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# TOWARD CHANGING MODELS OF SECURITIES ARBITRATION\*

Edward Brunet<sup>†</sup>

## INTRODUCTION

The 1987 *Shearson/American Express, Inc. v. McMahon*<sup>1</sup> decision unleashed a remarkable growth in the arbitration of securities disputes between customers and brokers.<sup>2</sup> Ten years later, what should we make of the explosive growth of securities arbitration? To be sure, many, including Judge Bruce Selya, laud the growth of securities arbitration and arbitration in general. Nonetheless, commentators have criticized the present state of securities arbitration and called for reform.<sup>3</sup> Indeed, the call for serious reform of the securities arbitration process has reached a serious enough level that the NASD has

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<sup>1</sup> 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

<sup>2</sup> In 1995, 6055 new arbitration claims were filed with the NASD. *See* NASD, *THE NEUTRAL CORNER* 7 (1996).

<sup>3</sup> *See, e.g.,* William A. Gregory & William J. Schneider, *Securities Arbitration: A Need for Continued Reform*, 17 *NOVA L. REV.* 1223 (1993); David A. Lipton, *Generating Precedent in Securities Industry Arbitration*, 19 *SEC. REG. L.J.* 26 (1991) [hereinafter *Generating Precedent*] (criticizing lack of precedent in securities arbitration); David A. Lipton, *Mandatory Securities Industry Arbitration: The Problems and the Solution*, 48 *MD. L. REV.* 881 (1989) [hereinafter *Mandatory Arbitration*] (criticizing the limited ability to appeal arbitral awards and the limited document discovery methods); Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 *HOUS. L. REV.* 327, 349-55 (1996) (criticizing lack of adequate discovery in securities arbitration); Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in all Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 *AM. U. L. REV.* 151 (1995) (criticizing lack of written opinions in securities arbitration and recommending a change to a system mandating opinions with supporting reasons); Margaret Jacobs, *NASD Panel to Study Reforms in Arbitration Process*, *WALL ST. J.*, Aug. 18, 1994, at C1.

responded with voluntary changes, and the NASD Task Force Report<sup>4</sup> has urged that numerous steps be taken to improve what is widely perceived to be a NASD securities arbitration system in need of repair.

Judge Selya has decried the present state of reforms as effectively ruining securities arbitration by overly judicializing what he perceives as a necessarily simple arbitration model.<sup>5</sup> To hear Judge Selya's comments is to learn of a successful, healthy arbitration system that needs improvements, but only at the margins. Judge Selya strongly criticizes the existing trend toward judicialization of securities arbitration. In a nutshell, Judge Selya criticizes numerous Task Force proposals, including (a) increased use of discovery in securities arbitration; (b) the early appointment of arbitrators to regulate discovery; (c) the writing of opinions when awarding punitive damages; and (d) the initiation of early neutral evaluation<sup>6</sup> and mediation programs as alternatives to securities arbitration.<sup>7</sup> He laments that litigation and securities arbitration have effectively collapsed and become mirror images of one another.

To say that I take issue with most of these points is an understatement. The Task Force recommendations are a step in the right direction that, in my judgment, could have gone even further. In contrast, the simple model of arbitration championed by Judge Selya is no longer demanded by many parties knowledgeable and experienced in arbitration and the choice of arbitral processes.

The trend toward judicialization of securities arbitration should be recognized as part of an overall market shift in arbitration models toward increasing demand for customized arbitration clauses. Part I of this Article describes this significant

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<sup>4</sup> NATIONAL ASSOCIATION OF SECURITIES DEALERS, SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE (1996) [hereinafter TASK FORCE REPORT]; see *infra* text accompanying notes 105-124.

<sup>5</sup> Bruce Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433 (1996).

<sup>6</sup> Early neutral evaluation ("ENE") involves an appointed "neutral" who is assigned to evaluate a case, inform the parties of the probable result and facilitate a potential settlement of the dispute. See David I. Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989).

<sup>7</sup> Selya, *supra* note 5, at 1451-53.

change in arbitration models away from the folklore type of arbitration championed by Judge Selya and toward use of a "contract model" that often results in so-called judicialized arbitration. In fact, securities arbitration's abandonment of folklore arbitration is in tune with a shift toward a more complex arbitration model dominated by party intent and market forces. Part II directly addresses the argument that securities arbitration has effectively become litigation and concludes that securities arbitration is sufficiently differentiated from conventional litigation. Part III analyzes the policies advanced by the increasing judicialization of securities arbitration and concludes that this shift in models is a positive development.

## I. SHIFTING ARBITRATION MODELS: FROM THE FOLKLORE MODEL TO THE CONTRACT MODEL

Perhaps the most difficult concept to understand about arbitration is its flexibility and creativity. Arbitrations lack a rigid, fixed model with one firm set of characteristics. Rather, there are many types of arbitration and each has special qualities. Reform of securities arbitration requires a sensitivity towards the following range of distinct arbitration models that presently exist.

### A. *Multiple Models of Arbitration*

#### 1. Folklore Arbitration

Folklore arbitration represents the most common denominator of the differing arbitration models. Judge Selya's image of arbitration probably falls within folklore arbitration. It is characterized by speedy, informal hearings and the following: (1) no evidence rules; (2) no discovery; (3) awards of an equitable nature that frequently ignore prevailing law; (4) no written opinion; (5) private hearings; and (6) "final" results with no right to appeal to the courts. For many, these traits are those that typically come to mind when attempting a settled definition of arbitration. In fact, however, arbitration of this type is increasingly less common; the disputants have demanded various changes in an overly simplistic and sometimes flawed model under attack as inadequate for administering complex

disputes.<sup>8</sup> I have labeled this type of arbitration "folklore arbitration" because these characteristics are probably what most arbitration outsiders think of when the word arbitration is used. In the common folklore, these traits aptly describe arbitration. In the debates about arbitration, folklore arbitration has taken on almost a mythic nature. Some mistakenly assume that all arbitration is folklore arbitration.

## 2. Judicialized Arbitration

Numerous types of arbitration now employ procedures which resemble those of litigation. It is not uncommon to see arbitration that includes: (1) motion practice; (2) application of substantive law; (3) awards that include findings of fact, conclusions of law and reasons; (4) substantial discovery; and (5) a degree of judicial review provided either by creation of an arbitral review panel or by an arbitration clause that calls for review of "errors of law." These features, of course, resemble conventional litigation.

