For example, a 1993 study of ADR programs' impact in Michigan federal court indicated that of the 1,691 cases referred to arbitration during the studied period, twenty-two percent were resolved through mutual acceptance of the arbitration decision.<sup>115</sup> Nonetheless, ninety-six percent of all cases referred to arbitration ultimately settled without trial. None of the twenty-five personal injury or products liability cases referred to mediation under a different Michigan program concluded through mutual acceptance of the mediation award. Researchers concluded that it was unclear how many cases would have settled outside of the program and whether any increase in the number of cases that settle before trial was sufficient to justify the costs of the program overall.<sup>116</sup>

Furthermore, there is evidence that many programs do not increase settlement or decrease trial rates.<sup>117</sup> Studies from the late 1980s and early 1990s indicate that arbitration programs often have little to no impact on settlement rates.<sup>118</sup> The recent study of the federal government's use of ADR in federal courts indicates that only half of the cases in court-ordered ADR settled, while parties settled in nearly three-fourths of cases using voluntary private ADR.<sup>119</sup>

A 2007 study of Arizona's court-connected arbitration program's performance indicates only thirty-nine percent of cases subject to arbitration settled, while fifty-five percent of cases outside the program settled.<sup>120</sup> Furthermore, not even half of the cases assigned to the arbitration program concluded in nine months in accordance with Arizona's Supreme Court's Case Processing

---

<sup>114</sup> Thomas D. Dyze, *ADR's Impact on the Resolution of Cases in the Michigan Federal Courts*, 74 MICH. BUS. L.J. 654 (1995) (noting how attorneys may use the ADR programs to get government-sponsored assessment of their cases).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See Hensler, *Alternative View*, *supra* note 113, at 408–13 (1990) (reporting study results of several court-mandated arbitration programs' efficiency in terms of time, settlement rates, and court costs).

<sup>118</sup> *Id.*

<sup>119</sup> Bingham et al., *supra* note 96, at 34–41 (reporting results of the study and noting its limitations, as well as the need for further research).

<sup>120</sup> Wissler & Dauber, *supra* note 6, at 75–79 (further explaining that more arbitration than civil cases used court resources through hearings on the merits).

Standards.<sup>121</sup> Researchers concluded that more cases likely would have concluded early with minimal court involvement were there no arbitration program in place.<sup>122</sup>

Similarly, researchers found that the mandatory nonbinding arbitration program the Philadelphia Court of Common Pleas adopted for its asbestos cases in the early 1980s did not promote efficient settlement of the flood of these cases at the time.<sup>123</sup> Under this program, judges held truncated hearings and rendered advisory opinions intended to induce settlement. The program was ultimately unsuccessful, and courts “could not keep up with the flood of asbestos case filings even by using this streamlined process in lieu of trial.”<sup>124</sup>

Court-connected arbitration may thus resemble a bad preseason football game. The players may go through the motions knowing that the results do not “matter” in that they do not “bind” the parties on the record. Teams may then waste resources and suffer needless injuries in the game. They may also keep their best players out of the fray to save them for the “real thing” to the extent disputants may refrain from offering their best evidence in arbitration to preserve its effect for the trial *de novo* they plan to pursue after the arbitral “preseason” is over. The difference is that football teams usually *make* money entertaining the public through preseason games, whereas courts and disputants often *lose* and *waste* resources through court-connected arbitral labyrinths.

## 2. Unfair Impacts of Arbitration Subject to Trial *De Novo*

Policymakers adopt mandatory programs in hopes of providing cost and efficiency benefits often associated with private consensual ADR. They hope that court-connected arbitration will ease judicial caseloads, and save courts and disputants time and money in resolving their disputes. Efficiency is not the only goal of these arbitration programs. Policymakers also surmise that these programs will foster fairness and aid parties in obtaining remedies in small-dollar claims that parties may not be equipped to pursue in

---

<sup>121</sup> These are the standards stated for ninety percent of the program cases. *Id.* at 79–83 (noting only forty percent of the cases in Maricopa County concluded within the nine months).

<sup>122</sup> *Id.* at 77–78.

<sup>123</sup> See Hensler, *Half Full*, *supra* note 2, at 1607 (discussing different ADR experiments courts have used to address mass personal injury litigation).

<sup>124</sup> *Id.* (noting that despite signs of initial success, the court could not schedule trials quickly enough to keep up with the requests for trial *de novo*).

court.<sup>125</sup> These laudatory goals, however, are seldom met through such court-connected arbitration programs.

