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The (Pre) (As) Sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers, 36 J. Marshall L. Rev. 589 (2003)

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A REAL ESTATE FOCUS

THE (PRE) (AS) SUMED "CONSENT" OF COMMERCIAL BINDING ARBITRATION CONTRACTS: AN EMPIRICAL STUDY OF ATTITUDES AND EXPECTATIONS OF TRANSACTIONAL LAWYERS

CELESTE M. HAMMOND*

In enthusiastically enforcing pre-dispute arbitration provisions,¹ American courts have emphasized the "voluntary" nature of the parties' consent to substitute arbitration in lieu of litigation. Richard Reuben's recent article analyzes what is required for the "actual assent" he sees as the basis for a democratic, constitutionally sound place for arbitration in the broader system of justice.²

Some courts, legislatures, and interested professional organizations have suggested that where consumers, employees, and other unsophisticated persons are parties to contracts with

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1. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS.L. REV. 33, 54 (1997) (using the term "compelled arbitration" to refer to situations where a party agreed to arbitrate future disputes but, once the dispute arose, would prefer to litigate rather than arbitrate).

2. Richard C. Reuben, *First Options, Howsam and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions* (unpublished manuscript, on file with author and The S.M.U. Law Review). See *Wright v. Universal Maritime*, 525 U.S. 70, 80 (1998) (requiring that a waiver of statutory rights by a labor union must be "clear and unmistakable"). In *Wright*, individual members of the union were seeking to waive rights on behalf of the entire labor union. *Id.*

businesses, the “voluntariness” of pre-dispute arbitration clauses in contracts is open to question and should be reviewable by the courts.³

Yet, because attorneys for business clients misunderstand the basics of arbitration as a dispute resolution process, the pre-dispute binding arbitration provisions of their clients’ agreements may not actually be “voluntary” and may lack the consent required to make a promise into a legally enforceable contract.⁴ Such attorneys are not equipped to counsel their clients “at the front end” in eliminating or modifying arbitration clauses to correspond with their clients’ expectations and needs.⁵

Empirical research has rarely been used to examine the understanding of the arbitration process or the expectations of transactional attorneys concerning arbitration. The Hammond survey of those members of a large metropolitan bar association, whose practice is primarily transactional in nature, about their knowledge and expectations about binding arbitration in commercial disputes, indicates confusion and misinformation about the process of the law of arbitration.

The thesis of this article is not that transactional attorneys perpetrate legal malpractice when they advise business clients about pre-dispute arbitration provisions.⁶ Instead, the thesis is that where the lawyer, as advisor/counselor, is egregiously incorrect in her own understanding and expectations, the client has not “knowingly” assented to arbitration and the agreement to arbitrate is not legally enforceable.⁷

3. See generally Schwartz, *supra* note 1, at 40-70 (criticizing this process).

4. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986) [hereinafter Barnett, *Consent Theory*] (defining the consent required as a “manifestation of the intention to alienate rights.”). See also Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992) [hereinafter Barnett, *Contract as Promise*] (setting forth a brief summary of the differing views of contracts).

5. See generally Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107 (2002) (discussing the negotiation theories that lawyers have for their clients).

6. There are no reported cases involving a claim of legal malpractice because an attorney advised a client to enter into binding arbitration.

7. See Barnett, *Consent Theory*, *supra* note 4, at 307-09, nn.155-58 (setting forth the limits of the objective approach to consent needed to form a legally enforceable contract where there is “proof of different subjective understanding of one or both parties.”).

I. CONSENT IS THE BASIS FOR ENFORCING PRE-DISPUTE ARBITRATION AGREEMENTS

A. Public Policy Favoring Arbitration Agreements

Even for the accidental tourist of case law that discusses the Federal Arbitration Act (FAA),⁸ it is not difficult to realize how jealously American courts have guarded arbitration as a means of dispute resolution over the past twenty years.⁹ Courts rest easy in their jealousy due to the presumed voluntary nature, also termed "knowing consent,"¹⁰ of private contracts containing pre-dispute arbitration clauses. When this consent may be lacking for any number of reasons, the court will fall back on a broad interpretation of the FAA, even though, as one commentator has recently described, the Act is really a legislative compromise undeserving of such a liberal reading.¹¹ Despite such criticisms, the broad interpretations of the FAA have pervaded federal court adjudication. This highly dependable trend, however, has been limited by at least two federal courts in recent years.

In *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit held that section 118 of the Civil Rights Act of 1991 prevents an employer from conditionally hiring individuals as long as they give consent to waive their right to bring future Title VII cases in court.¹² Likewise, in *Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, a Massachusetts District Court ruled the same way concerning section 118.¹³ "These decisions are, however, at least at present, exceptions to the general rule permitting mandatory arbitration of such claims."¹⁴

8. 9 U.S.C. § 10 (2000).

9. See Jean Sternlight, *Pancea or Corporate Tool?: Debunking The Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-63, 711 (1996) (commenting that the Supreme Court has developed a consistent pattern since 1983 of favoring arbitration over litigation).

10. See *id.* at 662-63. See also Richard C. Reuben, *Democracy and Arbitration: A return to first principles* (2003) (unpublished manuscript, on file with author and The Duke Law Journal) (theorizing that the RESTATEMENT (SECOND) OF CONTRACTS § 211(3), states that arbitration clauses waiving all legal rights and remedies is a term unanticipated by contract law and thus should be excluded from agreements).

11. Reuben, *supra* note 2, at 21.

12. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1185 (9th Cir. 1998).

13. *Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 995 F.Supp. 190, 212 (D. Mass. 1998), vacated by 1999 U.S. App. LEXIS 7793 (1st Cir. 1999).

14. Jean Sternlight, *Compelling Arbitration of Claims Under The Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 317-18 (1999). See *Desiderio v. NASD*, 191 F.3d 198, 205 (2d. Cir. N.Y. 1999) (criticizing *Duffield*, 144 F.3d 1182); *Haskins v. Prudential Ins. Co. of America*, 230 F.3d 231, 239-41 (6th Cir. 2000) (criticizing *Rosenberg*, 995

Regardless of the rare occasion where a federal court practices self-restraint and questions the elasticity of the FAA, the federal policy favoring arbitration is both a dominating and intimidating force in modern dispute resolution. As mentioned above, parties who contract for binding arbitration are presumed by the courts to have consented to the submission of the claim to arbitration. However, courts have not seemed overtly concerned with whether such consent is legally justifiable in a contractual sense.¹⁵ Rather, the courts have been distracted by the seductive avenue arbitration as a means to relieve burdensome dockets.

B. Extremely Limited Grounds for Reviewing Awards

It is this same presumed contractual consent to binding arbitration of future disputes that has persuaded courts that they should not vacate arbitral awards except on very limited grounds. Both the FAA and the Uniform Arbitration Act (UAA) statutorily contain very few, closely guarded, grounds for vacatur of an arbitrator's award.

1. Grounds for Vacatur: The FAA

The FAA¹⁶ lists only four grounds for vacatur of an arbitral award.¹⁷ Briefly, the four grounds are (1) arbitrator corruption, fraud or undue means; (2) evident partiality; (3) misconduct or misbehavior; and (4) misuse of power. These narrow grounds¹⁸ for vacatur have not been an

F.Supp. 190).

15. See Reuben, *supra* note 2, at 58 (discussing the significance of the "apparent embrace of implied consent to arbitrability").

16. 9 U.S.C. § 10 (2000).

17. *Id.* The statute stresses the limited nature of avenues for vacatur in the following language:

(a) In any of the following cases, the United States court for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party may have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

18. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956) (holding that judicial review of arbitration award is more limited than that of trial). Arbitrators are not bound by rules of evidence and may draw on their personal knowledge in making award, and swearing of witnesses may not be

impressive avenue for relief from an unfavorable arbitral award. A brief peek at some case law illustrates the challenge a party faces when attempting to seek a vacatur of an adverse award.

The first ground for vacatur under the FAA is corruption, fraud or undue means.¹⁹ In *Local Union 1160 v. Busy Beaver Bldg. Centers*,²⁰ the court found no undue means when the defendant apparently threatened one of the witnesses.²¹ The court noted that the arbitrator put little stock in that witness's testimony and ultimately held that the incident was not undue means under the FAA.²² The court also made a clear distinction between the actions of parties and those of the arbitrator.²³ The judge ruled that the grounds for vacatur at issue, in this case, undue means, focused on the actions of the arbitrator, not the parties.²⁴

The second ground for vacatur under the FAA, evident partiality, is likewise a challenging case to make against the entry of an adverse arbitral award. In *International Produce v. A/S Rosshavet*, the court held that standard of "evident partiality" contained in the FAA,²⁵ which would authorize vacating arbitration award due to bias of the arbitrator, is not made out by mere appearance of bias.²⁶ For example, *Hoffman v. Bargill, Inc.* is a case where the movant failed to establish more than the mere appearance of bias.²⁷ The holding, though intuitively questionable, remained true to the limited vacatur opportunities for dissatisfied arbitral parties.²⁸ In *Hoffman*, the movant grain-seller demonstrated to the court that the arbitrators who ruled in favor of the opponent grain-buyer were themselves all grain-buying executives.²⁹ In all fairness to the court, the movant failed to show any other evidence of impartial motivation other than the coincidence of occupation.³⁰ This case illustrates the limited application of grounds for vacatur under the FAA.

The third ground for vacatur under the FAA is misconduct or misbehavior.³¹ In *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*, the court vacated the arbitration award after finding arbitrator misconduct and misbehavior where the

required, and arbitrators need not disclose facts or reasons behind award. *Id.* at n.4.

19. 9 U.S.C. § 10 (2000).

20. 616 F.Supp. 812 (W.D. Pa. 1985).

21. *Id.* at 814.

22. *Id.*

23. *Id.*

24. *Id.*

25. 9 U.S.C. § 10 (2000).

26. 638 F.2d 548, 550 (2d Cir. 1981).

27. *Hoffman v. Cargill Inc.*, 59 F. Supp. 2d 861, 863 (N.D. Iowa 1999).

28. *Id.*

29. *Id.*

30. *Id.*

31. 9 U.S.C. § 10(3) (2000).

Commissioner of the National Basketball Association, acting as an arbitrator, failed to conduct a hearing and refused to allow the party charged with misconduct to rebut charges with evidence.³² More misconduct and misbehavior was found apparent in *Allendale Nursing Home, Inc. v. Local 1115 Joint Bd.*, the arbitrator was clearly aware of a legitimate and serious illness of a party's key witness, but still refused to grant a requested adjournment.³³ A final example can be found in *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, where the court found that an *ex parte* receipt of evidence by the arbitrators bearing on the amount of the award to be made amounted to misbehavior or misconduct.³⁴ These examples illustrate the type of misbehavior needed to disallow the rubber-stamping of arbitral awards. The misconduct or misbehavior must be egregious.

The fourth and final statutory ground for vacatur in the FAA is misuse of power.³⁵ *Western Employers Ins. Co. v. Jeffries & Co.*, explained that, when a party is forced into arbitration according to terms for which it did not bargain, it will be construed as a misuse of power.³⁶ In *Marshall v. Green Giant Co.*, the court held that manifest disregard of the law is a misuse of arbitrator power and will establish a basis for vacating an arbitration award where it is shown that the arbitrator knew the law, the law was clearly defined, and the arbitrator decided to ignore the law.³⁷

In summary, these four grounds for vacatur³⁸ center on the acts of the arbitrator rather than the parties themselves. Because of this focus, the grounds for vacatur listed above have become known as "among the narrowest known to law."³⁹ Moreover, even these grounds for vacatur may lack meaning because of the separability doctrine, which treats the pre-dispute arbitration provision as part of

32. *Riko Enterprises, Inc. v. Seattle Supersonics Corp.* 357 F. Supp. 521, 526 (S.D.N.Y. 1973).

33. *Allendale Nursing Home, Inc. v. Local 1115 Joint Bd.*, 377 F. Supp. 1208, 1215 (S.D.N.Y. 1974).

34. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 653 (5th Cir. 1979).

35. 9 U.S.C. § 10(4) (2000).

36. *Western Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258, 262 (9th Cir. 1992).

37. *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991).

38. See Stephan L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L.REV. 443, 461-96 (1998) (discussing the non-statutory grounds for vacatur).

39. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995).

the larger contract. Regardless of the enforceability of that larger contract, the arbitration provision is treated as a "separate" contract to which the parties are presumed to have consented. Thus, any challenges to the main contract will be considered by an arbitrator and not a court, without the protections of legal rules.⁴⁰ Courts would only "decide whether the arbitration clause itself is valid and enforceable"⁴¹ This is an interesting commentary on the state of arbitration; when one understands how tenuously the federal preference for arbitration flows from the presumed consent of arbitral parties, the manifest injustice of such limited grounds for vacatur almost shocks the conscience.

2. Grounds for Vacatur: The UAA, RUAA and Other Applicable State Law

Even egregious, unanticipated arbitral outcomes do not seem to affect the enforceability of the award due to the initial "voluntariness" of the consent to enter into a contract that contains an arbitration clause.⁴² For example, in *Advanced Micro Devices, Inc. v. Intel Corp.*, the California Supreme Court refused to reverse an arbitration award that gave the petitioner a royalty-free, licensed use of an Intel product even though it was not at issue in the arbitration.⁴³ The court explained, "the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted"⁴⁴ The dissenting justices noted that "under the majority's test it is theoretically possible for an arbitrator to order the losing party to be placed in the stocks or pillory or to direct that the contractual relationship be repaired by ordering the marriage of the parties' first-born children."⁴⁵

Murray Levin recently articulated the same sentiments when he expressed his amazement at how little attention

40. Reuben, *supra* note 2, at 48. This doctrine was enunciated by the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

41. Reuben, *supra* note 2, at 9.

42. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L. J. 425, 430-57 (1988). Although, as does the FAA, the UAA permits vacatur in cases of prejudicial misconduct by an arbitrator, neither statute contains grounds for reversal due to the arbitrariness or capriciousness of the arbitrator's decision. Research has revealed no general arbitration statute in any state that contains such language. *Id.* at 437.

43. 885 P.2d 994, 996 (Cal. 1994).

44. *Id.* at 996.

45. *Id.* at 1014, n.2.

was paid to the rule of law by the courts.⁴⁶ Likewise, Stephen Hayford has suggested that reasoned arbitral awards, or the lack thereof, are in need of a reorientation to the vacatur grounds by calling for

a reassessment of the contemporary paradigm for commercial arbitration whereby the threat of judicial vacatur effectively precludes the use of reasoned arbitration awards. After reviewing the nature and effect of the statutory and nonstatutory grounds for vacatur and critiquing the current case law interpreting and applying those standards, a new paradigm for commercial arbitration is proposed. That model centers on a redefined relationship between reasoned awards and the judicial standards for vacatur.⁴⁷

With calls for reform abounding in the field of binding commercial arbitration under the FAA, a serious look must be taken at the presumed consent of the arbitral parties. It is from this presumed consent that courts have led parties down a compulsory path that will ultimately end in a failed attempt to vacate an unappealing award barring an exotic circumstance. The problems with the end lie in the beginning.

II. QUESTIONS ABOUT CONSENT TO THE ARBITRATION PROVISION IN CONSUMER, EMPLOYEE, AND FRANCHISE CONTRACTS: ADHESION AND UNCONSCIONABILITY

Where consumers, employees, and other unsophisticated persons are parties to contracts with businesses, especially where the terms of the contract are mandated by the business, the "voluntary nature" of pre-dispute arbitration clauses is open to question.

The governing statutory law for arbitration disputes is primarily the FAA.⁴⁸ Scholars have noted that the FAA "was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer."⁴⁹ However, clauses mandating arbitration are now found in contracts as varied as those involving sales contracts for consumer household goods and pre-employment agreements.⁵⁰ The consumer or employee often enters the

46. Murray S. Levin, *The Role of Substantive Law in Business Arbitration and The Importance of Volition*, 35 AM. BUS. L.J. 105, 117-18 (1997).

47. Hayford, *supra* note 38, at 443.

48. 9 U.S.C. § 206 (2000).

49. Sternlight, *supra* note 9, at 647.

50. Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1341 (2002).

agreement without giving "voluntary, knowing consent."⁵¹ This lack of true consent is often due to the weaker party having no opportunity to negotiate the terms of the contract or any realistic opportunity to look elsewhere for a more favorable contract.⁵² This lack of choice often results in "consent" to boilerplate provisions that dictate arbitration terms limiting the rights of the weaker party and defeating the expectation of fairness.⁵³

A. Most Courts Uphold Arbitration Agreements

On occasion, courts have held that arbitration agreements are unenforceable.⁵⁴ Where the courts have ruled an arbitration contract invalid, the *terms of the agreement* have been deemed so one-sided and unfair as to completely circumvent the arbitration proceeding.⁵⁵ For example, in *Hooters of America, Inc. v. Phillips*,⁵⁶ the employer brought action to compel arbitration of employee's sexual harassment claims under the FAA.⁵⁷ The employee counterclaimed for violations of Title VII and for declaration that employer's arbitration agreements were unenforceable.⁵⁸ The Fourth Circuit Court of Appeals, held that: (1) the employee could agree to arbitrate the Title VII claim in pre-dispute agreement;⁵⁹ and (2) the employer materially breached agreement to arbitrate by promulgating egregiously unfair arbitration rules.⁶⁰ The repudiation of the arbitration agreement resulted because "Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, we hold that Hooters breached its agreement to arbitrate."⁶¹ In other instances, the court may find a special relationship like the fiduciary one between the stock broker and the investor where "reasonable expectations" of the investor does not include a pre-dispute arbitration clause waiving the right of access to the courts, the right to a jury trial and the right to reasonable discovery, the right to findings of fact and the right to enforce the rule of law applicable to her case by way of appeal.⁶²

51. Sternlight, *supra* note 9, at 647.

52. *Id.*

53. Levin, *supra* note 46, at 164; Thomas Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 894 (2001).

54. See, e.g., *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (1999) (illustrating an example of when arbitration was held unenforceable).

55. *Id.* at 939.

56. *Id.*

57. *Id.* at 935.

58. *Id.* at 936.

59. *Id.* at 937.

60. *Id.* at 935.

