

ALTERNATIVE EVIDENCE RULES FOR ARBITRATION

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Today, arbitration is broadly used for resolving civil disputes domestically and internationally. It is a subject so popular in practice that calling it an “alternative dispute resolution” may in fact be a misnomer. Regarding the taking of evidence in arbitration, the cliché is that no rules apply, and that arbitrators have the ultimate authority. In practice, too many arbitrators simply let everything in, no matter how prejudicial, cumulative, incredible, suspect, or otherwise useless, for fear that ruling out anything may lead to vacatur.

This Article probes into the importance and feasibility of having evidence rules in arbitration. It argues that the lack of evidence rules in arbitration cuts two ways. While some features of arbitration, like flexibility and efficiency, favor dispensing with most rules of evidence, such standards of practice slice away at the reliability, predictability, and fairness of arbitration. In addition, when arbitral parties are from different legal traditions, there is a special need to harmonize the rules for taking evidence. Beyond these two issues, the current trend of “judicializing” or formalizing arbitration also calls for forming more rules of evidence.

If evidentiary rules are needed in arbitration for good reasons, what should, or could, those rules look like? This Article brainstorms this important issue, suggests five promising perspectives, and compares them with the traditional evidence rules applied in jury and bench trials, culminating with an examination of the emerging best practice of taking evidence in arbitration: the IBA Rules on the Taking of Evidence in International Arbitration, including these rules’ strengths and limitations. The high popularity of the IBA Rules in practice proves that model evidentiary rules as soft law for parties and arbitrators could attain success. It is now time for evidence scholars to contribute to the development of this exciting frontier.

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INTRODUCTION

Arbitration as part of dispute resolution has a long history: the English used arbitration for commercial disputes as early as 1224;¹ George Washington had an arbitration clause in his will;² and Abraham Lincoln arbitrated a boundary dispute between two farmers.³ Today, arbitration is in broad use for civil dispute resolution, domestically and internationally.⁴ Negotiation, mediation, and arbitration together are known as “alternative dispute resolution” (“ADR”), which is so popular in practice that Carrie Menkel-Meadow has suggested that its very name may in fact be a misnomer: over 90 percent of all cases are now settled before trial.⁵ Other scholars have dubbed this development an “arbitration epidemic.”⁶

The surge in popularity of arbitration over the past several decades can in part be explained by the vanishing trial in federal and state courts.⁷ The

¹ Texas Arbitration Council, *The Benefits of Arbitration in Texas*, TEX. BAR 1 (Dec. 2014), https://www.texasbar.com/AM/Template.cfm?Section=Jury_Information&Template=/CM/ContentDisplay.cfm&ContentID=27796 [<https://perma.cc/P89L-BCG7>].

² *Id.*

³ John W. Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 JUDICATURE 263, 264 (1986).

⁴ See, e.g., Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [<https://perma.cc/6VCL-ZPWY>].

⁵ Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 JUDICATURE 300, 300 (1986) (“For the processes included—negotiation, arbitration, mediation, summary proceedings—are hardly alternatives: they are the norm for dispute resolution. Litigation in the form of trial held in court is, in fact, the ‘alternative’ when over 90 per cent [sic] of all cases, civil and criminal, are settled before trial.”); *What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, THE L. DICTIONARY, <https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/> [<https://perma.cc/B8ZA-ZA2P>].

⁶ See Katherine V.W. Stone & Alexander J.S. Colvin, *EPI Briefing Paper #414: The Arbitration Epidemic*, ECON. POL. INST., 6 (Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/Q7XG-LHVU>]; see also Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 852 (1992) (“We are nearing the point, if we have not already reached it, where a recent law school graduate is as likely to be assigned or retained to represent a client at an arbitration proceeding as in a jury trial.”).

⁷ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–63 (2004) (spotlighting an 84 percent decrease in the percentage of federal civil cases resolved by trial between 1962 and 2002, as well as significant parallel declines in state courts); see also Kirkpatrick, *supra* note 6, at 838 (“Alternative dispute resolution (ADR) programs have mushroomed throughout the nation during the past decade.”); James J. Alfani, *Alternative Dispute Resolution and the Courts: An Introduction*, 69 JUDICATURE 252, 252 (1986) (“That the alternative dispute resolution (ADR) movement has taken hold in the United States is now an established fact. Proponents and critics agree that there is widespread interest in alternatives to adjudication.”).

waning of civil litigation has seemingly offered “opportunities for the growth of private adjudication through binding arbitration.”⁸ Most people would agree that arbitration is usually faster and cheaper than trial for both parties while still having the capacity to offer justified results.⁹

More importantly, the current surge in arbitration is a result of judicial promotion of arbitration since the 1980s, when the Supreme Court of the United States repeatedly reinterpreted a little-known federal law enacted in 1925 called the Federal Arbitration Act (“FAA”), and radically expanded its scope.¹⁰ The FAA provides that when a dispute involves a contract that has a written arbitration clause, a court must, upon motion, stay litigation so that the dispute can go to arbitration.¹¹ Initially, the FAA applied to only a narrow range of commercial disputes, those brought in a federal court for issues arising under federal law.¹² Today, courts interpret the statute to apply to disputes of all types, whether brought in a federal or a state court.¹³ Moreover, the Supreme Court has held that the FAA overrides any state law that runs counter to the FAA’s pro-arbitration policies.¹⁴

⁸ Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 UNIV. ILL. L. REV. 1, 4 (2010).

⁹ See Carrie Menkel-Meadow, *supra* note 5; see also Andrew Garcia, *New Report Comparing Arbitration and Litigation in Employment Disputes Sparks Backlash*, CPR SPEAKS (July 22, 2019), <https://blog.cpradr.org/2019/07/22/new-report-comparing-arbitration-and-litigation-in-employment-disputes-sparks-backlash/> [<https://perma.cc/KLS5-Y9ZY>] (“The [NDP Analytics] report compared the arbitrations with more than 90,000 employment lawsuits in federal courts between 2014-2018. It found that employees were three times more likely to prevail in arbitration than in litigation, arbitrations lasted on average 96 days shorter than litigated cases, and the average amount awarded was almost twice as much in employment arbitration, at more than \$520,000, compared to litigation.”). As a law journal note nicely summarized, “[t]he features of arbitration that can lead to its superiority over litigation include: relative speed and economy, privacy, convenience, informality, reduced likelihood of damage to ongoing business relationships, simpler procedural and evidentiary rules, and the ability to select arbitrators who are experts and are familiar with the subject matter of the dispute. Further, the entire nature of arbitration is flexible and may be adapted to the needs of the parties.” Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 248 (1995).

¹⁰ Stone & Colvin, *supra* note 6, at 6–7; see also Thomas J. Stipanowich, *supra* note 8, at 9 (“In the twentieth century, pre-dispute (or ‘executory’) arbitration agreements evolved from disfavored status to *judicially* denominated ‘super-clauses.’”) (emphasis added).

¹¹ 9 U.S.C. § 3. In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. *Id.* § 2.

¹² See Stone & Colvin, *supra* note 6, at 8.

¹³ See *id.*

¹⁴ *Id.* at 7–8. (“[The U.S. Supreme Court] ruled in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), that when deciding whether a particular dispute comes within an arbitration clause, *courts should resolve all doubts in favor of arbitration*. It said that such a presumption furthered the ‘liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.’ This declaration of federal policy has served as a fixture of arbitration law and provided a rationale for the extraordinary expansion of the FAA that followed.”)

In addition, resolving international commercial disputes by arbitration rather than through a national court has become increasingly popular globally. Parties from different countries, jurisdictions, and cultures are drawn to the neutrality of the forum, the potential to choose the decision-makers, and the increased confidentiality and flexibility afforded by arbitration.¹⁵

With regard to the taking of evidence in arbitration, the cliché is that no rules of evidence apply, and that arbitrators have the ultimate authority.¹⁶ Almost always, the rules governing arbitration explicitly state that the formal rules of evidence are not binding.¹⁷ Therefore, the parties are free to agree on how evidence should be adduced, presented, and evaluated by the

(emphasis added) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)).

¹⁵ See, e.g., *Arbitration in the Americas*, CORP. DISPUTES MAG., 4 (Jan.–Mar. 2016) https://www.adr.org/sites/default/files/document_repository/Corporate%20Disputes%20Magazine%20Arbitration%20in%20the%20Americas.pdf [<https://perma.cc/ZR7P-4QTB>] (“The growth was recognised by the International Court of Arbitration of the International Chamber of Commerce (ICC), which in 2013 established a full branch of the ICC Secretariat in New York (SICANA). The statistics on case filings to date have also borne out the growing attraction of international arbitration as a dispute resolution mechanism. In 2014, the number of US parties in ICC arbitration increased by 28 percent over the previous year. And the International Centre for Dispute Resolution (ICDR) – the international arm of the American Arbitration Association – reported over 1000 new cases filed last year. In the Southern hemisphere, demand for arbitration services continues to increase, with the ICC reportedly planning to open a branch in São Paulo, Brazil.”); INT’L CHAMBER OF COM., ICC DISPUTE RESOLUTION 2020 STATISTICS 4 (2021) (“2020 marked new records for the International Chamber of Commerce (ICC). The ICC International Court of Arbitration registered 929 filings, leading to the highest number of cases being administered under the ICC Arbitration Rules (1,833), number of parties involved (2,507) and number of appointments or confirmations of arbitrators (1,520). Other records include the geographical diversity of arbitrators (92 nationalities) and places of arbitration (65 countries). The ICC International Centre for ADR received a total of 77 new cases – the largest number of registered cases in a year – under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules.”).

¹⁶ Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469, 469 (2016). There exist a number of famous arbitration rule sets, such as those of the American Arbitration Association (AAA), London Court of International Arbitration (LCIA), and International Chamber of Commerce (ICC), to name a few. While such rules might vary from the procedural point of view and certain details, they all grant the tribunal an ultimate authority on rules of evidence and on discovery. See discussion *infra* Section I.D.

¹⁷ See, e.g., *Patent Arbitration Rules*, AM. ARB. ASS’N. <https://www.adr.org/sites/default/files/Patent%20Arbitration%20Rules%20Sep%2015%2C%202005.pdf> [<https://perma.cc/UFF4-EBHR>] (as amended and effective Sept. 15, 2005) (“[C]onformity to legal rules of evidence shall not be necessary.”). Case law similarly confirms that the formal rules of evidence are not binding in arbitration. See, e.g., *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (“Arbitrators ‘enjoy wide latitude in conducting an arbitration hearing’ and ‘are not constrained by formal rules of procedure or evidence’” (quoting *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992)); *Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987) (“Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence.”).

tribunal.¹⁸ The only mention of evidence in the FAA is in Section 10(a)(3), which states that an arbitration award may be vacated where arbitrators refuse “to hear evidence pertinent and material to the controversy”¹⁹ The Act implies that evidence deemed irrelevant or immaterial may be rejected.²⁰ In practice, however, too many arbitrators take Section 10(a)(3) to mean one thing: “let everything remotely relevant in, no matter how prejudicial, cumulative, incredible, suspect, or otherwise useless, for fear that ruling out anything may lead to vacatur” (the “let-it-all-in” approach).²¹

In the end, due to the lack of evidence rules in arbitration and the extreme deference in any subsequent judicial proceedings,²² arbitrators have broad discretion and flexibility in handling the introduction of evidence.

¹⁸ Presumably, parties contracting to resolve disputes by arbitration can mutually agree to adopt any chosen formal rules of evidence, such as the Federal Rules of Evidence (“FRE”), either in advance or at the time of arbitration. But such action is rare in arbitrations. THE COLL. OF COM. ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 75 (Thomas J. Stipanowich et al. eds., 2010).

¹⁹ 9 U.S.C. § 10(a)(3).

²⁰ Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 36 (2003); see also *Reed & Martin, Inc. v. Westinghouse Elec. Corp.*, 439 F.2d 1268, 1274–75 (2d Cir. 1971) (stating that it is not erroneous for arbitrator to exclude evidence found irrelevant).

²¹ McAllister & Bloom, *supra* note 20; see also AM. COLL. OF TRIAL LAWS., *Best Practices Regarding Evidence in Arbitrations*, 2–3 (2018), https://www.actl.com/docs/default-source/alternative-dispute-resolution-committee/adr_best_practices_regarding_evidence_in_arbitrations.pdf?sfvrsn=2 [<https://perma.cc/H8LJ-FCXR>] [hereinafter “ACTL”] (“This tendency in arbitrations to admit evidence despite its non-compliance with traditional admissibility standards likely, at least in part, reflects arbitrators’ desire to insulate their awards from challenges that the arbitrator refused to receive material evidence Against this backdrop, a very liberal approach to admitting evidence is understandable.”). Another reason arbitrators sometimes allow clearly irrelevant evidence is as a form of catharsis for the parties to the dispute. MAURICE S. TROTTA, *ARBITRATION OF LABOR—MANAGEMENT DISPUTES* 32 (1974) (“Even though an experienced arbitrator may prefer to hear only logical arguments and pertinent reliable evidence, he recognizes the necessity of listening to *irrelevant* matter when it serves to release pent-up emotions. Having his day in court and being able to tell the other side exactly what is on his mind may be as important to a disputant as winning a case.”). But see *Radvany*, *supra* note 16, at 496 (indicating that arbitrators are not required to hear all the evidence proffered by a party). Arbitrators’ decisions to exclude significant evidence have been upheld. See, e.g., *Rai v. Barclays Cap. Inc.*, 739 F. Supp. 2d 364, 374–75 (S.D.N.Y. 2010) (arbitrator’s decision was upheld after not only refusing to postpone a hearing based on a witness’s inability to appear and testify, but moreover deciding to exclude that witness’s affidavit on the basis that cross-examination was not possible); *LJL 33rd St. Assocs., LLC v. Pitcairn Props. Inc.*, 725 F.3d 184, 187 (2d Cir. 2013) (holding that arbitrator’s exclusion of hearsay was not abuse of discretion and confirming award).