Instead, as discussed above, these arbitration programs often do little to reduce total dispute resolution costs or time. This is especially true when programs do not include sufficiently strong disincentives to demanding trial *de novo*, although tougher disincentives also may unfairly limit parties' trial rights.<sup>126</sup> Allowance for trial *de novo* often renders arbitration a superfluous but expensive dispute resolution process. Unlike binding arbitration under the FAA, court-connected arbitration determinations have no binding or estoppel effects, thereby allowing one party to force all the disputants to re-litigate arbitrated issues in court by requesting trial *de novo*. This burdens all the parties as well as the courts.

Moreover, this dual process structure, coupled with disincentives for seeking trial *de novo*, works to the disadvantage of those with the least resources.<sup>127</sup> Expenses and risks of penalties for seeking trial *de novo* may prevent these parties from pursuing legitimate or warranted challenges of unfavorable arbitration awards, thus leaving them to unhappily "live with" nominally nonbinding awards. In contrast, parties with greater economic and litigation resources may be inclined to reject awards and seek trial *de novo*. They may not fear costs of a protracted process, or even risks of penalties for pursuing a trial *de novo* that does not produce a sufficiently better result than that obtained in arbitration.<sup>128</sup> This opens the door for the more powerful parties to litigate the less powerful to economic death.

Disproportionate burdens of costs and penalties of seeking trial *de novo* may fall hardest on those with small dollar claims, especially to the extent arbitration and litigation costs do not vary with case size.<sup>129</sup> For example, consumers may have valid but small-dollar claims regarding cell phone and service provider charges that they may forego due to potentially high litigation costs. Court-connected programs generally target such small dollar claims in hopes of providing means for these consumers to pursue

---

<sup>125</sup> See Bernstein, *supra* note 15, at 2197–99 (discussing justifications for courts' arbitration programs).

<sup>126</sup> *Id.* at 2210–15.

<sup>127</sup> *Id.* at 2215–38 (highlighting how programs may disproportionately burden weaker parties due to their nonbinding nature).

<sup>128</sup> See *supra* notes 40–49 and accompanying text (discussing program rules providing such disincentives to seeking trial *de novo*).

<sup>129</sup> See Bernstein, *supra* note 15, at 2231–33 (noting how fee and cost-shifting provisions may overly burden those with small dollar claims).

remedies, and thereby perhaps police providers' practices. However, consumers who are forced to participate in individual arbitration proceedings may be effectively prevented from joining together to assert class actions, which may be the only realistic vehicle for policing companies' conduct in some cases.<sup>130</sup> Furthermore, consumers may simply lack resources to pursue the ordered arbitration before enduring a subsequent trial *de novo*.

In addition, courts may inadvertently perpetuate emotional harms by mandating a private dispute resolution process without sufficient regard for emotional proclivities or context.<sup>131</sup> For example, some harassment claimants are so fearful of an alleged harasser that forced participation in a private, more intimate process could be psychologically harmful. A claimant's intimidation and legal inexperience also may prevent the claimant from fully and effectively presenting his or her case in the arbitration.<sup>132</sup> More powerful parties may then use their resources and tactical tools to essentially scare the weaker parties into accepting one-sided settlement terms.<sup>133</sup>

Arguably, enforcement of an arbitration agreement under the FAA also may be detrimental or unfair in such cases. However, such arbitration is at least pursuant to the parties' contract and will result in a final award. This finality provides more closure than a nonbinding procedure, thereby minimizing parties' power to scare opponents into accepting one-sided settlements under threats of trial *de novo* expenses or prolonged painful dealings with opposing parties. Furthermore, courts may use contract defenses such as lack of assent or unconscionability to preclude enforcement of agreements to arbitrate in FAA cases.<sup>134</sup>

---

<sup>130</sup> It is doubtful, however, that a court would order a consumer to mandatory arbitration prior to joining a class action in progress.

<sup>131</sup> See Golann, *supra* note 8, at 492–94 (noting how ADR may not be effective in all cases).

<sup>132</sup> See Amy J. Schmitz, *Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55, 106 (2006) (critiquing application of the FAA to non-binding procedures and discussing cases in which enforcement of agreements to mediate should not be specifically enforced).

<sup>133</sup> See Bernstein, *supra* note 15, at 2194–97 (discussing how parties may use their asymmetric ability to bear costs of delay and bargaining power in nonbinding arbitration programs). See also Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 46–68 (1999) (discussing why and when a party may seek an injunction or specific performance to gain bargaining advantage although performance of the contract would be inefficient).

<sup>134</sup> JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §§ 2.5, 2.11, 4.2, 9.1 (4th ed. 1998) (explaining basic enforcement rules, and the doctrinal defenses of duress, undue influence, misrepresentation, mistake and unconscionability). Nonetheless, there are strong arguments for legislation such as the Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th

Finality is considered a virtue of FAA arbitration because it promotes not only efficiency, but also fairness.<sup>135</sup> For example, courts have recognized the unfairness of differential impacts of trial *de novo* in refusing to enforce arbitration requirements in insurance contracts that allow for such review if the award exceeds a certain amount.<sup>136</sup> They recognized that trial *de novo* clauses act as unfair escape hatches parties may use to play games of wait-and-see or to take advantage of uneven litigation resources.<sup>137</sup> One

---

Cong. (2007) (primarily sponsored by Sen. Russ Feingold (D-WI) and Rep. Hank Johnson (D-GA), respectively). See Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998) (suggesting legislative regulation of consumer, employment, and franchise arbitration).