61. *Id.*

62. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002); see *Badie v. Bank of America*, 67 Cal. App. 4th 779 (1998) (applying state contract law, the California Supreme Court affirmed an appellate court's refusal to overturn

Most courts reject the rationale in the *Hooters* case and enforce the one-sided provisions of arbitration agreements.⁶³ The courts have based their decisions on contract theory and the perceived Congressional preference for the FAA.⁶⁴ Generally, the Supreme Court has held that the FAA passed by Congress in 1925 is to be interpreted to favor the use of arbitration.⁶⁵ Arbitration agreements are generally held to be “valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.”⁶⁶ Because courts have construed the FAA as proof of Congress’ preference for arbitration, great deference has been given to these agreements.⁶⁷

B. Misunderstanding the Ramifications of Submitting to Arbitration

Though courts have adopted a pro-arbitration policy, unsophisticated parties remain unaware of the ramifications of the decision to submit to arbitration.⁶⁸ For example, arbitration agreements, especially the agreements found in adhesion contracts, often have the effect of depriving the unsophisticated party of substantive and procedural due process rights. These lost rights include the right to a trial, the right to an appeal, the right to class action, the right to present evidence, and the right to select an arbitrator.⁶⁹ Consumers and prospective employees assume they are guaranteed the same rights at arbitration as they are in jury trials. In actuality, claimants often lose the ability to seek punitive damages, the right to claim protections under substantive law, and the option to exercise procedural rights that are guaranteed at trial.⁷⁰ Most consumers and employees do not

trial court’s decision not to enforce a bank’s imposition of binding arbitration clause as part of existing contracts with personal checking and credit card customers).

63. See, e.g., *Hill v. Gateway 2000*, 105 F. 3d 1147 (7th Cir. 1997) (quoting Judge Easterbrook, “Competent adults are bound, . . . read or unread.”).

64. *Hooters*, 173 F.3d at 937.

65. *Id.* at 936.

66. *Id.*

67. See, e.g., 9 U.S.C. § 2 (2000) (declaring arbitration agreements unenforceable); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967) (Black, J., dissenting) (criticizing the majority’s decision to elevate arbitration provisions above all other contractual provisions). See also *Stipanowich*, *supra* note 53, at 895 (discussing the deference given to arbitration). *Stipanowich* suggests an irony in the fact that “the kinds of cases where courts are most likely to lend an ear to concerns about unfairness or surprise in arbitration agreements were business-to-business sales agreements under the Uniform Commercial Code.” *Id.* at 895.

68. Schwartz, *supra* note 1, at 55.

69. Beth A. Rowe, *Binding Arbitration of Employment Disputes: Opposing Pre-Dispute Agreements*, 27 U. TOL. L. REV. 921, 923 (1996).

70. Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion*

realize that they have waived these rights until they become necessary. Some of the rights most often waived in pre-employment or adhesion contracts are the aforementioned rights—trial, appeal, class action, and choice of the arbitrator.⁷¹

1. *Right to a Trial*

The right to a trial by jury is considered a fundamental right under the United States Constitution.⁷² The Seventh Amendment provides that "(i)n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."⁷³ The right to jury trial under the Seventh Amendment is applicable to causes of action based on statutes.⁷⁴ This application is central to employment claims under the Americans with Disabilities Act (ADA),⁷⁵ Title VII of the Civil Rights Act,⁷⁶ Age Discrimination in Employment Act (ADEA),⁷⁷ Family Medical Leave Act (FMLA),⁷⁸ Equal Pay Act (EPA),⁷⁹ and similar statutes.⁸⁰ But, the Supreme Court has ruled that an employee can be required to submit a claim before an arbitrator if the employee signed a pre-dispute, mandatory arbitration agreement.⁸¹

3. *Right to Appeal*

Most courts have ruled that arbitration decisions should not be subject to appellate review for error of law.⁸² The courts have left the role of delineating the grounds that constitute vacatur to the legislative branch.⁸³ Even in states that provide for judicial review for error of law, the error must often arise from "fraud,

in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision, 2 J. DISP. RESOL. 259, n.217 (1991).

71. See Rowe, *supra* note 69, at 923 (detailing the rights waived in adhesion contracts).

72. U.S. CONST. amend. VII.

73. *Id.*

74. See generally FED. R. CIV. P. 38(a) (stating "the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471-72 (1962). .

75. 42 U.S.C. § 12133 (2000).

76. *Id.* § 1981(a).

77. 29 U.S.C. § 621 (2000).

78. *Id.* § 2617.

79. *Id.* § 206.

80. Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1216 (2002).

81. Circuit City Stores v. Adams, 532 US 105, 109-10 (2001).

82. See generally Levin, *supra* note 46, at 117-19.

83. 9 U.S.C. § 10 (2000).

misconduct, [or] corruption”⁸⁴ In states where there is some form of judicial review, there is often no duty to provide a written opinion. Without this written explanation, review for errors of law becomes extremely difficult.⁸⁵

3. *No Right to Class Action*

The use of a provision forbidding the filing of an action as part of a class action effectively deters lawsuits.⁸⁶ This occurs because many individual claims are of such low value that it is economically imprudent to proceed in a single suit.⁸⁷ Often, the arbitrator’s salary, court costs and legal fees will surpass the amount of the claim.⁸⁸ In addition, when individual disputes proceed to trial, the damages awarded are generally lower than would occur in class action litigation.⁸⁹ The lower damages are a result of the use of arbitrators who are less likely to award punitive damages than a jury.⁹⁰ As a result of the lower awards, an action which is illegal or against public policy is not effectively deterred.⁹¹ Yet, effectively, the agreement to arbitrate precludes bringing claims in a class.

4. *No Right To Select Arbitrator*

Generally, litigants may not choose the judge who will decide a traditional court case. However, arbitrating parties commonly select the arbitrators that will decide disputes.⁹² There are numerous arbitration decision-making structures.⁹³ The numbers of arbitrators who decide the dispute may vary.⁹⁴ The selection method of the arbitrators is also subject to the preference of one or more of the parties.⁹⁵ The parties may choose from an institutional list⁹⁶ or may select arbitrators based on contract-based discretion.⁹⁷

84. Levin, *supra* note 46, at 127.

85. *Carpenter v. North River Ins. Co.*, 436 S.W.2d 549, 551 (Tex. Ct. App. 1968). See generally Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000).

86. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000).

87. *Id.* at 9.

88. *Id.* at 81.

89. *Id.* at 9.

90. *Id.*

91. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

92. Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 708 (2001).

93. *Id.* at 708-09.

94. See *Beattie v. Autostyle Plastics*, 552 N.W.2d 181 (Mich. App. 1996).

95. Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, OHIO ST. J. DISP. RESOL. 303, 337 (1998).

96. Schwartz, *supra* note 1, at 61.

97. Stipanowich, *supra* note 95, at 330.

As compared with jury panels, which reflect the diversity of the citizenry, lists of arbitrators are not diverse. Only six percent of 50,000 American Arbitration Association arbitrators are women.⁹⁸ Most are highly educated older, white males. This has been highly criticized particularly in employment arbitration.⁹⁹

No matter what the method, the party that retains the greatest deal of control over the selection process may gain an advantage. In commercialized arbitration agreements, this is often an employer or corporate entity.¹⁰⁰ Since an employer or corporate entity often has repeat contact with the arbitrators (who compete for the selector's repeated use), results more favorable to the employer corporate entity are likely.¹⁰¹

C. Standard of Waiver

To waive a constitutional or statutory right to a jury trial and the right to discovery,¹⁰² the party must knowingly and voluntarily assent to the arbitration.¹⁰³ Knowingly and voluntarily assenting to this waiver means that a party is entering a binding agreement without fraud or duress.¹⁰⁴ Parties can agree to arbitrate claims under the ADA, ADEA, and Title VII.¹⁰⁵

Courts determine whether parties knowingly and voluntarily assent to arbitration agreements and the employee's understanding of the obligations under the agreement.¹⁰⁶ Although the court in *KMC v. Irving Trust* did not specifically define "knowing and voluntary," its decision rested on the wording of the arbitration agreement and the employee's understanding of his or

98. *Smith v. American Arbitration Assoc., Inc.*, 233 F.3d 502, 508 (7th Cir. 2000) (affirming the dismissal of a suit alleging denial of plaintiff's equal protection of law because of lack of gender diversity on list of arbitrators available to arbitrate the claim); Katherine Eddy, *To Every Remedy A Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771, 777 (2001).

99. Victoria J. Craine, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?*, 8 B.U. PUB. INT. L.J. 537, 550 (1999).

100. *Id.*

101. *Drahozal*, *supra* note 92, at 710. 33 D.H. *Overmeyer Co. v Frick Co.*, 405 U.S. 174, 185 (1972) (stating that waiver of due process rights must be "voluntary, knowing and intelligently made"). *See also* *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding employees not bound by arbitration agreements regarding sexual discrimination suits because they did not knowingly forego their statutory rights and remedies).

102. *Drahozal*, *supra* note 92, at 697.

103. *KMC v. Irving Trust*, 757 F.2d 752, 756 (6th Cir. 1985) (noting that most courts require that waivers of the right to a jury trial be "knowing and voluntary.>").

104. *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3rd Cir. 1988).

105. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

106. *KMC*, 757 F.2d at 756.

her obligations under the agreement.¹⁰⁷

In *Prudential Insurance Co. v. Lau*, the court held that the employee did not knowingly agree to arbitrate because the securities exchange registration form that the employee was required to sign as a condition of employment did not contain the waivers to which the prospective employee was submitting.¹⁰⁸ In general, consent is presumed granted in pre-employment¹⁰⁹ and consumer contracts.¹¹⁰

D. Unconscionability of the Contract to Arbitrate

In judging the validity of arbitration clauses, the Supreme Court has adopted a contractual approach.¹¹¹ This approach is derived from the premise that arbitration clauses are contractual agreements between two willing parties.¹¹² Thus, when determining if a weaker party is bound by an arbitration agreement in a consumer contract, the legal constructs for fraud, duress or unconscionability in contract law apply.¹¹³

Courts have been generally unwilling to invalidate consumer contracts on the grounds that they are adhesion contracts or that there is extreme economic disparity between the two contracting parties.¹¹⁴ The doctrine of "adhesion" is an indicator within the rubric of unconscionability.¹¹⁵ Courts have held that unconscionability requires proof that the contract is both procedurally and substantively unconscionable when made.¹¹⁶ Courts further note that there must be a showing of some absence of meaningful choice by the parties and of contract terms that are unreasonably favorable to the other party.¹¹⁷ The courts have deemed unfavorable terms to constitute "substantive" unconscionability and lack of meaningful choice as procedural

107. *Id.* at 758.

108. *Prudential Ins. Co. v. Lau*, 42 F.3d 1299, 1304 (9th Cir. 1994).

109. Schwartz, *supra* note 1, at 54.

110. *Brower v. Gateway*, 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998).

111. Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001 (1996).

112. *Id.* at 1004.

113. *Seus v. John Nuveen & Co*, 146 F.3d 175, 183 (3d Cir. 1998) (stating that "[n]othing short of a showing of fraud, duress, mistake or some other ground recognized by the law of contracts generally would have excused the district court from enforcing Seus's [mandatory arbitration] agreement."). *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (stating that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements . . .").

114. *Brower*, 676 N.Y.S.2d at 572.

115. Anne Brafford, *Arbitration Clauses in Consumer Contracts*, 21 J. CORP. L. 331, 348 (1996).

116. *Brower*, 676 N.Y.S.2d at 573.

117. *Id.*

unconscionability.¹¹⁸

When determining if there are reasonable alternatives to a consumer agreement, the courts have looked at whether there were competitors or employers that offered consumer contracts with more favorable terms.¹¹⁹ The court noted that "with the ability to make the purchase elsewhere and the express option to return the goods, the consumer is not in a 'take it or leave it' position at all; if any term of the agreement is unacceptable to the consumer, he or she can easily buy a competitor's product instead"¹²⁰

This same rationale has been extended to employment contracts where courts have noted the choice not to begin work where the terms of employment are unacceptable.¹²¹ Arbitration clauses that are hidden in a lengthy document, written in fine print, drafted using complex legal jargon, or negotiated between parties of unequal bargaining power may indicate a procedurally unconscionable agreement.¹²² In commercialized contracts, the parties are almost always in unequal bargaining positions. Thus, unless the arbitration contract leaves the weaker party effectively without a remedy, the courts will not invalidate an arbitration clause simply because of unequal bargaining power.¹²³

For example, the court in *Hooters* found that the arbitration agreement between the employer and employee included provisions 1) requiring the employee to provide notice of the nature of her claim while the company did not have to file any responsive pleadings; 2) requiring the employee to list all fact witnesses and a brief summary of facts known while the company did not have to do the same; and 3) requiring the employee and employer to select arbitrators exclusively from a list of arbitrators created by the employer.¹²⁴ The arbitrators could have even been managers or corporate officers.¹²⁵ The court stated in dicta that "[b]y creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual

118. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28 (3d ed. 1999).

119. *Brower*, 676 N.Y.S.2d at 572.

120. *Id.*

121. *Id.*

122. FARNSWORTH, *supra* note 118, § 4.28.

123. *Preston v. Kruezer*, 641 F.Supp. 1163, 1172 (N.D. Ill. 1986) (stating that the claimant would have to be without a remedy in order for the agreement to be deemed invalid). See also *Hooters*, 173 F.3d at 941 (holding that, as a general rule, objections to the fairness of the arbitration should be brought before the arbitrator, but that, when the weaker party is denied the opportunity for arbitration, the issue is justifiable); *Reuben*, *supra* note 2, at 6 (arguing that the absence of legal standards and substantive judicial review of arbitration awards leads to "gross substantive and procedural injustices" where power imbalance between parties).

124. *Hooters*, 173 F.3d at 938-39.

125. *Id.* at 939.

duty.¹²⁶

Because of the difficulty in establishing unconscionability, little protection is afforded the unsophisticated consumer.¹²⁷ The stronger party may effectively emasculate the substantive and procedural legal protections afforded to consumers or employees through the use of an arbitration agreement; thus, the risks of the bargain are shifted to the weaker party.

E. Courts Espouse The "Myth" of Voluntariness

Pre-employment and consumer arbitration agreements are given validity because the U.S. Supreme Court articulates and gives credence to the "myth" of voluntariness in these situations. The Court's assertion that arbitration is preferential on policy and legal grounds is manifested in many recent rulings.¹²⁸ This preference is most clearly manifested in the under-girding of consumer arbitration agreements through the use of contract law.¹²⁹ Also, as noted by Professor Jean Sternlight, there are three myths that are propagated by the courts.¹³⁰ First, the courts espouse that there is a legislative preference for arbitration; second, the courts promote that Congress intended the FAA to apply to federal and state courts; and finally, the courts advance that the substantive results obtained from arbitration are similar to results obtained through litigation.¹³¹ Each of these myths will be addressed in turn.

1. Congress Prefers Arbitration

In the late nineteenth and early twentieth century, courts did not usually enforce arbitration agreements that were entered before a dispute arose.¹³² However, awards from arbitration

126. *Id.* at 940. The *Hooters* court acknowledged that, even though the contract in question was unenforceable, their decision should not "be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration." *Id.* at 941.

127. See *Preston*, 641 F.Supp. at 1171 (stating that "the mere fact that one party to a contract enjoyed little relative bargaining strength however cannot alone render a contractual provision unenforceable."). See also *Gilmer*, 500 U.S. at 41 (holding that there will often be unequal bargaining power between employees and employers, but that alone is not sufficient to hold an arbitration award unenforceable).

128. See, e.g., *Gilmer*, 500 U.S. at 24, 25 (indicating the court's liberal federal policy toward arbitration agreements). See also *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) (describing why the courts favor arbitration).

129. Sternlight, *supra* note 9, at 641.

130. *Id.* at 642.

131. *Id.* at 641-42. See Reuben *supra* note 2, at n.35 (citing Carrington & Haagen, *infra* note 132, at 334, and stating the a proposed reason for the Supreme Court's recent support of contractual arbitration is due to its "renewed" embrace of contract rights).

132. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996

agreements that were entered post-dispute were generally just as enforceable as court judgments.¹³³ This distinction was made to ensure mutual assent.¹³⁴ The courts were hesitant to infer mutual assent because less sophisticated parties were not as likely to contemplate all the ramifications of pre-dispute resolution.¹³⁵ As one state court noted, "by first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullifying the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy."¹³⁶ Generally, courts of equity refused to order specific performance of an arbitration agreement or to deny litigation of disputes covered by an arbitration agreement.¹³⁷ Damages were available for breach of agreement to arbitrate, but they were difficult to prove or were nominal.¹³⁸

The Supreme Court began its doctrinal shift towards enforcement of pre-dispute arbitration agreements in employment contracts in 1974, with the decision in *Alexander v. Gardner-Denver*.¹³⁹ In *Alexander*, the Court decided that a union member could pursue a racial discrimination claim in court after receiving an adverse ruling under an arbitration agreement.¹⁴⁰ The Court ruled that an employee could not prospectively waive rights granted under Title VII of the Civil Rights Act, nor could

SUP. CT. REV. 331, 334-36 (1996).

133. See *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 255 (1890) (holding that a stipulation between parties that provides only for a method of determining the amount of an award, and that leaves liability determinations to the court, is valid); see also *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) (holding that effect will be given to an arbitration award by a court of law); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (holding that the Court would not narrowly construe arbitration agreements and would thus give latitude to the contracting parties).

134. See *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904) (reasoning that mutual assent was important by holding that "the underlying reason for the recognition of the [arbitration] award is found in the fact that the parties not only agreed to submit their differences, but voluntarily permitted the agreement to be executed, and consented for the award to be actually made by judges of their own selection.").

135. See *id.* (noting that "the more astute party [could] oust the courts of jurisdiction.").

136. *Id.*

137. *Kulukundis Shipping*, 126 F.2d. at 984.

138. *Id.*

139. 415 U.S. 36 (1974).

