ARBITRATION ARCHETYPES FOR ENHANCING ACCESS TO JUSTICE

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In the second half of the twentieth century, the use of arbitration proliferated in the United States as part of a greater alternative dispute resolution (ADR) movement, with the promise that using ADR processes would, among other things, enhance disputants' access to justice. Arbitration offers disputing parties a process to resolve their dispute, which, at least in theory, is known for decreased cost, increased speed, party control, privacy, and finality. These characteristics generally enhance parties' access to justice because, as compared to litigation, barriers to entry are lower, outcomes are delivered more quickly, substantive outcomes are more equitable, and parties have a greater opportunity to be heard. However, not all twenty-first-century arbitration proceedings share these characteristics. Rather, today, arbitration comes in many forms and can be administered by different forums and procedural rules with a great variation in how cheap, how fast, and how procedurally and substantively fair the process really is. Whether a particular form of arbitration enhances access to justice depends greatly on the characteristics of the process in a particular forum or industry. This Article offers a simple framework to determine which

Arbitration, a dispute resolution process where parties agree to submit their dispute to third-party neutrals who, after hearing from all parties, issue a binding decision or award,[2] has been used to resolve commercial disputes in the United States since the country's founding.[3] Participants choose arbitration, at least theoretically, because they consider it to be a speedy and inexpensive form of dispute resolution as compared to litigation,

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valid claims of parties with little to no bargaining power[16] and is even unconstitutional.[17]

In addition to critiquing the "forced" nature of some arbitration proceedings, scholars claim that the *process* that results from an adhesive agreement to arbitrate is unfair, thus belying the access to justice narrative.[20] Setting aside the consent critique, regardless of how a dispute enters arbitration, the disputant will want an arbitration process to be procedurally and substantively fair and ultimately to deliver justice.[21] However, critics contend that today's arbitration process has become too litigation-like, eliminating its advantages as a speedy, economical ADR process.[22] Empirical studies have yielded the additional critique that the repeat-player-process advantages garnered by parties with superior bargaining power harm those with weaker bargaining power.[23] Finally, due to the strictly limited grounds for appeal and no requirement that arbitration awards include

include an explanation or reasoning. *Id.* at 198–203. The law in those areas is thus very uncertain, even murky, and parties attempting to settle a dispute that otherwise would go to arbitration are bargaining in this murky shadow. *Id.* Ultimately, this uncertainty leads parties to settle disputes for amounts that do not fully reflect the value of bargaining endowments that the shadow of the law would otherwise grant. *Id.*

20. *See* Nolan-Haley, *supra* note 12, at 377 ("[A]rbitration has actually limited access to

reasons,[24] arbitration skeptics challenge the lack of accountability of the arbitration panels.[25]

Notably, these process critiques do not differentiate among types of arbitration. Instead, they assume that arbitration is a monolithic process. This assumption is false, however, as twenty-first-century arbitration can differ greatly depending on the industry in which the dispute arises[26] and the forum that administers the process pursuant to its own unique procedural rules.[27] Among these different forums, aspects of the process can vary regarding how to demand arbitration, requirements for initial pleadings, how many and how arbitrators are chosen, prehearing procedures allowed—such as discovery and dispositive motions—whether rules can be altered by the parties, forum fees, arbitrator fees, the length of the hearing, whether an award is published, and the requirements for an award.

In light of these vast differences in arbitration subtypes, it is neither possible nor accurate to conclude one way or the other whether "arbitration" enhances or decreases disputants' access to justice as compared to litigation.[28] Rather, it depends on the arbitration "subtype." This Article proposes a framework to assess a limited question: whether a particular form of arbitration enhances disputants' access to justice relative to litigation.[29] Part I attempts to define what "access to justice" means in the context of arbitration. Part II identifies process features that contribute to a finding that a subtype of arbitration increases parties' access to justice relative to litigation. Part III identifies a few specific types of arbitration that, when

24. *See* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013) ("Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.' That limited judicial review, we have explained, 'maintain[s] arbitration's essential virtue of resolving disputes straightaway.'" (first quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995); then quoting Hall St. Assocs., L. L. C. v. Mattel, Inc., 552 U.S. 576, 588 (2008))); Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) ("[A]rbitrators are not required to provide an explanation for their decision." (quoting Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997))).

25. *See* Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L.L.

assessed against these features, more effectively deliver access to justice and thus can be considered "arbitration archetypes."