<sup>135</sup> See *supra* notes 75–77 and accompanying text (discussing *Hall Street's* holding that the FAA precluded parties from contractually expanding court review of arbitration awards under the FAA).

<sup>136</sup> These programs have been most prevalent for resolution of uninsured motorist disputes. See, e.g., *Parker v. American Family Ins. Co.*, 734 N.E.2d 83, 84–86 (Ill. Ct. App.), *cert. denied*, 738 N.E.2d 928 (Ill. 2000) (also refusing to enforce trial *de novo* clause).

<sup>137</sup> See *Parker*, 734 N.E.2d at 84–86 (holding trial *de novo* clause in uninsured motorist policy violated public policy because it harmed arbitration's value and unfairly favored insurers); *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923–27 (Ct. App. 1996) (voiding trial *de novo* provision in physician's contract with his patient); *Goulart v. Crum & Forster Pers. Ins. Co.*, 271 Cal. Rptr. 627, 627–28 (Ct. App. 1990) (holding insurance code arbitration provision prevented either party from seeking trial *de novo*); *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 346–49 (Colo. 1998) (en banc) (holding that insurance agreement allowing either party to request trial *de novo* if the award exceeded \$25,000 was against public policy); *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1140–42 (D. Haw. 1991) (finding trial *de novo* would destroy arbitration's value, and thus striking the provision and requiring limited judicial review under Hawaii's arbitration statute); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1244–51 (Ohio 1992) (holding nonbinding "arbitration" unenforceable); *Spalsbury v. Hunter Realty, Inc.*, No. 76874, 2000 WL 1753436 at \*3 (Ohio Ct. App. Nov. 20, 2000) (concluding that even if Hunter had been party to the arbitration agreement, the nonbinding clause was void as against public policy); *Zook v. Allstate Ins. Co.*, 503 A.2d 24, 25–27 (Pa. Super. Ct. 1986) (finding trial *de novo* provision ambiguous and thus unenforceable, especially because "a court of competent jurisdiction is only empowered to disturb the arbitration award if there is evidence of fraud, misconduct, corruption or some other irregularity which caused the rendition of an unjust, inequitable or unconscionable award"); *Slaiman v. Allstate Ins. Co.*, 617 A.2d 873 (R.I. 1992) (holding trial *de novo* provision violates public policy); *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617, 621–23 (Wash. 2001) (en banc) (holding trial *de novo* provision unenforceable because courts will not "condone what amounts to a waste of judicial resources" or go through arbitration "only to see if it goes well for their position before invoking the courts' jurisdiction"); *Petersen v. United Services Auto. Assoc.*, 955 P.2d 852, 854–56 (Wash. Ct. App. 1998) (voiding trial *de novo* provision because "[t]he purpose of arbitration is to avoid the courts to resolve a dispute"). Although *Hall Street* may now direct a different result, some cases have upheld these trial *de novo* clauses as valid exercises of contractual liberty. See *Hayden v. Allstate Ins. Co.*, 5 F. Supp. 2d 649, 651–53 (N.D. Ind. 1998) (holding insurance contract provision allowing either party to request trial *de novo* if the award exceeded Indiana financial responsibility limits was not against public policy because the "court is not required to favor arbitration over the unambiguous term of the contract"); *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 296–300 (Ariz. Ct. App. 1997) (allowing appeal of arbitration award under contract incorporating an appeal provision that was part of the state's statutory

court held that a trial *de novo* provision in a doctor/patient arbitration agreement violated public policy where it allowed litigation if a malpractice claim exceeded \$25,000.<sup>138</sup> The court emphasized, “a nonfinal arbitration is, in the last analysis, an oxymoron.”<sup>139</sup>

Similarly, other courts have concluded that non-final arbitration is not even “arbitration” due to its incongruent nature.<sup>140</sup> The Supreme Court of Colorado in *Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo. 1998),<sup>141</sup> for example, severed a trial *de novo* provision from an uninsured motorist insurance policy that permitted a party to demand trial *de novo* after arbitration if the award exceeded a specified limit.<sup>142</sup> The court then enforced the arbitration award under the limited review standards of Colorado’s adoption of the UAA. It found that the clause violated Colorado’s constitutional and legislative policies advancing timely resolution of claims.<sup>143</sup>