140. See *id.* at 45 (holding that federal courts have plenary power to enforce compliance with Title VII, and that a prior decision by an arbitrator does not "[foreclose] an individual's right to sue or [divest] federal courts of jurisdiction."). See also *Reilly*, *supra* note 80, at 1213 (stating that courts have allowed employees to bring claims before a court, even when they have been subject to mandatory arbitration).

arbitration bar an individual from seeking a judicial remedy.¹⁴¹ Scholars noted a significant increase in the number of civil cases as a result of *Alexander*.¹⁴²

The increased caseload was one impetus behind the doctrinal change.¹⁴³ The change was enunciated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹⁴⁴ and later in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁴⁵ The doctrine, as noted in *Mitsubishi*, is that a party that agrees to arbitrate a claim does not give up substantive statutory rights, but instead allows its resolution to occur in an alternative forum.¹⁴⁶ This decision was the initial step towards recharacterizing arbitration agreements as contractual in nature and thus requiring enforcement unless fraud, duress, or unconscionability was proven.

Next, *Gilmer v. Interstate/Johnson Lane Corp.*¹⁴⁷ was decided. The Supreme Court ruled that a pre-employment registration with a national stock exchange, which required submission to arbitration of any claim that rose from employment, was enforceable.¹⁴⁸ Courts have subsequently used these decisions to vigorously uphold pre-employment arbitration agreements. But this shift is inconsistent with the congressional intentions under the FAA. As noted by scholars, section 2 of the agreement "makes enforceable arbitration agreements covering disputes 'arising out of' a contract between the two parties."¹⁴⁹ The statute does not purport to enforce agreements to arbitrate "any and all controversies between parties to an arbitration agreement . . ."¹⁵⁰

The legislative history indicates that there was concern that the law would be misapplied to the detriment to unsophisticated individuals. Senator Walsh of Montana spoke of the FAA's use to enforce adhesion contracts:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you cannot make any contract. It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well there is

141. *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 (1974).

142. Reilly, *supra* note 80, at 1214.

143. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 638 (1985). The Court noted that the FAA favored arbitration agreements and thus a presumption toward arbitration was established. *Id.* at 626.

144. 460 U.S. 1 (1983).

145. *Mitsubishi*, 473 U.S. at 614

146. *Id.* at 628.

147. 500 U.S. 20 (1991).

148. *Id.* at 23.

149. Schwartz, *supra* note 1, at 75.

150. *Id.* at 75-76.

nothing for the man to do except to sign it and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.¹⁵¹

The Senator was assured by fellow Congressmen that the bill was not intended to cover situations like the ones raised in his hypothetical.¹⁵² However Senator Walsh's concern has come to pass under the current Supreme Court.

2. FAA Applies To State And Federal Courts.

In numerous decisions, the Court has preempted state authority to govern arbitration agreements through its interpretation of the FAA.¹⁵³ In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court ruled that if a party to a contract moves to invalidate the entire contract due to fraud, the arbitrator retains control.¹⁵⁴ However, if a party moves to invalidate the arbitration clause because of fraud, then the court will retain jurisdiction.¹⁵⁵ Under an opposite ruling, the moving party could have litigated in court the arbitration agreement as a whole.¹⁵⁶ This would leave only a few issues for the arbitrator to decide.¹⁵⁷

Under *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court held that a district court could not predicate its stay of an arbitration agreement based on an identical action brought in state court.¹⁵⁸ The Court further held that the purpose of the FAA was to create substantive federal law that controls both in federal and state courts.¹⁵⁹ In dicta the Court stated, "as a matter of federal law, any doubts . . . should be resolved in favor of arbitration"¹⁶⁰

Even more importantly, the Supreme Court in *Southland Corp. v. Keating*¹⁶¹ held that the FAA preempted state statutes that specifically overruled arbitration agreements.¹⁶² The state Franchise Investment Law was held by the California Supreme Court to render void arbitration agreements that arose from its

151. *Id.* at 76.

152. *Id.*

153. See e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (determining the circumstances that warrant a federal court's jurisdiction over the dispute).

154. *Id.* at 404.

155. *Id.* at 403-04.

156. Brafford, *supra* note 115, at 337.

157. *Id.*

158. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 28 (1983).

159. *Id.* at 24.

160. *Id.* at 24-25.

161. 465 U.S. 1 (1984).

162. *Id.* at 16.

implementation.¹⁶³ The United States Supreme Court reversed, citing the congressional policy under the FAA preferring arbitration to litigation and the Supremacy Clause.¹⁶⁴ State defenses to contract law were not effected. Further, in *Mitsubishi Motors*,¹⁶⁵ the Court upheld the enforcement of arbitration clauses even when the arbitrator would be forced to interpret a federal statute.¹⁶⁶

These decisions run counter to the initial congressional intent. The limited manner in which unconscionability laws are applied effectively removes the possible application of law to arbitrated disputes. In addition, the Supreme Court's use of the FAA to preempt state legislation runs counter to the commitment to the federalist system.¹⁶⁷

3. *Arbitration Results Substantially The Same As Litigation*

The final myth is that similar disputes that are resolved through arbitration result in the same outcome as if litigated. The primary advantages that courts want to achieve with arbitration are expediency, financial savings, and less taxation on the judicial system.¹⁶⁸ However, the limited empirical evidence seems to indicate that arbitration skews results in favor of employers or the party in the stronger negotiating position.¹⁶⁹

One study compared employment cases decided by California juries to arbitrated employee disputes in the securities industry.¹⁷⁰ The study found that employees won in fifty-seven percent of the jury cases and in fifty-three percent of the arbitrated cases.¹⁷¹ This difference is not statistically significant, but an important difference surfaced when the claims of discrimination were compared. In jury verdicts, employees were successful forty-four percent of the time while plaintiffs were successful twenty-six percent of the time in arbitration. Perhaps the most important finding was that the median jury award was \$264,700 while the median arbitrated award was just \$49,900.¹⁷² This study provides

163. *Id.* at 5.

164. *Id.* at 16.

165. *Mitsubishi*, 473 U.S. at 614.

166. *See generally id.* (holding the arbitration agreement enforceable).

167. Sternlight, *supra* note 9, at 697.

168. Brafford, *supra* note 115, at 333.

169. Schwartz, *supra* note 1, at 64.

170. Orrick, Herrington & Sutcliffe, Summary of California Jury Verdicts Study 1-4 (1995). The study compiled data from 949 verdicts that were reported. *Id.*

171. *Id.*

172. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 EMPLOYEE REL. L.J. 21, 35-37 (1995) (noting a survey of sixty-two awards in security industry employment cases

evidence that there is a disparate impact on individuals that submit to arbitration.

F. *Proposals For Reform Abound*

Calls for reform have come from varied groups. The ABA, unions, and even state legislators have taken another look at reforming arbitration.¹⁷³ The reform ideas range from barring pre-dispute arbitration clauses in consumer and statutory civil rights situations like employment to implementing a step-process where disputes are first mediated and then, if necessary, arbitrated. Some of these reform ideas are addressed below.

1. *Presumptively Unenforceable*

Protections may be afforded to the weaker party by assuming that certain arbitration agreements are presumptively unenforceable. The arbitration agreements that should be targeted are agreements that are entered pre-dispute and are adhesive in nature. There is a greater likelihood that both parties have carefully weighed the eminent outcomes of their dispute once the dispute has arisen. As noted by Todd Rakhoff, there are numerous principles that support the presumption against enforcement.¹⁷⁴ Among them is the need to maintain the social independence of the parties, the danger in upholding arrangements that hinder competition, the possibility that stronger parties must not be allowed to circumvent the law through contract and waiver, and the risks that can be evidenced by the document but not totally shifted. Adhesive contracts lie on the periphery of general contract doctrine and thus may merit this special analysis.

2. *The Mini-Trial.*

An alternative to the current system of inequitable arbitration under a pre-employment contract is a system requiring reasoned awards, application of the rule of law, and the possibility for judicial review. The use of reasoned opinions imposes transparency on the dispute resolution process.¹⁷⁵ An arbitrator that is forced to justify a decision may look more rationally at the elements of the dispute.¹⁷⁶ The American Arbitration Association

that came before the NASD and NYSE).

173. SABO & ZAHN, ATTORNEYS AT LAW, ALTERNATIVES TO ARBITRATION, available at <http://www.sabozahn.com/pdf/37.pdf> (last visited May 4, 2003).

174. Todd D. Rakhoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176 (1983).

175. Alan Scott Rau, *Symposium: The Lawyer's Duties and Responsibilities in Dispute Resolution: Article: Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 530 (1997).

176. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 652 (1995).

("AAA") has adopted this position and the AAA rules now permit either party to ask for an "opinion" from the arbitrator, as long as the request is made before arbitration commences.

Though arbitration relieves congestion in the courts and is less expensive than litigation, the rulings that come from arbitration decisions must be predictable. The common law system in the United States assures that precedents will be followed. Individuals can then modify their behavior to fit what is normatively acceptable under the law. Consistency is necessary for conformity of behavior. This same principle is necessary for arbitration awards. To accomplish this, arbitration decisions should serve as precedent for subsequent arbitrated disputes. If arbitration decisions are based on the law, then this will be less difficult to accomplish. An example of this is seen in the proposed amendment to the Illinois version of Uniform Arbitration Act.¹⁷⁷ The Chicago Bar Association (CBA) Civil Practice Committee in 2001 recommended the conformity to law for arbitrated disputes; however, that recommendation was never adopted by its Board of Managers.

3. *The Step Process*

A number of courts have instituted a step-process of dispute resolution.¹⁷⁸ This system involves the referral of a dispute initially to mediation. If mediation is not successful, then the parties enter arbitration, and ultimately the issue may be adjudicated.¹⁷⁹ There may be intervening, optional steps including an early neutral evaluation and a summary jury trial.

The Federal District Court for the Northern District of Alabama is paradigmatic of the step-process.¹⁸⁰ Parties to the dispute who opt for the program first enter into mediation. If mediation proves unsuccessful, then the parties move to arbitration. At this step, they may introduce evidence and advance their complaints. There is then a decision based on the merits of the case. If, however, a party is dissatisfied with the result, they may proceed to trial.¹⁸¹

177. 710 ILL. COMP. STAT. 5/1 *et. seq.* Illinois law does not require arbitrators to follow the rule of law.

178. This process has been instituted in courts in California, New Jersey, Texas, Massachusetts, the District of Columbia, and Alabama. This concept was originally coined the "multi-door courthouse" by Frank E. A. Sander, *Varieties of Dispute Processing*, The Pound Conference, 70 F.R.D. 79, 111 (1976).

179. Stipanowich, *supra* note 95, at 321-22.

180. *Id.* at 322.

181. *Id.* If the parties elect to continue to trial, the court will hear the case *de novo*. *Id.* at 322. However, if the party that rejects the arbitration fails to receive a better judgment in court, that party pays all the opponents fees and attorneys costs associated with the trial. *Id.*

The advantage to this step process is that it is premised on a flexible tailoring of the process to the controversy aimed at better resolutions of existing disputes, as well as grievances that were not then being aired for a lack of an appropriate mechanism.¹⁸² The system preserves expediency, judicious use of resources, and relieves crowded court dockets, yet ensures due process and equal protection for both parties.

III. PRE-DISPUTE ARBITRATION PROVISIONS IN COMMERCIAL CONTRACTS ARE OFTEN MADE PART OF A CONTRACT WITHOUT CONSENT OF THE PARTIES

Provisions for pre-dispute arbitration in commercial agreements may also lack the requisite consent to be enforceable¹⁸³ because transactional attorneys who advise these contracting parties often misunderstand basic aspects of binding arbitration¹⁸⁴ as a dispute resolution process.¹⁸⁵ Thomas J. Stipanowich recognizes the role of transactional lawyers as "contract planners" who can manage future problems by negotiation and drafting.¹⁸⁶ To do this successfully, "planners need a basic appreciation of their practical uses and limitations, the availability and appropriateness of legal 'teeth,' if any, and the roles played by third-party interveners."¹⁸⁷ Without such clear understanding of arbitration law and the process, the consent to arbitrate is questionable.

The nature of transactional work is to focus on the "win/win."¹⁸⁸ In negotiating the contracts that will structure their relationships, business clients are urged to collaborate with the other side.¹⁸⁹ Transactional lawyers in business and real estate support their clients in deal making, not disputes. In fact, because

182. *Id.* at 304. See generally *Court Says No Passing on Step ADR Clauses*, DISPUTE RESOLUTION TIMES, July-Sept. 2002 (discussing an Eleventh Circuit case where a party missed a step and thus did not adequately set the arbitration process in motion).

183. Levin, *supra* note 46, at 180 (arguing that "[j]udicial scrutiny ought to focus on the voluntariness of the agreement, and not the correctness of the arbitration award.").

184. See Reuben, *supra* note 2, at 4-5 (defining arbitration as an "informal process in which substantive and procedural law are not necessarily applied and in which arbitration decisions are final in that they are not subject to substantive review by courts beyond procedural defects such as arbitral bias.").

185. See Levin, *supra* note 46, at 174-75 (identifying the "problem" with respect to voluntariness as one where the role of substantive law in arbitration is not clearly defined, participants misunderstand the role and, "in this environment of confusion and misunderstanding[,] some agree to arbitrate").

186. Stipanowich, *supra* note 53, at 831-32.

187. *Id.* at 917.

188. Brunet, *supra* note 5, at 124.

189. *Id.*

of what may seem like “unnecessary squabbling to the contracting process,”¹⁹⁰ such attorneys may want to avoid objecting to use of arbitration in future disputes. Their clients do not want to focus on possible failure of the business relationship, *i.e.*, the “divorce” at the beginning of the relationship.¹⁹¹

Furthermore, in his recent article studying “high stakes employment contracts,” which makes use of empirical research based on completed S&P 500 CEO contracts,¹⁹² Edward Brunet questions the “popular mythology that arbitration and mediation will be optimal for each party.”¹⁹³ Brunet suggested that where parties want low risk, predictable results, they may be better off with litigation or “judicialized arbitration” that requires the arbiter to apply the rule of law to future disputes.¹⁹⁴ This article provides some apt comparisons between the negotiating of a dispute resolution clause of a contract between highly skilled employees and prospective employers and the negotiating of a dispute resolution clause in other contracts where parties are relatively equal in bargaining power.¹⁹⁵ Such parties often have spent “huge amounts to obtain and comply with the legal opinions of counsel.”¹⁹⁶ Business clients who invest in legal advice adopt a legal position that is “‘close to the line’ the optimal business posture for the firm consistent with ‘the law.’”¹⁹⁷ In a real sense, then, arbitration awards and awards based on “equity” rather than the “law” yield a negative return. “An arbitration award that is premised upon the arbitrator’s gut level of ‘fairness,’ rather than the substantive rule of law, yields a negative return on investment for a business that has paid attorneys for legal advice.”¹⁹⁸

A. Misunderstandings of Transactional Lawyers: Rule Of Law; Reasoned Awards; And Judicial Review

I have identified three areas of misunderstanding on the part of transactional attorneys that support the conclusion that their advice regarding binding arbitration clauses contributes to a lack of the “knowing consent” on which enforceability of such clauses is based. All three involve the incorrect expectation that arbitration, with its third-party decision maker, is sort of a private court, with

190. *Id.* at 116.

191. *See id.* at 113-28 (describing this reality with respect to negotiating employment contracts for high stakes workers by analyzing seven hypotheticals).

192. Brunet, *supra* note 5, at 109.

193. *Id.* at 108.

194. *Id.* at 135.

195. *Id.* at 117.

196. *Id.* at 112.

197. *Id.*

198. *Id.* at 113.

a private judge who may know more about the facts of the controversy than a real jurist, but who will apply applicable law, explain the decision and be subject to review.

1. Substantive Law Applies

First, transactional lawyers expect that the arbitrator shall apply a "rule of law"¹⁹⁹ in resolving the dispute.²⁰⁰ The Hammond Survey of transactional lawyers representing business clients in commercial transactions indicates that most lawyers expected that the arbitrator was required to apply a rule of law to the dispute.²⁰¹

In fact, of course, unless the contract provides otherwise, the "folklore arbitration"²⁰² standard is "principles of fairness and equity."²⁰³ The Latin phrase, *ex aequo et bono*, provides little guidance. Justice Black remarked that arbitrators may be "wholly unqualified to decide legal issues"²⁰⁴ but that does not matter since the arbitrator has no duty to resolve a dispute in accord with the parties' legal rights.²⁰⁵ Results are the product of "fact-dominated rough justice."²⁰⁶ Unless the arbitrator perpetrates fraud, is biased, or exhibits other serious misconduct, as narrowly defined,²⁰⁷ there is no basis for overturning an award because it fails to follow the substantive law.

Murray S. Levin expressed surprise at the

199. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (noting that, in this context "rule of law" means parties should be treated the same, that the law should be fair, that law should be predictable, stable and transparent and judges should be neutral and independent.). See also Reuben, *supra* note 2, at 15-17 (stating that the value of a rule of law as important to the collective rights of society, separately from protections afforded to an individual). The author recognizes a "fundamental jurisprudential tension" in deciding whether to enforce agreements to arbitrate between the rule of law and personal autonomy that is part of freedom of Contract. *Id.*

200. Levin, *supra* note 46, at 107, 179 (acknowledging acknowledges that role of substantive law in arbitration may be confusing to many lawyers).

201. See Celeste Hammond, *Survey for Business / Commercial Lawyers Regarding Binding Arbitration*, (Jan. 2002) (unpublished survey on file with author) (noting that over seventy percent of those surveyed had this expectation).

202. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999) (coining this term to indicate the arbitration process unaltered by contract).

203. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 712 (1999) (stating that "[a]n agreement to arbitrate is in effect, an agreement to comply with the arbitrator's decision, whether or not the arbitrator applies law . . .").

204. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting).