²² See, e.g., *Farkas v. Receivable Fin. Corp.*, 806 F. Supp. 84, 87 (E.D. Va. 1992) (rejecting arguments that arbitration was tainted by admission of hearsay and other evidence that would be inadmissible under the FRE); *Racine v. State, Dep’t of Transp. & Pub. Facs.*, 663 P.2d 555, 557–58 (Alaska 1983) (finding admission of prejudicial hearsay to be insufficient to justify vacatur as long as the arbitrator received other evidence to support the award).

Considering that the choices arbitrators make in taking evidence have a direct impact on the outcome of arbitration—as well as the reality that the FAA gives courts extremely limited power to review arbitral awards, no matter how erroneous they might be²³—the lack of evidentiary rules in arbitration is at least controversial, if not outrageous.²⁴

The rest of this Article focuses on the central question of whether evidence rules are needed in arbitration, and, if so, what those rules should or could look like. Part I identifies five important reasons for having evidence rules in arbitration: (i) for the rationality of arbitral outcomes, (ii) for the predictability of arbitration, (iii) for the fairness of arbitration, (iv) for the harmonization of the arbitration process among participants of different legal traditions, and (v) for the purpose of “quasi-judicializing” the arbitration process. If any generally accepted rules are to govern evidentiary problems encountered in arbitration, they remain to be formulated. Before initiating that discussion, Part II first revisits the three core objectives of arbitration—fair and just dispute resolution, time and cost efficiency, and flexibility—which must form the backbone to any arbitration rules. It then discusses what those evidence rules in arbitration should or could look like from five promising perspectives and compares them with the rules of evidence applied in jury trials and in bench trials. Part III takes a close look at the most current comprehensive guidance for taking evidence in arbitration, *the IBA Rules on the Taking of Evidence in International Arbitration*, discussing these rules’ strengths and weaknesses. Finally, the Article wraps up with the conclusion that it is important and feasible to continue developing evidence rules in arbitration.

I. REASONS FOR HAVING EVIDENCE RULES IN ARBITRATION

The lack of evidence rules in arbitration cuts two ways. While some features of arbitration, like flexibility and efficiency, favor dispensing with most rules of evidence, such standards of practice slice away at the rationality, predictability, and fairness of arbitration. Furthermore, when arbitral

²³ See Stone & Colvin, *supra* note 6, at 6 (“Under [the FAA], an award can only be set aside on four grounds: it was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set out in the parties’ arbitration agreement. Each of these has been interpreted exceptionally narrowly. There is no provision for overturning an award based on errors of fact, contract interpretation, or law.”).

²⁴ See, e.g., Prac. L. Litig. & Prac. L. Arb., *Arbitration vs. Litigation in the US*, <https://uk.practicallaw.thomsonreuters.com/w-006-5897> [<https://perma.cc/N398-RCA3>] (“This flexibility [in admission of evidence] can be a disadvantage as well as an advantage in that the lack of certainty can lead to an increase in time and costs of the arbitration In the appropriate case, a party may prefer litigation because . . . [a]rbitrators are more likely to allow hearsay and irrelevant evidence.”); Paradise, *supra* note 9, at 269–73 (outlining the implications of the lack of evidence rules in patent infringement arbitrations).

participants, including parties, counsels, and arbitrators, come from diverse backgrounds, jurisdictions, or even legal traditions, the lack of evidentiary rules makes it exceedingly difficult to harmonize the taking of evidence. Beyond these two factors, the trend of “judicializing” or formalizing arbitration also calls for having evidence rules in arbitration.

A. For the Rationality of Arbitral Outcomes

Traditionally, one recognized function of arbitration is to “let off steam,” meaning that the arbitration hearing should serve as a “safety valve,” bringing to the surface latent dissatisfactions or frustrations so that the overall social or economic climate may be improved. This is the so-called “therapeutic” approach.²⁵ However, more important is arbitration’s use as an instrument for privately adjudicating civil or commercial disputes, where each disputant presents evidence and arguments in an endeavor to obtain a legally enforceable decision in his or her favor by a neutral, intervening third party (either one arbitrator or a panel of arbitrators).²⁶ In arbitration, the neutral, nongovernmental decision-maker employs mostly “left-brain[ed]” or “rational” mental processes (analytical, mathematical, logical, technical, or administrative), rather than “right-brain[ed]” or “creative” mental processes (conceptual, intuitive, artistic, symbolic, or emotional).²⁷ Thus, the decision sought needs to be a rational one, which means that accurate fact-finding (or to say “searching for truth”) is still critically important in arbitration. Otherwise, the arbitral parties might as well flip a coin or roll some dice, both methods that would be faster and cheaper than the current arbitration process and arguably still fair to both parties, but certainly not rational. As Ronald J. Allen has stated, “[w]ithout accurate fact-finding, rights and obligations are meaningless. The resolution of every contested claim of a right or an obligation is entirely dependent upon the finding of facts, and is derivative of them.”²⁸ This observation is no less true in the context of arbitration.

An arbitrator’s decision in favor of one party or the other needs to be based on evidence and arguments presented at arbitration hearings. According to the “therapeutic” approach, anything should be admitted that either

²⁵ *Problems of Proof in the Arbitration Process: Report of the Pittsburgh Tripartite Committee*, in PROBLEMS OF PROOF IN ARBITRATION 245, 245–47 (Dallas L. Jones ed., 1967).

²⁶ *Id.* at 247.

²⁷ Cooley, *supra* note 3, at 263–64 (“The most basic difference between [arbitration and mediation] is that arbitration involves a *decision* by an intervening third party or ‘neutral;’ mediation does not The arbitrator deals largely with the objective; the mediator, the subjective. The arbitrator is generally a passive functionary who determines right or wrong; the mediator is generally an active functionary who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.”).

²⁸ Ronald J. Allen, *The Domain of Evidence Law*, 23 EVID. SCI. 371, 379 (2015).

party desires to present, so that arbitration can relieve tensions.²⁹ Unfortunately, however, this let-it-all-in approach opens the door to various types of unreliable evidence.³⁰ For example, affidavits that have not been cross-examined are particularly unreliable and yet are often admitted in arbitration.³¹ The testimony of “junk scientists” may also unduly influence the outcome of the arbitration because the “true expert will assert her scientific conclusions cautiously, while the ‘junk scientist’ will confidently articulate the truth of scientifically dubious propositions.”³² And without rules of evidence in arbitration proceedings, hearsay evidence would be made by witnesses without any personal knowledge; character evidence with significant effect of prejudice would come in; and unauthenticated photos, doctored electronic evidence, and deepfakes could hardly be identified by arbitrators as false or tampered with.

Given these potential problems, although experienced arbitrators generally accept evidence that would not be admitted in court (especially in jury trials), they often do so with a brief statement that the evidence will be considered “for what it is worth,” just like many trial judges have done in bench trials.³³ Arbitrators do so mostly because they are confident that they, just like those bench trial judges, can appropriately weigh the evidence and disregard evidence that is not trustworthy, based on their experience and expertise.³⁴ But that belief may not be accurate. Recent research suggests that cognitive and implicit biases, which may be triggered or exacerbated by exposure to evidence of questionable relevance or reliability, may play a much larger role in arbitrators’ decisions than they may understand or admit.³⁵ The let-it-all-in approach fails to take account of this concern.

²⁹ *Problems of Proof in the Arbitration Process*, *supra* note 25, at 245–46.

³⁰ The let-it-all-in approach in arbitration opens the door to irrelevant and immaterial evidence being heard, although section 10(a)(3) of the FAA states more narrowly that an arbitration award may be vacated where arbitrators refuse “to hear evidence *pertinent and material* to the controversy.” 9 U.S.C. § 10(a)(3) (emphasis added).

³¹ Tom Arnold, *Setting Up the Arbitration*, in 1 ARBITRATION, MEDIATION, AND OTHER ADR METHODS 149, 199 (1993). The average un-cross-examined affidavit likely contains “one falsehood for every page or three” and “[n]ot infrequently a falsehood per paragraph.” *Id.*

³² Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror “Incompetence” and Scientific “Objectivity”*, 25 CONN. L. REV. 1083, 1091 (1993).

³³ See Edna Sussman, *The Arbitrator Survey – Practices, Preferences and Changes on the Horizon*, 26 AM. REV. INT’L ARB. 517, 521 (2015) (discussing e-mail survey of 401 experienced arbitrators conducted between October 2012 and February 2013; 34 percent of arbitrators “never” exclude evidence that would be inadmissible in court; 55 percent do so only 25 percent of the time; only 11 percent do so always or often).

³⁴ *Id.* at 521–22.

³⁵ See, e.g., Edna Sussman, *What Lurks in the Unconscious: Influences on Arbitrator Decision Making*, 32 ALTERNATIVES 149, 153 (2014) (“Yet studies with judges have confirmed that inadmissible evidence, once heard, has a profound impact on judicial decisions.”). The same is true for arbitrators. *Id.* at 155.

For example, while generally less impressionable than lay jurors, arbitrators might still be swayed by junk scientists. In any arbitration, the most preferable situation is for the arbitrator to be an expert in the exact technical field of the dispute. But this is rarely possible: there are only a limited number of experts in any particular technical field, and even fewer who have the training and skill necessary to be arbitrators.³⁶ Also, while arbitrators with legal training may understand that hearsay evidence is generally less probative than live testimony made by a witness with personal knowledge and subject to cross-examination, many states have no licensing or law degree requirements for arbitrators.³⁷ All that is needed are two parties willing to contractually agree to submit a dispute to a third party for resolution.³⁸ Thus, an arbitrator might be unaware of the suspicious weight of hearsay evidence and the importance of cross-examination in truth-seeking.

Even those arbitrators who have been practicing attorneys for many years, and whose decision is supposed to be comparable to a trial judge's decision, may not be able to appropriately filter out unreliable evidence, despite conventional beliefs to the contrary. For example, the New York Times reported a study of Ohio judges in 2001

[t]o test whether [they] could discount what they knew to be inadmissible information—like a defendant's prior conviction. It turned out they couldn't. Those who heard information that reflected badly on the defendant—but that the law says should be ignored—ended up voting against the defendant; judges who didn't hear it ruled the other way.³⁹

If judges failed the epistemological test, how can we assume that arbitrators would be able to appropriately consider evidence “for what it is worth” all by themselves?

³⁶ Paradise, *supra* note 9, at 272 (“Junk scientists are said to ‘discard enough “bad” data to make the remaining “good” points look important Professional statisticians call this “data dredging.”’) (quoting PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* 27 (1991)).

³⁷ See, e.g., *Arbitrator Training: Becoming an Arbitrator*, ADR TIMES (Mar. 29, 2021), <https://www.adrtimes.com/arbitrator-training> [<https://perma.cc/RL6Z-MLLU>]. In the United States, there are no national requirements for becoming an arbitrator, and the requirements vary widely by state. “For example, a number of states, including Georgia, Illinois, and California, require arbitrators to be attorneys who have practiced for a certain number of years. Other states only require bachelor's degrees.” See Clinton M. Sandvick et al., *How to Become an Arbitrator*, WIKIHOW, <https://www.wikihow.com/Become-an-Arbitrator> [<https://perma.cc/G3ZR-FTCU>] (last updated Apr. 11, 2019).

³⁸ ADR TIMES, *supra* note 37.

³⁹ Patricia Cohen, *Judicial Reasoning Is All Too Human*, N.Y. TIMES (June 30, 2001), <https://www.nytimes.com/2001/06/30/arts/judicial-reasoning-is-all-too-human.html> [<https://perma.cc/U8GG-CM33>].

The underlying rationale for guiding by evidence rules is to promote the resolution of disputes on more reliable evidence.⁴⁰ Even if both parties of a dispute may submit and present almost any evidence during an arbitration hearing, a set of well-designed evidentiary rules could help attorneys representing clients in arbitration explain the reliability of presented evidence to the arbitrator, inform the arbitrator how he or she should view and weigh the evidence, and increase the reliability of arbitral outcomes.⁴¹ For example, even if most hearsay is admissible in an arbitration hearing, rules of evidence could remind the arbitrator that it is generally less probative than live testimony of a witness with personal knowledge, if the declarant is unavailable for cross-examination. Rules of evidence may also provide checklists or guidance for arbitrators to better evaluate the reliability of scientific evidence, electronic evidence (including AI evidence), and other new forms of evidence constantly driven by the development of science and technology.

B. For the Predictability of Arbitration

Without conformity to evidence rules in the arbitration process, uncertainty and unpredictability abound as to how arbitrators will handle evidence presented by the parties. In some cases, arbitrators determine that not all of the evidence will be admitted or considered, while in others, even immaterial or prejudicial evidence is admitted and influences the outcome.⁴² “Most arbitrators and academics [assume] that, absent terms to the contrary in the agreement providing for arbitration, the traditional rules of evidence do not apply, and certainly do not strictly apply, in arbitration.”⁴³ However, most lawyers representing clients in arbitrations also do litigations, and they often expect that the arbitrator will view the rules of evidence as presumptively authoritative.⁴⁴ Those lawyers tend to view arbitrations as merely a nonjudicial forum for presenting evidence in much the same way as evidence would be presented in a courtroom. This is quite different from the

⁴⁰ See Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1965 (2008); see also Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (1992); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 232–33 (1988). Both Seigel and Nance are modern proponents of the “best evidence” oriented theory of evidence law.

⁴¹ See Radvany, *supra* note 16, at 511–12.

⁴² Paradise, *supra* note 9, at 271.

⁴³ ACTL, *supra* note 21, at 1.