Judicialized arbitration, however, falls short of a typical lawsuit in numerous ways by retaining an identity distinct from conventional litigation. First and certainly foremost, judicialized arbitration lacks a jury. The avoidance of a jury trial is one of the true characteristics of all arbitration. Parties who knowledgeably consent to arbitrate seek to opt out of decision-making by a jury. They often fear that the jury will interject a fact based sense of arbitrariness into their decisionmaking that will produce an unfair and potentially prejudicial result. Second, the arbitral hearing is likely to be informal, with little in the way of formal application of the rules of evidence. Even judicialized arbitration hearings do not resemble a trial because the rules of evidence do not exist in this context. Third, the hearing and the final result are likely to be private and not

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<sup>8</sup> See, e.g., *Gateway Technologies, Inc. v. MCI Telecommunications, Inc.*, 64 F.3d 993 (5th Cir. 1995) (two large corporations contract to arbitrate but provide that errors of law shall be subject to appeal); *Western Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258 (9th Cir. 1992) (corporation and securities firm contract for arbitrator to enter findings of fact and conclusions of law); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984) (corporate parties to international business transaction agree to arbitrate and direct arbitrator to make findings of fact and base award on such findings).

open to public scrutiny or criticism. These traits are the reasons that the parties have not chosen conventional litigation but, instead, selected a form of arbitration much different than folklore arbitration.

Particular attention should be given to the potentially high costs of judicialized arbitration. The trial-like characteristics of this more formal type of arbitration mean that those parties who select judicialized arbitration must be willing to spend more to achieve the particular advantages they seek. Judicialized arbitrations also are less timely than folklore arbitrations. The additional length of time taken to achieve the various judicial safeguards will be a factor in driving up costs. The fact that judicialized arbitration exists demonstrates that some firms are willing to pay more for what they perceive to be a higher quality of arbitration. The age-old adage that "you get what you pay for" applies in dispute resolution where some parties are very willing to spend more. Those parties who seek this judicialized form of arbitration desire accurate, informed results that are more in line with substantive law but still do not want a jury or the public scrutiny associated with trial.

### 3. Contract Model of Arbitration

Because consent to arbitrate is an essential element of arbitration, it may seem unusual and confusing to speak of a contract model of arbitration. Arbitration is the creature of contract. Nonetheless, recent Supreme Court cases and market demand illustrate the primacy of the contract model of arbitration in which arbitration takes on dispute resolution features selected by the contractual partners.<sup>9</sup> Judicialized arbitration is a reflection of the ascendancy of the contract model of arbitration. Some disputants will contract for arbitration that resembles litigation and select some of the features of the ordinary trial process. Others may prefer a low cost, "stripped-down" form of dispute resolution with no discovery whatsoever and an informal hearing. If folklore arbitration is something

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<sup>9</sup> See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

the contract parties want, there should be a legal means to supply for this market demand. Courts will typically uphold the will of the contract signatories and enforce their choice of a potential menu of procedural options. To the extent that arbitration exists, it is a reflection of contract and the meaningful, informed consent of the parties. Accordingly, it should not be surprising that the courts have looked to the desires of disputing contractual partners in allowing the increasingly customized arbitrations that exemplify the contract model of arbitration.

#### 4. Public Interest Model of Arbitration

An additional type of arbitration has been described by Professor Speidel as a public interest model of arbitration.<sup>10</sup> This variety of arbitration is regulatory in nature, with an administrative agency regulating its process. Securities arbitration is one example of public interest arbitration. Telecommunications arbitration is a second example.<sup>11</sup> While securities arbitrations are sponsored by the self-regulatory organizations ("SROs"), the Securities and Exchange Commission ("SEC") has statutory authorization to oversee and regulate the SROs.

The public interest model of arbitration is necessitated by market failure. Because arbitration is the creature of contract, government regulation will not typically need to be available in the arbitral process. Market theory holds that only where some substantial market failure exists should the government intervene. The degree of existing securities arbitration oversight by the SEC is due to the perception that the SROs need some public interest scrutiny in their own necessarily self-interested oversight of the self-regulatory process. Some oversight of the SROs by a public body fosters investor confidence.

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<sup>10</sup> Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1362-63 (1996) (calling for a "public" model of securities arbitration).

<sup>11</sup> See § 252 of Telecommunications Act of 1996, Pub. L. No. 104-104, 10 Stat. 66 (1996) (codified at 47 U.S.C.A. § 151 (Supp. 1997)) (calling for arbitration of disputes between companies that control local service and newer competitors who seek to use the network of the incumbent firm).

The SEC has statutory authority to influence securities arbitration. In the 1975 amendment to section 19 of the Exchange Act, the SEC was given the power to oversee proposed SRO changes in arbitration rules; proposed changes must be consistent with the Exchange Act to merit approval.<sup>12</sup> In addition, the SEC can "abrogate, add to, and delete from" any SRO rule in order to advance the investor protection policies of the Exchange Act.<sup>13</sup> This guarantee of regulatory power was one of the factors that led the *McMahon* majority to its pro-arbitration holding.<sup>14</sup>

The past and present degree of SEC public interest regulation of securities arbitration reveals an ongoing agency presence but little in the way of regulatory vigor. The quantum of securities arbitration regulation that exists stems from the changes made by the SROs that are often instigated by the Securities Industries Conference on Arbitration ("SICA").<sup>15</sup> The SEC had a direct role in the initiation of securities arbitration when, in 1976, it solicited public comment regarding the evaluation of a "uniform system of dispute grievance procedures for the adjudication of small claims."<sup>16</sup> Input from the public indirectly led the SEC to issue a report recommending new dispute resolution procedures involving broker-investor disputes.<sup>17</sup> Following *McMahon*, the SEC led a number of initiatives to improve the quality of arbitration in a new era involving a higher volume of more complex, multi-claim securities arbitrations. The director of the SEC Division of Market Regulation sent a thirteen-page letter to the SROs and SICA listing a wide variety of recommended changes to the code of

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<sup>12</sup> 15 U.S.C. § 78s(b)(2) (1975).

<sup>13</sup> *Id.* § 78s(c).

<sup>14</sup> *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987).