I. WHAT IS "ACCESS TO JUSTICE"?

Before evaluating whether a dispute resolution process enhances access to justice, we must define what "access to justice" means in this context. A recent historical perspective on the "access to justice" movement characterized it as "helping people gain access to fair representation in the courts, lowering legal costs, and reducing delays and the complexity of the justice systems."[30] Professor Jacqueline Nolan-Haley recently stated that "[s803 Tc.1377 Tw[(abnrece8vm-.1377 Tw[(abnreca)1TDlu -143727 T.0009 i)-6.0001 Tc.153 847 and

The common elements from these definitions (and many others) include *efficient*, *cost-conscious* and *accessible processes*, and *fair outcomes*.[34]

and a binding award.[38] Under the FAA, any award resulting from an arbitration process that does not provide the parties with a full and fair opportunity to be heard risks vacatur.[39] In addition, under the FAA, prevailing parties have the ability to convert the award into a court-enforced judgment,[40] and losing parties can seek to modify or vacate an award for process deficiencies.[41]

Beyond these common criteria, additional characteristics contribute to a process's efficiency and substantive fairness. However, not all arbitration subtypes share the additional process characteristics that are critical to a conclusion that the process enhances parties' access to justice when compared to litigating the same claims and defenses in court. And not all process characteristics of arbitration subtypes are equally important to this assessment. Thus, it is critical to identify which of these additional process features are most essential to enhancing access to justice.

In order for a subtype of arbitration to enhance parties' access to justice, in addition to the common features identified above, it is critical that the process: (1) cost less and take less time than litigating the same claim in court; (2) result in a published, explained award; (3) does not strip the rights of the parties to assert any claim, remedy, or procedure that would be available in court; and (4) permit the parties to be represented. The following sections explain why these four features are the most important.

A. Cost and Speed

To conclude that a process enhances a party's access to justice when compared with litigation in court, the costs of the arbitration process first and foremost should be at least equal to or less than the costs of resolving the same claims or defenses in court through the litigation process.[42] In the

38. While nonbinding arbitration exists (sometimes called "advisory arbitration"), arbitration within the meaning of the FAA and arbitration in the classical sense are presumed to be binding unless otherwise indicated. *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 145–47 (2002) Ar6s

United States, both litigation and arbitration require parties to pay two different types of costs: forum fees and attorney's fees. Unlike in litigation, however, in arbitration, the parties must also compensate the arbitrators for their time.[43]

In litigation, the plaintiff must pay a filing fee of just a few hundred dollars, regardless of the size of the claim.[44] In addition, the losing party might have to pay nominal "court costs," which could include the plaintiff's filing fee.[45] If the litigant cannot afford the filing fee and can demonstrate indigency, applicable statutes in federal courts authorize the court to waive the fee.[46] The forum fees do not vary based on the dollar value of claim, and no additional payments are required to compensate the judge or jury.[47] The largest component of costs in litigation is attorney's fees, especially for attorneys' time spent on extensive motion practice and discovery.[48]

In arbitration, forum fees often are higher than forum fees in litigation and could include filing fees, session hearing fees, and arbitrator fees.[49] Typically the claimant pays a filing fee to initiate the claim, which rises as the dollar value of the claim rises, and additional forum fees for each hearing session.[50] These forum fees often total in the thousands of dollars, rather than hundreds.[51] In addition, unlike in court, parties jointly pay hourly or

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movement and noting that it "highlighted barriers in legal procedures including costly litigation"); John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 189 (2018) (stating that "the vast majority of disputes exist in a range of controversy that makes litigating to a decision unaffordable aoTm decisi.7(gm(, aHin)70 9 2802F[(ie

daily rates to compensate the neutrals.[52] In some forums (for example, the Financial Industry Regulatory Authority (FINRA)), the cost of the arbitrator is built into each party's session fee;[53] at others (for example, the American Arbitration Association (AAA)), parties pay arbitrator fees on top of the amounts listed in fee schedules.[54] Hourly rates of arbitrators could be more than $500 or even $1000 per hour, depending on the industry and the experience of the arbitrator.[55] And the hours can add up quickly as many hearings take days or even weeks, not just hours.

The other important difference in costs between arbitration and litigation is attorney's fees: arbitration typically has far less motion practice and more restricted discovery than litigation.[56] Though the empirical evidence is not conclusive,[57] some scholars contend that, because motion practice and discovery is far more limited in arbitration than in litigation and thus attorney's fees are lower, arbitration is still less expensive overall to pursue an award than litigation for a similar type of case.

In most cases, if an arbitration party cannot pay filing or other forum fees, then the party cannot proceed with the arbitration.[58] However, the Supreme

52. *See Costs of Arbitration*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf [https://perma.cc/594L-XXKV] (last visited Apr. 12, 2020).

53. *See, e.g.*, *12902. Hearing Session Fees, and Other Costs and Expenses*, *supra* note 49.