⁴⁴ “Arbitrators, in contrast, are bemused by litigators who approach arbitration as a shadow judicial forum with the expectation that arbitrators are to be impressed by frequent and expert citations to court rules such as the [FRE]. The fact that formal rules of evidence do not apply in arbitration (unless the parties expressly mandate it, which is rare) little deters the transplanted trial lawyer.” Alfred G. Felio, *Evidence in Arbitration: A Guide for Litigators*, in AM. ARB. ASS’N HANDBOOK ON COMMERCIAL ARBITRATION 267, 267 (2nd ed. 2010).

view of arbitrators, who are generally open to “alternative methods for presenting evidence that would not be permitted in court.”⁴⁵

A common issue arises when there are no pre-established rules regarding evidence, leading the two parties to the hearing with significantly divergent assumptions about which evidence will be permissible.⁴⁶ These different expectations can quickly lead to new strife between the parties, exacerbating the disputes already in progress, and cause additional problems of uncertainty and inefficiency for lawyers or arbitrators who are undertaking their first arbitration.⁴⁷

Even if all participants in an arbitration, including the arbitrator(s), lawyers, and parties, have reached a consensus that the let-it-all-in approach is to be followed, questions and ambiguities remain. Say, for example, that the arbitrator believes that she will use common sense rather than any written rules to navigate and assess evidence submitted by the parties: what are the “common sense” rules that would apply to the parties and to the arbitrator during the arbitration hearing? Or if, instead, the test is that arbitrators are to determine what is pertinent or not pertinent in a case, then by what standard shall we judge what is “pertinent”?⁴⁸ Even if the arbitrator has a clear understanding of common sense or pertinence, it would be irrational to assume that the other participants in the arbitration hold the same view as hers or could easily and quickly be brought to it. There are even genuine disputes on what standard of proof shall be applied in arbitration. Some say it is the preponderance of evidence;⁴⁹ others believe that it is the clear and convincing evidence standard.⁵⁰

The arbitration process would benefit from greater clarity as to how the rules of evidence, evidentiary principles, and customary practices for receiving evidence should apply. With well-designed rules of evidence applied in arbitration, arbitrators could be more consistently apprised of evidence-based reasons to admit and weigh evidence, lawyers could better determine

⁴⁵ ACTL, *supra* note 21, at 1.

⁴⁶ Paradise, *supra* note 9, at 271.

⁴⁷ See William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 148 (Loukas A. Mistelis & Julian D. M. Lew eds., 2006).

⁴⁸ PROBLEMS OF PROOF IN ARBITRATION, *supra* note 25, at 247.

⁴⁹ See, e.g., Robert B. Von Mehren, *Burden of Proof in International Arbitration*, in 7 PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 123, 127 (Albert Jan van den Berg ed., 1996) (“The standard most generally applied in international commercial arbitration is probably the ‘preponderance of evidence.’”).

⁵⁰ See, e.g., *Presenting Your Case in Arbitration*, AM. ARB. ASS’N., https://www.adr.org/sites/default/files/document_repository/Presentating_your_case_in_Arbitration.pdf [<https://perma.cc/SBK2-4PDF>] (last visited Mar. 19, 2022) (“In order for the arbitrator to decide in favor of a party, the party must provide sufficient clear and convincing evidence to support their claims.”).

the value of both favorable and unfavorable evidence and prepare and make evidentiary arguments in arbitration, and the results of arbitrations could become more predictable, which in turn would foster more efficient resolution of cases by arbitration.

C. For the Fairness of Arbitration

The greater flexibility and informality of arbitration can work well when two equally experienced parties come together to design an arbitration procedure and choose an arbitrator whom they both trust. However, for two parties with disparity in strength, it can easily turn into a nightmare. For instance, consumers or employees are often required to enter into mandatory arbitration with a large corporation in order to buy a product or service or to get a job, removing formal legal protections which leaves them vulnerable to unfair procedures and unjust outcomes.⁵¹ In the absence of evidence rules, the party with more resources in an arbitration may be incentivized to engage in a “battle of experts” with the less resourceful party—“a war of attrition in which each party presents an excessive number of expert witnesses in an effort to counter those called by the other.”⁵² Unfortunately, this battle claims as its victims not just the less endowed party, but also nearly all of the advantages of arbitration, including savings in cost, time, and quality.⁵³ Even more importantly, such an arbitral proceeding would fail to deliver a key element of the desired product: a sense that justice has been respected.

Procedural formality is often another term for due process. One of the potential benefits of having evidence rules in arbitration is that it can enhance fairness throughout an arbitral proceeding. Well-designed rules of evidence would provide a sense of equal treatment, promoting the right to be heard, an unbiased tribunal, and upholding one of the tenets of the rule of law: that similar cases should be treated in a similar fashion.

D. For Harmonization of the Arbitration Process Among Participants of Different Legal Traditions

If the parties choose arbitration to solve their dispute, they need to decide whether to proceed either in *ad hoc* arbitration or under an arbitral in-

⁵¹ See Stone & Colvin, *supra* note 6, at 5.

⁵² Paradise, *supra* note 9, at 271.

⁵³ Ian Meredith & Louise Bond, *Experts Evidence in International Arbitration: Common Criticisms and Innovative Solutions*, K&L GATES (Aug. 24, 2021), <https://www.klgates.com/Expert-Evidence-in-International-Arbitration-Common-Criticisms-and-Innovative-Solutions-8-24-2021> [https://perma.cc/8M7U-R7MF] (“In 2007, the ICC produced a report on reducing time and costs in arbitration, which was most recently updated in 2018. Unsurprisingly, inefficient use of expert evidence was highlighted as one issue that can significantly increase the time and costs of an arbitration.”).

stitution.⁵⁴ If the parties choose *ad hoc* arbitration, they can either adopt established rules of evidence like the Federal Rules of Evidence (“FRE”), subject to any party agreement, or tailor their own evidentiary rules.⁵⁵ However, in most cases, parties of *ad hoc* arbitration do not follow either method: for the purposes of flexibility and efficiency, they do not adopt the FRE, but they are also too busy to make their own rules of evidence.⁵⁶ Moreover, because *ad hoc* arbitration lacks a supporting institution, the effectiveness of the proceedings depends fully on the cooperation of the parties.⁵⁷ That is why, in cases in which rules are chosen, they are most often selected by referring to the rules of a major arbitral institution.⁵⁸

Still, even where such a set of arbitral institution rules is referenced, it often says very little about the process of taking evidence.⁵⁹ Rules of major arbitral institutions like the International Chamber of Commerce (“ICC”), London Court of International Arbitration (“LCIA”), United Nations Commission on International Trade Law (“UNCITRAL”) and American Arbitration Association (“AAA”) address the conduct of proceedings simply by saying that arbitrators may establish the facts by “all appropriate means,”⁶⁰ with the “widest discretion to discharge these general duties,”⁶¹ or in “whatever manner [the tribunal] considers appropriate.”⁶² In such cases, the normal course of action would be to go with the legal tradition one is familiar with, trained in, and practiced. In an arbitration where both parties, their representing lawyers, and the arbitrator(s) are all from the same legal back-

⁵⁴ LORENZ RAESS, COURT ASSISTANCE IN THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 7 (2020).

⁵⁵ *Id.*

⁵⁶ *See id.* at 7–8.

⁵⁷ *Id.*

⁵⁸ *Id.* at 8.

⁵⁹ *See, e.g., UNCITRAL Arbitration Rules: General Assembly Resolution 31/98 art. 28*, UNITED NATIONS COMM’N ON INT’L TRADE L., <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> [<https://perma.cc/CE32-M6QG>] [hereinafter UNCITRAL]; *Administered Arbitration Rules art. 22.3*, H.K. INT’L ARB. CTR. (Nov. 1, 2018), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf [<https://perma.cc/BEU3-EAGP>] [hereinafter HKIAC]; *Arbitration Rules art. 22.1(vi)*, THE LONDON CT. OF INT’L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [<https://perma.cc/7XD4-XWZV>] [hereinafter LCIA].

⁶⁰ *2021 Arbitration Rules art. 25*, INT’L CHAMBER OF COM. (Jan. 1, 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> [<https://perma.cc/FV9Y-NB7J>] [hereinafter ICC].

⁶¹ LCIA, *supra* note 59, art. 14.2.

⁶² *International Dispute Resolution Procedures: Including Mediation and Arbitration Rules art. 16*, AM. ARB. ASS’N. (June 1, 2009), <https://www.adr.org/sites/default/files/International%20Dispute%20Resolution%20Procedures%20%28Including%20Mediation%20and%20Arbitration%20Rules%29%20-%20English%20Jun%202001%2C%202010.pdf> [<https://perma.cc/7PPL-7PAH>] [hereinafter AAA]. *See also* UNCITRAL, *supra* note 59, art. 25 (6) (“The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”).

ground, it may be relatively simple to achieve harmony in these matters. But due to the fast development of technologies and commerce, people and organizations all over the world, and with diversified backgrounds of law and culture, are more engaged than ever. For example, nowadays, Chinese corporations like Alibaba and Baidu list their stocks on Nasdaq, while American manufacturers like Tesla build factories in China, and millions of merchants and buyers from all over the world sell and purchase commercial products on Amazon.com every day.⁶³ When people and organizations from different jurisdictions and cultures enter into an arbitration, without guidance of rules, it is much more difficult for them to reach a consensus in taking evidence. Frequently, individuals from different legal backgrounds hold contrasting perspectives on the appropriate handling of evidentiary matters.⁶⁴ “One example of culture clash relates to communications from in-house lawyers, which are privileged in the United States but not in many European countries.”⁶⁵ Accordingly, a memo would be protected if sent by an in-house counsel in New York,⁶⁶ but advice given by an in-house counsel in Geneva would not be protected, since the Swiss lawyer presumably had no expectation of privilege.⁶⁷ Such a dilemma is mostly concentrated in arbitrations where participating parties come from oppositional common law and civil law traditions.⁶⁸

Evidentiary rules and procedures vary significantly between civil law and common law traditions. Without getting too far off course, it can be observed that the differences are most pronounced when it comes to the preparation and submission of documentary evidence,⁶⁹ the admission of oral ev-

⁶³ See, e.g., Andrew Buck, *57 Amazon Statistics to Know in 2023*, LANDING CUBE (Dec. 20, 2022), <https://landingcube.com/amazon-statistics> [<https://perma.cc/UDL2-EEMR>] (“Amazon ships approximately 1.6 million packages a day. That works out to more than 66 thousand orders per hour, and 18.5 orders per second.”).

⁶⁴ See RAESS, *supra* note 54, at 8.

⁶⁵ Park, *supra* note 47, at 151.

⁶⁶ See *NCK Org. Ltd. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976).

⁶⁷ Dr. Jodok Wicki, *Is the Attorney-Client Privilege and the Work Product Doctrine Relevant Abroad?—Pitfalls and Best Practices Legal Professional Privilege in Switzerland*, CMS VON ERLACH HENRICI, (Oct. 7, 2010), <https://cms.law/en/media/local/cms-vep/files/publications/publications/legal-professional-privilege-in-switzerland> [<https://perma.cc/7YT5-KHU4>].

⁶⁸ Within common law and civil law countries, further divisions take place, as each country has developed its own procedure. The general rules, however, are common for the countries belonging to a particular legal family.

⁶⁹ Since judicial factfinders in the civil law system are mostly highly educated and trained judges (in contrast with the lay jurors of the common law system), civil law gives much emphasis to written evidence and documents. This is because there is less need for oral explanation of the evidence to the judges during hearings. See, e.g., Zhuhao Wang & David R. A. Caruso, *Is an Oral-Evidence Based Criminal Trial Possible in China?*, 21 INT’L J. EVIDENCE & PROOF 52, 62–63 (2017).

idence⁷⁰ from witnesses of fact and expert witnesses,⁷¹ and the actual conduct of evidentiary hearings,⁷² as well as the role of the tribunal, the role of counsel, and the conduct of the proceedings.⁷³ All these divergences reflect the main distinction between common law and civil law: an adversarial versus inquisitorial system.⁷⁴

Common law is characterized by the adversarial approach, where the judge or arbitrator usually does not play an active role in the dispute. Their role is limited to ensure the equity and fairness of the proceedings, while the parties are the protagonists, charged with introducing all the issues of the dispute. Matters, questions, and objections not raised by the parties are not taken into consideration by the judges.⁷⁵ The adversarial approach influences all stages of the proceeding, determining the rules of evidence presentation, exclusionary rules, and the role of counsel. This system obligates the parties to present all the relevant evidence in their possession, including evidence that is adverse to their own interest.⁷⁶ In contrast, civil law is characterized by the totally opposite approach.

⁷⁰ As opposed to the civil law system, the common law system is mostly oriented toward oral evidence and hearings, as the oral discussion and assessment of evidence permits the jury to fully understand and evaluate it. Also, oral evidence allows the adversarial counsels to have more room to act at trial. *See, e.g.*, Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1077–78, 1123 (2019).

⁷¹ Usually in the common law tradition, the experts are appointed by the parties, whereas in the civil law tradition the experts are appointed by the judge, either upon the request of the parties or within the authority of the judge to act *ex officio*. *See, e.g.*, Zuhao Wang, *An Alternative to the Adversarial: Studies on Challenges of Court-Appointed Experts*, 2 J. FORENSIC SCI. & MED. 28, 28, 30 (2016).

⁷² Hearings and trials are much longer in common law countries, where they have the crucial job of allowing counsel to fully present and examine evidence, make arguments, and express their tactical and strategic capacities. To the contrary, hearings in civil law countries are a less central part of the proceedings. In some cases, where the crucial facts can be established based on contracts or other documentary evidence, the hearing can be omitted. Whenever there is still a need for oral submissions and evidence, the hearing is conducted, however, in a much shorter time frame than in the common law tradition. *See, e.g.*, *Key Differences in Civil Litigation Between Civil and Common Law Systems*, JUDICIARIES WORLDWIDE, <https://judiciariesworldwide.fjc.gov/civil-litigation> [<https://perma.cc/JQ66-UWS4>] (last visited June 26, 2023).

⁷³ In the common law tradition, interlocutory proceedings are separated from the final hearing, as all the information needs to be presented to the jury at trial. In contrast, in the civil law tradition, as the professional judges are also the factfinders, there is no need to separate the stages of the proceedings into the pre-hearing and final hearing phases. *See* Anna Magdalena Kubalcyk, *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, 3 GRONINGEN. J. INT’L L. 85, 88–89 (2015).

⁷⁴ *See id.*

⁷⁵ *See* Laurent Vercauteren, *The Taking of Documentary Evidence in International Arbitration*, 23 AM. REV. INT’L ARB. 341, 343 (2012).

⁷⁶ *See* JEFFREY WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 746 (2012).