205. Carrington & Haagen, *supra* note 132, at 345.

206. Brunet, *supra* note 5, at 110.

207. 9 U.S.C. § 10 (2000).

little judicial attention directed to the precise issue of the proper role for substantive law in the arbitral decision-making process. For the most part the courts have merely skirted the issue while addressing attempts to vacate arbitration awards because of alleged errors of or lack of regard for the law.²⁰⁸

Brunet suggests that if one party or her attorney lacks information that "the arbitrators can ignore legal rights and decide disputes based upon pure gut instincts,"²⁰⁹ that lack of knowledge itself may contribute to the possibility of opportunistic behavior in the negotiation. The misinformed commercial party will expect arbitration to protect legal rights just as the typical consumer and employee reasonably may expect justice in accordance with applicable law.²¹⁰ A party to a commercial agreement may expect such protection if the attorney advising him has such an expectation.²¹¹

2. Reasoned Awards

Secondly, transactional lawyers expect that the arbitrator will provide reasons for the award.²¹² However, the general American practice, without amendment of the arbitration clause, does not require arbitrators to explain their decisions.²¹³ Alan Scott Rau explores the effect of the absence of any requirement of a reasoned opinion on arbitral decision-making and notes a link between giving of reasons and a commitment to some rule.²¹⁴ He points out that the practice in other legal systems is the opposite.²¹⁵ And, the International Chamber of Commerce Rules require a statement of reasons and a review of the award before it becomes final.²¹⁶

208. Levin, *supra* note 46, at 124.

209. Brunet, *supra* note 5, at 116.

210. Stipanowich, *supra* note 53, at 904.

211. See Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 156 (1994) (noting that, in reacting to a survey of Minnesota construction arbitrators functioning according to the AAA rules, Dean Thompson was surprised at the "fact that a significant number of arbitrators do not follow the law," in that the AIA General Conditions require that "the contract shall be governed by the law of the place where the project is located.").

212. See Hammond Survey, *supra* note 201, at question #50 (noting that between thirty-five and forty percent of the respondents indicated that they expected a reasoned award "always;" an additional thirty-two expected this would happen "usually.").

213. See Stipanowich, *supra* note 42, at 535 (reporting a survey of construction industry bar, not as to what they "expect" but as to their "preference" and found that for cases involving over \$250,000, fifty-five percent favored requirement of written findings of fact and forty percent favored requirement of written conclusions of law).

214. Rau, *supra* note 175, at 535.

215. *Id.* at 538.

216. Carrington & Haagen, *supra* note 132, at 347-48.

Recently revised AAA Rules allow either party to request reasons as long as the request is made at the beginning of the hearing.²¹⁷ Other specialized arbitration systems that require reasons include the diamond industry,²¹⁸ collective bargaining, and a wide range of trade associations.²¹⁹ The Center of Public Resources (CPR) Non-Administered Arbitration Rules provide for reasoned awards unless the parties provide otherwise.²²⁰

3. Judicial Review

The third misconception transactional lawyers have about binding arbitration is that the award is reviewable for errors of law.²²¹ Generally, arbitral decisions are not reviewable for errors of fact or of law.²²²

Moreover, there is interaction between these three misunderstood areas of arbitration. Thus, without reasoned awards by the arbitrator and with no recourse to judicial review,²²³ the meaning of a rule of law standard is unclear.²²⁴ It is, practically speaking, impossible to determine that the arbitrator did not apply the substantive law without expressed reasons for the decision.²²⁵ As Stephen Hayford points out, even if the rule of law is *not* the standard for arbitrator's award, the absence of reasoned awards means that parties and their counsel "are provided no reliable indicia of whether the arbitrator's decision

217. AMERICAN ARBITRATION ASSOCIATION, DISPUTE REVIEW BOARD GUIDE SPECIFICATIONS § 104(k) (Dec. 1, 2000), available at <http://www.alta.org/store/rules/index.htm>.

218. Rau, *supra* note 175, at n.175.

219. *Id.* at 536.

220. *Id.* at n.162.

221. Hammond Survey, *supra* note 201, at questions #51, #54, and #57. Over fifty percent of the transactional lawyers without experience with arbitration expected that some form of judicial review existed for parties unhappy with the result. *Id.* See Stipanowich, *supra* note 42, at 468 (stating that transactional lawyers are the only misinformed parties and reporting that some of the respondents to a 1985 survey of construction lawyers conducted by the ABA showed "ignorance or confusion regarding current standards of review.").

222. Stipanowich, *supra* note 53, at 880. See Cole, *supra* note 85, at 1238 (citing *Burchell v. Marsh*, 58 U.S. 344, 349 (1854), for the U.S. Supreme Court's clear position that awards would not be set aside for errors of law or of fact). See also Stipanowich, *supra* note 42, at 439 (noting that the "arbitral award is generally assailable only on very limited grounds such as fraud or denial of a hearing.").

223. See Carrington & Haagen, *supra* note 132, at 347 (discussing whether a particular decision or award is faithful to controlling law in FAA arbitration).

224. Cole, *supra* note 85, at n.267. Cole agrees that even where enhanced judicial review is part of the agreement, review for "errors of law" is not workable unless the arbitrator would write an opinion explaining findings of fact and law. *Id.*

225. Ware, *supra* note 203, at 721.

was founded on a full understanding of the material facts and a proper interpretation and application of the relevant provisions of their contract and the applicable law."²²⁶ All they have is the award without any means for analyzing whether it is "fair," other than the arbitrator's view of the dispute.

B. Confusion of Transactional Lawyers

My interaction with practitioners raised the suspicion that transactional lawyers do not understand important aspects of the arbitral process and are ill-equipped to counsel clients about the inclusion and the details of arbitration clauses. On several occasions the author had been asked to speak on aspects of arbitration—particularly on the absence of reasoned awards, the absence of a requirement that arbitrators follow a rule of law, and the absence of judicial review for failure to follow the law at bar association conferences. These presentations were included in the broader category of "Traps for the Unwary" because of the recognition that the audience, mostly transactional, commercial real estate lawyers, were not well versed in Alternative Dispute Resolution (ADR). Perhaps the audience's expectation that arbitration clauses were revocable was consistent with the earlier view of arbitration that permitted a party who had agreed to arbitrate future disputes to change his mind and withdraw assent.²²⁷ Like Thomas Stipanowich, the author discussed commercial arbitration with many sophisticated practitioners and trial court judges and discovered many who confused mediation and arbitration or believed that the arbitrator was bound by applicable substantive law.²²⁸ Moreover, the Hammond Survey discloses a confusion of mediation and arbitration in the minds of some survey respondents. For example, the expectation that the "parties must agree with the terms of any award which the arbitrator enters before it becomes binding"²²⁹ by some is more consistent with the mediation process than with arbitration.²³⁰

C. Legal Education's Focus on Litigation as the Dispute Resolution Method as Well as the Source of Much Law

Traditional legal education focuses on dispute resolution through the litigation system, rather than on transactions and

226. Hayford, *supra* note 38, at 446.

227. Carrington & Haagen, *supra* note 132, at 340.

228. Stipanowich, *supra* note 53, at n.17.

229. See Hammond Survey, *supra* note 201, at question #49(c) (analyzing the responses, which show that eight percent of transactional lawyers believed that "the parties must agree with the terms of any award which the arbitrator enters before it becomes binding.").

230. The author tested her hypotheses with empirical research in the Hammond Survey.

planning, which leads lawyers to expect that the rule of law is the basis for our system of justice.²³¹ The ascendancy of the "rule of law" versus "rule of men" is based as much on the need for predictability and its function to mold behavior as the belief that justice is better served.²³² To the extent that "folklore arbitration" does not require application of substantive rules of law, has no judicial review, and is secretive, it does not support this tradition.²³³ Heinrich Kronstein, perhaps cynically, examines the power of an association like the AAA or the International Chamber of Commerce, both of which he would term "institutional arbitration," to appoint the arbitrators, to appoint the place of the hearing and to determine other aspects of the arbitration.²³⁴ He criticizes this development, "[i]n the name of freedom of contract courts have given arbitrators the power to determine the legality of a contract, and in addition have conferred on them the power to develop and systematize new 'rules,' outside of and uncontrolled by courts, yet applicable in entire fields of business."²³⁵ He complains that "they consider as 'law's' principle task the bestowal of a legal blessing upon the fullest utilization of a freedom-of-contract concept as formal and as empty of substance as such freedom can be."²³⁶

231. See Rau, *supra* note 175, at 533 (commenting about the difficulty of rationalizing a result that might occur in an arbitration of a breach of an installment sales contract or a claim based on fraud with the expected result under the contracts doctrine).

232. Lawrence B. Solum, *Equity and The Rule of Law*, THE RULE OF LAW 121-22 (Ian Shapiro, ed., NYU Press 1994). Lawrence B. Solum traces the ideal of the rule of law at least as far back as Aristotle and indicates that it has seven requirements, including "no extralegal commands are obligatory[;] [t]he personal will or arbitrary decision of government officials should not serve as the basis for imposing legal detriments; the legal system should meet the requirement of publicity [D]ecisions should reflect the precept that similar cases should be treated similarly." *Id.* at 122.

233. See Stipanowich, *supra* note 53, at 914 (commenting on the impact of no judicial review of arbitration awards). Stipanowich states:

Practically speaking, of course, policies of judicial deference to arbitration awards, the absence of a record, and of an opinion accompanying the award have amounted to a virtual 'don't ask, don't tell' policy regarding judicial treatment of arbitral awards, leaving parties to draw their own conclusions about how the result jibes with legal standards, business practices, or other norms that might have been applied more overtly in a court of law.

Id. See also Heinrich Kronstein, *Arbitration is Power*, 38 N.Y.U. L. REV. 661, 662 (1963) (predicting that arbitration will lead to "removal of duly constituted legislative and judicial control over large areas of conduct, and the upsetting of traditional concepts about the sources to which the individual may look to the ordering of his behavior in society and the normal expectations he can have regarding the applications of that ordering to himself.").

234. Kronstein, *supra* note 233, at 662.

235. *Id.* at 667.

236. *Id.* See Carrington & Haggren, *supra* note 132, at 334 (providing a more

Law schools, of course, repeatedly use casebooks filled with appellate opinions as their primary teaching material. This leads many attorneys to expect that judicial review is available for errors of law and serious errors of fact in the United States dispute resolution system. Most of these attorneys are, however, most familiar with litigation as a dispute resolution system.²³⁷

Moreover, “fairness” and “equity” are not presented as separate from legal rules in law school. Students, and the lawyers they become, imagine that equity provides principles to guide around strict rules of law whose application may lead to unfairness in particular instances.²³⁸ Lawrence B. Solum argues for a “virtue centered” dispute resolution system where equity is “not the exercise of arbitrary discretion.”²³⁹ He notes real tensions between the values that underlie the rule of law and the practice of equity, which sometimes involves judges going beyond the letter of the law and which leads to less predictable results.²⁴⁰ However, Solum is thinking about a system of justice that is based on the rule of law, which may not be an accurate way to describe binding arbitration. To the extent that both arbitration and mediation yield private results, they endanger law making by *stare decisis*. United States District Judge Sarah S. Vance of the Eastern District of Louisiana fears that the reduced role for courts in developing rules of law actually makes going to trial more risky, a “game of chance” because litigants have less information about the likely outcome.²⁴¹

Stephan Landsman of DePaul University College of Law and co-chair of the ABA Litigation Section’s Civil Justice Institute fears that the reduction in the number of trials actually endangers the litigation system’s legitimacy.²⁴² According to Professor Landsman, “If you try too few cases, if they become a rarity you

recent comment agreeing that the U.S. Supreme Court’s emphasis on contract rights explains the Court’s support of contractual arbitration).

237. See Stipanowich, *supra* note 53, at 835 (noting as a supporter of the trend away from litigation and towards arbitration, he criticizes contracts courses which are taught “as if the appellate judicial decision is the normal method of resolving contracts disputes, despite the fact that the vast majority of issues and disputes never result in a complaint, and the vast majority of filed cases are dismissed or settled without trial.”).

238. See Solum, *supra* note 232, at 27 (discussing H.L.A. Hart’s view that “judges are constrained by the law in the decision of easy cases, within the core of a rule. In the penumbra, decisions are governed by the discretion of the judge. . . . Doing equity in the penumbra of the rules is simply the exercise of discretion. . . .”) (citing H.L.A. HART, *THE CONCEPT OF LAW* 121-150 (Oxford University Press 1961)).

239. Solum, *supra* note 232, at 136.

240. *Id.* at 135.

241. Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 26.

242. *Id.*

lose that sense of legitimization."²⁴³ Even negotiations occur "in the shadow of law."²⁴⁴ Parties to negotiations, mediation or non-binding arbitration are aware that "they have the option to go to court, if an agreement is not reached."²⁴⁵ Jean Sternlight explains that the lines between litigation with its application of the rule of law to particular facts and ADR are blurred; the processes are not merely complementary, but intertwined.²⁴⁶

Furthermore, to the extent that what is "fair" is determined by expectations, the rule of law and consistent adherence to it are important to the development of what we consider to be "fair."²⁴⁷ While some commentators advocate privatizing the justice system with the expectation that systems would develop to enforce awards and to guarantee consistency of results without judicial precedents,²⁴⁸ others point to the international arbitration experience as evidence of a "ton of uncertainty" which tends to lead to litigation.²⁴⁹

Finally, the focus of legal education on appellate cases leads students to expect that judicial review is available for errors of law and serious errors of fact in dispute resolution, including arbitration. Then Attorney General Janet Reno addressed the Association of American Law Schools at its annual meeting in January 1999 and urged law schools to educate future lawyers in more than just dispute resolution. She emphasized the role of "lawyer as advisor," "lawyer as planner" and "lawyer as problem solver" to require students to see themselves as responding to clients' needs and interests before disputes arise.²⁵⁰ In effect,

243. *Id.*

244. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 108 (2000) (citing Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979)).

245. Sternlight, *supra* note 244, at 108.

246. *Id.* at 107.

247. See Jeffrey Scott Wolfe, *Across the Ripple of Time: The Future of Alternative (or, is it "Appropriate?") Dispute Resolution*, 36 TULSA L.J. 785, 794 (2001) (arguing that, in a market system, including the new ones in former Communist countries, an adversarial system "grounded upon a rights-based paradigm, in turn founded upon 'the rule of law,' must remain in place . . ."). Otherwise, he fears "anarchistic manipulations of situational morality - 'whatever works' - and can be agreed upon, notwithstanding extant legal principles" which if left unchecked "erodes essential societal and economic stability" *Id.*

248. BRUCE L. BENSON, *THE ENTERPRISE OF LAW* 371-72 (Pacific Research Institute for Public Policy 1990).

249. Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J.L. & PUB. POL'Y 578, 589 (2000).

250. Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to AALS*, 49 J. LEGAL EDUC. 5, 8 (1999).

Attorney General Reno was recognizing the deficiencies in legal education for the bulk of transactional lawyers.²⁵¹

D. The Role of Legal Scholarship

In scholarly writings, there frequently is confusion of binding arbitration with non-binding processes like mediation. Jean Sternlight notes that even ADR scholar Frank Sander made little attempt to distinguish between binding arbitration and mediation in a recent article even though he clearly knows the differences.²⁵² She provides lengthy footnotes showing that many ADR advocates and critics lump mediation and arbitration together,²⁵³ as do legislators²⁵⁴ and business groups.²⁵⁵ Jethro K. Lieberman and James F. Henry noticed the lack of a generally accepted abstract or theoretical definition of alternative dispute resolution in a 1985 study.²⁵⁶ Instead, they suggested that they be considered as "a set of practices,"²⁵⁷ and they overlooked the differences in statements such as "since the very premise of ADR is that it is a consensual process designed to circumvent judicial process."²⁵⁸ Lieberman and Henry conclude that "[w]e therefore need a typology of disputes to help determine which kinds of cases are amenable to ADR and which should be left to the traditional devices of adjudication."²⁵⁹ Thus, Lieberman and Henry focus on the differences in the dispute, rather than the significant differences between ADR processes.

Legal educators may contribute to a lack of appreciation for the differences between arbitration and other non-judicial

251. *But see* Rau, *supra* note 175, at 532 (comparing European arbitrators who are accustomed to reasoned awards with the American practice of dispensing with such awards in arbitration). Rau points to American legal education, where students so carefully hone the "skills of deconstructing judicial opinions" and where they are "so laboriously trained to debunk their explanatory power." *Id.* at 532. These are the reasons American lawyers no longer believe in "the presence of opinions as an indispensable element of a just decision." *Id.*

252. *See* Sternlight, *supra* note 244, at 97 (referring to Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 3 (2000)).

253. *See id.* at 111 (citing a list of several articles).

254. *Id.*

255. *Id.* *See also* Deloitte & Touche, *Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels*, ALTERNATIVE DISPUTE RESOLUTION (ADR) (1993) (noting that those who still hesitate to use ADR are fearful because of uncertainty and unpredictability of the results).

256. James K. Lieberman & James F. Henry, *Symposium on Litigation Management: Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425-26 (1986).

257. *Id.* at 425-26.

258. *Id.* at 435; *also* Cole, *supra* note 85, at 1200. "ADR is built primarily on a party autonomy model; party consent is the nearly exclusive guiding principle for process design." *Id.*

259. Lieberman & Henry, *supra* note 256, at 438.

processes by offering courses where all "non-litigious methods are lumped 'into one ADR blob.'"²⁶⁰

According to Sternlight, this confusion may lead some business lawyers to counsel against arbitration where they have had a bad experience with mediation; they might not like the 'touchy-feely' aspect of mediation and prefer arbitration where they expect the arbitrators to apply a rule of law, but more quickly, privately and at lower cost than would a judge.²⁶¹ Although she does not comment on the reverse, where an attorney with a good experience in mediation might expect the same ability to reject the "resolution" offered by the arbitrator, Professor Sternlight might ascribe this false expectation to the confusion.²⁶²

Leonard Riskin and James Westbrook discuss the confusion about terminology in their text, *Dispute Resolution for Lawyers*,²⁶³ and Stipanowich's analysis of statute based arbitration cases leads him to conclude that the courts have expanded the application of arbitration law to enforce mediation and step clauses beyond the intentions of the drafters of the applicable legislation.²⁶⁴ In one case the court carefully determined that the FAA did not apply to a dispute resolution clause in a real estate contract and then it applied the Illinois version of the UAA to stay judicial

260. Sternlight, *supra* note 244, at 98. The author chooses to compare mediation and arbitration in an LLM course for those who want to specialize in commercial real estate transactions on the theory that transactional lawyers will benefit from understanding the differences and will often choose mediation. The course is called "ADR in Real Estate: Mediation and Arbitration." The goals are to acquaint students with the applicable substantive law, to encourage student participation in simulations as counsel for parties but not as neutrals, or "arbitration wannabees" (a term coined by Scott Carfello, regional vice president of the AAA who co-teaches the course), and to develop skill in drafting appropriate mediation and arbitration provisions for typical documents, *e.g.* real estate sales contracts, leases, construction contracts, loan documents. The LLM Program at John Marshall Law School has a separate required course, Drafting and Negotiations Skills Workshop. In the future, this orientation to educating our students intending to enter transactional practice should decrease the common reaction from colleagues upon learning that a professor is engaging in scholarship about ADR, "Just what is the difference between arbitration and mediation?" as reported by Stipanowich from "a relatively sophisticated practitioner with more than two decades of general commercial and real estate practice under his belt inquired." Stipanowich, *supra* note 53, at n.17.