This is not to say that nonbinding evaluative procedures are always inefficient or unfair. One study indicated that litigants and attorneys have been satisfied with court-connected arbitration

---

compulsory arbitration system and therefore properly could be part of contractual arbitration procedures); *Kaplan v. Conn. Pleasure Tours*, No. 557609, 2001 WL 528123 (Conn. Super. Ct. May 1, 2001) (ordering trial *de novo* under an arbitration agreement that required the requesting party to pay all costs of arbitration); *Roe v. Amica Mut. Ins. Co.*, 533 So.2d 279, 281 (Fla. 1988) (finding Florida’s enactment of the UAA did not apply to a nonbinding arbitration award rendered pursuant to an arbitration agreement allowing either party to seek trial *de novo*); *Cohen v. Allstate Ins. Co.*, 555 A.2d 21, 23 (N.J. Super. Ct. App. Div.), *cert. denied*, 563 A.2d 846 (N.J. 1989) (finding trial *de novo* clause in uninsured motorist contract was enforceable in order to effectuate the intent of the parties); *Bruch v. CAN Ins. Co.*, 870 P.2d 749, 751–52 (N.M. 1994) (enforcing trial *de novo* clause in insurance arbitration provision although the courts “strongly encourage final settlement by arbitration”).

<sup>138</sup> *Saika*, 56 Cal. Rptr.2d at 925–27.

<sup>139</sup> *Id.* at 923. See also *Schaefer*, 590 N.E.2d at 1244–46.

<sup>140</sup> See *Schaefer*, 590 N.E.2d at 1244–46. The court recognized “that the real problem lies in the imprecise use of the term ‘arbitration,’” and stated that arbitration necessarily “must be final, binding and without any qualification or condition as to the finality of an award whether or not agreed to by the parties.” *Id.* at 1245. The court concluded that by creating an “escape hatch,” the ADR provision was “not a provision providing for true arbitration,” and therefore was unenforceable. *Id.* at 1248 (emphasis omitted). This meant that the trial *de novo* provision left the parties “with no valid alternative-dispute-resolution procedure” and thus they could litigate their claims in court. *Id.* at 1248–49.

<sup>141</sup> 952 P.2d 342 (Colo. 1998) (en banc).

<sup>142</sup> *Id.* at 343–49. The policy required that disputes regarding damages were to be “settled by arbitration” but if the award exceeded \$25,000, either party could request a trial on all issues within 60 days of the award. *Id.* at 343–44.

<sup>143</sup> *Id.* at 348–49. The court explained that substantive judicial review of these arbitration awards would thwart the program goal of minimizing insurers’ power to use their superior economic resources to out-litigate insureds. *Id.* at 346–48. The court stressed that “unproductive delay is entirely inconsistent with the public policy in favor of a speedy resolution of disputes.” *Id.* at 348.

processes.<sup>144</sup> Winners and losers in the study reported satisfaction with arbitration at the same rates as that obtained through trial.<sup>145</sup> In contrast, litigants who settled their cases through court-mediated conferences reported significantly lower rates of satisfaction.<sup>146</sup> That said, it is unclear whether encouraging satisfaction rates justifies the costs of ADR programs. This is especially true due to the lack of information on whether parties would have been just as satisfied if they had settled privately without any judicial intervention.

It may be that cheaper and less intrusive court programs could augment process satisfaction while also increasing overall efficiency of dispute resolution. For example, technological advances and expansion of Internet capabilities have provided promise for use of On-line Dispute Resolution (“ODR”).<sup>147</sup> Although ODR has its uncertainties and lacks the human element of face-to-face contact, it increases the range of connection and communication possibilities.<sup>148</sup> The Internet allows for flexible scheduling and asynchronous communication, as well as interactive dialogue.<sup>149</sup> Furthermore, online arbitration may be particularly effective and efficient because of this flexibility and the reduced need for face-to-face interaction and the type of complicated communication processes that may be necessary in more facilitative ADR processes.<sup>150</sup>

The Internet is already providing means for dispute resolution processes. For example, a non-final on-line administrative resolution process under the Uniform Dispute Resolution Procedures (“UDRP”) through Internet Corporation for Assigned Names and

---

<sup>144</sup> See Hensler, *supra* note 113, at 415–16 (noting research indicating satisfaction with the process).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 416–17 (noting how “litigants believe that both arbitration and trial are more fair than settlement conferences,” and how this is significant in light of the prevalence of settlement conferences).

<sup>147</sup> See Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 327–29 (2008) (discussing how use of Online ADR can foster efficient dispute resolution and maximize the growth of e-commerce in England and abroad).

<sup>148</sup> *Id.* at 328–34 (explaining how use of ODR provides beneficial and efficient avenues for communication that may transcend benefits of the face-to-face environment in traditional ADR).

<sup>149</sup> *Id.* at 330–32.