<sup>15</sup> The SICA was created in 1977 to study securities arbitration. It consists of representatives of the SROs, the Securities Industry Association, an industry trade association, and the public. The SICA makes periodic reports to the SEC. See generally Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 *FORDHAM URBAN L.J.* 483 (1996). The SICA was created to develop a uniform code of arbitration. See generally Constantine N. Katsoris, *The Level Playing Field*, 17 *FORDHAM URBAN L.J.* 419 (1989).

<sup>16</sup> *Settling Disputes Between Customer and Registered Brokers and Dealers*, Exchange Act Release No. 12,528, 9 SEC Docket 833, 834 (1976).

<sup>17</sup> *An Integrated Nationwide System for the Resolution of Investor Disputes*, Exchange Act Release No. 12,974 [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,807 (Nov. 15, 1976).



arbitration; these changes were subsequently approved by the SEC in 1989.<sup>18</sup> In 1993, the SEC approved changes in the Code of Arbitration which required arbitrators to describe the issues in controversy, the amounts claimed and the amount awarded.<sup>19</sup>

While the theory of SEC oversight of SRO activities appears plausible, the reality is a system that leaves any public interest regulation of securities arbitration largely in the hands of the SROs. The amount of SEC resources devoted to overseeing securities arbitration appears minimal.<sup>20</sup> The occasional comments or suggestions regarding securities arbitration by the agency do not represent much in the nature of true public interest regulation. The thorough study of securities arbitration done by the NASD Task Force is the type of work one might have expected from an agency devoted to regulating securities arbitration. Regulation of the SROs was, however, intentionally designed as a modest form of regulation.<sup>21</sup>

Accordingly, securities arbitration, while a variety of public interest arbitration, is far from the heavy-handed form of regulation that one associates with a regulated industry. The SEC oversight of the SROs appears to be a fairly weak form of public interest arbitration and one that relies on elements of judicialized arbitration to achieve the degree of self-regulation necessary to instill investor confidence.<sup>22</sup>

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<sup>18</sup> See Lipton, *Generating Precedent*, *supra* note 3, at 29. SICA responded to these recommendations by changing the Uniform Arbitration Code, and the SEC later approved these rule changes in 1989. Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc., NASD, and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Exchange Act Release No. 26,805 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,414 (May 10, 1989). These changes improved document discovery, made available the prehearing conference and redefined the distinctions between public and private arbitrators.

<sup>19</sup> 25 Sec. Reg. & L. Rep. (BNA) 1166 (Aug. 1993).

<sup>20</sup> Margaret Jacobs, *SEC Faces Criticism for Role in the Oversight of Arbitration*, WALL ST. J., Nov. 15, 1995, at C1.

<sup>21</sup> *Accord*, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 265 (1987) (Blackmun, J., dissenting) ("The Commission does not pretend that its oversight consists of anything other than a general review of SRO rules and the ability to require that an SRO adopt or delete a particular rule."); LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 643 (3d ed. 1995) ("[R]egulation of the *ethics* of an industry means a substantial degree of *self-regulation*, properly supervised by government.").

<sup>22</sup> See *infra* text accompanying notes 89-101.

Telecommunications arbitration is another example of public interest arbitration. Section 252 of the Telecommunications Act of 1996 calls for arbitration of the inevitable disputes between incumbent telephone companies that control local service and newer competitors who now may enter the market by using, for a fee, the network of the incumbent firm.<sup>23</sup> Under the Act, the parties to these interconnection disputes may seek arbitration from the state utility commissions. Such disputes are likely to be complicated and involve powerful parties and complex ratemaking issues within the special expertise of the state utility commissions. The use of arbitration to set compensation fees should keep such complicated matters from taking the time of the court system and take advantage of the subject matter expertise of the state regulatory agencies. The legislation is silent on the arbitration procedures that the state agencies will utilize. Presumably, states will make their own administrative rules governing the arbitration of interconnection disputes. State utility commissions will review the arbitration decisions to determine if the results are consistent with the legal standards of the Telecommunications Act.<sup>24</sup> The Act also permits an aggrieved party to sue in federal court to decide if the results of the arbitration and the state commission review are consistent with the Act. This procedure will put federal district judges in the unusual position of reviewing an arbitration for legal error; they will not be reviewing the private decisions of a contract arbitration.<sup>25</sup>

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<sup>23</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 252, 10 Stat. 66 (1996).

<sup>24</sup> *Id.* § 252(e)(6).

<sup>25</sup> This procedure is unlikely to be looked upon favorably by the already busy federal trial judges. Years ago the Supreme Court effectively washed its hands of vigorous judicial review of complicated ratemaking orders of administrative agencies. *See, e.g., Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

B. *Debunking Folklore Arbitration as the Unitary Arbitration Paradigm: Revisiting the Ambiguous History of the Federal Arbitration Act*

Many commentators, including Judge Selya, treat arbitration as though it is a constant, fixed process with a definite meaning. They point to arbitration as a consensual process with an expert arbitrator, little or no discovery, application of equitable principles, informal and speedy hearings, and results that are final. To be sure, these characteristics of the "folklore arbitration" still paint a fairly accurate picture of arbitration in general and securities arbitration in particular. Nonetheless, the arbitration paradigm set forth by these characteristics is presently crumbling. The NASD's adoption of some litigation procedures and the recommendations of the Task Force report illustrate that arbitration is not based upon a fixed, rigid set of characteristics.

One cannot fully comprehend the recent changes to judicialize arbitration without careful consideration of American arbitration history. The passage of the United States Arbitration Act in 1925 did not, in fact, at all mark the adoption of a firm, definite arbitration paradigm. Many ambiguities existed in the type of arbitration envisioned by the drafters of the Federal Arbitration Act ("FAA"). In fact, the following discussion demonstrates that the seeds of judicialized and contract models of arbitration are present in the legislative history of the FAA.