261. Sternlight, *supra* note 86, at 44.

262. Although my empirical research purposely avoids comparing expectations regarding arbitration and mediation due to my concerns about confusion, the survey does disclose some respondents who expect to be able to reject the award in arbitration if they do not like it. See *supra* notes 227-230, and accompanying text (noting the confusion of most members of the legal profession concerning arbitration).

263. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION FOR LAWYERS* 7 (2d ed. 1997).

264. Stipanowich, *supra* note 53, at 860-63.

proceedings.²⁶⁵ As Stipanowich remarks, “an unremarkable opinion – except that the dispute resolution provision called for mediation, not binding arbitration.”²⁶⁶ He urges courts to appreciate the real differences between ADR processes and warns of the dangers of misapplying arbitration statutes and their case law to mediation.²⁶⁷

To the extent courts confuse these processes, the “voluntariness” of parties’ choice of a non-litigation method of resolving their disputes is undermined.²⁶⁸ Lumping together arbitration that has been selected by the parties *after* a dispute arises with arbitration forced upon the parties by pre-dispute arbitration clauses also inhibits careful analysis of the arbitral process.²⁶⁹

E. Vigorous Marketing of ADR Contributes to the “Myths”

It may be that the vigorous marketing of ADR contributes to this confusion, as well as to a lack of transparency about arbitration.²⁷⁰ Christopher Drahozal characterizes ADR as an “industry” where many of the players are repeaters.²⁷¹ In the market for dispute resolution services, the arbitrators compete with each other for selection by disputants, which is not the case for the judiciary.²⁷² Jurists often see work as arbitrators to be the next stage in their career paths.²⁷³ Rau considers this arbitrator self-interest in trying to expand prospects for appointment to be a “structural bias” that is rarely discussed, and which contributes to the lack of transparency about the process and to the lack of information—the source of “confusion” of many including

265. See Stipanowich, *supra* note 53, at 861 (discussing *Cecala v. Moore*, 982 F. Supp 609, 612 (N.D. Ill. 1997)).

266. *Id.*

267. *Id.* at 863.

268. Drahozal, *supra* note 249, at 579 (explaining that the confusion of the general public may be exacerbated by media treatment). For example, in an episode of the TV show *Seinfeld*, characters decide to get an “impartial mediator” for a contract dispute, but in reality wanted and hired an arbitrator to make the ultimate decision.

269. See generally Paul D. Carrington & Paul Y. Castle, *Contract Provisions Controlling Resolution of Future Disputes: The Tradition of Revocability* (unpublished manuscript, on file with the author), available at <http://www.roscoepound.org/new/carrington.pdf> (last visited April 6, 2003) (arguing for a return to the policy of allowing either party to revoke a pre-dispute arbitration clause after a dispute arises). If Levin is correct about “voluntariness” being most significant, then whether or not both sides embrace the process at the time of the hearing is important.

270. Drahozal, *supra* note 249, at 585-88.

271. *Id.* at 588.

272. *Id.* at 586-87.

273. *Id.* at 586-88.

attorneys about alternatives to litigation.²⁷⁴ Experience in this marketplace finds few, if any, arbitrators who will criticize the process or provide suggestions on how to alter the standard features of the arbitration provision.²⁷⁵ Moreover, arbitration providers like the AAA, JAMS Arbitration Resolution Experts, National Arbitration Forum and the Center for Public Resources (CPR) Institute for Dispute Resolution are in the business of administering arbitration services.²⁷⁶ Without court enforcement of arbitration clauses and awards and without client use of arbitration by clients, they would not succeed financially.²⁷⁷ These provider firms are really the 'brokers' of arbitration, going between the arbitrators and the parties. They market arbitration heavily.²⁷⁸

This need to market arbitration services makes it more difficult to dispel some of the "myths"²⁷⁹ that have developed about the process.²⁸⁰ The marketing of "ADR" as a process where the parties are supposed to be in control with more informal hearings, more speed and more efficiency can be a disappointment to those who actually try arbitration, which is becoming much more like litigation.²⁸¹ There is an absence of empirical evidence to support the marketing myth that arbitration is necessarily faster, cheaper and otherwise better than litigation.²⁸² Sarah Rudolph Cole notices

274. Rau, *supra* note 175, at 521.

275. *Id.* at 520-21.

276. See, e.g., Stipanowich, *supra* note 53, at 878 (discussing the role and protection of "providers" including providing neutrals, or "intervenor," with immunity from liability for dispute resolution-related activities).

277. Drahozal, *supra* note 249, at 589.

278. Brunet, *supra* note 202, at 53-54.

279. Sternlight, *supra* note 9, at 674 (explaining that the term "myth" is used to describe the U.S. Supreme Court's preference since 1983 for arbitration over litigation, its conclusion that the FAA preempts all protective state legislation, and its "assurance" that arbitration will be just as fair to the parties).

280. See, e.g., Brunet, *supra* note 5, at 108 (analyzing the mythology that arbitration and mediation will produce optimal results for both the employer and the employee—an "assumption of efficiency" that has resulted in an increase of pre-dispute arbitration clauses).

281. See, e.g., Sternlight, *supra* note 86, at 36 (citing Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995), and criticizing his claim to discussions both mediation and arbitration; yet, he states that all ADR processes "share the feature that a third party is involved who offers an opinion or communicates information about the dispute to the disputants," which typifies mediation, but not arbitration).

282. Sternlight, *supra* note 9 at 677-94 (stating that most studies have examined longitudinal attitudes rather than objective measures, and that commentators do not agree that it is cheaper than litigation).

It is often asserted by supporters of ADR, in general, and Environmental ADR in particular, that alternative dispute resolution techniques are desirable, in large measure, because of the considerable savings that accrue from diverting cases from litigation to non-litigation

both an interest of commercial parties to a greater judicialization of arbitration, generally through agreements for enhanced judicial review and an increased skepticism in society generally toward arbitration.²⁸³ The applicability of arbitration has expanded from its beginnings as a system to resolve disputes quickly between members of the medieval merchant class, conducting business at fairs far from their homes.²⁸⁴

It may be "the broad range of arbitration contexts today" that makes it difficult to evaluate arbitration.²⁸⁵ From a role in deciding pure business disputes between merchants in its early history, arbitration has expanded to disputes between employers and employees, securities brokers and investors, lawyers and their clients over fees, husbands and wives in divorce proceedings, patients and doctors/hospitals in medical malpractice and, most recently, plaintiffs and defendants in all sorts of civil rights cases.²⁸⁶ Broadbrush evaluations of arbitration or, even less useful, of ADR do not paint a clear picture.²⁸⁷

Several commentators have even questioned the underlying assumption of the myth that, but for arbitration, parties to disputes would be stuck with full litigation.²⁸⁸ Statistics provided by the Bureau of Justice in studying settlement behavior indicate that trials are "rare, even freakish, events," and that only about three percent of cases filed were tried to verdict.²⁸⁹

Furthermore, the marketing of arbitration has succeeded.

modes of resolution; yet, this is another theoretical area where serious theory is lacking due, in considerable part, to deficient empirical data.

Carrington & Haagen, *supra* note 132, at 384.

283. Cole, *supra* note 85, at 1240.

284. *Id.*

285. Levin, *supra* note 46, at 161-63.

286. Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution In America*, 34 VAL. U. L. REV. 343, 353 (noting that arbitration of disputes that involve questions of private law, such as construction contracts and family law, should be considered separately from disputes involving questions of public law, such as international law, and disputes involving a mix of private and public questions, such as labor law and environmental law). This approach could lead to even more variation in analyses of arbitration as a dispute resolution process. *Id.*

287. Levin, *supra* note 46, at 161-63.

288. See, e.g., RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH, 102-04 (2d ed. 1995) (cited in Sternlight, *supra* note 14, at 319).

289. Charles Silver, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2109-11 (2002) (reporting on studies done by the Bureau of Justice Statistics, U.S. Department of Justice, Civil Justice Survey of State Courts). See *supra* notes 207, 208, and 211 and accompanying text (listing the rare circumstances in which a party to arbitration may expect review of the substantive law).

Although some of the data blurs arbitration and mediation,²⁹⁰ the providers report great increases in the number of arbitrations over the past fifteen years.²⁹¹

F. Lack of Transparency About Arbitration

A lack of transparency about the arbitration process contributes to the misinformation and confusion of transactional lawyers and results in the lack of true assent to binding arbitration. Stipanowich describes a lack of clear and understandable information about arbitration generally and about a program offered by a particular provider as some of the cause for concerns about systemic fairness in use of arbitration.²⁹² Even relatively sophisticated attorneys may only have a general idea of the differences between mediation and arbitration, let alone an understanding of modern dispute resolution procedures that are incorporated by reference in the contract. Arbitration rules can run many pages and are subject to modification by the institutional provider without notice.²⁹³ Many transactional lawyers lack arbitration experience, which makes them especially vulnerable.²⁹⁴

For example, Brunet suggests that the use of "folklore arbitration" which prohibits discovery, prohibits preliminary hearing and forbids the arbitrator from issuing a written, reasoned decision may be due to the parties' lack of experience and/or knowledge.²⁹⁵ He expects that knowledgeable parties, and their advisor attorneys, will use a judicialized model, what he calls the "contract model," which includes routine discovery, motion practice, application of substantive rules of law, written awards with findings of fact and reasons, and enhanced judicial review.²⁹⁶ "Asymmetrical information" about the arbitration process, for

290. See, e.g., Deloitte & Touche Survey, *supra* 255, at 10 (noting that a survey of Fortune 1000 general counsel and large law firms involved with litigation concluded that user's "effectiveness of ADR in settling certain types of cases than they were about the effectiveness of the actual methods of ADR suggests that there may still be room for improved methods of ADR," instead of dealing more directly with approval of mediation and criticism of arbitration by those surveyed).

291. Silver, *supra* note 289, at 2103 (discussing several of reports). See Sabin, *supra* note 50, at 1339 (reporting that the American Arbitration Association caseload grew from 92,100 in 1998 to 136,673 in 1999, a forty-eight percent increase in one year and over the five years of 1995-1998 an increase of 145 percent).

292. Stipanowich, *supra* note 53, at 890.

293. *Id.* at 891.

294. Thompson, *supra* note 211, at 156 (stating a survey of transactional lawyers are less likely to have served as arbitrator or to have represented a party, than are litigators).

295. Brunet, *supra* note 202, at 46.

296. *Id.* at 45.

example the “tendency of some arbitrators to ignore the law,” in bargaining may make the giving up of rights by adopting a pre-dispute arbitration provision less than consensual.²⁹⁷ Because the contracts within which arbitration clauses are included are usually confidential and not open to review by outsiders, it is difficult to review draft clauses other than the boilerplate provided by arbitration providers like the AAA.²⁹⁸

Even the courts may not fully understand all the ramifications of binding arbitration. The FAA, which is cited as authority for the enforceability of almost all arbitration agreements, is “dense” and counsel have not provided much illumination about the complicated relationship between the private institution of arbitration and the public institutions which are effected by increased use of it.²⁹⁹

The secrecy surrounding arbitration and the usual lack of reasoned awards contributes to the lack of transparency.³⁰⁰ Typically, third parties are excluded from hearings, there is no transcript of the arbitration hearing, arbitrators will not be required to testify regarding their activities and parties impose strict confidentiality requirements on each other.³⁰¹ Critics believe that the non-public nature of arbitration proceedings and awards undermines society’s role in setting the terms of justice. The non-publicity also may make it less likely that disputes will settle before the arbitration process begins because of the uncertainty of the outcome of arbitration.³⁰² In his economic analysis of arbitration agreements, Keith Hylton argues that arbitration contributes to “erosion of the publicly accessible stock of common-

297. Brunet, *supra* note 5, at 115.

298. Drahozal, *supra* note 249, at 580.

299. See Carrington & Haagen, *supra* note 132, at 338-39 (suggesting the triumph of the academic movement of law and economics with its valuing of efficiency above all else, including for example conscious choice in contracts, may persuade courts to enforce contracts of a party “who unconsciously and improvidently submits to an adverse choice of forum for the enforcement of his rights . . .”). More likely, the courts, especially the U.S. Supreme Court’s, opinions are the “product of underattention to practical consequences . . .” *Id.* at 339.

300. See Cole, *supra* note 85, at 1234 (noting that arbitrators are not required to publish their reasons and usually do not). See also Rau, *supra* note 175, at 536 (explaining that this is only a default rule that can be changed by contract drafting); The American Arbitration Association, Commercial Arbitration rules, Jul. 1, 1996, available at <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04048.html> (last visited May 4, 2003) (stating the rules that permit either party to request a reasoned award, but only if the request is made before the hearings begin).

301. Brunet, *supra* note 202, at 45. These are characteristics of “folklore arbitration” and support a primary process goal of privacy. *Id.*

302. See, e.g., Sternlight, *supra* note 9, at 695 (noting that privacy concerns actually reduced the likelihood of cases being settled).

law rules" and hinders "the development of new rules."³⁰³ In areas where the law is not yet developed, the opportunity to apply a rule of law and to develop a consistent set of rules is lost.³⁰⁴

Moreover, it is difficult to evaluate either the process or particular arbitrators except anecdotally from those who may learn of the results of arbitration in a particular legal community.³⁰⁵ A lack of accountability, based on the arbitrator's freedom from the need to explain or justify an award,³⁰⁶ and no public review of their activities or work product prevents transactional lawyers, as well as those more directly involved in the arbitration process, from getting the information necessary to an informed opinion in selecting an arbitrator. Additionally, repeat players have access to information about decision patterns of a particular arbitrator that is not available to others in the absence of any requirement that arbitrators disclose prior decisions.³⁰⁷ It appears to be common practice for large organizations and law firms representing them to "keep databases containing extensive background information on each potential arbitrator, including how the arbitrator ruled in a number of cases as well as the quality of his decision."³⁰⁸ This also means that the "market" will be less likely to get rid of problem arbitrators³⁰⁹ or

303. Keith Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 S. CT ECON REV. 209, 243 (2000).

304. Sternlight, *supra* note 9, at 686. The author has been made personally aware of this downside of arbitration when she served as an arbitrator of a predatory lending claim of a residential mortgage borrower. When the author learned that other arbitrators were hearing similar cases involving the same respondent, she realized that the opportunity for developing consistent rules and for informing third parties was lost by the secrecy of the process. *See id.* (citing a discussion of how arbitration's lack of precedent building and lack of access to what would be public information in litigation is harmful, especially to consumers).

305. Stipanowich, *supra* note 42, at 448. The AAA advises parties to investigate prospective arbitrators, but this can be time consuming and costly and nearly impossible especially because prospective arbitrators live and work in distant places. *Id.* "Moreover, discussions with colleagues or acquaintances may answer few questions about the effectiveness of a particular person as an arbitrator . . ." because the names of parties and attorneys who may have such information are not disclosed. *Id.*

306. Rau, *supra* note 175, at 529.

307. *Id.* at 524, n.145.

308. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements between Employers and Employees*, 64 UMKC L. REV. 449, 477 (1996). The court acknowledged that one of the parties had a large database of information about the rulings of certain arbitrators that was not available to the other side. *Id.* at n.127. *See also* Bryant G. Garthy, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 932-33 (noting that the arbitration system is clearly dominated by repeat clients).

309. *See* Brunet, *supra* note 202, at 52 (noting how easy it is to become an

problem aspects of the arbitration process. Most of the criticism of the latter is from academics who base their recommendations on theoretical difficulties with the structure rather than empirical evidence of what really is happening.³¹⁰

G. The Experience of Transactional Lawyers, or Lack Thereof, with Arbitration

To the extent transactional lawyers have any experience with the arbitration process as arbitrator or representative of a party in arbitration,³¹¹ they are misled. Their experience is that arbitrators are usually attorneys or former judges³¹² and that parties in arbitration make legal arguments and submit "briefs."³¹³ According to survey respondents, arbitrators will often "rule" on legal issues.³¹⁴ This leads survey participants to expect the arbitrator to know and to follow a rule of law.³¹⁵ The clear immunity of arbitrators from liability for any conduct during arbitration reflects a tendency to treat arbitrators like judges.³¹⁶ However, judges are not selected to hear cases based on how they are expected to decide them. The concept of an "independent judiciary" is central to our system of justice.³¹⁷ Yet, even Judge Posner has recognized and approved the lack of independence of

arbitrator; with few barriers and no regulation). "[I]t is not difficult to hold out oneself as an arbitrator." *Id.*

310. However, recent empirical studies by academics may indicate a shift in legal scholarship from the doctrinal to empirical.

311. See Hammond Survey, *supra* note 201, at question #18 (showing that, out of 137 transactional lawyers, only thirty-four had experience with arbitration from serving as a representative of a party or as an arbitrator; while out of sixty-five litigation lawyers, thirty have served as arbitrators or representatives of parties).

312. *Id.* at questions #48, #26.

313. *Id.* at questions #15, #16.

314. *Id.* at questions #17, #30.

315. *Id.*; see Soia Mentschikoff, *Commercial Arbitration*, 61 COL. L. REV. 846, 861 (1961) (reporting that, in 1961 a reported survey of arbitrators by the American Arbitration Association showed eighty percent of the *experimental* arbitrators thought that they should reach decisions "within the context of the principles of substantive rules of law but almost ninety percent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."). See also Thomson, *supra* note 211, at 154-55, n.69 (citing a survey of AAA construction arbitrators in 1993).