<sup>150</sup> *Id.* at 340–47 (explaining how on-line arbitration provides cost and time savings for parties and neutrals). “[T]he opportunities for using the virtual capabilities of electronic media in law-related processes are enormous. For instance, computer facilitated charts, figures, graphs, scales, tables, and diagrams can be utilized in OADR proceedings.” *Id.* at 343.

Numbers (“ICANN”) has shown some instances of success.<sup>151</sup> Parties have used the UDRP on-line procedure to obtain a relatively quick and cheap determination of who may use a contested domain name. These UDRP procedures allow parties to present their cases on-line to obtain a written nonbinding decision on their claims.<sup>152</sup> Although the process has been subject to criticism, it provides an example of how the Internet may be used to promote efficient dispute resolution, especially in communal and specialized areas.<sup>153</sup>

Nonetheless, the Internet creates challenges and opportunities for ADR. It is easy to see how ODR can foster efficient dispute resolution. The bigger challenge is to ensure fair process and party satisfaction. Indeed, any ODR program must be developed with values and standards of ADR as guideposts, along with keen awareness of resource and access differentials.<sup>154</sup>

---

<sup>151</sup> See Jason M. Osborn, Note, *Effective and Complementary Solutions to Domain Name Disputes: Uniform Domain Name Dispute Resolution Policy and the Federal Anticybersquatting Consumer Protection Act of 1999*, 76 NOTRE DAME L. REV. 209, 210–21 (2000). The UDRP was adopted on August 26, 1999 and the implementation documents were approved on October 24, 1999. *Internet Corp. for Assigned Names and Numbers (ICANN): Rules for Uniform Domain Name Dispute Resolution Policy*, 39 I.L.M. 952 (2000) [hereinafter *UDRP Rules*]; WIPO Arbitration Rules, available at <http://www.wipo.int/amc/en/arbitration/rules/index.html> (last visited Oct. 22, 2008).

<sup>152</sup> The UDRP proceedings do not constitute binding arbitration under the FAA. *Parisi v. Netlearning, Inc.*, 139 F.Supp. 745, 749–53 (E.D. Va. 2001). See also *Lockheed Martin Corp v. Network Solutions, Inc.*, 141 F. Supp. 2d 648, 651–52 (N.D. Tex. 2001) (explaining UDRP’s purpose and process, and noting that the average time from filing to decision is fifty-two days); *Virtual Countries, Inc. v. Republic of S. Africa*, 148 F. Supp. 2d 256, 259–61, 265 n.10 (S.D.N.Y. 2001) (explaining UDRP’s development, and doubting that ICANN would amend the UDRP’s nonbinding administrative procedure to provide for binding arbitration). See also Speidel, *supra* note 70, at 188–90 (concluding that the RUAA does not apply to UDRP determinations and aptly noting other important limitations of the RUAA’s unitary approach to complex arbitration issues in public policy contexts). Furthermore, the UDRP is not court-connected or subject to governmental fairness oversight.

<sup>153</sup> Proceedings must be on-line unless the panel specifically determines that it is “an exceptional matter” and therefore an in-person, telephonic, or teleconferenced hearing is necessary. *UDRP Rules*, *supra* note 151, at 957–60. In addition, they only cover cancellation and transfer of the domain names abusively registered and not claims for damages or injunctive relief other than return of a domain name. *Id.* at 952; see also Luke A. Walker, *ICANN’s Uniform Domain Name Dispute Resolution Policy*, 15 BERKLEY TECH. L.J. 289, 299–302 (2000); *Eresolution: Noodle Time, Inc. v. Max Mktg.*, 39 INTERNAT’L LEG. MATERIALS JUDICIAL AND SIMILAR PROCEEDINGS 795, 797 (2000) (finding Max Marketing had acquired the *benihanaoftokyo.com* domain name in violation of UDRP cybersquatting rules and ordering transfer of the domain name to the complainant). Any judicial determination of a respondent’s appeal will trump the panel’s decision, provided that ICANN receives documentation regarding the lawsuit within ten days after it is notified of the decision. Osborn, *supra* note 151, at 220 (citing UDRP Procedure 4(k)).

<sup>154</sup> See Haloush & Malkawi, *supra* note 147, at 348.

The problem is that staid court-connected nonbinding arbitration lacks this relatively inexpensive and flexible nature. Parties forced to pursue court-connected arbitration as a precursor to litigation do not simply arbitrate on-line. Furthermore, they may be predisposed to refuse to accept an award due to resistance to any imposed process, grudges against other parties or fears of appearing “weak.” Moreover, the burdens of the resulting labyrinth of arbitration and litigation processes generally fall hardest on those with the least resources. Contrary to the goals of court-connected programs, these programs may decrease dispute resolution efficiency and unfairly burden those with small dollar claims.