54. *See, e.g.*, *Costs of Arbitration*, *supra* note 52.

55. *See generally* Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG., Spring 2017, at 8.

56. Schwartz, *supra*

Court has held that an arbitration agreement is enforceable for federal statutory claims even if a party is unable to afford the costs of the arbitration process.[59] As a result, an indigent party would only be able to afford the arbitration process if a forum provides a fee waiver for demonstrated financial hardship or if another entity absorbs the cost.

Related to cost is speed, as time often translates to money for disputants. To enhance parties' access to justice, arbitration should also lead to a resolution more quickly than litigation in court. The longer a process takes from initial filing to enforcement of an award, the less justice is delivered to the parties.

Of course, the duration of a civil case in court varies greatly depending on the means of disposition (dismissed after motion, settled, or judgment after trial), the court (state or federal), and the type of case (simple breach of contract or complex corporate litigation). In federal court, recent statistics report that, nationally, the median time of a civil case from filing to trial is 27.8 months,[60] though even that median varies greatly depending on the district.[61] In state courts, a recent empirical study found that the mean length of time for civil cases from filing to disposition was 306 days, though some outliers of twenty years or more were reported.[62] In contrast, generally speaking, arbitration forums report faster resolution times for their cases.[63]

In sum, if parties must pay higher filing and other forum fees to pursue the same claims as in court and must compensate attorneys for substantial hours, then the arbitration process decreases, as opposed to enhances, parties' access to justice. If parties can get to a resolution faster than in court, then the arbitration process enhances their access to justice.

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pending arbitration because the employee-defendant failed to pay his share of arbitration fees and the arbitrators terminated arbitration).

59. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236–37 (2013) (holding that an arbitration agreement is enforceable even if it strips a part of the ability to sue, so long as it does not strip a party's right to sue). The Court did recognize, in dicta, that it could envision a situation where an arbitration agreement might not be enforceable because "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable." *Id.* at 236.

60. *United States District Courts—National Judicial Caseload Profile*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf [https://perma.cc/9J6Y-ATKB] (last visited Apr. 12, 2020) (covering the twelve-month period ending September 30, 2019).

61. *See generally id.*

62. NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF LITIGATION IN STATE COURTS 28 (2019), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [https://perma.cc/ZC4X-4KVU] (reporting the results of an empirical study of 152 state courts in ten counties across the country of all cases disposed of from July 1, 2012 to June 30, 2013).

63. *See, e.g.*, *Measuring the Costs of Delays in Dispute Resolution*, AM. ARB. ASS'N

B. Published, Explained Award

To provide at least the same access to justice as courts, arbitration forums must publish their arbitrators' awards just as courts do.[64] In court, outcomes of civil cases are published via a "judgment" filed with the court clerk.[65] That judgment memorializes a verdict or a decision on a dispositive motion so that the public is aware of outcomes, even if it is not aware of the reasons for a jury's verdict or a disposition.[66]

Publication ensures some accountability.[67] Absent a public memorialization of the outcome, like a court judgment, disputants cannot be sure that the arbitration neutral decided the case pursuant to the powers granted to it by the parties in the arbitration agreement.[68] Additionally, cognitive psychology research suggests that people exert greater efforts to improve the quality of their decision-making when they are more likely to be held accountable for their decisions.[69]

To *enhance* access to justice in arbitration relative to litigation, arbitrators must also issue an explained award by including a rationale for the outcome.[70] An "explained award" is not the same thing as a fully reasoned court opinion. As the Second Circuit explained:

> [A] reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth

64. Though no statute requires an award to be in writing, most arbitration forums require that awards be in writing and signed by a majority of panelists. *See, e.g.*, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES r. 46(a) (AM. ARBITRATION ASS'N 2016); *13904. Awards*, FINRA: RULES & GUIDANCE (Feb. 21, 2018), https://www.finra.org/rules-guidance/rulebooks/finra-rules/13904 [https://perma.cc/VTN8-X3WT].

65. *See* FED. R. CIV. P. 58.

66. *See id.*

67. Though an explained award does make arbitrators even more accountable, juries are not required to explain their verdicts. Thus, arbitration awards even without explanations provide parties with access to the same brand of justice as they could obtain in court.

68. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.").

69. *See* Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73, 107–08 (2005); *see also* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 513 (2002) ("[I]f accountability is to improve an ultimate decision, the decisionmaker must be aware that he will be held accountable prior to making a commitment.").