316. Stipanowich, *supra* note 53, at 876. "[T]he immunity of arbitrators from liability in the performance of their arbitral role is very well-established under U.S. arbitration law [T]he principle is founded upon the functional comparability of arbitrator to judges, whose immunity is based upon the need to protect their impartiality and to shield them from undue influence in the course of decision making." *Id.*; see also Sternlight, *supra* note 9, at 673 (noting that the U. S. Supreme Court asserted that arbitrators are as capable as judges without any empirical proof).

317. Carrington & Haagen, *supra* note 132, at 346.

arbitrators as a "tradeoff between impartiality and expertise."³¹⁸

Moreover, the attorney who counsels business clients often does so through "legal opinions of counsel" which are the attorney's best guess as to what the client's position should be—often one that is in Brunet's words, "close to the line—the optimal business posture for the firm consistent with the law."³¹⁹ Brunet decries the compromise awards in arbitration as a negative return on the legal advice for which business clients have hired their attorneys.³²⁰ He discusses the compromise arbitration awards and awards based on "equity" in the context of arbitrators granting discretionary bonuses to highly skilled Wall Street traders and investment bankers in 2000.³²¹ As a matter of law, the bonuses were completely a discretionary decision of management and had not been provided for by the employment contract.³²² Yet, arbitration panels awarded significant bonuses to several traders and investment bankers even though they were discharged prior to receiving the bonuses.³²³ Brunet suggests that these awards may be based on an arbitrator's "equity-based compromise 'instinct' of fairness."³²⁴ Surely, the Wall Street firm, which likely had received a legal opinion that "bonus payments to traders who were discharged were wholly discretionary" and a decision entirely left to management, would question the value of such legal services which had not warned of the unreviewability of arbitration awards.³²⁵

Only a client who analyzes a situation and concludes that a compromise would be more beneficial than its legal position would be, actively embraces binding arbitration. However, the "deals" are made with little attention to dispute resolution alternatives upfront.³²⁶

H. The Disconnect Between Litigation and Transactional Lawyers

Finally, the "disconnect" between litigators and transactional attorneys even within the same law firm means that the latter are

318. Rau, *supra* note 175, at 487. It has also been suggested that arbitrators be held to a more relaxed standard than that of public judicial officers. *Id.* at 494. However, the court holds that insisting on the isolation of arbitrators from eminent partiality may be unrealistic. *Id.*

319. Brunet, *supra* note 5, at 112. It is reasonable to assume that "[i]f these firms chose to follow substantive rules, they probably want to have legal rules applied with care to their disputes." *Id.*

320. *Id.* at 112-13.

321. *Id.* at 113.

322. *Id.*

323. *Id.*

324. *Id.* at 113.

325. *Id.*

326. See *supra* notes 189-191 and accompanying text (noting that transactional lawyers focus on the "marriage," not the "divorce").

not likely to be well informed about arbitration.³²⁷ Tom Stipanowich comments that “[t]ransactional lawyers, those in the best position to offer advice and counsel in the structuring of contractual conflict management options, tend to be less well informed than colleagues in what are traditionally known as litigation departments.”³²⁸ Stipanowich reports comments of a litigation partner of a leading Boston law firm:

I found one of the problems was that many of these ADR issues were addressed by my transactional corporate partners, who didn't like me tinkering with the ADR provisions at the end of deals so they couldn't close the transaction. Unfortunately, the clauses they used were often taken out of form books and not really discussed between the parties. Now, we have begun to change the culture so that the transactional lawyers call me and consult about ADR language. They don't just stick something in out of a form book, but consult someone who can actually help tailor a clause to the particular circumstances.³²⁹

Transactional lawyers do not communicate productively until after a dispute arises and the transactional lawyer asks the litigators for an analysis of the case. Of course, they expect the analysis to be based on the rule of law applied to the facts, which may not produce a realistic assessment if the right to litigate has been waived and replaced with an obligation to arbitrate.³³⁰ All of the above contribute to the misinformed status of transactional attorneys who will be advising clients about including an arbitration clause or not and about whether or not to draft around the “folklore arbitration” clause and in what ways. The FAA did not contemplate enforcement of a pre-dispute arbitration clause where the “disparate knowledge” of the parties in understanding both the nature of potential future dispute and the differences between arbitration and litigation is so likely.³³¹

327. See text accompanying note 411 (demonstrating that litigators are more accurate in their understanding of and expectations about arbitration).

328. Stipanowich, *supra* note 53, at 834.

329. *Id.* at n18.

330. See *supra* notes 189-91 and accompanying text (noting that this mistake stems as much from the behavior of the transactional lawyers, trying not to raise the possibility of a “divorce” at the beginning of the disagreement, as from any antipathy between the two groups of attorneys).

331. Schwartz, *supra* note 1, at 69. Schwartz was discussing pre-dispute arbitration clauses in a contract of adhesion, but some of the same considerations apply in the commercial context. *Id.*; see also Stipanowich, *supra* note 53, at 880 (discussing *Westinghouse Electric Corporation v. New York City Transit Authority*, 623 N.E.2d 531, 534 (N.Y. 1993), where the court refused to invalidate the arbitration clause because Westinghouse acted “with its business eyes open, to accept the terms, specifications and risk of the bid contract, including the ADR clause.”).

IV. ASCENDANCY OF EMPIRICAL LEGAL RESEARCH IN THE LAST TWO DECADES HAS IMPLICATIONS FOR SCHOLARSHIP GENERALLY AND FOR ALTERNATIVE DISPUTE RESOLUTION IN PARTICULAR

A. *Changes In Legal Scholarship*

No longer will the author do research based solely on opinions of appellate courts. As a new academic in the 1970s, the author had planned to do what would now be called empirical research on unconscionable provisions in standard, form residential leases. The author began to solicit copies of such leases from real estate broker organizations and bar associations nationwide with the intention of examining such leases and collecting data on the presence of offending clauses. The author's theory was that despite changes in the law that made such provisions illegal and unenforceable, they remained a part of most leases. Based on this author's years of experience as a legal-services attorney, this author's theory, when included in printed form, was that, the clauses gave leases the appearance of validity and a binding effect in the eyes of residential landlords and tenants. After collecting data, the plan was to make inferences about whether leases generally included the provisions. Additionally, conclusions would be drawn about whether certain changes in the law, mostly in case law, had resulted in compliance in the negotiated, "take it or leave it," leases signed by most tenants.

Doctrinal research uncovered an article by Curtis Berger in the *Columbia Law Review*.³³² Berger had a very different view of his task of research and writing. His approach was to review all 103 reported New York appellate cases from 1970-72 to determine how those courts had dealt with "unconscionable" clauses in residential leases.³³³ The obvious and serious limitation of this approach was that it would only trace what courts did in one jurisdiction with the relatively few leases those courts reviewed during the period. Nevertheless, Curtis Berger's scholarship preempted my own.

A second, early teaching experience brought about an empirical approach to this research. In the author's Estates and Trusts course, at least three Statutes of Intestate Succession are compared by the students.³³⁴ These are default rules, where the

332. See Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974) (researching arbitration clauses in standard residential leases). Berger deserves recognition as well for his success in making transactional real estate an acceptable research field, and for supporting the development of a separate section on Real Estate Transactions within the AALS, scheduled to occur in 2004.

333. *Id.* at 792.

334. These three statutes are usually a very old version that incorporates principles of primogeniture, the current Illinois version, and the Uniform

decedent neglected to make a valid will, and they allegedly mirror the presumed intention of the decedent, that is, what the decedent would have directed in a valid will. The provision in many state versions in the late 1970s and early 1980s provided that if the decedent died survived by a spouse and children, even minor children, a substantial portion of her estate would go to the children.³³⁵ That such a distribution of a decedent's estate would be the actual choice of most decedents is highly doubtful.³³⁶

Over the last several years, the author studied arbitration and mediation as alternatives to litigation of commercial real estate disputes along with implications of pre-dispute binding arbitration clauses.³³⁷ Not only did a party to arbitration give up a "right to trial," the party also "voluntarily" gave up a right to a rule of law, the right to a reasoned award and the right to judicial review by agreeing to arbitrate.³³⁸

Early concerns and research focused on commercial real estate transactions—acquisitions, financing, construction, leasing, ownership and management of land. The legal issues that arose there were familiar and drew attention to the skills that the attorneys who facilitate the deals must develop.³³⁹ Therefore, cases dealing with arbitration clauses within commercial real estate documents were reviewed. To the extent these opinions disclosed

Probate Code.

335. See, e.g., IND. CODE ANN. § 29-1-2-11 (Michie 2002); CAL. PROB. CODE § 6401 (West 2002); 755 ILL. COMP. STAT. 5/2-1 (2002).

336. Year after year my students complained that the typical decedent would have chosen to give all of her estate to the surviving spouse. Yet, the legislature as representative of the citizens had thought otherwise.

337. Definitions of "binding arbitration" often emphasize the process, rather than a comparison with litigation. See, e.g., Stipanowich, *supra* note 53, at 840 (listing the essentials: "a) an agreement[;] b) to settle controversies[;] c) through an adjudicative process[;] d) before a private third party or parties[;] e) who render a legally binding award."

338. Although the author served as an AAA arbitrator and as an attorney/arbitrator with the Cook County Mandatory Arbitration Program since its inception, she did not appreciate these basics about the arbitration process. The author participated in bar associations, particularly with practicing real estate lawyers as a member of the American Bar Association Section on Real Property Probate and Trust Law, the Chicago Bar Association Real Property Law Committee and the American College of Real Estate Lawyers. These experiences suggested that her own lack of knowledge and her expectations were typical of transactional lawyers generally. The author would like to thank the attorneys in the above organizations for providing insights that helped the structure of her empirical study. These colleagues included Janet Johnson of Schiff, Hardin, & Waite; Margery Newman, Stanley Sklar, and Tom Homburger of Bell, Boyd & Lloyd; Barry Hawkins of Shipman & Goodwin; and Michael Kim of Arnstein & Lehr.

339. The author purposely did not look at residential transactions because they would more closely fit within the research being conducted in the consumer, employment, and civil rights arenas.

the language of the clauses, they tended to be AAA boilerplate.³⁴⁰ Even though the clauses could be modified, few of the cases dealt with clauses drafted to reflect the kind of close scrutiny by attorneys and their clients which the author had come to expect on various other aspects of deals.³⁴¹

The author reviewed review of materials distributed primarily at bar conferences³⁴² to ascertain what was happening in practice.³⁴³ Thus, the perspective and knowledge of some of the most sophisticated commercial real estate attorneys could be examined,³⁴⁴ but information about whether and to what extent those who advised clients applied this knowledge was missing.

B. University of Illinois Law Review Conference, April 2001

A research conference presented by the University of Illinois Law Review in Spring 2001³⁴⁵ inspired the empirical direction of this article. At this conference, presenters documented and validated this trend in legal scholarship. Three of the authors have shared drafts of their articles, which will be among the most recent on topic of empirical research within the legal academy.

Professor Shari Seidman Diamond's clear definition of empirical legal research as based upon observation requires qualitative as well as quantitative analysis: "[G]ood empirical research typically involves the systematic organization of a series of observations with the method of data collection and analysis made available to the audience."³⁴⁶ She uses as an example of

340. See, e.g., *Waldron v. Goddess*, 460 N.Y.S.2d 793 (N.Y. App. Div. 1983); *Sagonowsky v. More*, 75 Cal. Rptr. 2d 118 (Cal. Ct. App. 1998); *Pardee Construction Co. v. Superior Court*, 123 Cal. Rptr. 2d 288 (Cal. Ct. App. 2002) (showing cases where binding arbitration within commercial real estate that state that they are boilerplate).

341. *Pacific Gas & Electric Co. v. Superior Court*, 19 Cal. Rptr. 2d 295 (Cal. Ct. App. 1993)

342. For example, the annual meetings of the ABA usually include at least one session on drafting ADR provisions.

343. In some ways this reminds me of my earlier interest in examining to what extent lease clauses reflected the state of the law.

344. At least some of whom are more involved with litigation than transactional work.

345. It was entitled, "Empirical and Experimental Methods in Law." The University of Illinois Law Review will publish a symposium issue of articles from that conference in the near future.

346. Shari Seidman Diamond, *Symposium: Empirical and Experimental Methods of Law: Empirical Marine Life in Legal Waters: Clams, Dolphins and Plankton*, U. ILL. L. REV. 803, 805 (2002); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2-3 (2002). "What makes research empirical is that it is based on observations of the world. These facts may be historical or contemporary, based on legislation or case law, the results of interviews or surveys, or the outcomes of secondary archival research or primary data collections." *Id.* Epstein and King add, "in terms of legal scholarship, it is only the *purely* normative or theoretical that is *not*

empirical research an interview study that compiles a report on the percentage of respondents who thought they were entitled to sue, but chose not to as “quantitative.” An alternative version of the same study might focus on describing the range of responses that injured individuals make regarding their injuries without any attempt at assessing the frequency of particular responses, which is still empirical, but non-quantitative. A non-empirical approach to the same theme might be a description or model that predicts, “based on the scholar’s assumptions about what might motivate people to sue,” how people will react to an injury under various circumstances.³⁴⁷ Although, the model may be based in part on empirical research, it actually is not “empirical”—it is merely susceptible to empirical research methods showing that many people do not enlist the help of the legal system in such circumstances.³⁴⁸

Diamond describes a scholar who analyzes when an individual *should be entitled* to turn to the legal system for help following an injury, whom she concludes is conducting traditional normative legal scholarship. It only becomes “empirical” research when, and if, the scholar attempts to examine how people actually behave.³⁴⁹ In surveying recent work at the American Bar Foundation where she is a senior research fellow, Diamond summarizes what all empirical research has in common, “orientation to evidence that requires more than armchair speculation.”³⁵⁰

Her clever, engaging “Typology of Empiricism” chart describes how law scholars use and react to empirical methods.³⁵¹ Using comparisons with marine life—the Clam, the Dolphin, and Plankton—she provides a basis for those who are unsure whether their research is truly empirical³⁵² and how the response of their

empirical.” *Id.* (emphasis added). See also Richard Revesz, *Exchange: Empirical Research and the Goals of Legal Scholarship: A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 171 (2002) (noting that the author’s view is more restrictive than Epstein and King’s in that “[i]t focuses on econometric analyses, and its examples are drawn primarily from studies of judicial behavior.”).

347. Diamond, *supra* note 346, at 804.

348. *Id.*

349. *Id.* at 805. The author’s work in studying the knowledge and expectations of commercial, transactional attorneys regarding binding arbitration fits into the first category that Professor Diamond describes: “For empiricists studying the law, the question is usually about how law and legal institutions actually behave and with what effects. For non-empiricists, the question more often is about how they ought to behave.” *Id.* at 806.

350. *Id.* at 807.

351. *Id.* at fig.1.

352. See Epstein & King, *supra* note 346 (mounting a forceful attack on empirical research); see also Revesz, *supra* note 346, at 169 (criticizing Epstein and King’s attack on empirical research).

academic colleagues may range. The "clams," in the ocean as well as in the country's law schools, are "relatively immobile" creatures who, because they lack the eyes and a distinct head, are very limited in their ability to actively search their environment.³⁵³ "Dolphins" are "active inhabitants of the marine environment whose intelligence, ingenuity and playfulness" are well known.³⁵⁴ They are crucial to the survival of empirical legal scholarship because they can be the "source of energy and perspective" for academia and because they are able to recognize weaknesses in conclusions drawn from some research.³⁵⁵ "Plankton," a "large category of organic and inorganic material which exists in a drifting, floating state too weak to swim against the current,"³⁵⁶ corresponds to academics who use or provide empirical research without actually contributing directly to the field, who use it as the "method of the moment, arguing for or against empiricism depending on the season."³⁵⁷

Within each species, Diamond identifies three categories: the Doer; the User; and the Critic.³⁵⁸ She expects that the distinction between the doers, users, and critics will not be as telling in predicting the future of empirical research as the distinction between the species.³⁵⁹ The "Dolphin/User" is at the center of the matrix.³⁶⁰ This type is "intellectual squarely rooted in the traditional legal academy" while recognizing the possibilities that empirical inquiry can offer.³⁶¹ As compared with the clams, the Dolphin/User is able to do central processing, which involves evaluating the fit between the theory and method used, while the clam can only engage in peripheral processing, adopting the conclusion of an empiricist merely because it has been published.³⁶² Thus, many Dolphin/Users are traditionally bound academics who have collaborated with social scientists.³⁶³

353. Diamond, *supra* note 346, at 808.

354. *Id.* at 808.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 814. According to Diamond, the Dolphin/Doer is not nearly as crucial to acceptance of empirical legal research over the long run; although, like the Dolphin/User, such scholars have a "[deep] involvement with empirical research" and a "habitual pattern of interaction" with Dolphin Users and Critics. *Id.* at 817. These are scholars for whom empirical research is a method of scholarship and includes many who have Ph.D.s in social science disciplines. *Id.*

361. *Id.* at 814.

362. *Id.*

363. *Id.* at 815. See, e.g., KALVEN HARRY, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). See also JOHN THIBAUT, *PROCEDURAL JUSTICE* (1975) (noting the procedural justice work of Laurens Walker with the author).

Another conference participant, Michael Heise, traces the development of empirical research historically, pointing to both the emerging professionalization of law and the modern American law school model, the case method, at the turn of the Twentieth Century as leaving little room for empirical legal scholarship.³⁶⁴ “Periodic spurts” of such scholarship was produced during the Legal Realism Movement.³⁶⁵ Four factors in the period after World War II contributed to a forward movement: 1) the Chicago Jury Project at the University of Chicago Law School; 2) the creation of Walter E. Meyer Research Institute of Law at Yale University; 3) the financial support reaching a critical mass; and 4) the development of the Law and Society Association and its *Law and Society Review*, and the current “emerging new empiricism.”³⁶⁶

Heise theorizes that three groups of factors explain the re-emergence of empirically based legal scholarship.³⁶⁷ First, “as specific lines of theoretical or doctrinal research mature the potential contribution of empirical or experimental work increases.”³⁶⁸ As key assumptions are identified and transformed into hypotheses, they are susceptible to empirical testing.³⁶⁹ And the sheer increase in the volume of what is accepted as legal scholarship and the breadth of issues considered enhances possibilities for empirical research.³⁷⁰ Secondly, Heise credits changes in those who produce legal scholarship from those who only were trained in law schools to those who have multiple graduate degrees, including Ph.Ds.³⁷¹ Finally, the growing number and accessibility of datasets specifically developed with legal scholarship in mind and, with it, calls from the courts for empirical work spurs on empirical legal research.³⁷²

Using Empirical Judicial Decision-making Scholarship as a case study for the purpose of reviewing and evaluating a variety of models,³⁷³ Heise concludes that because of limitations imposed by data,³⁷⁴ research design and statistical methods, the empirical

364. See generally Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decisionmaking and the New Empiricism* (2000) (unpublished manuscript on file with the author and THE UNIVERSITY OF ILLINOIS LAW REVIEW).