## V. CONCLUSION

Nonbinding, nonconsensual arbitration is often nonsensical. It strives to provide the same types of efficiency benefits commonly associated with private arbitration under the FAA. However, it often fails to deliver these benefits due to its court-ordered character and allowance for trial *de novo*. Instead, it often produces inefficient and burdensome hassles and costs for courts and disputants. These hassles and costs may foster unfairness by disproportionately burdening those with the least power and resources.

Accordingly, it is time for policymakers to abandon these mandatory arbitration programs. Instead, policymakers should consider using more innovative processes such as ODR to better serve goals of efficiency, fairness and justice. Policymakers now have opportunity to explore these processes for fostering restorative and more efficient dispute resolution. Such processes may not only save time and money, but may also ease tensions and protect parties from facing emotionally harmful confrontations. This may result in overall cost reductions while promoting more amicable settlements through the Internet’s virtual “space.”

COURT-ORDERED ARBITRATION PROGRAMS: UPDATED 07/08  
 AMY J. SCHMITZ, ASSOCIATE PROFESSOR, UNIVERSITY OF COLORADO SCHOOL OF LAW

	<b>Mandatory Arbitration Statute</b>	<b>Binding/Nonbinding</b>	<b>Jurisdictional Limit</b>	<b>Types of Cases</b>	<b>Subject to trial <i>de novo</i>?</b>
<b>Alabama</b>	No court-ordered arbitration program found.				
<b>Alaska</b>	Alaska R Civ. P. 16	Court in its discretion may hold pretrial conference to facilitate settlement, including use of ADR.			
<b>Arizona</b>	Ariz. Rev. Stat. Ann. § 12-133 (2006); Ariz. R. Civ. P. 72-76.	Non-binding	Varies by Superior Ct.	Civil cases with only money judgments sought.	Yes, upon request by either party within 20 days of award.
<b>Arkansas</b>	No court-ordered arbitration program found.				
<b>California</b>	Cal. Civ. Proc. Code § 1141.10-28 (2007); Cal. R. Ct. R. 3.810-3.878.	Nonbinding, unless parties stipulated to binding arbitration.	\$50,000	Civil cases with only money judgments sought.	Yes, upon request by either party within 30 days of award.
<b>Colorado</b>	Repealed Colorado Mandatory Arbitration Act in 1991				
<b>Connecticut</b>	Conn. Gen. Stat. § 52-549u-aa (2007); Ct. R. Superior Ct. Civ. § 23-60.	Non-binding	\$50,000	Civil cases with only money judgments sought.	Yes, upon request by either party within 20 days of award.

<b>Delaware</b>	Del. Super. Ct. C.P.R. 16.1. REPEALED	Non-binding, unless parties stipulated to binding arbitration.	\$100,000	Civil cases seeking monetary judgments, nominal nonmonetary claims allowed.	Yes, upon request by either party within 20 days of award.
<b>District of Columbia</b>	D.C. R. Civ. Arb. R. I-XVI	Non-binding, unless parties stipulated to binding arbitration.	When judge and parties decide it is best.	Civil cases	Yes, upon timely request by either party.
<b>Florida</b>	Fla. Stat. § 44.103-108 (2007); Fla. R. Civ. P. 1.820-1.840.	Non-binding	Arbitration or mediation may be ordered by judge or by stipulation.	Civil cases	Yes, upon request by either party within 20 days of award.
<b>Georgia (Fulton County)</b>	Ga. Fulton Co. R. 1000; GA R UNIF ADR Introduction	Non-binding	\$25,000	Civil cases with only money judgments sought.	Yes, upon request by either party within 20 days of award.
<b>Hawaii</b>	Haw. Rev. Stat. § 601-20 (2006); Haw. St. Cir. Ct. Arb. R. 1-28	Non-binding	Probable jury award of \$150,000 or less	Civil tort cases	Yes, upon request by either party within 20 days of award.
<b>Idaho</b>	No court-ordered arbitration program found.				
<b>Illinois</b>	Ill. Sup. Ct. R. 86-95.		\$50,000		
<b>Indiana</b>	Ind. Code Ann. (West 2003) Alt. Disp. Resol. R. 1.6	Judge may order mediation, non-binding arbitration, or mini-trial. Judge may order binding-arbitration or summary jury-trial with both parties' consent.	Judge's discretion.	Civil and domestic relations cases.	Yes, if parties selected non-binding arbitration, must reject arbitral award within 20 days of its filing.
<b>Iowa</b>	No court-ordered arbitration program found.				
<b>Kansas</b>	No court-ordered arbitration program found.				