The primary goal of the 1925 FAA was to reject the doctrine of ouster and permit federal courts to compel and enforce agreements to arbitrate.<sup>26</sup> Under the notion of ouster, American courts refused to honor pre-dispute arbitration agreements that "ousted" the judiciary's jurisdiction to hear a civil dis-

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<sup>26</sup> See *Bills to Make Valid and Enforceable Written Promises for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions of Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on Judiciary, 68th Cong., 1st Sess. 6 (1924) [hereinafter 1924 Hearings]* (testimony of Charles L. Bernheimer, Chairman of Committee on Arbitration, Chamber of Commerce of New York, that proposed new legislation "would make arbitration a reality . . . would cause an agreement or contract in writing providing for arbitration to be binding upon the parties and an irrevocable proposition").

pute.<sup>27</sup> Pre-FAA custom permitted the revocation of predispute arbitration agreements.<sup>28</sup> The FAA was designed to abandon unequivocally the ouster and revocation reasoning and, instead, to effectuate the agreement of contractual parties to engage in a binding arbitral process.<sup>29</sup> The contract model was central to the basic concept underlying the passage of the FAA.

These goals were aimed solely at the federal courts. According to Professor Ian Macneil's exhaustive study of the FAA's background,<sup>30</sup> there is no support for any intent for the 1925 federal legislation to be applied by the state courts.<sup>31</sup> The chief sponsor of the bill, Julius Henry Cohen, made repeated references to the federal courts in his testimony and disclaimed any intent to "bludgeon" the legislation upon an unwilling state.<sup>32</sup> Despite this clear intent, the Supreme Court has confused the FAA's purpose by mistakenly holding that the intent of the Act was to force the states to apply the various principles embodied in the federal law.<sup>33</sup>

It is also clear that the FAA was intended to be applied to commercial transactions and that the parties intended to benefit from the provision for binding, unrevokable agreements to arbitrate were businesses. The parties sponsoring the original FAA were commercial businesses.<sup>34</sup> There was never any all-encompassing intent of Congress to fashion a universal arbitration law applicable to private individuals or consumers. The context of the FAA's background was one in which lawyers who represented business interests sought to pass a law enabling their clients to enjoy the benefits of arbitration. When referring to the beneficiaries of the Act, the American Bar

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<sup>27</sup> See, e.g., *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S.D.N.Y. 1915) ("a complete ouster of jurisdiction . . . is void in a federal forum").

<sup>28</sup> *Id.*

<sup>29</sup> See generally IAN MACNEIL ET AL., I FEDERAL ARBITRATION LAW § 5.1 (1995).

<sup>30</sup> IAN MACNEIL, AMERICAN ARBITRATION LAW (1992) [hereinafter AMERICAN ARBITRATION LAW].

<sup>31</sup> MACNEIL, AMERICAN ARBITRATION LAW, *supra* note 30, at 113-15, 117.

<sup>32</sup> 1924 Hearings, *supra* note 26, at 38, 40.

<sup>33</sup> See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The *Southland* decision is remarkable for its preemption holding that blatantly ignores legislative intent.

<sup>34</sup> See generally 1924 Hearings, *supra* note 26 (listing multiple firms sponsoring bill).

Association Committee that successfully shepherded the FAA through Congress made specific reference not to "citizens" but, instead, to "merchants."<sup>35</sup> Charles L. Bernheimer, Chair of the Committee of Arbitration of the New York Chamber of Commerce, began his 1924 testimony in favor of the bill by referring to "the business point of view" that underlaid his analysis.<sup>36</sup> Bernheimer also made frequent mention of "merchants" as those who would gain from the passage of the FAA.<sup>37</sup> The testimony of Julius Henry Cohen referred repeatedly to the benefits of the Act to businesses, merchants, shippers, and commerce.<sup>38</sup> No mention of individual consumers who might be covered by the Act exists in the legislative history of the FAA.

The relationship of substantive legal principles to the arbitration process was particularly unsettled at the passage of the FAA. The supporters of the legislation borrowed from a prior arbitration experience that permitted arbitrators to apply equitable principles as a basis for decision. Yet, the Act itself made specific reference to the "rights of the parties" as a basis for setting aside an award.<sup>39</sup> Use of the term "rights" within the FAA is indicative of the unsettled nature of the original American arbitration model. In the folklore arbitration model, legal rights have no role whatsoever—arbitrators use whatever norms they want when deciding disputes, and courts refuse to review for errors of law. In the folklore type of arbitration, the parties to an arbitration clause are opting out of the court

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<sup>35</sup> American Bar Ass'n Committee on Commerce, Trade and Commercial Law, *Legal Justification*, 11 A.B.A. J. 153, 156 (1925). Professor Macneil concludes that this article, published shortly after the passage of the Act, "was lifted almost verbatim from Julius Henry Cohen's brief submitted to the joint subcommittee [in 1924]." MACNEIL, *AMERICAN ARBITRATION LAW*, *supra* note 30, at 122.

<sup>36</sup> 1924 Hearings, *supra* note 26, at 6-7. Bernheimer testified that he represented the Importers and Exporters Association, the Merchant's Association of New York and 73 other businesses that endorsed the legislation leading to the passage of the FAA. 1924 Hearings, *supra* note 26, at 6-7.

<sup>37</sup> 1924 Hearings, *supra* note 26, at 7.

<sup>38</sup> 1924 Hearings, *supra* note 26, at 38-41; accord, Lionel S. Popkin, *Judicial Construction of the New York Arbitration Law of 1920*, 11 CORNELL L.Q. 329 (1926) ("Contracts between merchants or between others in the business world are . . . those contracts primarily which the legislature in passing the Arbitration Law wished to cover").

<sup>39</sup> 9 U.S.C. § 10(a)(3) (1994) (permitting vacating of award where there is "any other misbehavior by which the rights of any party have been prejudiced") (emphasis added).

system and seeking a "final" result from the arbitrator. If the FAA truly did adopt a folklore model of arbitration, why did its drafters provide explicit grounds for setting awards aside? And, why did the FAA drafters choose to give the arbitral parties "rights" that were to be of use in setting aside awards? The logical, plain meaning answer may be that the type of commercial arbitration envisioned by the Act's drafters was a process that enabled the parties to retain some legal rights that merited application by the arbitrator and the courts.

Whether these "rights" were to be procedural or substantive is an interesting question. To date, courts have given scant attention to the reference to "rights" in the FAA.<sup>40</sup> The folklore arbitration model, which posits that parties who consent to arbitration give up all legal rights and effectively opt out of the legal system, has no room whatsoever for legal rights. A few courts and commentators explain away the "rights" reference in the FAA by employing a procedural twist. Some decisions say that the arbitration must be fundamentally fair.<sup>41</sup> This approach construes the arbitral parties' rights as relating to a purely procedural, largely ambiguous and toothless "right" to a fair hearing.