365. *Id.* at 5-6.

366. *Id.* at 7-9.

367. *Id.* at 13.

368. *Id.* at 14.

369. See *id.* at 15 (setting forth the key assumption of “voluntariness” about binding commercial arbitration which is the basis for the author’s hypothesis about the knowledge and expectations of transactional lawyers which, in turn, “beg for” empirical testing).

370. Heise, *supra* note 364, at 15.

371. *Id.* at 17.

372. *Id.* at 18.

373. *Id.* at 24.

374. *Id.* at 53. Brunet, *supra* note 5, at 110. Brunet attributes a feature of

perspective remains "only a tool," to enhance traditional legal scholarship.³⁷⁵

Thomas Ulen claims that "recent scholarly trends in the law show evidence of a movement toward an even more science-like discipline."³⁷⁶ In discussing the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁷⁷ where the Court laid out a four-step inquiry as to what is required for testimony to be considered "science," Ulen sees similarities between his own characteristics of science and the scientific method.³⁷⁸ He compares some questions that might be resolved by logical argumentation with others that would be better solved by empirical observation.³⁷⁹ Ulen relies on Thomas Kuhn's paradigm shift explanation for scientific revolutions,³⁸⁰ and predicts, for example, that the prevailing paradigm of the social sciences, rational choice theory,³⁸¹ is likely to be replaced because so many anomalous behaviors are not explained by it.³⁸²

Ulen argues that several factors explain why the study of law is not yet a "legal science" susceptible to a Nobel Prize.³⁸³ He finds a puzzling lack of "a core, shared theory across national boundaries in the academic study of law" and an absence of empirical and experimental work as compared to other social sciences.³⁸⁴ He contends this has been changing since the shift from legal formalism to legal realism in the 1930s and 1940s.³⁸⁵

the Corporate Library database he used in researching conduct of employer and employee in "high stakes" employment contracts, that "it reports only the terms of the completed CEO contracts and fails to show the multiphase process of negotiating agreements" as a limitation on his empirical study. *Id.* The Corporate Library is accessible on the web. *Id.*

375. Heise, *supra* note 364, at 53.

376. Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 876 (2002) (forthcoming publication on file with THE UNIVERSITY OF ILLINOIS LAW REVIEW and the author).

377. 509 U.S. 579 (1993).

378. Ulen, *supra* note 376, at 881.

379. *Id.*

380. *Id.* at 884. Anomalies to the prevailing paradigm may gather to such an extent that adjusting the latter no longer succeeds. *Id.* A new paradigm is eventually developed or proposed that supplants the existing one because it can account for both the phenomena explained by the older paradigm and the anomalies. *Id.*

381. *Id.* at 886. It has been used in examining economic phenomena in related disciplines including political science, international relations and law. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (summarizing rational choice theory as "expected utility theory" as well as a "self-interest" theory).

382. Ulen, *supra* note 376, at 887.

383. *Id.* at 899.

384. *Id.*

385. *Id.* at 900.

With the realist's notion that the evaluation of a law should include its likely consequences comes the need for empirical work. Yet, most empirical work over the past sixty years has been descriptive rather than analytical according to Ulen.³⁸⁶

However, he discerns a move in legal scholarship towards a true scientific approach like that prevailing in other social, natural, physical, and behavioral sciences.³⁸⁷ This is possible due to increasingly comprehensive theories that he argues are prerequisites to any science.³⁸⁸ Law and economics provides such a comprehensive theory that, for example, maintains that rules and standards of property law "should (and largely does) foster the efficient use of society's scarce resources."³⁸⁹ He predicts that this will lead to "increasing attempts to engage in analytical empirical work designed to establish the truth of hypotheses about legal topics derived from that core theory."³⁹⁰ Critical Legal Studies and Law and Society research may also provide the same comprehensive theoretical goals that will lead to empirical work.³⁹¹

Ulen ends his article with a report of Robert C. Ellickson's empirical study of legal scholarship, which showed that between 1982 and 1996 law professors and students have been more inclined to produce quantitative analyses.³⁹² Besides, Ulen believes that legal scholars are now directing their work towards other legal scholars, rather than towards the practicing bar and judges as in the past.³⁹³ He expects this to change the direction of legal scholarship.³⁹⁴

C. Need For Empirical Research About Knowledge And Expectation Of Transactional Lawyers

Attending the University of Illinois conference and the subsequent colloquy with colleagues Professors Julie Spanbauer and Janice Mueller, led to a Lexis search of "empir! and arbit!,"

386. *Id.* at 901.

387. *Id.* at 909.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 910. Ulen sees the convergence internationally of the standard U.S. model of business organization "in which the corporation is seen as a nexus of contracts and elements of corporate law seek to maximize shareholder wealth" as a potential core theory in corporate law that may serve as the basis for empirical study. *Id.*

392. *Id.* at 913 (citing Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 528-29 (2000)).

393. *Id.* at 916. "[T]he ascendant source of prestige among legal scholars today is the high esteem of fellow academics." *Id.* See also Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L.REV. 34 (1992) (discussing the trend in which legal scholars seek the esteem to their colleagues).

394. Ulen, *supra* note 376, at 915.

where no reports of empirical studies of attitudes and expectations of transactional lawyers about binding arbitration were found to test the previously mentioned theories.³⁹⁵

Some legal scholars have even questioned the anecdotal evidence that "arbitration is becoming more widely used than it has in the past," because it is difficult to get evidence about the widespread nature of arbitration agreements.³⁹⁶ While the arbitration institutions keep records on caseload filings, there is a dearth of record keeping on what parties are agreeing to *before* there is a dispute.³⁹⁷ Drahozal notes that in thirteen states, franchise contracts must be filed and are therefore available to researchers.³⁹⁸ Brunet suggests the Corporate Library database for examination of CEO contracts,³⁹⁹ but neither resource provides data on the process by which pre-dispute arbitration clauses are included.⁴⁰⁰

D. Alternative Dispute Resolution Generally

Indeed, there are few empirical studies about ADR,⁴⁰¹ and even fewer about the functioning of transactional lawyers with respect to it.⁴⁰² Andrea Kupfer Schneider updated a 1976 empirical study that had been conducted by surveying 1,000 lawyers in Phoenix about their most recent negotiation experiences.⁴⁰³ She surveyed 2,500 Milwaukee and Chicago lawyers about their most

395. The author thanks her friend Susan C. Haddad, J.D. '77, The John Marshall Law School, for her suggestion that the author join her in taking a course Social Science Research in the summer of 2001, which provided basic information about empirical research and set some ground rules for the author's survey.

396. Drahozal, *supra* note 249, at 580.

397. *Id.* Drahozal contends that it would be less likely that parties would choose arbitration after their dispute arose because, at that point, the parties would have "fairly divergent views or interests." *Id.* It is more common for the agreement to submit to arbitration to be made at the time the contract is signed. *Id.*

398. *Id.* at 580-81.

399. Brunet, *supra* note 5, at 109-10.

400. *Id.*

401. See Stipanowich, *supra* note 53, at 835 (noting the author's reference to his own studies in the field of construction arbitration).

402. *Id.* Stipanowich suggests that a lack of empirical data makes it difficult to evaluate how effectively arbitration works. Stipanowich, *supra* note 42, at 432. A 1991 survey conducted by the ABA Forum on the Construction Industry failed to ask questions about the respondents' law practice; this means that there is no way to evaluate whether the group was representative of the construction bar and offers no data separating litigators from transactional lawyers. Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 83 (1996).

403. See GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-46 (West Group 1983).

recent negotiation experience to compare perceived, subjective negotiation behavior with perceived effectiveness in negotiation.⁴⁰⁴ She concluded that “as adversarial negotiators have gotten more extreme over the past twenty-five years, they also have become both nastier and less effective.”⁴⁰⁵ She recommends a problem solving, rather than adversarial approach for attorneys engaged in negotiations, at least based on the survey participants own perceptions as to which behavior works.⁴⁰⁶ Although she did not separate out respondents based upon categories of “transactional” versus “litigators,” it is likely that some of those surveyed were transactional lawyers because of the selection method used.⁴⁰⁷ One thousand names were randomly selected from the membership of the Wisconsin State Bar Association, particularly Milwaukee County and two neighboring counties, and 1500 names were randomly selected from the membership of the Chicago Bar Association.⁴⁰⁸

Similarly, a recent article by Dwight Golann studies outcomes in specific, private mediation cases by interviewing professional mediators.⁴⁰⁹ His goal was to determine, in cases where there already was a relationship between the parties, whether mediators were able to facilitate repairs of relationships,⁴¹⁰ which has been touted as an advantage of mediation over litigation.⁴¹¹

1. Arbitration

Published empirical studies of arbitration are limited and do not involve the perspective of transactional attorneys. Deloitte & Touche performed a study of law firm attorneys specializing in litigation and the general counsels of Fortune 1000 companies about their experiences with ADR during the three-year period from 1990–1992.⁴¹² From the 813 legal departments and 1,400 law firms who were sent the survey,⁴¹³ two hundred forty-six (eleven

404. Andrea Kupfer Schneider, *Perception, Reputation and Reality, An Empirical Study of Negotiation Skills*, DISPUTE RESOLUTION MAGAZINE, Summer 2000, at 24, 24-25.

405. *Id.* at 27.

406. *Id.* at 28.

407. *Id.* at 25.

408. *Id.*

409. Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 303-04 (2002).

410. *See id.* at 303-04 (stating that the study was conducted on the outcomes of legal disputes between parties where there was a “significant pre-existing relationship” between the parties, as compared to, for example, a tort claim resulting from an automobile accident, where the disputants were strangers prior to the conflict).

411. *Id.* at 301.

412. Deloitte & Touche Survey, *supra* note 255, at 1.

413. *Id.* at 17.

percent) of the attorneys actually responded.⁴¹⁴ Seventy-two percent of those responding had some experience with "ADR," although the type of experience (e.g., neutral or representative of a party) and the particular ADR process involved was not clear.⁴¹⁵ Like so many other reviews, the survey really was looking at alternatives to litigation, rather than binding arbitration as such.⁴¹⁶

A 1998 study by the Foundation for the Prevention and Early Resolution of Conflict (PERC), Cornell University, and Price Waterhouse, LLP targeted 606 general counsel and chief litigators for Fortune 1000 corporations.⁴¹⁷ Although the authors acknowledged that negotiation is "the core of all dispute resolution," they limited the study to mediation and arbitration, processes involving neutral third-parties.⁴¹⁸ Although the respondents cited savings of money and time as compared with litigation as reasons to select arbitration, part of the so-called "myth," many identified serious concerns that they considered as barriers to use of arbitration, including that the process is not confined to legal rules, difficulty in appealing awards, and lack of confidence in arbitrators.⁴¹⁹

Brunet's recent study of high stakes employment contracts reviewed the actual contracts, but only to the extent those were available.⁴²⁰ And, he does not attempt to survey the thinking of the attorneys advising the clients and drafting the documents.⁴²¹ Similarly, Christopher Drahozal's empirical research about "unfair" arbitration clauses in seventy-five franchise agreements used by leading franchisers consisted of his reviewing actual contracts.⁴²² Drahozal had access to these forms because Minnesota requires franchisers to register before selling franchises in that state.⁴²³ His careful analysis was from the standpoint of "consumerized" arbitration, rather than agreements between

414. *Id.* at 1.

415. *Id.* at 2.

416. *Id.* at 1. See Golann, *supra* note 409, at 301-02 (stating that much of the writing discussing mediation centers on the theme of the repair of the parties' relationships, contrasted with the relationship that results from parties involved in litigation).

417. DAVID B. LIPSKY & RONALD L. SEEBER, Cornell/PERC Institute on Conflict Resolution, *The Appropriate Resolution of Corporate Disputes - A Report on the Growing Use of ADR by U.S. Corporations* 7 (1998).

418. *Id.*

419. *Id.* at 25-26.

420. Brunet, *supra* note 5, at 109-10. Brunet points out that contracts between CEO's and their employers are usually confidential, as well as the Corporate Library website used to gather information about these types of contracts, but not the negotiation process used to arrive at that result. *Id.*

421. *Id.* at 110.

422. Drahozal, *supra* note 92, at 721-22.

423. *Id.* at 722.

commercial parties.⁴²⁴

2. Arbitration in Construction

Most of the empirical research about arbitration thus far has focused on the construction industry. Thomas Stipanowich, now the president of CPR, has discussed and evaluated many of the studies in a series of law review articles.⁴²⁵ The focus of his article "Rethinking of American Arbitration," in 1988 was a then recent survey of opinions and attitudes toward arbitration under AAA rules conducted by the ABA.⁴²⁶ However, it only solicited responses from those who had experience as advocates and arbitrators,⁴²⁷ and only of those involved in the construction industry.⁴²⁸ In a later article titled "Beyond Arbitration: Innovation and Evolution in the United States Construction Industry," Stipanowich discusses the 1991 ABA Survey on Dispute Resolution, which also solicited responses from members of the ABA Forum on the Construction Industry.⁴²⁹ Out of 5,400 members who were sent the survey, 552 responded.⁴³⁰ The primary focus of the survey was to be mediation, mini-trial, summary jury trial and non-binding arbitration rather than binding arbitration.⁴³¹ And, while the 1994 Multidisciplinary Survey on Dispute Avoidance and Resolution in the Construction Industry was industry-wide, the only attorneys asked to respond

424. *Id.* at 700-20. Drahozal reports a more optimistic view about the impact of binding arbitration on consumers than many other scholars as a result of his research. *Id.* at 771-72. Most likely, there are other informal, unpublished empirically based studies that solicit information from transactional attorneys. For example, the Alternate Dispute Resolution Committee of the American College of Real Estate Lawyers (ACREL), of which the author is a member, sent out a questionnaire in 1994 to all members of the College. This questionnaire was being used to assist the Committee in planning future activities, including educational programs and a listing of members who would be available as neutrals in mediation and arbitration.

425. See Thomson, *supra* note 211 (discussing an empirical study of Minnesota arbitrators' actual practices during the pre-hearing, hearing and award stages of an arbitration. See also Levin, *supra* note 46, at 160-61 (reviewing a pilot study conducted in 1990 by Professor Levin of executives from sixty construction firms of attitudes about mediation and arbitration).

426. Stipanowich, *supra* note 42, at 432.

427. *Id.*

428. *Id.* at 453-54 (noting that 513 out of over 3000 members of the ABA Forum Committee on the Construction Industry and the Construction Litigation Division of the Litigation Section, who were polled, responded).

429. Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 82 (1996) (discussing in depth the scope, design, implementation, and findings of the 1991 survey).

430. *Id.* at 88.

431. *Id.* at 82.

were members of the ABA Forum on the Construction Industry⁴³² and the ABA Section on Public Contract Law.⁴³³ The goal was to collect data from those who had experience with a variety of alternatives to litigation in the context of construction and from the variety of players. The expectation was that the attorneys polled would have had professional experiences with ADR, including binding arbitration, as representatives of parties and/or as neutrals.⁴³⁴

E. The Survey

Although the original intention of this survey had been to focus on commercial real estate lawyers, the focus soon turned to commercial transactional attorneys. The author considered polling members of the Illinois State Bar Association (ISBA), but decided that the organization had a high number of members in small firms and solo practices who would be more involved in representing individuals rather than businesses. Also, the author soon decided that fewer members of the ISBA would fit into a distinct and separate category of "transactional" or "litigator" because of the nature of their practices and many would be involved in both aspects of practice. Another consideration was made to poll members of the American Bar Association (ABA), but that group consists of attorneys who primarily practice within large firms and who would have more years in practice than the desired survey target.

The author targeted the Chicago Bar Association (CBA) as an appropriate group for survey. It is a voluntary membership bar association with over ten thousand members who practice primarily in Chicago and Cook County, Illinois. It has many active practice committees plus a separate Young Lawyers Committee (YLS) for those under thirty-five years of age or within ten years of licensure. The YLS is organized into substantive groups as well as subcommittees, including those on Real Estate Law and Corporate Practice. Because the CBA does not charge any additional amount of dues for participation in any particular committee or subcommittee, members may belong to more than one subgroup, choosing from separate practice areas depending on their level of interest. On the other hand, the CBA does require committee and subcommittee members to participate, at least by attending monthly meetings, in order to remain in good standing within those groups. It is this combination of easy access to

432. *Id.* at 128-29 (noting that 459 responded out of 5222 members polled).

433. *Id.* at 129 (commenting that only 69 members responded out of about 5000 members polled).