70. However, it is well accepted that an "arbitrator's rationale for an award need not be explained" unless the parties specify that requirement in their arbitration agreement. D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006); *see also* Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co., No. 18-CV-2714 (AJN), 2019 WL 1349527, at *3 (S.D.N.Y. Mar. 26, 2019) (Parties can contract to "require arbitrators to issue more detailed awards.").

> the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties.[71]

An explained award enhances parties' procedural justice. Parties that can understand the basic rationale for the outcome of their dispute are more likely to feel as if they have been heard.[72] To ensure that arbitrators based their outcome on applicable rules of law and principles of equity, parties must be able to ascertain the basis of the arbitrators' decision, even if they do not understand the full reasoning.[73] If disputants believe the process is random or arbitrary, they may lose faith in it.[74]

Arbitration opponents claim that, because they do not have to fully reason their awards like judges, arbitrators do not observe the rule of law.[75] Indeed, under the FAA, parties cannot challenge an arbitration award merely for an error of law but only if arbitrators manifestly disregard the law.[76] Thus, it is hard to discern whether the arbitrators followed the law when deliberating. However, the promise of arbitration is a decision not just based on the law but based on law combined with equity. It is hard to argue that applying equitable principles does not enhance fairness.

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71. Leeward Constr. Co., Ltd. v. Am. Univ. of Ant.-Coll. of Med., 826 F.3d 634, 640 (2d Cir. 2016). Several other circuits have adopted substantially similar definitions of a reasoned award. *See, e.g.*, Sabre GLBL, Inc v. Shan, 779 F. App'x 843, 855 (3d Cir. 2019); Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 473 (5th Cir. 2012); *see also* Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844 (11th Ci

C. Absence of Right- or Remedy-Stripping Procedural Rules

The rules of the arbitration forum also must permit the parties to pursue all the rights and remedies they would have for the same claim if it were pursued in court.[77] If a party can be denied the right to bring certain claims that they otherwise could bring in court or assert certain remedies that they could otherwise assert in court, then that process surely limits access to justice. Examples could include forum rules restricting the arbitrator's power to award punitive damages or attorney's fees when they would be available in court or to allow joinder of similar claims. Thus, whether the arbitration forum's procedural rules reduce or eliminate a party's ability to pursue its full rights and remedies—as would be available in court—is a significant factor when measuring access to justice.

D. Right to Representation

Finally, to ensure that parties do not lose access to justice in arbitration and have the ability to assert their rights effectively, the forum must permit parties to be represented by a lawyer or other chosen representative.[78] Recent empirical studies have shown that parties fare better in arbitration if they are represented by counsel.[79] The arbitration process is different from court but can be similarly intimidating for the unfamiliar. In addition, commentators have raised concern regarding the advantage of "repeat players"—those parties who regularly arbitrate disputes in connection with their business and thus are very familiar with the process and regularly compensate arbitrators for their time.[80] Just as repeat players might gain an advantage from their

77. This process characteristic is distinguished from right- or remedy-stripping clauses in the agreement to arbitrate. For example, many scholars contend that the now common use of a class or collective action waiver alongside an agreement to arbitrate precludes parties from bringing class or collective claims. *See supra* note 15 and accompanying text. Nevertheless, the Supreme Court has held that these waivers are enforceable. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (enforcing a class action waiver in an employment arbitration agreement); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (enforcing a class action waiver in a consumer arbitration agreement).

78. I am not aware of any arbitration forum that bans parties from being represented if they so choose. Some forums, such as FINRA, have explored amending their rules to ban nonattorney representatives from representing parties as a means to prevent exploitation of investors, not as a means to decrease access to justice. *See* Benjamin P. Edwards, *FINRA Seeking to Ban Non-attorney Representatives (a/k/a NARs)*, BUS. L. PROF BLOG (Dec. 27, 2018), https://lawprofessors.typepad.com/business_law/2018/12/finra-seeking-to-ban-non-attorney-representatives-aka-nars.html [https://perma.cc/V2SA-538C].

79. Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter?: The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016). The authors gathered existing empirical research and "conclude[d] that the evidence strongly supports the conclusion that representation benefits clients. The vast majority of the studies provide evidence that represented parties obtain more favorable outcomes than unrepresented parties, although a handful of studies suggest the opposite." *Id. But see* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 106 (2015) (reporting the results of an empirical study finding that some unrepresented parties reached better outcomes in arbitration than represented ones).