Such a reading of the FAA is inconsistent with the intent of the drafters. Julius Henry Cohen was the chief spokesperson supporting the passage of the FAA.<sup>42</sup> Cohen explained the Act in a 1926 article published shortly after the legislation's pas-

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<sup>40</sup> See generally MACNEIL ET AL., IV FEDERAL ARBITRATION LAW, *supra* note 29, § 40.4.3 ("this catch-all provision [of § 10(a)(3)] has in fact caught very little over the years"). It is noteworthy that the thorough Macneil five-volume treatise covering federal arbitration law identifies no cases containing the "rights" language of § 10(a)(3). See Edward Brunet, *Arbitration and Constitutional Rights*, 72 N.C. L. REV. 81, 115-17 (1992) (plain meaning of "rights" in § 10(a)(3) of FAA implies constitutional rights).

<sup>41</sup> See, e.g., *Bell Aerospace Co. v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974) (arbitrator must "grant the parties a fundamentally fair hearing"); *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101, 104 (S.D. Ohio 1980) ("[c]ourts will set aside awards in which there is a procedural impropriety which denies a party fundamental fairness").

<sup>42</sup> While it has sometimes been assumed that Cohen drafted the legislation, his testimony supporting the bill praises the drafting and then asserts that "it is not my work." 1924 Hearings, *supra* note 26, at 15. W.H.H. Piatt, Chairman of the ABA Committee on Commerce, Trade and Commercial Law, testified in favor of the bill and stated that Cohen "has had charge of the actual drafting of the work." 1924 Hearings, *supra* note 26, at 10. Cohen did admit that "it is true I made the first draft." 1924 Hearings, *supra* note 26, at 15.

sage.<sup>43</sup> He made specific reference to the arbitral parties' holding of "rights."<sup>44</sup> He also referred to the court's task of ensuring that the parties to an arbitration receive arbitral rights.<sup>45</sup>

To date, this important piece of legislative history has been largely ignored by courts and underemphasized by commentators. In addition to challenging the folklore that arbitral parties have no rights, this important piece of history shows that arbitration was not intended to be entirely informal. Even in an informal setting the parties to an arbitration were intended to possess formal rights.

The impact of this historical reading of the FAA also challenges another of the myths perpetrated by the folklore model of arbitration, that of giving no judicial review in order to achieve swift and final arbitration. It is very unlikely that Julius Cohen foresaw that American judges would refuse to provide any review whatsoever of arbitration awards. Cohen testified that "it would be unjust to deny the right of appeal altogether," that trial judges should "safeguard the party whose rights have been substantially violated by the arbitrators," and that "to deny any right of appeal at all would be to take away a most important privilege and safeguard without a compensating gain."<sup>46</sup> The numerous grounds for vacating awards were carefully set out in the original legislation.<sup>47</sup> Some of these grounds were ambiguous and would permit courts to reinterpret the FAA in a more flexible manner consistent with the original history and spirit of the Act.

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<sup>43</sup> Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

<sup>44</sup> Cohen & Dayton, *supra* note 43, at 274 (referring to the arbitral participants as having "rights," a "right of appeal" and "rights" to be "safeguard[ed]" during the arbitration hearing).

<sup>45</sup> Cohen & Dayton, *supra* note 43, at 274 ("[I]f arbitrators' awards are subject to mistake and other human frailties, as necessarily they must be, it is obvious that review solely by a judge setting a motion term will not suffice to safeguard the party whose rights will have been substantially violated by the arbitrators.").

<sup>46</sup> 1924 Hearings, *supra* note 26, at 37; Cohen & Dayton, *supra* note 43, at 274.

<sup>47</sup> United States Arbitration Act §§ 11-12 (recodified at 9 U.S.C. § 10(a) (1994)).

These points challenge the concept of "folklore arbitration" that arbitration results are final. It appears that even the most ardent of the supporters of the original FAA had a distinct role in mind for the courts.

Whether courts should consider substantive law when reviewing arbitral awards is a much more difficult question than most commentators and courts presently are willing to concede. Today we often hear the slogan that courts will not review awards for mere errors of law.<sup>48</sup> Yet, arbitration awards in general, and securities arbitration in particular, often involve detailed questions of statutory interpretation. It is noteworthy that Julius Cohen was skeptical of using arbitration for the resolution of complicated statutory disputes:

[Arbitration] is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. Speaking generally, it is a proper remedy for the determination of those classes of disputes which arise day by day in the common experience of the disputants and the individuals to whom the dispute is to be referred.<sup>49</sup>

Cohen's unambiguous assertion should give pause to those who wish to expand arbitration to all manner of disputes and to divest the courts of any review function whatsoever.

Language within the Supreme Court landmark cases that have expanded arbitration exhibit an understandable concern that the limited review function of courts should include some evaluation of whether an award is inconsistent with a statute. Even *McMahon*, perhaps the high water mark of modern arbitration, contained this intriguing rationale for arbitrability of securities disputes:

[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. . . . [T]here is no reason to assume at the outset that arbitrators will not follow the law; [and] although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute.*<sup>50</sup>

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<sup>48</sup> *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982) (courts must confirm arbitration awards despite "erroneous findings of fact or misinterpretation of law"), *cert. denied*, 459 U.S. 1200 (1983).

<sup>49</sup> Cohen & Dayton, *supra* note 43, at 281.

<sup>50</sup> 482 U.S. 220, 232 (1987) (emphasis added).



The literal impact of this language would require a court to assess whether a securities arbitrator has complied with the various securities statutes applicable to the dispute.

Any instincts to ignore the above language seemingly endorsing a model of judicialized arbitration should be put to rest by the *Gilmer v. Interstate/Johnson Lane Corp.* decision.<sup>51</sup> The *Gilmer* opinion, which required the arbitration of Age Discrimination in Employment Act claims, quoted the above *McMahon* language favorably and used its judicial review reference to ensure that arbitrators comply with the ADEA as an explicit rationale.<sup>52</sup>

Nonetheless, lower courts have completely ignored these passages from *Gilmer* and *McMahon* to require that courts ensure that statutory rights are applied properly by arbitrators. The myth of folklore arbitration has caused contemporary courts to disregard the above referenced language of *McMahon* and *Gilmer*. Most judges, like Judge Selya, assume that arbitration means minimal or no judicial review and, despite the admonitions of *McMahon* and *Gilmer*, avoid any requirement that judges serve as guarantors of any particular statutory rights.