434. *See id.* at 132-33 (polling attorneys who specialize in business transactions, rather than litigation, means that most do not have much experience as neutrals and/or as representatives of parties).

committees and subcommittees⁴³⁵ plus the requirement that members participate minimally,⁴³⁶ which supports the choice of respondents.⁴³⁷ The organization is dedicated to educating its members about recent developments in practice, and membership is sufficiently broad to yield a representative sample, at least of lawyers in an urban setting. Moreover, members of several committees were selected to receive the fifty-seven item, ten-page questionnaire.⁴³⁸ Two hundred thirty-one attorneys responded out of the 1,194 surveyed.⁴³⁹

1. *Demographics of Respondents*

The survey was structured to get demographic information. The first question asked the participants to indicate the category that "best" reflects the nature of their practice from among the following: Corporate/Business; Personal Injury; Consumer; Labor/Employment; Real Estate; and Estate Planning/Probate.⁴⁴⁰ With the exception of Personal Injury and Estate Planning/Probate, which were not selected by anyone, at least one respondent selected each of the categories.⁴⁴¹

The second demographical query asked the participants to indicate the percentage of their practice as "devoted to Litigation," "devoted to Transactions," and "devoted to Office Management and Administration."⁴⁴² For each, respondents were asked to indicate "none, 1-10%, 11-25%, 26-50%, or more than 50%."⁴⁴³ Also, the survey solicited information about firm size,⁴⁴⁴ years in practice,⁴⁴⁵

435. This is as compared to the ABA and ISBA, which assess extra dues for membership in their subcommittees.

436. There is no such requirement for ABA or ISBA committee membership.

437. *Id.* The author hoped to get a good response rate after having been chair of the Real Property Law Committee. Based on her years of participation in that Committee, including three years as an officer and six on the executive committee, the author realized that members are principally involved in commercial real estate rather than residential. Even those in subcommittees on Condominiums and Affordable Housing, for instance, have clients who are developers and associations rather than individual owners. In addition, the Illinois Residential Lawyers Association (IRELA) was not polled because they specialize in practices involving residential transactions.

438. The survey was mailed with a stamped, return envelope to the following committees: Agri-Business (23); Commercial Finance and Transactions (140); Corporate Law Departments (169); Corporations and Business Law (405); Environmental (107); Real Property Law (516); Young Lawyers Committees on Corporate Practice (178); and Real Estate Law (182). The number of surveys actually mailed is smaller than the total for all of the committees because some members are in more than one committee.

439. *See generally* Hammond Survey, *supra* note 201.

440. *Id.* at question #1.

441. *Id.*

442. *Id.* at questions #2, #3, and #4.

443. *Id.*

444. *See id.* at question #5 (allowing participants to select firm sizes of solo,

and familiarity with arbitration by education or discussion with colleagues.⁴⁴⁶ These last demographic questions were designed to help assess how transactional lawyers get information and training about arbitration.

The survey characterized as "transactional" those attorneys who indicated both that at least twenty-six percent of their practice is devoted to transactions and that less than twenty-six percent of their practice is devoted to litigation.⁴⁴⁷ This yielded 137 lawyers who were labeled "transactional."⁴⁴⁸ The survey also separated those with no professional arbitration experience⁴⁴⁹ from those who had either been a representative of a party or an arbitrator.⁴⁵⁰

2. Transactional Lawyers' Understanding and Expectations

For purposes of this article, data about the transactional lawyers' understanding and expectations of arbitration law and procedure was pursued, in particular whether they expected the arbitrator must apply the rule of law,⁴⁵¹ whether the arbitrator will provide reasons for the award⁴⁵² and whether they expected that, if a party disagreed with the award, there was some part of the process for an appeal or review.⁴⁵³ Also examined was the extent to

1-15, 16-50, 51-100, and over 100).

445. See *Id.* at question #6 (allowing participants to select years in practice of: under 5; 5-10; 11-15; 15-25; and more than 25).

446. See *Id.* at question #7 (asking "[h]ave you discussed arbitration as a dispute resolution mechanism with other lawyers?" and allowing participants to select: never; a few times; frequently; and very frequently). Question #8 asked "[d]id you take a course in alternative dispute resolution in law school?" and allowed participants to select yes or no. *Id.* at question #8. Question #9 asked "[h]ave you attended any CLE programs, seminars or trainings on arbitration since law school?" and allowed participants to select yes or no. *Id.* at question #9.

447. *Id.* at questions #2, #3. The survey group had 122 participants who were in the "more than 50%" transactional practice category and fifteen who were in the "26-50%" transactional practice category. *Id.*

448. *Id.*

449. *Id.* at questions #10-#13 (finding that ninety-four participants had no professional arbitration experience).

450. *Id.* at questions #11, #18. Twenty-eight participants fell into this category. *Id.* Fifteen participants had served as a representative only of a party; five had served as an arbitrator only; eight had served both as a representative of a party and an arbitrator. *Id.*

451. *Id.* at question #45 (noting that over seventy percent of participants answered affirmatively).

452. *Id.* at question #50 (finding that between twenty-five and sixty-seven percent of participants expected a reasoned award "always" or "usually.").

453. *Id.* at questions #51, #54, #57. The survey found that fifty-seven percent of participants expected there was some appeal process; between thirty-eight and sixty percent of the participants expected judicial review to be available for arbitrator's failure to follow applicable substantive law or because the arbitrator was mistaken as to the applicable substantive law; and

which these lawyers reviewed documents “for real estate, business or commercial clients” which included a binding arbitration clause.⁴⁵⁴ Further, this inquiry examined the extent to which they included an arbitration clause in documents they drafted,⁴⁵⁵ how often they modified arbitration clauses,⁴⁵⁶ and how often they “deleted or recommended to the client that the arbitration clause be deleted in business, commercial or real estate related documents.”⁴⁵⁷ The results of the survey support the aforementioned theory that transactional lawyers are reviewing and suggesting modifications, including deletion, of arbitration clauses even though they misunderstand certain basic characteristics of arbitration. Moreover, although there were not sufficient responses to make statistically valid inferences, those attorneys with arbitration experiences were more likely to make modifications in the arbitration clauses of documents they reviewed for clients.⁴⁵⁸ Empirical studies of the impact which greater knowledge and experience with arbitration would have on their advice to business clients about deleting or modifying arbitration provisions awaits another day.⁴⁵⁹

between eighteen and thirty-eight percent of the participants expected that a disagreeing party could demand a rehearing and decision in a court. *Id.*

454. See *Id.* at question #31 (allowing participants to select: never; once or twice; a few times; frequently; and very frequently). Between fifty-five and eighty-six percent of the participants selected frequently or very frequently. *Id.* Participants who had no experience with arbitration selected these categories fifty-five percent of the time, those who with experience representing a party selected them eighty-six percent of the time, those who had served as both an arbitrator and had experience representing a party selected them seventy-five percent of the time, and those who had only served as an arbitrator selected them sixty-percent of the time. *Id.*

455. See *Id.* at question #32 (asking for the frequency of arbitration clause inclusion and allowing participants to select: “never, once or twice, a few times, frequently, very frequently.”).

456. See *Id.* at question #34 (asking for the frequency with which attorneys modified the clauses and allowing participants to select: “never, once or twice, a few times, frequently, very frequently.”).

457. See *id.* at question #36 (asking for frequency of actual or recommendation of deletion).

458. See, e.g., *id.* at question #34 (finding that forty-one percent of the transactional lawyers with no arbitration experience said “never” when asked if they modified arbitration clauses as compared to twenty-five percent of those who had experience either as arbitrators or as representatives of parties).

459. Stipanowich, *supra* note 42, at 432. Although there has been little in the way of empirical research, Stipanowich reports a study of the construction industry bar which shows that for cases involving over \$250,000, fifty-five percent of those surveyed favored a requirement that arbitrators make written findings of fact. *Id.* at 469.

V. DRAFTING SOLUTIONS CONSIDERED

Since arbitration provisions are treated as the result of private contracts between parties, some commentators urge the modification, and sometimes elimination of, pre-dispute arbitration clauses to include requirements that arbitrators follow a rule of law, provide reasoned awards, and permit judicial review on grounds of error of law or fact as the way to meet the requirements of knowing consent discussed herein.⁴⁶⁰ Typically, CLE seminars reviewing arbitration for transactional lawyers end with the suggestion that if a party, or her attorney, disapproves of some features of arbitration, they may draft around those and even resort to the "judicialization" of arbitration.⁴⁶¹ Such models offer parties the advantages of arbitration, which have been marketed heavily as promoting speed, privacy, and reduced expense, while retaining the predictability and application of the rule of law of litigation.⁴⁶² However, it is unclear whether the courts will enforce such individually tailored arbitration agreements and it is unlikely that commercial lawyers who counsel clients regarding transactions and the contracts that support those transactions will know enough about the law of arbitration to draft appropriate modifications.⁴⁶³

Stephen Hayford urges lawyers to counsel their clients "at the front end" on the desirability of arbitration and modification of the process,⁴⁶⁴ instead of relying on the confused law about vacatur of

460. See generally Cole, *supra* note 308.

461. Cole, *supra* note 85, at 1240. Growing suspicions about arbitration may be the cause for disapproval of the 'folklore' version. *Id.* Brunet lists characteristics of the judicialized model: routine discovery; motion practice; substantive rules of law; written awards with findings of fact and conclusions of law; and enhanced judicial review for legal error. Brunet, *supra* note 202, at 45-46. See Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1445-46 (1996) (criticizing this trend in securities arbitration, including enhanced discovery and pre-hearing motion practice, as causing the expense of a typical arbitration to overtake the cost of a comparable case in litigation).

462. See Brunet, *supra* note 5, at 128 (citing advertisements of the National Arbitration Forum, a national institutional service provider, which requires all arbitration awards to be based on the rule of law as an indication of market acceptance of this modification of folklore arbitration); see also Brunet *supra* note 202, at 54-55 (describing judicialized arbitration in AAA International Arbitration Rules, CPR, and National Arbitration Forum).

463. See, e.g., Cole, *supra* note 85, at 1259 (concerning whether appropriate standards for judicial review will be included in such modifications so as to preserve the institutional integrity of the judiciary as well as meet parties' approval).

464. See Hayford, *supra* note 38, at 503 (proposing a new paradigm for commercial arbitration). The paradigm would require reasoned awards explaining how the arbitrators applied the rules of law to the facts but would limit vacatur to only "the most rudimentary guarantees of procedural and substantive fairness, of the type embodied in section 10(a) of the FAA." *Id.*

awards to guarantee “justice,” which boils down to a “big error of law” test.⁴⁶⁵ At the pre-dispute stage, parties and their lawyers too often focus on the purported savings in cost and time that arbitration offers only to ignore two other key factors: the lack of reasoned awards which would indicate how arbitrators dealt with questions of law and fact in particular cases, and the risk that the awards produced will be “unacceptable” because they are perceived as being the result of flawed reasoning.⁴⁶⁶

For example, parties may “carve out” of pre-dispute arbitration provisions certain claims or claims beyond a certain dollar amount.⁴⁶⁷ Richard Speidel argues that the Supreme Court, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,⁴⁶⁸ permitted the parties to use a tailor-made contract to arbitrate.⁴⁶⁹ Thomas Stipanowich identifies a trend to join “garden variety” arbitration with “more exotic specimens” reflecting the imaginativeness of drafters.⁴⁷⁰ Nevertheless, there may be limits on what the parties can construct, especially where it includes a provision for judicial review of awards.⁴⁷¹ Still, many commentators see provisions for application of a substantive rule of law to issues in arbitration and judicial review for errors of law as part and parcel of contract arbitration that should be enforceable.⁴⁷²

465. *Id.* at 474.

466. *Id.* at 498.

467. See Drahozal, *supra* note 249, at 586 (noting that it is fairly common to see this in franchise arbitration agreements that he has reviewed).

468. 489 U.S. 468 (1989).

469. See Richard E. Speidel, *Securities Arbitration: A Decade After McMahon: Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOKLYN L. REV. 1335, 1346 (citing cases following *Volt* which have enforced limits on the scope of the arbitration; allowed selection of the administering institution; and allowed the applicable procedural rules specifying details of the arbitral process, including selection of the arbitrator and the situs for the arbitration and the choice of the applicable substantive law). The Court effectuated this decision by holding that the parties to an arbitration under the FAA could choose state law, and thus include that state's arbitration law. *Id.* at 1347-48. See also Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L. ARB. 225, 235-37, n.41 (setting forth cases illustrating the many variations of issues subject to arbitration and the rules under which the arbitration will proceed).

470. Stipanowich, *supra* note 53, at 833.

471. See Rau *supra* note 469, at 252 (concluding that a federal court cannot be required to apply the procedural rules of a state court when reviewing an arbitration award). The court went on to state that an attempt to force a federal court to review an award with arbitrary rules would be likened to “flipping a coin or studying the entrails of a dead fowl and, as such, may not be enforceable even under a contract model.” *Id.*

472. See, e.g., Ware, *supra* note 203, at 735 (noting that, given the Arbitration Act's strong policy of empowerment of the parties to arbitration, Congress should enforce the arbitration agreement); cf. Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards*

However, critics of enforcing enhanced judicial review clauses argue that adding these requirements will just make arbitration the same as litigation and they advocate no such modifications of the process, even in individual cases.⁴⁷³ Moreover, it is unclear whether parties may provide for judicial review of arbitration awards.⁴⁷⁴ There currently exists a split among the federal circuits on this issue.⁴⁷⁵ The concern about whether the FAA, in preempting state law, would permit enforcement of a judicial review for error of law provisions, was expressed by the drafters of the Revised UAA when they did not include a statutory sanction of an "opt-in" device.⁴⁷⁶ Additionally, if parties may not contract for judicial review, then a contractual requirement of the arbitrator to follow the rule of law⁴⁷⁷ and to provide reasoned opinions will have little meaning.

VI. CONCLUSION

Even if the terms and rules of the arbitration may be changed by the parties, due to the misunderstanding of transactional attorneys as to basic aspects of arbitration, the pre-dispute, binding arbitration provisions of their clients' agreements are not

Under the Federal Arbitration Act, 46 ST. LOUIS L. J. 509, 549 (2002) (noting that parties should not be able to expand judicial review by agreement because it will create a second form of adjudication). See also Brunet, *supra* note 202, at 48-49 (analyzing the Supreme Court's jurisprudence in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) as confirming contract model). But see Speidel, *supra* note 469 at 1347 (arguing that the principle of the *Volt* case expands the FAA's grounds for judicial review and vacation of arbitration awards to those selected by the parties);

473. See generally Sullivan, *supra* note 472. C.f. Cole, *supra* note 85, at 1262 (comparing use of judicial review of arbitration awards to requests by all parties for vacatur of trial court orders). She points out that there is no empirical study as to whether requests for more court involvement wastes or conserves scarce judicial resources. *Id.*

474. See Brunet, *supra* note 5, at 129-30 (listing examples of contracts between CEOs and S&P 500 firms which include provisions for judicial review of arbitration awards).

475. See Robert D. Taichert, *Conflicting Decisions Raise New Questions About Judicial Review*, DISPUTE RESOLUTION TIMES, April-June 2002, at 5 (noting that the Court of Appeals of the Tenth Circuit cited the differing opinions of the Fifth and Ninth Circuits in holding that the arbitration rules of the FLL did not allow parties to alter judicial process through private contract); see also Cole, *supra* note 85, at 1250-62 (finding current judicial analyses of parties' requests for expanded judicial review unsatisfactory and posits a two pronged test: 1) whether the statute permits expanded review and 2) whether expanded review threatens institutional integrity of the judiciary).

476. Andrew D. Ness, *Revised Uniform Arbitration Act of 2000 Makes Only Incremental Changes*, available at http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/April_8_2002/uniform_arbitration_act.htm (last visited April 28, 2003).

477. Levin, *supra* note 46, at n.86.

really “consensual.”

Much has been written about malpractice by attorneys who do not advise clients to consider using ADR.⁴⁷⁸ Yet, transactional attorneys who misunderstand arbitration may commit malpractice when they advise their clients about using arbitration and when they draft and modify pre-dispute arbitration clauses. The Reporter Comments to early drafts of the Revised UAA, which would have permitted parties to contract in the arbitration agreement for judicial review of errors of law,⁴⁷⁹ expressed a concern that lawyers would always add a provision for judicial review to prevent a malpractice charge.⁴⁸⁰ Rau, who characterizes the lack of a requirement of a reasoned award to be only a “default rule,” reported that he knew of no empirical study that reversed the default rules of no reasoned awards, no rule of law and no judicial review.⁴⁸¹ However, he refers to CPR’s Non-Administered Arbitration Rules “where they do reverse the usual presumption by opting for a reasoned award.”⁴⁸²

Only if the arbitral process itself becomes more transparent will transactional lawyers be competent to advise their business clients as to whether they should agree to arbitrate future disputes and under which model of the process.⁴⁸³ Consent to arbitration by business parties, as more generally with consumers, employees, and franchisees, requires knowledge which current practices preclude. Enhancing transparency about the process can be achieved by making reasoned awards the default rule. Detailed notice provisions explaining the basic differences between arbitration and litigation should be a part of business agreements with pre-dispute arbitration clauses, as much as they should be required in contracts between parties with uneven bargaining power.⁴⁸⁴ More honest marketing is necessary, especially by institutional providers. These marketing efforts should be geared toward attorneys and highlight the real advantages and

478. See, e.g., Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999). See also “Lawyers Too Seldom Consider ADR, GCS Say: Those Who Don’t Use ADR Won’t Be Around for Long,” ILLINOIS LEGAL TIMES, June 1997 at 23. (noting the trend that outside counsel are being expected to suggest ADR more often).

479. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, TENTATIVE DRAFT NO.3, § 19(b), Oct. 9 1998, available at <http://www.law.upenn.edu/library/ulc/uarba/arb1098.htm> (last visited May 4, 2003).

480. *Id.* at n.147.

481. Rau, *supra* note 175, at 537 (1997).

482. *Id.* at n.184.

483. The contractual model of arbitration should be made a part of the FAA and should serve as the policy behind the interpretation of that statute by the courts, including the U.S. Supreme Court.

484. Stipanowich, *supra* note 53, at 897.

disadvantages of arbitration. Thus arbitration, as compared with litigation, mediation, and the likely settlement of cases submitted to litigation, would help educate, rather than merely "sell" lawyers on the process.

Of course, this would require that much more empirical research be conducted to produce useable information—empirical research on the myriad of cases that now may be subject to arbitration—and on more than simply the attitudes of arbitrators. Facilitation and support for such research by the big players, like the AAA, is necessary at this point. It has been nearly a decade since the completion of the most recent AAA and ABA sponsored research on this subject. Moreover, that research was limited to construction industry disputes.

With more information comes better educated attorneys, both in the law school setting and in continuing legal education.⁴⁸⁵ With a developed competency on the law of arbitration and appreciation of the process, transactional attorneys can assist their clients in giving consent to arbitrate, or not.

485. See Stipanowich, *supra* note 53, at 917 (recommending that legal educators teach more effectively about arbitration).