<b>Kentucky</b>	UCLR Add. A. Arbitration Rules (Boone, Campbell, Gallatin & Kenton Counties); Joint U.S. Dist. Ct. Rules D.Ky., LR 16.2	Non-binding	The dispute must be at least 3 months old and any case shall be submitted to arbitration regardless of the amount in controversy.	Civil cases	Any party may appeal within 30 days of the issuance of the award and receive a trial <i>de novo</i> .
<b>Louisiana</b>	No court-ordered arbitration program found.				
<b>Maine</b>	Me. R. Civ. P. 16	Mandatory post-answer ADR conference required to select mediation (default if parties can't agree), early-neutral evaluation, or non-binding arbitration.		Civil actions brought or removed to Superior Court. Personal injury cases for less than \$30,000 are exempted.	Yes, and exemption notices must be filed within 30 days.
<b>Maryland</b>	No court-ordered arbitration program found.				
<b>Massachusetts</b>	Ma. R. S. Ct. Rule 1:18 Uniform R. Disp. Resol.	Any trial court may initiate a pilot program of mandatory, nonbinding ADR, parties may choose the type.		Courts may refer cases to a qualified form of ADR.	
<b>Michigan</b>	No court-ordered arbitration program found.				
<b>Minnesota</b>	Minn. Stat. § 484.73-76 (2006); Minn. Gen. R. Prac. Dist. Ct. R. 114	A majority of judges in a judicial district may set up a system of mandatory non binding arbitration in a district court.	More than \$7,500	Civil actions except those involving family law.	
<b>Mississippi</b>	No court-ordered arbitration program found.				

<b>Missouri</b>	Mo. R. S. Ct. Rule 17	Non-binding, not mandatory	Judge's discretion.	Civil disputes except those involving family law.	Yes, arbitral award is inadmissible in any court of law.
<b>Montana</b>	No court-ordered arbitration program found.				
<b>Nebraska</b>	No court-ordered arbitration program found.				
<b>Nevada</b>	Nev. Rev. Stat. § 38.250-259 (2005); Nev. Arb. R. 1-24.	Mandatory non-binding arbitration of certain actions filed in District Court or Justice Court, but allowing parties to agree to alternative methods of dispute resolution.	\$50,000	Civil disputes	Yes, written findings of the arbitrator must be admitted at trial, arbitrator is not allowed to testify.
<b>New Hampshire</b>	No court-ordered arbitration program found.				
<b>New Jersey</b>	N.J. Stat. Ann. § 2A:23A-20 (West 1997); N.J.R.C. R. 4:21A-1.	Non-binding	\$20,000	Civil action for personal injury except for those which fall under the motor vehicle reform act.	Yes, if one of the parties petitions the court within 30 days of the filing of the arbitration decision.
<b>New Mexico</b>	N.M. Stat. § LR2-601-603 & LR3-701-710.	Non-binding	\$25,000	Civil disputes except those involving: appeals, UAA, extraordinary writs, adoption, commitment, conservatorship, guardianship, probate, childreans code, domestic relations, workers comp, student loans, drivers license, election and tax.	Yes, if one of the parties petitions the court within 15 days of the filing of the arbitration decision.

<b>New York</b>	22 NY ADC 28.0 -14	Non-binding	\$6,000 except \$10,000 in New York Civil Court, mandated by judges discretion.	Any action brought forth in a trial court can be subject to binding arbitration as a calendar clearing mechanism by the Chief Judge.	Yes, if request is made by a party not in default within 30 days after the award has been filed.
<b>North Carolina</b>	N.C.G.S.A § 7A-37.1	Non-binding	\$15,000	Civil actions except actions that are solely to settle an account.	Yes
<b>North Dakota</b>	No court-ordered arbitration program found.				
<b>Ohio</b>	Ohio Sup. R. 15; Cuyahoga Co. R. 29; Stark Co. R. 16.	Non-binding	\$50,000	Civil actions excluding real estate, equitable relief, and appeals.	Yes, if request is made by a party not in default within 30 days after the award has been filed.
<b>Oklahoma</b>	No court-ordered arbitration program found.				
<b>Oregon</b>	Or. Rev. Stat. § 36.400-36.425 (2005); UTCR, Ch. 13.	Non-binding	\$50,000	Civil actions or domestic suits in which division of property is the only matter contested.	Yes, if request is made by a party not in default within 20 days after the award has been filed.
<b>Pennsylvania</b>	42 Pa. C.S.A. § 7361; Pa. R. Civ. P. 1301-13.	Non-binding	\$50,000	Civil actions	Yes, if request is made by party within 30 days after the award has been filed.
<b>Rhode Island</b>	R.I. Gen. Laws § 8-6-5 (2006); R.I. R. Arb.	Non-binding	\$100,000	Civil actions except family law issues, title to real estate, wills and decedents estates, and landlord and tenant.	Yes, if party files notice within twenty days after the award is filed.
<b>South Carolina</b>	No court-ordered arbitration program found.				