The inquisitorial method focuses on the active role of the judge or arbitrator. The judge is in charge of the conduct of the proceedings. The role of the judge is to investigate the case, establish all the facts and the law while the parties and their counsels assist in this process. . . . The parties are not required to present all the relevant evidence. They can determine which evidence they wish to rely on without being forced to present the evidence not in line with their interests.⁷⁷

The differences between common and civil law traditions can thus lead to serious conflicts in arbitration if the arbitral parties come from opposing backgrounds. Hence, the harmonization of the procedural rules of arbitration, especially the taking of evidence, has become a particular problem in such situations. Unfortunately, because legal traditions vary so significantly, the task of finding a compromise that will not favor any single legal tradition or jurisdiction can be quite challenging, particularly because the search for such common ground often only occurs after a dispute arises, when tensions are already heightened. Hence, to provide arbitral parties of different legal backgrounds a suitable solution for the taking of evidence without conflicts and misunderstandings, preexisting, well-designed rules of evidence are needed.⁷⁸

E. For the Purpose of “Quasi-Judicializing” the Arbitration Process

Early in the twentieth century, the dawn of the modern era of American arbitration was heralded by the passage of the FAA, supporting the enforcement of contractual agreements to arbitrate future disputes. And advocates championed arbitration as a means of avoiding the “needless contention that [is] incidental to the atmosphere of trials in court.”⁷⁹ Arbitration was popularly labeled as “a more efficient, less costly, and more final method for resolving civil disputes”.⁸⁰ In the decades since the FAA’s passing, contractual provisions for the resolution of disputes by arbitrators have become a standardized practice in many kinds of commercial contracts.⁸¹ These practices, together with broad judicial enforcement of arbitration provisions, have made “arbitration a wide-ranging surrogate for [civil] trial

⁷⁷ See Kubalczyk, *supra* note 73, at 88–89.

⁷⁸ International arbitral institutions, such as UNCITRAL, ICC and LCIA, provide only general provisions in terms of the taking of evidence, while the one exception is the IBA Rules on the Taking of Evidence in International Arbitration, which will be discussed and analyzed in Part III of this Article. *Infra* Part III.

⁷⁹ See Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n.44 (1928); see also Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988) (noting that “[o]bservers frequently depict arbitration as a speedy and economical process.”).

⁸⁰ Stipanowich, *supra* note 8, at 8.

⁸¹ See Curtis E. von Kann, *Not So Quick, Not So Cheap*, BLOOMBERG L. (Sept. 20, 2004), <https://www.bloomberglaw.com/document/X90LRJGK000000?jsearch=900005415263#jcite> [<https://perma.cc/858B-L5GA>] (commenting on the widespread, and potentially creative, use of arbitration provisions in commercial contracts).

in a public courtroom”.⁸² However, the more arbitration has taken over the territory historically reserved for civil litigation, the more it has taken on the traditional features of a court trial and begun to increasingly resemble the civil litigation it was designed to supplement.⁸³

Since the 1980s, a wave of “judicialization” of arbitration has arisen. Some have characterized it as a “second stage movement”: the first stage witnessed the creation of literally hundreds of local arbitration programs over the preceding decades; the second stage involved the “institutional-iz[ation]” of many of these programs through official recognition, sponsorship, or assimilation into the court system.⁸⁴ In a featured article, *Arbitration: The “New Litigation”*, Thomas Stipanowich observed that the character of arbitration has changed, becoming “‘judicialized,’ formal, costly, time-consuming, and subject to hardball advocacy.”⁸⁵

Nonetheless, some would argue that “[t]he foundation of every arbitration proceeding is the arbitration agreement.”⁸⁶ The freedom of parties to negotiate and execute arbitration agreements is known as the principle of party autonomy, and it is the most important difference between arbitration and litigation.⁸⁷ Thus, this trend of “judicializing” arbitration proceedings is an intrusion into the nature of arbitration as a private contract between parties. But is this really so bad?

At first blush, judicialized arbitration may seem a contradiction in terms. Arbitration is presumed to present an alternative to legal formalities, a phrase that often stirring images of the judicial waste satirized in the Dickensian inheritance dispute *Jarndyce v. Jarndyce*, which had become so complicated that no living soul knew what it meant, and whose legal costs consumed the entire estate.⁸⁸

However, this is only half of the truth. In reality, elements of judicial proceeding inevitably enter arbitration as soon as the arbitral parties want a judicially enforceable, *binding* result. No one would much care about legal

⁸² Stipanowich, *supra* note 8, at 9.

⁸³ *Id.*

⁸⁴ See Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 134–35 (1984); see also Alfani, *supra* note 7, at 252; Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986) (describing the extent of adoption and official integration of the arbitration process into existing state and federal court systems).

⁸⁵ Stipanowich, *supra* note 8, at 11–19.

⁸⁶ Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?*, 6 J. SUST. DEV. L. & POL'Y 222, 222 (2015).

⁸⁷ Stipanowich, *supra* note 8, at 1–2, 36.

⁸⁸ Park, *supra* note 47, at 146–47. *Jarndyce v. Jarndyce* is a fictional probate case in *Bleak House* (1852–53) by Charles Dickens, progressing in the English Court of Chancery. See Law vs. Justice Theme Analysis of *Bleak House* by Charles Dickens, LITCHARTS <https://www.litcharts.com/lit/bleak-house/themes/law-vs-justice> [<https://perma.cc/6VAV-EFTV>]. The case is a central plot device in the novel and has become a byword for seemingly interminable legal proceedings.

rights if either party could unilaterally elect to disregard the arbitrator's decision. In general, a valid arbitration award constitutes a full and final adjustment of the controversy.⁸⁹ It has the force and effect of an adjudication, and being granted *res judicata* effect, it precludes the parties from litigating the same subject again.⁹⁰ "The award can be challenged in court only on very narrow grounds."⁹¹

Thus, the power arbitrators possess not only derives from the private agreement executed by parties, but it is also vested by the judicial system. In this sense, the arbitrator's function is *quasi*-judicial in nature, and the arbitration award has binding effect. "So it is not at all surprising that [parties] expect ordered arbitral proceedings" rather than "a lottery of inconsistent results."⁹² Nicely designed evidentiary rules for arbitration would enhance the prospect that similar arbitration cases will be treated in similar ways, as these rules would prompt a consistent and systematic way of taking evidence by the arbitrators.

Based on the above five reasons, this Article argues that the vacuum that traditionally surrounds the practice of evidence rules in arbitration hearings is wrong and should be corrected.

II. WHAT THOSE RULES SHOULD OR COULD LOOK LIKE

If it is preferable to have evidence rules rather than following the let-it-all-in approach in taking evidence in arbitration, then the next natural question is what those rules should or could look like. The current treatment of evidence among various arbitral regimes is obviously inadequate.⁹³ "If any generally accepted rules are to govern evidentiary problems encoun-

⁸⁹ *Donoghue v. Kohlmeyer & Co.*, 380 N.E.2d 1003, 1006 (Ill. App. Ct. 1st Dist. 1978).

⁹⁰ *Cooley*, *supra* note 3, at 268.

⁹¹ *Id.* Note that in some states, the grounds relate to the partiality of the arbitrator or to misconduct in the proceedings, such as refusal to allow the production of evidence or to grant postponements, as well as to other misbehavior in conducting the hearings so as to prejudice the interests of a party. *See generally* Martin Domke, *Judicial Challenge of Award*, in 1 *DOMKE ON COMMERCIAL ARBITRATION* (2001).

⁹² *Park*, *supra* note 47, at 147.

⁹³ Arbitral regimes like the FAA, the American Arbitration Association ("AAA"), the Judicial Arbitration and Mediation Services, Inc. ("JAMS"), Financial Industry Regulatory Authority ("FINRA") Arbitrations, and Conflict Prevention and Resolution ("CPR") Arbitrations exhibit broad similarities in their treatment of evidence in that arbitrators are generally given relatively wide latitude to admit what they wish.

The specific treatment of evidence within the various bodies of rules, however, differs: some regimes cabin discussion of evidence to its own rules, while others package it within rules governing the overall conduct of the arbitration hearing. Unlike the FRE, none of these rules or rule regimes, however, provide a comprehensive framework for analyzing evidentiary admissibility.

Radvany, *supra* note 16, at 493; *see also* *PROBLEMS OF PROOF IN ARBITRATION*, *supra* note 25, at 248.

tered in arbitration hearings, they remain to be formulated.”⁹⁴ Before we can initiate that discussion, nonetheless, it is important to review the essential objectives of arbitration, which must form the backbone to any arbitration rules.

A. *Three Core Objectives of Arbitration Revisited*

Based on a review of the rules and principles of various arbitral institutions,⁹⁵ and articles discussing fundamentals of arbitration,⁹⁶ this article claims that the three main objectives of arbitration are: (1) fair and just dispute resolution, (2) time and cost efficiency, and (3) flexibility.

⁹⁴ PROBLEMS OF PROOF IN ARBITRATION, *supra* note 25, at 248.

⁹⁵ The AAA (Commercial) Rule 23 and AAA (Consumer) Rule 23 grant the arbitrator the authority to issue any orders deemed necessary to achieve “fair, efficient, and economical resolution of the dispute [or case].” *Commercial Arbitration Rules and Mediation Procedures Rule 23*, AM. ARB. ASS’N (Sept. 1, 2022), https://adr.org/sites/default/files/Commercial-Rules_Web.pdf [<https://perma.cc/V5CS-ABWU>]; *Consumer Arbitration Rules Rule 23*, AM. ARB. ASS’N (Sept. 1, 2014), https://adr.org/sites/default/files/Consumer-Rules-Web_0.pdf [<https://perma.cc/3TDD-XH6M>]. Similarly, Article 17.1 of the UNCITRAL directs the arbitral tribunal to exercise its discretion to conduct a “fair and efficient” dispute resolution process and “to avoid unnecessary delay[s] and expense[s].” *UNCITRAL Arbitration Rules 17.1*, U.N. COMM’N ON INT’L TRADE L. (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf [<https://perma.cc/L62X-D3BN>]. Rule 14.2 of the LCIA goes beyond the arbitral tribunal’s duties, by assigning a duty to the disputing parties to act in good faith to achieve an efficient and expeditious dispute resolution. *Arbitration Rules art. 14.2*, THE LONDON CT. OF INT’L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [<https://perma.cc/7XD4-XWZV>]. In fact, when deciding on the split of the arbitration cost, LCIA Rule 28.4 gives the arbitrator the authority to reward a party that cooperates to achieve an efficient resolution, and even to penalize a party that causes undue delay or expense. *Arbitration Rules art. 28.4*, THE LONDON CT. OF INT’L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [<https://perma.cc/7XD4-XWZV>]. The CPR rules also allow the arbitrator to reward a party’s efficient conduct and penalize otherwise, but in a more constructive and motivating manner, as Rule 19.2 requires the disputing parties to agree upfront on such stipulations. *Administered Arbitration Rules 19.2*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019), https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [<https://perma.cc/6E4R-F4WL>]. Moreover, Rule 9.2 of the CPR empowers the arbitral tribunals to set time limits on the arbitration phases to achieve their obligation to resolve the dispute as expeditiously and economically as possible. *Administered Arbitration Rules 9.2*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019), https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [<https://perma.cc/6E4R-F4WL>]. Article 37.5 of the ICC also allows the tribunal to take into account each party’s efficient conduct when assigning the arbitration costs among the disputing parties. *Administered Arbitration Rules 37.5*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019), https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [<https://perma.cc/6E4R-F4WL>].

⁹⁶ *See, e.g.*, Stipanowich, *supra* note 8, at 1–2 (“The most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs.”); Paradise, *supra* note 9, at 264 (“[A]rbitration is completely flexible.”).

1. *Fair and Just Dispute Resolution*

The first three reasons for having evidentiary rules in arbitration, as established in Part I (rationality, predictability, and fairness),⁹⁷ are all rooted in the objective of having a fair and just dispute resolution. That is also why people say that arbitration has a quasi-judicial function in nature:⁹⁸ it seeks a rational factfinding process,⁹⁹ simple justice,¹⁰⁰ and due process.¹⁰¹ It is because of this objective of arbitration that courts are willing to recognize a decision made by arbitrators, generally refuse appellate review of arbitration, and recognize arbitration's *stare decisis* effect. The goal of fairness and justice also explains why arbitration is seen as a legitimate alternative to litigation by the public, and why it has been accepted by the public and gained so much popularity. Rules of various arbitration regimes well reflect this essential objective.¹⁰²

2. *Time and Cost Efficiency*

If fair and just dispute resolution is something arbitration inherits from litigation, the second objective, that of time and cost efficiency, is a feature that separates arbitration from the latter. In fact, a chief reason for inventing and allowing arbitration of disputes was the lengthy process and high cost of litigation.¹⁰³ Thus, to keep arbitration's principal advantage in dispute resolutions, the objective of time and cost efficiency must be retained, relative to the case's complexity and disputed value. Even with the trend of arbitration

⁹⁷ See Sections I.A, I.B & I.C for detailed discussion.

⁹⁸ Cooley, *supra* note 3, at 267.

⁹⁹ See Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. 363, 368 (1998).

¹⁰⁰ See Cooley, *supra* note 3, at 269.

¹⁰¹ See Park, *supra* note 47, at 145.

¹⁰² For example, Rule 14.1(i) of LCIA explicitly states that the arbitral tribunal duties during the arbitration process include acting fairly with the disputing parties and giving each a reasonable opportunity to present its case. *Arbitration Rules art. 14.1(i)*, THE LONDON CT. OF INT'L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [<https://perma.cc/7XD4-XWZV>]. Similarly, Article 22.4 of the ICC directs the arbitral tribunal to act impartially and fairly and to give equal opportunity to each party to present its case. *2021 Arbitration Rules art. 22.4*, INT'L CHAMBER OF COM. (Jan. 1, 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> [<https://perma.cc/FV9Y-NB7J>]. Article 25.1 of the ICC reminds people that facts matter in arbitration, stating that the tribunal shall establish the facts of the case by all appropriate means. *2021 Arbitration Rules art. 25.1*, INT'L CHAMBER OF COM. (Jan. 1, 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> [<https://perma.cc/FV9Y-NB7J>].