80. *See supra* note 23 and accompanying text.

familiarity with arbitration, nonrepeat, unrepresented players are at a disadvantage due to their lack of familiarity.[81]

III. ARBITRATION ARCHETYPES TO ENHANCE ACCESS TO JUSTICE

Are there any arbitration processes that include all of the features that are critical to enhance access to justice? It certainly is easier to identify those arbitration subtypes that do not have th

in a grievance process that culminates in binding arbitration."[86] Most grievance arbitrations are administered either by the AAA or the Federal Mediation and Conciliation Service (FMCS).[87] Grievance arbitration includes all of the criteria for a process that enhances access to justice as compared to litigation: low cost,[88] speed,[89] published and explained awards,[90] no right-stripping procedural rules,[91] and the right to representation.[92] Also, it provides for party control[93] and an oral hearing unless the parties waive it.[94] Thus, labor arbitration is an arbitration archetype.

B. FINRA Customer Arbitration

Arbitration in the securities industry between investors and brokerage firms for disputes arising from account activity or between individual brokers and their employing firms also contains the criteria important to enhance access to justice. FINRA subsidizes most of the cost of the forum for investors and associated claimants (including the cost of arbitrators),[95] publishes all awards on its website,[96] expressly prohibits any claim- or remedy-stripping provisions,[97] and provides a right to representation.[98] Further, FINRA has an average turnaround time for a claim of just over one

86. *See* Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 794 (2013) (describing the process of labor arbitration). For a thorough description of the process of grievance arbitration, see generally JAY E. GRENIG & ROCCO M. SCANZA, FUNDAMENTALS OF LABOR ARBITRATION (2011).

87. *See generally* GRENIG & SCANZA, *supra* note 86.

88. The AAA Schedule of Fees for Labor Arbitration sets a $275 flat filing fee. The union provides the worker with a representative and pays the worker's share of the costs of arbitration, so the process is affordable and accessible for workers. *See* Levinson, *supra* note 86, at 843; *see also* Nagele-Piazza, *supra* note 57, at 43.

89. *See* Levinson, *supra* note 86, at 815–17.

90. LABOR ARBITRATION r. 37 (AM. ARBITRATION ASS'N 2015) (indicating that the default rule is that arbitrators must include opinions with their awards). Labor awards are published on legal research databases such as LexisNexis and Westlaw. *Cf.* 29 C.F.R. § 1404.14 (2019) ("While FMCS encourages the publication of arbitration awards, arbitrators should not publicize awards if objected to by one of the parties.").

91. *Cf.* LABOR ARBITRATION r. 47 ("The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties.").

92. *Id.* r. 18.

93. *Id.* r. 1 ("The parties, by written agreement, may vary the procedures set forth in these rules.").

94. *Id.* r. 32.

95. *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 49 n.27 (2012).

96. *See Arbitration Awards Online*, FINRA, http://www.finra.org/arbitration-mediation/arbitration-awards [https://perma.cc/9A57-K2ER] (last visited Apr. 12, 2020).

97. *2268. Requirements When Using Predispute Arbitration Agreements for Customer Accounts*, FINRA: RULES & GUIDANCE (Dec. 5, 2011), https://www.finra.org/rules-guidance/rulebooks/finra-rules/2268 [https://perma.cc/E9GT-E68U] (Rule 2268(d)(3)).

98. *12208. Representation of Parties*, FINRA: RULES & GUIDANCE (Dec. 15, 2008), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12208 [https://perma.cc/J4FH-TBCM].

year,[99] allows parties to change any procedural rule with consent,[100] requires arbitrators to issue an explained award if all parties request it,[101] and provides a telephonic, oral hearing option for small claims.[102] A decade ago, I analyzed the fairness of securities arbitration, specifically investors' claims against their brokers, and concluded that it was fair.[103] The forum has only added more fairness features in the decade since. Thus, FINRA arbitration is an arbitration archetype.

CONCLUSION

The ADR movement was started, in part, because it promised disputants an alternative to the high costs and protracted delays of litigation while ensuring fairer outcomes based not on rigid application of archaic rules but on industry norms and customs. But not all ADR processes achieve this goal. In order to enhance access to justice relative to a court-based process, a dispute resolution process should be efficient, cost-conscious, and accessible and should ensure a fair outcome. Since arbitration processes differ depending on the forum, the industry, and the parties' agreement to arbitrate, it is not possible to conclude whether arbitration in general enhances parties' access to justice. Identifying characteristics of an arbitration process that contribute to access to justice creates a simple framework to locate those subtypes of arbitration that truly deliver on the promise that ADR enhances access to justice. Those "arbitration archetypes" should be used as models for reforms to types of arbitration that do not have the archetypal characteristics—both to improve the fairness of those processes and to put a stop to the overgeneralized nature of arbitration critique. By preserving some types of arbitration and improving others, disputants will continue to believe in the legitimacy of the process and ensure additional access to justice.

99. *Dispute Resolution Statistics*, FINRA: ARB.