<b>South Dakota</b>	No court-ordered arbitration program found.						
<b>Tennessee</b>	Tn. R. S. Ct. Rule 31	Non-binding, with the consent of the parties.	At discretion of judge and parties	Civil actions	Yes		
<b>Texas</b>	Tex. Civ. Prac. & Rem. Code Ann. S 154.027 (West Supp. 1995).	Election of the parties.					
<b>Utah</b>	UT R J Admin. Rule 4-510	Non-binding		Civil actions except those pursuant to: Medical Benefits Recovery Act, Uniform Civil Liability for Support Act, Uniform Act of Paternity, and certain actions brought under specific provisions of the Utah Rules of Civil Procedure.	Yes		
<b>Vermont</b>	VT R RCP Rule 16.3	Non-binding	Judge's discretion	Civil actions except for small claim actions.			
<b>Virginia</b>	No court-ordered arbitration program found.						
<b>Washington</b>	Wash. Rev. Code 7.06.010-080 (2005); Sup. Ct. Mandatory Arb. Rules and Local Rules.	Non-binding	Mandatory for counties with populations of more than 100,000, can be ordered at the judges discretion for counties with populations less than 100,000, also claim has to be less than \$15,000 or up to \$50,000 if voted on by 2/3 of the judiciary.	Civil actions except for appeals from municipal or judicial courts.	Yes, if requested by party within 20 days after award is filed.		

<b>West Virginia</b>	No court-ordered arbitration program found.							
<b>Wisconsin</b>	Wis. Stat. s 802.12 (1994).	Court has option of ordering many different types of ADR. Binding arbitration is one, but requires consent of both parties.	Judge's discretion.		Civil and Family Matters	Depends on type of ADR selected by judge.		
<b>Wyoming</b>	No court-ordered arbitration program found.							
<b>FEDERAL DISTRICTS</b>								
<b>M.D. Fla.</b>	FL R USDCTMD Rule 8.01	Non-binding	\$150,000		Civil actions except constitutional violation.	Yes if request is made within 30 days after award is filed.		
<b>N.D. Ala.</b>	U.S. Dist. Ct. Rules N.D. Ala., ADR Plan	Non-binding unless consented to by the parties. Plan encourages parties to choose a process but court orders Mediation or Med/Arb Track if parties do not choose otherwise.	None stated in the Plan.		All civil cases not excluded by category by the judge. Court has discretion in choosing to order a case to ADR.	Yes, unless parties have mutually consented to a binding process or settlement.		
<b>W.D. Mich.</b>	W.D. Mich. Ct-Annex Arb.	Non-binding unless consented to by the parties. Court may suggest binding, but parties still must consent.	\$150,000		All civil cases seeking monetary damages and/or insubstantial non-monetary relief. Constitutional rights cases require all parties' consent.	Yes, if party demands trial de novo within 30 days.		

2009] COURT-CONNECTED ARBITRATION PROGRAMS 625

<b>D.C. Id.</b>	D. Id. L. Arb. R. (a)	Judge may refer parties to non-binding arbitration, but requires consent of all parties.				
<b>DCs of N.J.</b>	L.R. 201.1. (U.S. Dist. Ct. Rules D.N.J., L.Civ.R.201.1)	Non-binding	\$150,000		Civil actions except constitutional violations and social security actions.	Yes, if request is made within 30 days after award is filed.
<b>E.D.N.Y.</b>	L.R. 83.10 (NY US DIST CT E DIST CIVIL Rule 83.10)	Non-binding	\$150,000		Civil cases except social security, tax, prisoners civil rights, and constitutional violations.	Yes if request is made within 30 days after award is filed.
<b>E.D.Pa.</b>	L.R. 53.3. (PA R USDCCTED CIV Rule 53.3)	Non-binding	\$150,000		Civil cases except social security, constitutional violation, case where a prisoner is a party.	Yes, if request is made within 30 days after award is filed.
<b>N.D. Cal.</b>	CA R USDCCT ADR L.R. 4-1	Non-binding	\$150,000		Civil cases according to judges discretion.	Yes, if request is made within 30 days after award is filed.
<b>DCs of WY</b>	L.R. 16.3 (WY R USDCCT CIV Rule 16.3)	Non-binding	Court's discretion		Civil actions except: pro se cases, preliminary injunctions/TROs, constitutional challenges of a statute, social security cases, freedom of information act cases, privacy act cases, immigration cases.	
<b>W.D. Ok.</b>	LcVR16.3 ss.1-5.12	Non-binding	\$100,000		Civil actions except constitutional violations, administrative reviews and prisoner violations.	Yes if request is made within 30 days after award is filed.
<b>W.D. Tx.</b>	LcVR-88	Only with the consent of the parties				