¹⁰³ See, e.g., Paradise, *supra* note 9, at 261 ("When President Ronald Reagan signed the patent arbitration bill, he stated that one of the chief reasons for allowing arbitration of patent disputes was 'the inordinately high cost of patent litigation.'") (quoting Statement on Signing the Patent and Trademark Office Appropriations Bill, 1982 PUB. PAPERS 1087).

as the “new litigation,” as discussed in Part I,¹⁰⁴ arbitration is still and should always be more efficient in time and cost than litigation.¹⁰⁵

3. Flexibility

Finally, as Gregg Paradise said, “arbitration is completely flexible.”¹⁰⁶ This flexibility is seen as another advantage of arbitration over litigation.¹⁰⁷ What this objective reflects is the party autonomy inherent to arbitration, the ability of users to tailor processes to serve particular needs, unlike in litigation.¹⁰⁸ An arbitration agreement made by the parties is the bylaw of the arbitration proceedings, and is to be interpreted “in accordance with the intention of the parties as therein expressed and in the light of the facts and circumstances surrounding the negotiations for and execution of the agreement.”¹⁰⁹ In addition, the arbitration agreement can be enforced under contract law by the courts.¹¹⁰

All three above objectives are cornerstones of arbitration, and the loss of any one of them would cause the mechanism of arbitration to fall into a

¹⁰⁴ See Section I.E for a discussion of this trend of formalizing arbitration.

¹⁰⁵ Rules of various arbitration regimes well reflect this essential objective of time and cost efficiency. Like those regarding the fairness aspects, LCIA rules are also straightforward about process efficiency. For instance, Rule 14.1(ii) of LCIA explicitly states that the arbitral tribunal duties during the arbitration process include the adaptation of suitable procedures that could help resolve the dispute while avoiding unnecessary delay and expense. *Arbitration Rules art. 14.1(ii)*, THE LONDON CT. OF INT’L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [https://perma.cc/7XD4-XWZV]. Article 22.1 of the ICC states that both the arbitral tribunal and the parties shall conduct the arbitration expeditiously and economically, relative to the case’s complexity and disputed value. *2021 Arbitration Rules art. 25.1*, INT’L CHAMBER OF COM. (Jan. 1, 2021) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> [https://perma.cc/FV9Y-NB7J].

¹⁰⁶ Paradise, *supra* note 9, at 264.

¹⁰⁷ See H.R. REP. NO. 97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777. Rules of various arbitration regimes similarly reflect this essential objective of flexibility. For example, 33(b) of AAA(C) directs the arbitrator to exercise discretion in conducting the arbitration proceedings “with a view to expediting the resolution of the dispute,” and he or she may control the production of evidence accordingly. *Commercial Arbitration Rules and Mediation Procedures Rule 33(b)*, AM. ARB. ASS’N (Sept. 1, 2022), https://adr.org/sites/default/files/Commercial-Rules_Web.pdf [https://perma.cc/V5CS-ABWU]. Rule 14.5 of LCIA assigns the widest discretion to the tribunal performing its duties. *Arbitration Rules art. 14.2*, THE LONDON CT. OF INT’L ARB. (Oct. 1, 2020), <https://www.lcia.org/media/download.aspx?MediaId=837> [https://perma.cc/7XD4-XWZV].

¹⁰⁸ Stipanowich, *supra* note 8, at 1–2.

¹⁰⁹ Local No. 725, Int’l Union of Operating Eng’rs v. Standard Oil Co., 186 F. Supp. 895, 899 (D.N.D. 1960); *see also* S.A. Mineracao da Trindade-Samitri v. Utah Int’l Inc., 576 F. Supp. 566, 569–70 (S.D.N.Y. 1983) (“An arbitration clause must be interpreted in accordance with the intention of the parties.”).

¹¹⁰ See 35 U.S.C. § 294(a) (stating that arbitration agreements “shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract”).

structural disaster. Nonetheless, between and among these three core objectives of arbitration, there are dynamic, complex interactions. In arbitration, fairness requires some measure of efficiency, since justice too long delayed or too costly becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver the sense that justice had been respected. As William Park said, “[a] chef who aimed to provide fine dining might fail either by making customers wait too long or by serving junk food instead of a gourmet meal.”¹¹¹ Flexibility provides a means to realize fairness and efficiency. However, out-of-control flexibility would only lead to the opposite effect. When developing evidentiary rules for arbitration, designers need to pay close attention to the dynamics of these three objectives and balance between and among them.

B. Five Aspects of Developing Evidence Rules in Arbitration

With the goal of balancing fairness, efficiency, and flexibility of arbitration in mind, what should or could evidentiary rules for arbitration look like? This Article suggests the following five promising perspectives.

1. Rules for a Time-Efficient, Cost-Effective Process of Arbitration

In order to achieve the objective of time and cost efficiency, various arbitration regimes over the years have already formed a cluster of good common practices. First, arbitration typically features significantly more limited discovery than what would be permitted under civil litigation.¹¹² Arbitrators are also supposed to exercise a more “managerial” role in controlling discovery, for the purpose of limiting time and expense.¹¹³ Second, an arbitration hearing is typically more simplified and expedited than the trial process of a civil litigation, relative to the case’s complexity and disputed value.¹¹⁴ Last but not least, according to the scarce rules of evidence that

¹¹¹ Park, *supra* note 47, at 144.

¹¹² The broad discovery regime of Rule 26 of the Federal Rules of Civil Procedure would facilitate the unearthing of substantial amounts of information. FED. R. CIV. P. 26. However, that regime is expensive to administer and time consuming to navigate for litigators. With the notion of efficient and cost-effective arbitration, the various arbitration rule regimes typically feature significantly more limited discovery than what would be permitted under Rule 26, with one arbitration regime, FINRA, even using pre-made “Discovery Guides,” which specify certain documents or types of documents that are presumed to be discoverable. See *Rule 12506(a)*, FINRA (Apr. 3, 2017), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12506> [<https://perma.cc/RUP3-JTQ4>].

¹¹³ See Paul B. Radvany, *Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure*, 34 REV. LITIG. 705, 734 (2015) (providing the AAA rule requiring the arbitrator to manage information exchange with a view to achieving efficiency).

¹¹⁴ The FAA allows arbitration to proceed with only a summary hearing and even with restricted inquiry into factual issues. *Booth v. Hume Publ’g, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (citing *O.R. Sec., Inc., v. Prof’l Planning Assocs., Inc.*, 857 F.2d 742, 747–48 (11th Cir. 1988)). An arbitrator should be expected to act to simplify and expedite the

currently exist in various arbitration regimes, arbitrators are expected to hear relevant and material evidence to the controversy.¹¹⁵ The requirement of materiality limits the scope of relevancy, and produces a more efficient and focused hearing in an arbitration.¹¹⁶

All three of these common practices are instances of good solutions and should continue to be maintained in arbitrations. In addition, for efficiency of arbitration, this Article suggests the following evidentiary rules and practices. First, rules on redundancy should be added. Current rule regimes of arbitration almost exclusively emphasize relevancy and materiality of evidence,¹¹⁷ but a speedy resolution of disputes demands that evidence also not be redundant or unduly cumulative.¹¹⁸ Thus, it is equally important to have rules in arbitration that parties can rely on to raise objections against, and the arbitrator can apply to exclude, evidence based on redundancy.

Second, hearsay and documentary evidentiary rules that uniquely apply to arbitration should be drafted. Since the intent of the arbitration proceeding is to save both time and expense (through limited discovery and a simplified and expedited hearing), it is understandable that much of the evidence in arbitration may raise hearsay concerns, may not come with a certifying witness, may not have witnesses knowledgeable or willing enough to testify, may more frequently use documentary evidence, and so forth.¹¹⁹ To accommodate such a liberal approach to evidence, evidentiary rules for arbitration, in contrast to the complex regulatory regime of the FRE,¹²⁰ should focus on the trustworthiness of hearsay, incorporating a catch-all rule with an easy-to-use checklist on assessing reliability of hearsay evidence (like Rule 807 of the FRE). Meanwhile, complementary to this general acceptance of hearsay, evidentiary rules in arbitration should openly endorse a much broader usage of documentary rules, in order to counter the strong common law preference for oral testimony from witnesses with

proceeding. *See, e.g.*, *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (“Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”) (quoting *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹¹⁵ *See, e.g.*, *Commercial Arbitration Rules and Mediation Procedures Rule 35(a)*, AM. ARB. ASS'N (Sept. 1, 2022), https://adr.org/sites/default/files/Commercial-Rules_Web.pdf [<https://perma.cc/V5CS-ABWU>].

¹¹⁶ Feliu, *supra* note 44, at 270–71.

¹¹⁷ *See, e.g., id.*; *Comprehensive Arbitration Rules and Procedures Rule 22(d)*, JAMS (June 1, 2021), <https://www.jamsadr.com/rules-comprehensive-arbitration/> [<https://perma.cc/JF6F-EATM>].

¹¹⁸ *See* AM. COLL. OF TRIAL LAWS., *supra* note 21, at 4.

¹¹⁹ Radvany, *supra* note 16, at 506.

¹²⁰ FRE includes a general rule excluding all hearsay (Rule 802 of FRE), together with numerous exemptions and exceptions (Rules 801(d)(1), 801(d)(2), 803, 804 and 807). FED. R. EVID. 801–807.

firsthand knowledge.¹²¹ This framework should help bolster the presentation of evidence in arbitration using visual materials, affidavits, expert reports, summary charts, graphs, and diagrams, as well as demonstrative exhibits to an extent that likely would not be acceptable in court.¹²²

Finally, the new evidentiary rules should be made available in a simple format and be easy to use and to learn for all participants, especially for professional arbitrators without a legal background.

2. *Rules for the Validity of Decision-Making in Arbitration*

There are three categories of evidentiary rules—rules addressing uncertainty and ambiguity, rules with universal values, and rules for policy considerations—that if systematically applied in arbitrations in place of the let-it-all-in approach, would promote more justified arbitral results for the long run.

a. *Regulations Relating to Uncertainty and Ambiguity*

Legal decisions, including in arbitrations, are made under uncertainty and ambiguity. It is widely if not universally believed that the law should establish how to decide in the face of uncertainty and ambiguity, rather than letting each factfinder decide idiosyncratically.¹²³

Consequently, one typically finds a quite brief rule (or small set of rules) and a robust set of cases that regulate this uncertainty in various way[s]. At the most general level, each substantive cause of action has an associated burden of persuasion [and burden of production] that specifies the degree to which the fact finder must be persuaded [i.e., the standard of proof] in order to return a verdict. . . . In civil cases, the general standard [of proof] is that each element of the cause of action must be established by the plaintiff to a preponderance of the evidence, which is normally understood to mean anything greater than a 0.5 probability. . . .¹²⁴ In criminal cases, because of constitutional command, the prosecution must prove every element of the offense beyond a reasonable doubt, [which is normally understood to mean anything greater than a 0.9 or 0.95 probability.]¹²⁵

¹²¹ See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1174–76 (1996).

¹²² See Susan Hanmer Farina, *Efficient and Effective Presentation of Arbitral Evidence*, 43 BRIEF 46, 47 (2014) (claiming that by holding evidence in a form of VASE [Visuals, Affidavits, Summaries, and Exhibits], presentation of evidence in arbitration should become more efficient and effective).

¹²³ Ronald J. Allen, *Artificial Intelligence and the Evidentiary Process: The Challenges of Formalism and Computation*, 9 A.I. & L. 99, 106 (2001).

¹²⁴ In some other civil cases, for a whole host of reasons, the standard is clear and convincing evidence. See *id.*

¹²⁵ *Id.*; *In re Winship*, 397 U.S. 358, 361 (1970).

In arbitrations, similar regulations relating to uncertainty and ambiguity, including but not limited to the burden of production and burden of persuasion,¹²⁶ are also needed. These will help guide arbitrators in making rational decisions.

b. Basic Evidentiary Principles with Universal Values

A second set of limitations on the proof process comes in the universal requirements, known as the basic evidentiary principles, which still have a place in arbitration to ensure a rational factfinding process, to foreground the objective of ascertaining truth, to avoid improper collateral effects that outweigh probative value of evidence, and to promote the determination of cases based on the evidence that is most persuasive.¹²⁷

As in litigation, the first principle of evidence in arbitration is the relevancy and materiality requirement, meaning that evidence offered should be relevant to resolve the dispute, and be of consequence to the cause of action. Almost all arbitration regimes nowadays have embraced this evidentiary principle.¹²⁸ However, they need to be more explicit that arbitrators can and should exclude logically irrelevant and immaterial evidence without the fear that such arbitral awards will later be vacated.

The general principle of relevancy and materiality animates more concrete principles of evidence. One is the requirement that any evidence (i.e., real evidence and witness testimony) first be authenticated, which means shown to be what it purports to be (or in the case of a witness, shown to be who he or she purports to be).¹²⁹ Another one is alertness to prejudice or bias associated with certain types of evidence (like character evidence, testimony of an interested person, etc.), especially when probative value of such evidence is substantially outweighed by its prejudicial effect.¹³⁰ Also, the best evidence principle encourages the parties to present lay witnesses with firsthand rather than secondhand knowledge, as well as to provide the original of a written text rather than a copy of it if its contents matter.

c. Policy Considerations

In modern evidence codifications, much more space is spent on adjustments to the process of proof for policy reasons than on adjustments for rea-

¹²⁶ Rules on inferences and presumptions, additional options to be considered in arbitration, also belong to this category.

¹²⁷ Kirkpatrick, *supra* note 6, at 847; Allen, *supra* note 123, at 107; Radvany, *supra* note 16, at 512; Feliu, *supra* note 44, at 268.

¹²⁸ Federal Arbitration Act of 1947, 9 U.S.C. § 10(a)(3) (An arbitration award may be vacated where arbitrators refuse "to hear evidence pertinent and material to the controversy.").

¹²⁹ Allen, *supra* note 123, at 108.