The power of folklore arbitration model is considerable. Folklore arbitration has survived a legislative history that fails to support it. It has also caused modern judges to ignore the Supreme Court's hint that judicial review of arbitration preserves statutory rights, and to lose sight of the plain meaning of the FAA and its reference to the "rights of the parties."

The relevance of the dubious folklore arbitration model to securities arbitration reform is considerable. Reform of securities arbitration appears premised upon a feeling that the folklore model is inappropriate for securities arbitration participants, and that, instead, a regulatory public interest model using features of judicialized arbitration should be implemented. The rejection of folklore arbitration is entirely appropriate. Folklore arbitration is largely a myth and is not supported by

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<sup>51</sup> 500 U.S. 20 (1991).

<sup>52</sup> *Id.* at 32 n.4.

an explicit legislative history or a carefully worded statute. There is good reason for the Task Force and its supporters to have abandoned the folklore arbitration model.

C. *The Contract Model of Arbitration and Judicialization by the Application of Law Clause*

In the folklore model of arbitration, the arbitral signatories contracted to a definite, firm process and tinkered minimally apart from agreeing to arbitrate. Professor Speidel has made a very important contribution to arbitration theory by arguing that the courts and commentators have given too little consideration to the legitimacy of investor consent to arbitration.<sup>53</sup> According to Professor Speidel, investor contracts to arbitrate before the NASD amount to contracts of adhesion that lack consent.<sup>54</sup>

Contract is central to the Speidel position and to arbitration theory. Without a valid agreement to arbitrate, arbitrations can not and should not occur. Agreements that purport to call for arbitration following a contractual process largely lacking in consent are suspect. Arbitral organizations such as the NASD, resting upon a shaky consensual process, are probably wise to adopt judicial procedures. Such procedures are more familiar to the typical "rookie" litigant investor who may bring a securities claim against a broker. Judicialized arbitration possesses a visceral sense of fairness that should help to achieve a perception of equitable treatment that is essential to investor confidence.

In contrast to alleged agreements to arbitrate contained in boilerplate contracts between brokers and customers, the arbitration clause used in balanced transactions between equally sophisticated parties is often much different. Much of the demand for judicialized arbitration comes from the parties themselves. Corporate America spends billions of dollars each year to get quality "preventative law" legal advice. Well-run businesses seek to follow the law in order to decrease the risk of

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<sup>53</sup> Speidel, *supra* note 10, *passim*.

<sup>54</sup> Speidel, *supra* note 10, at 1337 ("securities arbitration is located on the dark side of the arbitration coin, since the contract to arbitrate is essentially a contract of adhesion").

liability losses. Not surprisingly, some businesses may desire to use arbitration to achieve a quicker and private result but fear the type of lawless juror-like outcomes that will often characterize inscrutable arbitration awards. These firms have long opted to write an arbitral contract with an application of law clause—a clause requiring the arbitrator to apply substantive legal principles in deciding the dispute.

Judge Selya acknowledges this development but criticizes court enforcement of such rational bargains as mistaken efforts to judicialize arbitration.<sup>55</sup> Increasing use of the application of law clause, however, is entirely understandable. Businesses want to avoid risk and to achieve predictability in their transactions. The application of law clause provides a means to take advantage of some of the features of arbitration and to avoid the potential arbitrariness that characterizes the folklore model of arbitration.

Businesses that opt for the application of law clause are, of course, opting to spend more on their arbitral process. Courts should enforce such clauses by agreeing to review the awards to effectuate the will of the parties. Indeed, some firms choose to draft their arbitration clauses to provide specifically that “the courts will review the award for legal error.”<sup>56</sup> This type of clause achieves the same result as the application of law clause. Under the contract model of arbitration, the courts must enforce arbitral bargains.

Existing decisions demonstrate that courts will provide review of arbitrations where the parties so provide. *Gateway Technologies v. MCI Telecommunications*<sup>57</sup> illustrates the power of the application of law clause. There the court of appeals followed the parties’ instruction to review for “errors of law,” and vacated a \$2,000,000 punitive damage award. The arbitration clause provided that the parties would “negotiate in good faith any disputes” and that, if negotiations failed to resolve differences, binding arbitration was to occur “except that errors of law shall be subject to appeal.”<sup>58</sup> The arbitra-

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<sup>55</sup> Selya, *supra* note 5, at 1455.

<sup>56</sup> See, e.g., *Gateway Technologies, Inc. v. MCI Telecommunications, Inc.*, 64 F.3d 993 (5th Cir. 1995); *Fil et Cables d’Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984).

<sup>57</sup> 64 F.3d 993 (5th Cir. 1995).

<sup>58</sup> *Id.* at 995

tion clause was part of a commercial contract calling for Gateway to furnish, install and maintain the technology and equipment needed for inmates at Virginia corrections institutions to make automated collect telephone calls. The trial court rejected MCI's effort to set aside the award, reasoning that its review would not require "a scrutiny as strict as would be applied by an appellate court reviewing the actions of a trial court."<sup>59</sup> Instead, the district judge reviewed "under the harmless error standard, but with due regard for the federal policy favoring arbitration."<sup>60</sup>

The *Gateway Technologies* decision is predicated upon the contract model of arbitration. While the nature of judicial review on suits to vacate arbitral awards is normally very narrow,<sup>61</sup> the Fifth Circuit viewed this particular arbitration clause as expanding judicial review. The opinion went out of its way to acknowledge the position of the trial judge, who was clearly in favor of settling what he thought was an ill-fated effort by the parties to unnecessarily judicialize arbitration.<sup>62</sup> The trial judge accused the parties of having "sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review." Citing and quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>63</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>64</sup> and *First Options of Chicago v. Kaplan*,<sup>65</sup> the Fifth

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<sup>59</sup> *Id.* at 996.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) (courts to set aside arbitral awards "only in very unusual circumstances"); *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 84 F.3d 772, 774 (5th Cir. 1996) ("Our review of the arbitration award itself is very deferential, and we should set aside that decision only in narrow circumstances."); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) ("review of an arbitration award is extraordinarily narrow").

<sup>62</sup> *Gateway Technologies v. MCI Telecommunications*, 64 F.3d 993, 997 (5th Cir. 1995).

<sup>63</sup> *Id.* at 996 (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (Supreme Court articulates a contract driven model of arbitration because to ignore parties' contract "would be quite inimical to the FAA's purpose of ensuring that private agreements to arbitrate are enforced according to their terms") (emphasis added).

<sup>64</sup> *Id.* (quoting *Mastrobuono v. Shearson, Lehman & Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995), quoting *Volt*, 489 U.S. at 479 (Supreme Court stresses contract model of arbitration by suggesting that "arbitration under the [FAA] . . . is a matter of consent, not coercion, and the parties are generally free to structure

Circuit placed itself clearly in the camp of those who view arbitration as a model of contract or party choices and rejected the trial court's effort to adhere to arbitration as a static, folklore paradigm.

The Supreme Court has repeatedly acknowledged the validity of honoring the parties' intent in their agreement to arbitrate. *Volt* represents an unequivocal endorsement of the contract model of arbitration. In *Volt*, the Court construed the FAA to "ensur[e] that private agreements to arbitrate are enforced according to their terms."<sup>66</sup> The *Volt* decision permitted the parties' insertion of an expansive choice of law clause to include implied reference to California arbitration law that permitted a stay of arbitration pending the conclusion of litigation. Two 1995 Supreme Court cases echoed *Volt*'s penchant for private ordering. In *Mastrobuono*, the Court upheld an arbitrator's award of punitive damages by relying on party intent. *Mastrobuono* pointed to the arbitration clause's reference to the use of NASD procedures and the ability of the arbitrator to award punitive damages, which was clearly set forth in the NASD Arbitrator's Manual. *Mastrobuono* firmly followed *Volt* by reasoning that "the parties are generally free to structure their arbitration agreements as they see fit."<sup>67</sup> *First Options of Chicago* supported this reasoning. By stating that "the basic objective in this [arbitration] area [is] . . . to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,'"<sup>68</sup> the decision clearly stands on the contract model foundation.

Several other federal decisions take the position that a court should honor the desires of the parties to judicialize arbitration. For example, in *Western Employers Ins. Co. v. Jefferies & Co., Inc.*,<sup>69</sup> the Ninth Circuit overturned a trial court's petition to vacate a NASD arbitral award in which the

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their arbitration agreements as they see fit").

<sup>65</sup> *Id.* at 996-97 (quoting *First Options of Chicago v. Kaplan*, 115 S. Ct. 1920, 1925 (1995) ("the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms"))).

<sup>66</sup> *Volt*, 489 U.S. at 479.

<sup>67</sup> *Mastrobuono*, 115 S. Ct. at 1216.

<sup>68</sup> *First Options of Chicago*, 115 S. Ct. at 1925.

<sup>69</sup> 958 F.2d 258 (9th Cir. 1992).

panel ignored the parties' agreement that they enter findings of fact and conclusions of law. The investor, an insurance company, authorized its broker to invest up to \$20 million. At the investor's request, the broker agreed to alter the standard form arbitration agreement to require the arbitrators to supplement the award with findings of fact and conclusions of law. The award failed to include findings and conclusions. The Court of Appeals for the Ninth Circuit based its decision on the panel's failure to arbitrate consistent with the conditions set by the arbitral parties,<sup>70</sup> and concluded that the panel's refusal to follow the parties' instructions amounted to action exceeding the panel's authority under section 10(a)(4) of the FAA.<sup>71</sup> *Western Employers* is of particular interest because it involved a party selection of a judicialized form of arbitration in a securities arbitration setting. It stands as authority for the proposition that knowledgeable parties to a securities arbitration may desire trial-like procedures and illustrates that a brokerage firm will contract for judicialized arbitration when faced with demand from an important customer.

Similarly in *Fils et Cables d'Acier Lens v. Midland Metals Corp.*,<sup>72</sup> the trial court upheld the parties' desires that the arbitrator "shall make findings of fact and shall render an award based thereon," and that the trial court, when determining whether to confirm the award, "shall have the power to review (1) whether the findings of fact rendered by the arbitrator are . . . supported by substantial evidence, and (2) whether as

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<sup>70</sup> *Id.* at 262 ("the NASD panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement").

<sup>71</sup> 9 U.S.C. § 10(a)(4) (1994). The *Western Employers* court was not completely impressed with the ability of the parties to contract freely for judicialized arbitration. In dictum, Judge Nelson observed that the use of findings of fact and conclusions of law would not change the nature of court review of arbitral awards. 958 F.2d at 261. Citing *Local Joint Executive Bd. v. Riverboat Casino, Inc.*, 817 F.2d 524 (9th Cir. 1987), the *Western Employers* decision reasoned that it would not alter the otherwise deferential standard of review of awards even where findings reveal that the arbitrator had misapplied the law. *Western Employers*, 958 F.2d at 261. This reasoning is hardly startling. Findings of fact and conclusions of law are routine in labor grievance arbitration. Systematic and enhanced judicial review of such findings has long been rejected. See, e.g., *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982) ("award will not be vacated because of erroneous findings of fact or misinterpretations of law").

<sup>72</sup> 584 F. Supp. 240 (S.D.N.Y. 1984).

a matter of law . . . the award should be affirmed, modified or vacated."<sup>73</sup> *Fils* analyzed the issue as one controlled by contract principles—the court viewed the arbitration as “wholly dependent upon agreement.”<sup>74</sup> The *Fils* decision also reasoned that the arbitral parties possessed the contractual power to bind the court “absent a jurisdictional or public policy barrier.”<sup>75</sup> The court found no violation of public policy because the task of reviewing the arbitrator’s findings is “clearly a far less searching and time-consuming inquiry than a full trial.”<sup>76</sup> *Fils* also supports the contract model of arbitration in a noteworthy factual context. The parties were two businesses involved in a multinational business transaction who entered into an informed, arm’s length agreement to use a type of judicialized arbitration.