¹³⁰ *Id.* at 107-08.

sons of relevancy and finding the truth.¹³¹ Examples include the policy-based exclusions in the FRE (Rules 407–415) and the privilege rules (Article V of FRE). It is neither necessary nor appropriate for arbitrations to adopt wholesale all the policy rules of evidence effective in litigations. However, for the purposes of consistency in policy implementation as well as respect for the norms, the most common and popular policy rules of evidence should be seamlessly adopted in arbitrations as well. These rules include, for example, attorney-client privilege and the work product rule, exclusionary rules on unlawfully obtained evidence, and rules that are designed to avoid discrimination against vulnerable societal groups.

3. *Rules That Are Helpful to Arbitrators in Assessing Reliability of Complex Evidence*

Traditionally, legal professionals have been depicted as epistemically superior.¹³² However, in recent years, multiple studies have found that judges as trier of fact are, like jurors or other lay assessors, susceptible to cognitive illusions, fallacies, and implicit biases.¹³³ When faced with complex evidence in domains outside of their legal expertise, trial judges arguably look as vulnerable as lay jurors.¹³⁴ Here, forms of “complex evidence” include but are not limited to both scientific and nonscientific expert evidence, statistical evidence, and various new forms of evidence (electronic evidence, big data evidence, machine-made and process-based evidence, and blockchain and AI evidence) that most professional triers of fact are generally unfamiliar with.¹³⁵ For perhaps the first time, trial judges’ profound knowledge in law and wisdom in life cannot guarantee high capability in assessing the re-

¹³¹ *Id.* at 108.

¹³² *See, e.g.*, *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (“Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury.”); *United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001) (evidence of defendant’s prior conviction was not unduly prejudicial in bench trial; holding that “we have confidence that at the bench trial, the experienced district judge was able to separate the emotional impact from the probative value of this potentially prejudicial evidence.”).

¹³³ In a recent article, the author argued that the traditional view of “[j]udges’ epistemic exceptionalism” is false. *See* Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 289–92 (2022); *see also* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 209 (2019). Even more seriously, professionals tend to overestimate their own cognitive abilities. *See* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 189 (2006); *see also* discussions *supra* Section I.A.

¹³⁴ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007) (Both judges and lay jurors “are predominately intuitive decision makers, and intuitive judgments are often flawed.”); Steiner-Dillon, *supra* note 133, at 238 (“Both jurors and judges have difficulty correctly interpreting evidence grounded in statistics and probability.”).

¹³⁵ *See* Wang, *supra* note 133, at 307–08.

liability of evidence; when complex evidence is entered, they also need some guidance.¹³⁶ And here we do have established regulations to strengthen trial judges' gatekeeper role. In the FRE, Daubert-Rule 702 on expert testimony and Rule 902 (13–14) on self-authentication for electronic evidence both provide authoritative and practical guidance to trial judges.¹³⁷ There are also numerous best practices for judges, written by renowned scholars and covering various new developments in evaluating complex evidence.¹³⁸

There is no rational reason to believe that arbitrator(s) in a time-efficient and cost-effective arbitration would do better than trial judges in a litigation in assessing the reliability of complex evidence. Thus, it is important to take advantage of already established laws and best practices and to formulate rules that can help guide arbitrators in assessing such evidence, in service of rational and accurate decision-making in arbitration.¹³⁹

4. Rules That Empower Arbitrators to Take Evidence

As an important alternative vehicle to resolve disputes—in a manner that is binding, final, and enforceable—arbitration as a mechanism and arbitral awards need to derive power from and be endorsed by the state machine, both legislatively and judicially. From the legislative perspective, contract law and the FAA grant arbitration the blessing it needs. Judicially, courts have consistently ruled that a valid arbitration award constitutes a full and final resolution of a controversy.¹⁴⁰ It has all the force and effect of an adjudication, and effectively precludes the parties from litigating the same subject again.¹⁴¹

¹³⁶ Zhuhao Wang, *The Fate of Evidence Law: Two Paths of Development*, 24 INT'L J. EVIDENCE & PROOF 329, 343 (2020).

¹³⁷ FED. R. EVID. 702, 902(13–14).

¹³⁸ For example, for the best practices of authenticating electronic evidence, *see generally*, e.g., Paul W. Grimm et al., *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1 (2017); for the best practices of evaluating the admissibility of AI evidence, *see generally*, e.g., Paul W. Grimm et al., *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9 (2021); for the best practices of assessing reliability of process-based evidence, *see generally*, e.g., Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077 (2019).

¹³⁹ *See* discussion *supra* Section I.A.

¹⁴⁰ *See, e.g.*, *Donoghue v. Kohlmeyer & Co.*, 380 N.E.2d 1003, 1004, 1007 (Ill. App. Ct. 1st Dist. 1978).

¹⁴¹ *See Oxford Health Plans L.L.C. v. Sutter*, 569 U.S. 564, 569 (2013) (noting that an arbitrator's decision that “even arguably constru[es] or appl[ies] the contract” cannot be reversed, regardless of whether the arbitrator's decision ultimately was correct, because the parties “bargained for the arbitrator's construction of [the] agreement”) (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)). The arbitral award can be challenged in court only on very narrow grounds that vary by state, including, for example: partiality of the arbitrator, refusal to allow the production of evidence, refusal to grant postponements, and misbehavior in conducting the hearings so as to prejudice the interests of a party. *See* DOMKE, *supra* note 91, at § 38:12.

However, since the fundamental structure of arbitration is to submit a civil dispute to a nongovernmental decision-maker, there are still rare occasions in arbitral proceedings, and in taking evidence in particular, that arbitrators need to have more sweeping power, but the law is silent or ambiguous in response. Take, for example, discovery in arbitral proceedings. As discussed above, for efficiency purposes, discovery in arbitration is significantly more limited than what would be permitted under civil litigation. However, during that limited discovery, if one arbitral party fails to make disclosures or to cooperate as required by the arbitration agreement, can the other party move for the arbitrator to issue an order compelling disclosure? To this day, case law and legal doctrine in the United States remain inconsistent regarding this question.¹⁴²

Even more seriously, what if there is some important evidence in the hand of a third party that is independent from any of the arbitral parties, and the nonparty has indicated that it will not cooperate without being compelled to do so: does the arbitrator have the subpoena power to obtain such third-party discovery? The short answer is yes, but there is no real guarantee that third-party discovery will work in arbitration as it does in federal or state court litigation.¹⁴³ Section 7 of the FAA does give the arbitrator the power to subpoena a third party during a regular arbitral hearing: “arbitrators . . . may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”¹⁴⁴ But the arbitral party that asked the arbitrator to issue the subpoena still needs to petition court assistance to enforce it, and the FAA is silent on that matter. In practice, such a process has generally been considered overly time consuming, burdensome, costly, and confusing.¹⁴⁵ In fact, in a recent study of more than 900 arbitration practitioners conducted at Queen Mary University of London, the lack of power in relation to third

¹⁴² See RAESS, *supra* note 54, at 2–3. Federal Rules of Civil Procedure Rule 37, along with related case law, provides the framework for motion for an order compelling disclosure or discovery in federal civil litigation. FED. R. CIV. P. 37.

¹⁴³ Nicholas A. Gowen, *Obtaining Third-Party Discovery in Arbitration Is Not Guaranteed*, 27 ALTERNATIVE 4, 5 (2021). Federal Rule of Civil Procedure Rule 45 and related case law provides the framework for third-party subpoena response in federal civil litigation. FED. R. CIV. P. 45.

¹⁴⁴ 9 U.S.C. § 7; see also *Wash. Nat’l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126 (2d Cir. 2020) (A panel of arbitrators issued subpoenas to non-party witnesses to appear and produce documents at an arbitration hearing. The non-party witnesses declined to appear or produce documents as directed by the subpoenas. The party that asked the arbitrators to issue the subpoenas petitioned a federal district court in New York to enforce the subpoenas. The non-party witnesses moved to dismiss the petition for lack of subject matter jurisdiction, and to quash the subpoenas. The district court denied the motions and ordered the witnesses to appear at the arbitration hearing with their documents).

¹⁴⁵ See RAESS, *supra* note 54, at 2.

parties was rated as one of the worst characteristics of international arbitration.¹⁴⁶

At a time when disputes to be resolved in arbitration have become more complex, in terms of multiple contracts, arbitral parties, jurisdictions, and third parties, a clear and easy-to-use mechanism that would empower arbitrators to take evidence is more crucial than ever.

5. *Soft Law to Maintain Flexibility and Efficiency of Arbitration*

So far, this Article has argued that evidentiary rules are still needed in arbitration and provided four promising perspectives on how to develop such rules. Just as important is the matter of what properties these evidentiary rules should have. To add to the above discussion on the dynamic and complex relationship among the three major objectives of arbitration: evidentiary rules can enhance fairness and justice, but they are a direct threat to the flexibility of arbitration, and more deeply to the nature of arbitration, party autonomy.¹⁴⁷ These rules may also potentially place a burden on the efficiency of arbitration. After all, for so many years, advocates have claimed that arbitration proceedings are able to enhance speed and efficiency and lower costs in the resolution of disputes because “they are not subject to legal ‘technicalities’ such as the rules of evidence.”¹⁴⁸

Any regulatory instrument will limit the “flexibility” of arbitration. William Park once mentioned a vivid story that fully demonstrates this point:

In a recent issue of *Cahiers de l'arbitrage*, the eminent Paris avocat Serge Lazareff likened [procedural law] to a loathsome skin disease, using the provocatively pejorative label *le prurit réglementaire* (“regulatory pruritus”). Serge began with a hypothetical conversation (at least I hope it was hypothetical) in which a lawyer at a hearing asks the Tribunal chairman for a pause in the testimony so he can relieve himself. “Monsieur le Président, puis-je aller aux toilettes?” Mr. Chairman, can I visit to the WC? The response is a resounding negative (“Non, mon cher Maître”) bolstered by citation to provisions of the Code of Conduct for Arbitral Hearings that stipulates precise numbers of bathroom breaks in function of the length of hearings.¹⁴⁹

This story well reminds us that we cannot and should not go too far in regulating evidence taking in arbitration. “Anything excessive becomes in-

¹⁴⁶ WHITE & CASE & SCH. OF INT’L ARB., QUEEN MARY UNIVERSITY OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 8 (2018).

¹⁴⁷ Obviously, flexibility and party autonomy are indispensable features of arbitration. See Thomas J. Stipanowich, *supra* note 8, at 1–2 (2010) (“The most important difference between arbitration and litigation—and the fundamental value of arbitration—is the ability of users to tailor processes to serve particular needs.”).

¹⁴⁸ Kirkpatrick, *supra* note 6, at 838.

¹⁴⁹ Park, *supra* note 47, at 143.

significant.”¹⁵⁰ Meanwhile, we should avoid doing too little. As above discussed, procedural formality is often another term for due process, and modern arbitration is plagued by the let-it-all-in approach to evidence. Indeed, efficiency involves making the process shorter and cheaper. Fairness, however, sometimes entails additional time and cost. Here, Professor Park told us another great story:

Discussion of these competing goals brings to mind a conversation many years ago with the secretary general of a prominent arbitral institution. He was being interviewed following his retirement after a long career during which his organisation had seen a marked increase in caseload and prestige. When asked what he considered to be his most important achievement, the eminent elder statesman replied without a moment’s hesitation, “[w]hy, the greatest success was taking a process that had been quick and cheap and turning it into one that is now long and expensive. *Enfin!* At last we are respected.”¹⁵¹

With the goal of a careful balance among the three major objectives of arbitration—fairness, efficiency, and flexibility—a delicate compromise is to arrange the evidentiary rules in arbitration as *soft law*, a set of evidentiary guidelines for all participants in arbitration, in distinction to the harder norms imposed by statutes. In almost all cases, such guidelines will have far-reaching effects, notwithstanding their nonbinding nature,¹⁵² while parties could still tailor processes as they see necessary to serve particular needs. In fact, the growth of evidentiary rules as soft law has made breakthroughs during the past three decades. The International Bar Association (“IBA”) has developed its rules on evidence in this way. First published in 1999, the *IBA Rules on the Taking of Evidence in International Arbitration*, soft laws, were revised in 2010 and then revised again in 2020.¹⁵³ The initiative proved to be successful. Since their introduction in 1999, the IBA Rules have become increasingly important and are commonly adopted as default guidelines in international arbitration proceedings.¹⁵⁴ Part III of this Article examines the IBA Rules in depth.¹⁵⁵

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 144.

¹⁵² *Id.* at 142.

¹⁵³ See INT’L BAR ASSOC., *IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION* 5–6 (2020), <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> [<https://perma.cc/W7KQ-RVYG>].

¹⁵⁴ See *IBA Rules and Guidelines Regarding International Arbitration: An Overview*, ACERIS L. (Mar. 29, 2021), <https://www.acerislaw.com/iba-rules-and-guidelines-regarding-international-arbitration-an-overview/> [<https://perma.cc/YYL4-JMT7>] (“[T]he IBA Rules of Evidence are . . . frequently adopted in . . . arbitrations.”); see also Duncan Gorst & Stephanie Tutt, *2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration*, KLUWER ARB. BLOG, (Mar. 28, 2021), <https://arbitrationblog.kluwerarbitration.com/2021/03/28/2020-revision-of-the-iba-rules-on-the-taking-of-evidence-in-international-arbitration/> [<https://perma.cc/VQ5U-2HKH>].

¹⁵⁵ See *infra* Part III.

C. Evidentiary Rules for Jury Trials vs. for Arbitration

Evidence rules in arbitration should be significantly different from the rules of evidence applied in jury trials, such as the FRE. Some scholars believe that because the FRE “[is] widely used, well understood, and generally successful in protecting the integrity of evidence,” they should be utilized in arbitrations as a starting point.¹⁵⁶ In other words, according to this view, the general framework of evidentiary rules for arbitration should be a *modified* FRE. Such a viewpoint is representative and makes some intuitive sense.¹⁵⁷ However, this Article argues that it is a wrong approach for two primary reasons.

First, since arbitration is a creature of contract law, parties have the option to exert significant control over the process.¹⁵⁸ That means that as long as they are willing, arbitral parties can choose FRE or any modified version of FRE as the governing rules for taking evidence in their arbitration. However, in reality, that only happens in rare cases: instead, the FRE are widely ignored in arbitration discussions.¹⁵⁹ Therefore, from an empirical perspective, it is not difficult to draw the conclusion that the model of evidentiary rules used in jury trials is not a natural fit for arbitration.

Second, from an analytical perspective, besides concerns of time efficiency, cost effectiveness, and flexibility in arbitration, there are deeper *structural* reasons for why evidentiary rules for arbitration should be fundamentally different from the rules applied in jury trials. The jury trial makes use of a bifurcated factfinding process in which the trial judge acts as gatekeeper to determine the admissibility of evidence, and the jury acts as trier of fact to assess probative value, or to determine the weight of admitted evidence. In contrast, arbitration, as a nonjury proceeding, has no such bifurcation. Here, the arbitrator not only interprets the law but also determines the facts of the case at issue. The FRE, however, “are mainly rules of admissibility” and are thus poorly matched for arbitration and other nonjury

¹⁵⁶ See Paradise, *supra* note 9, at 273; see also PROBLEMS OF PROOF IN ARBITRATION, *supra* note 25, at 246 (“It is difficult to imagine that the legal rules of evidence which have evolved over centuries could not yield helpful suggestions for use by arbitrators and participants in arbitration cases.”).

¹⁵⁷ See, e.g., Tom Arnold, *Suggested Form of Contract to Arbitrate a Patent or Other Commercial Dispute*, 2 TEX. INTELL. PROPR. L.J. 205, 217 (1994); Patricia Taylor Fox & Wm. Gerald McElroy, Jr., *Evidentiary Rules in Reinsurance Arbitrations*, 16 ARIAS U.S. 2, 2 (2009) (“[W]hile arbitrators need not strictly follow evidentiary rules, a grounding in the principles that underlie formal evidentiary rules is helpful in charting evidentiary issues that may arise in the course of the arbitration.”).

¹⁵⁸ See Radvany, *supra* note 16, at 493; see also discussion *supra* Section II.A.3.

¹⁵⁹ See Susan Keilitz et al., *State Adoption of Alternative Dispute Resolution*, 12 STATE CT. J. 4, 5, 10 (1988); see also Radvany, *supra* note 16, at 493 (“While some [arbitral] regimes reference the FRE, it is only to distinguish the need to follow them, rather than an incorporation of the explicit concepts of evidence law in the arbitral forum.”).

proceedings.¹⁶⁰ As a classic saying goes, “[t]here is a greater danger of inviting judicial challenge to the arbitration award where the arbitrator admits too little evidence rather than too much.”¹⁶¹

Nonetheless, there are some important connections between the evidentiary rules for jury trials and those for arbitrations. For one, most rules of admissibility or exclusion can transform into rules of weight of evidence. As Laird Kirkpatrick said, “[t]here is likely to be little practical difference between a court trial where testimony by a witness without personal knowledge is excluded by Federal Rule 602 and an arbitration hearing where such testimony is received but disregarded.”¹⁶² “The principles underlying rules of exclusion have a direct bearing on questions of weight.”¹⁶³ For this reason, described by some scholars as the “[f]unctional [v]iew of [e]videntiary [r]ules,”¹⁶⁴ it is good for counsels representing arbitral parties as well as arbitrators to be generally familiar with the FRE. Even though the FRE are not binding in arbitration, their underlying rationale can help counsels make evidentiary arguments and aid arbitrators in evaluating evidence.¹⁶⁵

Also, it has long been posited that the primary purpose of evidentiary rules in jury trials is as a form of jury control, a method of steering lay jurors in the proper direction of factfinding (the “Jury Control” theory).¹⁶⁶ James Bradley Thayer described the law of evidence as “the child of the jury system” in 1898.¹⁶⁷ According to Thayer and his student John Henry Wigmore, exclusionary rules of evidence are needed to protect the jury against cognitive shortcomings.¹⁶⁸ But let us not forget that, over the years, legal scholars

¹⁶⁰ Wang, *supra* note 136, at 336–37. For a longer discussion, *see* Wang, *supra* note 133, at 298–304. *But see* Radvany, *supra* note 16, at 511 (“[O]n panels of multiple arbitrators, evidentiary decisions may be handled exclusively by a chairperson, who does have the opportunity to vet evidence before showing it to other members of the panel.”); Paradise, *supra* note 9, at 273–74 (suggesting the use of three-person panels in arbitration, with one arbitrator who has expertise in the exact technical area of the dispute and another has the legal expertise required to conduct the hearing, especially ruling on evidentiary matters).

¹⁶¹ Kirkpatrick, *supra* note 6, at 844.

¹⁶² *Id.* at 848.

¹⁶³ *Id.* (“Although hearsay may be received in an arbitration hearing, it is generally given less weight than live testimony, and although secondary evidence of an important writing may be received, an adverse inference may be drawn from failure to produce the writing itself.”).

¹⁶⁴ Feliu, *supra* note 44, at 268.

¹⁶⁵ *Id.*

¹⁶⁶ *See* Wang, *supra* note 136, at 330–31.

¹⁶⁷ JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (1898).

¹⁶⁸ *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 632–33 (Peter Tillers ed., 1983). *See generally* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CAL. L. REV. 2437 (2000) (tracing the history of evidence reform

have developed other theories to explain evidence rules as well, including that they facilitate adversary testing (the “Adversary System” theory),¹⁶⁹ restrain adversarial excess (the “Best Evidence Principle” theory),¹⁷⁰ and prevent, deter, and expose perjury (the “Control of Witness Dishonesty” theory).¹⁷¹ These alternative theories may be secondary to the Jury Control theory in explaining evidentiary rules developed and applied in jury trials, but all suggest promising initiatives for systematically developing evidentiary rules for arbitration. For example, we can use both the Adversary System theory and Control of Witness Dishonesty theory to develop rules of cross examination, objections, and impeachment in arbitration. We can also use the Best Evidence Principle to suggest to arbitrators that testimony from a witness with personal knowledge is preferred over secondhand hearsay evidence, and that a reliability test needs to be developed in order to separate high-quality scientific evidence from junk science.

D. Evidentiary Rules for Bench Trials vs. for Arbitration

Evidentiary rules for bench trials and for arbitration naturally have significant similarities. According to the current law of evidence, the FRE, technically the same codified rules apply to both jury and bench trials.¹⁷² However, in practice, trial judges often apply rules of evidence loosely when they sit without a jury.¹⁷³ Time and again in bench trials, “objections to the

through the codification efforts led by three great evidence scholars: Thayer, Wigmore, and Morgan).

¹⁶⁹ Developed by leading scholars Edmund Morgan and John Langbein, the “Adversary System” theory, facilitating adversary testing, claims that adversary procedure vests the parties with responsibility for presenting and developing evidence. The adversaries are obligated to gather and present their own evidence, and they are expected to challenge and test the strength of the evidence presented by the opposing side. Evidence rules should be developed to protect this opportunity for adversarial testing. See Zhuhao Wang, *The Peculiarity of American Evidence Law: An Outsider’s Observation and Reflection*, 26 INT’L J. EVIDENCE & PROOF 271, 275–76 (2022).

¹⁷⁰ Developed by leading scholar Dale Nance, the “Best Evidence Principle” theory (restraining adversarial excess) claims that evidence rules can be explained as a set of restraints on the truth-distorting effect of adversarial excess. According to this theory, active and zealous advocates who have no rules of evidence to restrain their zeal would have it in their power to prevent the administration of justice. Evidence law, accordingly, recognizes that advocates may be operating under selfish incentives to withhold important evidence or to otherwise distort the factfinding process in order to win the case. The rules of evidence promote the search for truth by controlling those incentives and compelling the adversaries to present the trier of fact with the most reliable information to be had. *Id.* at 276.

¹⁷¹ Developed by leading scholar Edward Imwinkelried, the “Control of Witness Dishonesty” theory claims that the trier of fact fears possible dishonest witnesses, and thus evidence rules were developed to prevent, deter, and expose perjury. *Id.*

¹⁷² “Scope,” of FRE makes no distinction between the applicability of the FRE in jury and in bench trials. FED. R. EVID. 101. Also, “Applicability of the Rules,” does not rule out bench trials. FED. R. EVID. 1101.

¹⁷³ Wang, *supra* note 133, at 272.

admissibility of evidence are met with the judicial response of, ‘I’ll let it in and just give it the weight it deserves,’”¹⁷⁴ a classic scene that recurs in arbitrations as well. In a recent article, *Rethinking Evidentiary Rules in an Age of Bench Trials*, the author explains why bench trial judges cannot rely on free proof and instead need the guidance of evidence rules—albeit different rules than those used for jury trials (i.e., the FRE)—and proposes five major directions in which to develop evidentiary rules for bench trials, including rules to assess the reliability of evidence, new forms of evidence, and complex evidence.¹⁷⁵

In both bench trials and arbitration, as opposed to jury trials, legal professionals rather than laypeople are the factfinders, and the bifurcated fact-finding process is absent. Such changes inevitably trigger a vastly different practice in taking evidence, with professional factfinders naturally paying more attention to reliability and sufficiency of evidence presented by the disputants, rather than to the question of admissibility.¹⁷⁶ Therefore, evidence rules designed for jury trials—as embodied in the FRE—cannot be cleanly, effectively, or sometimes even coherently applied to bench trials and arbitrations. Studies on evidentiary rules for bench trials are thus highly relevant to developing evidentiary rules for arbitration. Any substantive progress in developing evidentiary rules for bench trials—such as some concrete framework of rules—would only make developing evidentiary rules for arbitrations easier, and vice versa.

Nonetheless, there are still a couple of fundamental differences between these two. First, as discussed above, the objective of “flexibility—party autonomy” requires the evidentiary rules for arbitration to stay in the form of *soft law*, a set of guidelines that allow arbitral parties to yet tailor the evidence-taking process as they see necessary to serve particular needs.¹⁷⁷ In contrast with arbitration, a bench trial is not a “private contract” in nature¹⁷⁸ but rather a public vehicle to solve disputes administrated by the government. In a bench trial, the trial judge has significant discretion in assessing

¹⁷⁴ See Schauer, *supra* note 133, at 165–66.

¹⁷⁵ See generally Wang, *supra* note 133. The five major directions developing evidentiary rules for bench trials suggested in this article are:

A. Aim for concise rules that respect bench trial judges’ discretion and yet mitigate abuses of discretion, inconsistencies, unpredictability, and unfairness in fact-finding; B. Consider keeping most rules relating to extrinsic purposes and epistemic principles with universal values; C. Incorporate rules on assessing new forms of evidence and complex evidence; D. Develop rules on assessing the reliability of evidence; [and] E. Bench trial rules should consider not just information input control but also process and output control.

Id. at 304–11. Above suggestions C and D have also been mentioned in this article in largely the same fashion. Suggestions A and B have been mentioned in this article in an altered fashion. Only Suggestion E is not recommended in this article for arbitration.

¹⁷⁶ See *id.* at 303–04.

¹⁷⁷ See *supra* Section II.B.5 for a detailed discussion.

¹⁷⁸ For discussions on the arbitration agreement as a contract between disputants, see *supra* Section II.A.3; see also *supra* Section I.E.

evidence, but the trial does not have the objective of “flexibility—party autonomy” to pursue.¹⁷⁹ Thus, for the purposes of transparency, predictability, and consistency, evidentiary rules for bench trials need to be imposed by either statutes or precedents (judge-made law).

Second, as also mentioned above, for the purpose of time efficiency and cost effectiveness, documents¹⁸⁰ are the most commonly used evidence in arbitration.¹⁸¹ Thus, a significant portion of the evidentiary rules for arbitration must deal with production of documents. Such issues include, for example: cybersecurity and data privacy, scope of document collection, production format and authentication, privileged documents withheld from production, production of documents available to one party, documents in the possession of an opposing party, requests to produce by the arbitral tribunal, stages and procedures of production, translations, and failure to comply with a production order.¹⁸² Also, for the objective of efficiency, evidentiary issues should be solved early in an arbitration proceeding,¹⁸³ and the arbitration hearing is relatively short and streamlined.¹⁸⁴ Thus, many rules on production of documents in arbitration are pre-hearing rules.¹⁸⁵ In contrast, in bench trials, even though written evidence is used more frequently than in jury trials, and even though submissions in pretrial procedures are important,¹⁸⁶ witness live testimony is still the most important form of evidence in a process that is still trial centered. Not to mention that in criminal cases, the rights of defendants to confront witnesses in person are constitutionally protected.¹⁸⁷ Thus, it is not a surprise that evidentiary rules for bench trials would still focus on addressing witness live testimony at trial.

¹⁷⁹ A bench trial has the same objectives of “fairness” and “efficiency” to pursue as arbitration, while it has a higher priority on the pursuit of truth and accurate factfinding, together with desired allocations of errors.

¹⁸⁰ Here, “documents” shall be interpreted in the broad sense, including but not limited to written materials, electronic evidence, audiovisual materials, and other evidence in tangible forms, to distinguish from intangible evidence featured by witness live testimony.

¹⁸¹ See *supra* Section II.B.1 for a detailed discussion.

¹⁸² See, e.g., INT’L BAR ASS’N, *supra* note 153, at 10–13.

¹⁸³ See, e.g., ACTL, *supra* note 21, at 5 (“Sole arbitrator or arbitral panels [are recommended] . . . and the parties should engage early and directly on evidentiary issues.”).

¹⁸⁴ See, e.g., *JAMS Streamlined Arbitration Rules & Procedures*, JAMS (June 1, 2021), <https://www.jamsadr.com/rules-streamlined-arbitration> [<https://perma.cc/C6LY-XWHS>].

¹⁸⁵ See, e.g., INT’L BAR ASS’N, *supra* note 153, at 10–13.

¹⁸⁶ See Harold P. Weinberger et al., *Navigating A Civil Bench Trial in Federal Court*, PRAC. L. June–July 2018, at 37–38 (standing for the view that in a civil bench trial, the court sometimes prefers the parties to submit witness affidavits or declarations in lieu of live direct testimony, and some courts require a relatively short pretrial memorandum that summarizes the facts and legal issues).

¹⁸⁷ The Sixth Amendment provides that a person accused of a crime has the right to confront a witness against him or her in a criminal action. U.S. CONST. amend. VI. This includes the right to be present at the trial (which is guaranteed by the FED. R. CRIM. P. 43). See also *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

III. EVALUATING THE CURRENT BEST MODEL OF EVIDENCE RULES IN
ARBITRATION – THE IBA RULES OF EVIDENCE

While neither arbitration law (like the FAA) nor major arbitral institutions provide enough guidance on the taking of evidence,¹⁸⁸ the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”)¹⁸⁹ appear to be the first broad attempt and the most comprehensive document so far to combine aspects of both civil and common law practices for the taking of evidence in arbitration. The IBA Rules, first introduced in 1999, were prepared by a committee of the International Bar Association,¹⁹⁰ consisting of dozens of commercial arbitration practitioners from both civil and common law traditions.¹⁹¹ Designed as guidelines of best practice that parties or the arbitral tribunal in ad hoc or institutional arbitrations could adopt irrespective of the substantive or procedural laws governing proceedings,¹⁹² the

¹⁸⁸ See Radvany, *supra* note 16, at 493 (“The treatment of evidence among arbitral regimes exhibit broad similarities in that arbitrators are generally given relatively wide latitude to admit what they wish. The specific treatment of evidence within the various bodies of rules, however, differs: some regimes cabin discussion of evidence to its own rules, while others package it within rules governing the overall conduct of the arbitration hearing. Unlike the FRE, none of these rules or rule regimes, however, provide a comprehensive framework for analyzing evidentiary admissibility. While some regimes reference the FRE, it is only to distinguish the need to follow them, rather than an incorporation of the explicit concepts of evidence law in the arbitral forum.”).

¹⁸⁹ The revised 2020 IBA Rules were adopted by a resolution of the IBA Council on December 17, 2020, and were made available to the public on February 15, 2021. See INT’L BAR ASS’N, *supra* note 153. Unless otherwise stated, the IBA Rules being discussed in this article means the 2020 IBA Rules.

¹⁹⁰ The International Bar Association (IBA), founded in 1947, is a bar association of international legal practitioners, bar associations, and law societies. The IBA currently has a membership of more than 80,000 individual lawyers and 190 bar associations and law societies. Its global headquarters are located in London, England, and it has regional offices in Washington, D.C., United States, Seoul, South Korea, and São Paulo, Brazil. See *About the IBA*, IBA, <https://www.ibanet.org/About-the-IBA> [https://perma.cc/J2DE-C84H].

¹⁹¹ A prototype of the IBA Rules was first published in 1983 as “IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration.” IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Arbitration*, BUS. L. INT’L 16, 16–17 (2000). The 1999 IBA Rules were prepared by a working group of the IBA consisting of sixteen arbitration practitioners whose law firms were primarily located in civil law countries. Later on, the IBA Rules were revised by an IBA review committee consisting of twenty-two arbitration practitioners with more countries represented (especially East Asian countries) in 2010, and further revised by an IBA task force group of thirty-eight arbitration practitioners from Europe, North America, Asia, Africa, and South America, with a more equal distribution between civil and common law traditions, in 2020. See INT’L BAR ASS’N, *supra* note 153, at 25–33.

¹⁹² See RAESS, *supra* note 54, at 31 (“Although the IBA Rules are not institutional or ad hoc arbitration rules, they are intended to work in conjunction with them as supplementary guidance. . . . In this way, where neither the *leges arbitri* nor the institutional arbitration rules provide enough guidance, the IBA Rules can fill this vacuum.”).

IBA Rules have become increasingly important and frequently adopted as default guidelines in international commercial arbitration proceedings.¹⁹³ Such a unique and important arrangement deserves a closer look in terms of both its strengths and its weaknesses.

A. Strengths of the IBA Rules

The success of the IBA Rules worldwide is largely due to two important features: its harmonization initiative and its status as soft law. First, the main goal of the IBA Rules was to bridge the gap between different legal systems and their respective procedures on the taking of evidence, which is particularly useful when the arbitral parties come from opposing common law and civil law traditions.¹⁹⁴ The guidelines offer a broadly accepted combination of evidentiary rules from common law and civil law practices, and a well-established compromise between different views of how evidence might be taken in international arbitration. For example, Article 3 of the IBA Rules is a detailed rule on the production of documents, which reflects the centrality of documentary evidence in arbitration factfinding.¹⁹⁵ Such a culture of preferring documentary evidence to witness testimony comes from the civil law tradition. Nonetheless, Article 3's actual content is mainly about the discovery of documents, which is a feature of the common law tradition. Article 5, "Party-Appointed Experts," is from the common law tradition, while Article 6, "Tribunal-Appointed Experts," is from the civil law tradition.¹⁹⁶ Article 9, "Admissibility and Assessment of Evidence," draws from both traditions: while the admissibility of evidence is a featured

¹⁹³ See Cleary Gottlieb, *2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration*, ALERT MEMORANDUM, 2 (Feb. 17, 2021), <https://www.clearygottlieb.com/-/media/files/alert-memos-2021/2020-revision-of-the-iba-rules-on-the-taking-of-evidence-in-international-arbitration.pdf> [<https://perma.cc/V4CW-TEYW>]; see also *Report on the Reception of the IBA Arbitration Soft Law Products*, INT'L BAR ASS'N, 5-6 (2016), <https://www.ibanet.org/document?id=Subcommittee-on-Arbitration-Guidelines-and-Rules-IBA-soft-law-products-Sept-2016> [<https://perma.cc/HM4S-YEFU>]; Ahmad E. Alozn & Abdulla Galadari, *Evidence Admissibility and Evaluation Models in Commercial Arbitration*, 10 J. LEGAL AFF. DISP. RESOL. ENG'G & CONSTR. 1, 5 (2018) ("Pierre A. Karrer states, 'I cannot remember a single case where these rules [the IBA rules] were not used as guidelines' . . . Al Aidarous, a commercial arbitrator, is also of the view that the IBA rules are the best set of evidentiary rules.").

¹⁹⁴ INT'L BAR ASS'N, *supra* note 153, at 5 ("The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.").

¹⁹⁵ See *id.* at 10-13.

¹⁹⁶ See *id.* at 16-17; see also *Expert Evidence in International Arbitration*, ACERIS L. LLC (Mar. 27, 2022), <https://www.acerislaw.com/expert-evidence-in-international-arbitration/> [<https://perma.cc/76T8-4G9C>].

issue in the common law tradition, the assessment of evidence (i.e., rules on weight of evidence) is the focus of trial judges in the civil law tradition.¹⁹⁷

Second, the rules are a soft law: where such guidelines are used, the proceedings become more predictable and transparent, while the arbitrators retain the right to adapt the guidelines in order to meet the special needs of the respective arbitration. In the Preamble, the Rules make it clear that:

[t]hey are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.¹⁹⁸

Even with their inherent flexibility, the IBA Rules can be made binding in arbitration proceedings, either by agreement of the parties or by direct order of the arbitral tribunal.¹⁹⁹ And indeed, based on the ubiquity of the IBA Rules in international arbitral proceedings, it would not be an overstatement to say that the IBA Rules have achieved dominant status.

B. Weaknesses of the IBA Rules

Reading the previous remarks, one might easily form an impression that there are only advantages to using the IBA Rules as guidelines in an international arbitration. However, although the IBA Rules are an effective and tested tool, we are still at the beginning of the search for the ideal evidentiary rules for arbitration. In this way, the IBA Rules are more of a stepping-stone. There are at least three weaknesses to the IBA Rules.

First, the sense of compromise inherent in the IBA Rules between different legal traditions makes a lot of sense if the arbitration is in the international commercial realm, between parties of opposing legal traditions. But if the parties are both from either the common law or the civil law tradition, the attractiveness of adopting the IBA Rules would plummet, and the Rules can present unnecessary difficulties.²⁰⁰ This becomes evident in the context of an international arbitration where the parties are both from civil law countries that have a restrictive tradition on pretrial exchange of infor-

¹⁹⁷ See *Revised 2020 IBA Rules on Taking Evidence in International Arbitration*, ACERIS L. LLC (Mar. 14, 2021), <https://www.acerislaw.com/revised-2020-iba-rules-on-taking-evidence-in-international-arbitration/> [<https://perma.cc/3WBj-QFGW>].

¹⁹⁸ INT'L BAR ASS'N, *supra* note 153, at 7.

¹⁹⁹ See RAESS, *supra* note 54, at 32.

²⁰⁰ See Dominique D'Allaire & Rolf Trittman, *Disclosure Requests in International Commercial Arbitration: Finding a Balance Not Only Between Legal Traditions but also Between the Parties' Rights*, 22 AM. REV. INT'L ARB. 119, 125 (2011).

mation between disputants.²⁰¹ The IBA Rules on production of documents, a strong common law feature of discovery, would not meet the expectations of *either* party in this case.²⁰² In fact, a number of arbitration practitioners from civil law countries see a dominance of the common law tradition in the IBA Rules. This perception gave rise to the proposal of a different set of rules, the so-called *Inquisitorial Rules on the Taking of Evidence in International Arbitration*, also known as the Prague Rules.²⁰³

Nonetheless, even being attacked by civil law loyalists as “creeping Americanisation of international arbitration,”²⁰⁴ the IBA Rules have tragically so far not gotten the attention they deserve in the United States. American law schools still largely do not cover the IBA Rules in courses on evidence or arbitration, and the subject is omitted from the most popular law textbooks. Furthermore, a closer look at the past working committees of the IBA Rules (1999, 2010, and 2020 versions) reveals that American arbitration practitioners always only took a super minority role in drafting these rules.²⁰⁵ The majority of participants were actually from civil law traditions, even though the headquarters of the International Bar Association is in London, and it has a regional office in Washington, D.C.²⁰⁶

The second primary weakness, from a legal scholar perspective, is that the composition of the drafting teams of the IBA Rules over the years have all been arbitration practitioners.²⁰⁷ This one-sidedness is problematic. Indeed, the teams brought in significant practical experience from different legal traditions. But what about the theoretical foundations of the rules that need to be laid out and explained? Is it appropriate to have no voice at all from the scholarly field of evidence and proof when drafting the IBA Rules? Conversely, when the FRE was promulgated, and for its revisions over the

²⁰¹ See Claudia T. Salomon & Sandra Friedrich, *Obtaining and Submitting Evidence in International Arbitration in the United States*, 24 AM. REV. INT'L ARB. 549, 568 (2013).

²⁰² See INT'L BAR ASS'N, *supra* note 153, at 10.

²⁰³ The Prague Rules (so named for their place of launch) are a manifestation in favor of the civil law tradition and of an inquisitorial approach in international arbitration, established as a competitor to the IBA Rules. However, since their launch, the Prague Rules have been generally unpopular among arbitration practitioners. See Guilherme Rizzo Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part II*, KLUWER ARB. BLOG (July 6, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/07/06/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part-ii/> [<https://perma.cc/R4XB-E253>] (“[I]t is not by building an illusionary divide between common law and civil law practitioners that the Prague Rules will thrive. *Such approach, in fact, practically sentences them to still-birth.*”) (emphasis added).

²⁰⁴ See *id.*

²⁰⁵ See INT'L BAR ASS'N, *supra* note 153, at 25–33.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

years, the drafting teams have always had a more balanced composition of legal scholars and practitioners.²⁰⁸

Last but not least, significant rules of evidence are missing in the IBA Rules. Along the lines above mentioned regarding promising perspectives on developing evidentiary rules for arbitration, three basic categories of rules should be in place to promote validity (reliable and convincing results) in decision-making: (a) regulations relating to uncertainty and ambiguity (burdens and standard of proof), (b) evidentiary principles with universal values, and (c) policy considerations.²⁰⁹ The IBA Rules are too general and leave gaps in each of the three categories.²¹⁰ For example, the Rules fail to mention burdens and standard of proof at all,²¹¹ and they provide insufficient guidance on authentication of evidence (rules with universal value) and privileges (policy-based rules).²¹² In addition, even though Articles 5 and 6 are about experts, and Article 9 briefly mentions assessing weight of evidence, the IBA Rules still lack significant guidance that would be helpful to arbitrators in assessing reliability of evidence, especially the reliability of complex evidence and various new forms of evidence.²¹³

CONCLUSION

It's time to let go of the cliché that there are no rules of evidence in arbitration. This Article not only demonstrates why evidentiary rules are needed in arbitration, but also proposes what those rules should or could look like. When we are designing evidentiary rules for arbitration, it is not enough to merely seek to avoid an award being vacated by judicial review. The loftier and better goal is to ensure that arbitration is (and remains) fair and just, efficient in terms of time and cost, and flexible. The high popularity of IBA Rules in international arbitration practices proves that model evidentiary rules as soft law for parties and arbitrators could attain success. And

²⁰⁸ See generally *Rules Committees—Chairs and Reporters*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/committee_roster_for_web_current.pdf [<https://perma.cc/WUM8-8ZEL>] (last visited Aug. 9, 2023).

²⁰⁹ See *supra* Section II.B.2.

²¹⁰ See Rolf Trittman & Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings*, 31 UNSW L.J. 330, 333 (2008).

²¹¹ See Kubalczyk, *supra* note 73, at 106.

²¹² *Id.*; see also Gottlieb, *supra* note 193, at 9. (“[A]n opportunity may have been missed to further hone the Rules concerning Admissibility and Assessment of Evidence in the context of legal impediment or privilege as well as the drawing of adverse inferences.”).

²¹³ See *supra* Section II.B.3. Interestingly, one of the reasons to revise the IBA Rules in 2020 was to reflect established practices and address *new, technology-driven* challenges and developments in the taking of evidence in international arbitration. However, the Rules in their current form rarely mentioned electronic evidence or scientific evidence. See Gottlieb, *supra* note 193, at 1.

it is now time for evidence scholars to contribute to the development of this exciting frontier.