*Collins v. Blue Cross Blue Shield of Michigan*<sup>77</sup> also supports the parties’ agreement to judicialize arbitration by contracting for a greater scope of judicial review. In *Collins*, the arbitrator upheld the plaintiff’s claim that she had been terminated from her non-union job, a violation of the Americans with Disabilities Act<sup>78</sup> and the Michigan Handicappers’ Civil Rights Act<sup>79</sup> and ordered reinstatement and back pay. The issue of the scope of review arose when the employer, Blue Cross, sought to have the award set aside. Although the district judge upheld the award, he did so by reviewing for error of law. The parties had agreed that the arbitrator’s decision could be reviewed “on the ground that the arbitrator committed an error of law.”<sup>80</sup> Citing *Volt* as creating “freedom of contract,”<sup>81</sup> the court applied the error of law standard of review despite noting that the plaintiff, a non-union employee, “did not bargain for this lowered standard.”<sup>82</sup>

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<sup>73</sup> *Id.* at 242.

<sup>74</sup> *Id.* at 244.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 916 F. Supp. 638 (E.D. Mich. 1995), *vacated for lack of jurisdiction*, 96 F.3d 1448 (6th Cir. 1996).

<sup>78</sup> 42 U.S.C.A. § 12,101 (1995).

<sup>79</sup> MICH. STAT. ANN. § 3.550(101) (Callaghan 1996).

<sup>80</sup> *Collins*, 916 F. Supp. at 640.

<sup>81</sup> *Id.* at 641.

<sup>82</sup> *Id.* at 642. This reference to a “lowered” standard of review appears erroneous. In *Collins* the contract called for a *heightened*, not lowered, scope of judicial

Not every decision is hospitable to the parties' desires to judicialize arbitration. In *Lapine Technology Corp. v. Kyocera Corp.*,<sup>83</sup> the district court refused to follow the arbitral parties' agreement that the court "shall vacate, modify or convert any award . . . where the arbitrator's findings of fact are not supported by substantial evidence or . . . where the arbitrator's conclusions of law are erroneous."<sup>84</sup> The arbitration was before a panel of the International Court of Arbitration of the International Chambers of Commerce and involved American and Japanese companies. The court reasoned that arbitral parties cannot change the provisions for review set forth in the FAA, and that a public policy in favor of quick and informal arbitration prevented the court from following the parties' intent to seek greater review. The *Lapine Technology* decision appears to ignore the Supreme Court cases that require courts to uphold the intent of the arbitral parties. Yet, the result in *Lapine Technology* is not surprising. The decision involved a prior ICC arbitration that had taken four years to run its course and contained a record with "hundreds, if not thousands, of exhibits."<sup>85</sup> Under these circumstances the court would be required to take considerable time to provide clearly erroneous review.

Similarly, in *Chicago Typographical Union No. 16 v. Chicago Sun-Times*,<sup>86</sup> Judge Richard Posner refused to give enhanced judicial review to a written opinion accompanying a labor arbitration award. Judge Posner's reasoning focused on federal jurisdiction, a subject that he viewed as beyond the parties' powers to create by contract. In his terms, the arbitral parties "cannot contract for *judicial* review of that [arbitral] award; federal jurisdiction cannot be created by contract."<sup>87</sup> Such reasoning appears specious. While it is undoubtedly true that the FAA does not itself create federal subject matter jurisdiction,<sup>88</sup> the *Chicago Typographical Union* decision seems

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review.

<sup>83</sup> 909 F. Supp. 697 (N.D. Cal. 1995).

<sup>84</sup> *Id.* at 702.

<sup>85</sup> *Id.* at 706.

<sup>86</sup> 935 F.2d 1501 (7th Cir. 1991).

<sup>87</sup> *Id.* at 1505 (emphasis added).

<sup>88</sup> See, e.g., *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 970 (9th Cir. 1981) (independent subject matter jurisdiction needed for federal court to



predicated upon federal subject matter jurisdiction, which was clearly present in a case based upon a federal question. Judge Posner also based his refusal to provide more than the customary deferential review standard upon a second point. He asserted that "[i]t would be a serious practical mistake . . . to subject the reasoning in arbitrators' opinions to beady-eyed scrutiny [because] it might discourage them from writing opinions at all."<sup>89</sup> Judge Posner reasoned that the process of writing arbitral opinions is desirable "because writing disciplines thought" and review of such opinions would create disincentives to their production.<sup>90</sup> This analysis is supportive of arbitral judicialization at least in the sense that Judge Posner appears to support arbitration opinion writing. It is only enhanced judicial review that Judge Posner opposes in the *Chicago Typographical Union*.

## II. SECURITIES ARBITRATION IS SUFFICIENTLY DIFFERENTIATED FROM LITIGATION

At present, NASD arbitration is sufficiently different than litigation. There are numerous important distinctions that merit attention and continue to cause the securities industry to opt for arbitration over trial. Consequently, Judge Selya's fear that judicialized securities arbitration and litigation have become mirror images is misplaced.

First and foremost, securities arbitrations lack a civil jury. In my opinion, this characteristic is the *raison d'être* of securities arbitration and probably the real historical reason for its very existence; the securities industry developed NASD arbitration primarily to avoid adverse civil jury trial results. Juries are likely to favor individual investors and be hostile to the securities industry. Securities arbitration permits the industry to avoid these prejudices and, as important, avoid the risk of potentially large punitive damage awards. While punitive damages are possible in securities arbitration, they are

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hear case brought under FAA to confirm arbitral award).

<sup>89</sup> *Chicago Typographical*, 935 F.2d at 1506.

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

awarded in less than one percent of all completed arbitrations.<sup>91</sup> The risk of punitive damages is far greater in the civil jury trial.<sup>92</sup>

Second, discovery is fully available and routinized in civil litigation but is, of course, deemphasized in securities arbitration.<sup>93</sup> At present, depositions occur rarely in securities arbitration. While document exchanges are increasingly the norm in arbitration, they occur (or fail to occur) without the judicial supervision and threat of sanction that occurs in civil litigation. In other words, there is much less discovery available in securities arbitration. The limited amount of discovery that occurs often misfires due to the lack of an authority figure needed to administer the discovery process.

Third, securities arbitration occurs privately, far from the public eye. The industry strongly favors this characteristic because public allegations of broker misconduct tend to depress investor confidence. To be sure, some general publicity regarding securities arbitration is available to the public. Journalists are able to learn of and report major securities arbitration results.<sup>94</sup> The narrow amount of SEC oversight of the

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<sup>91</sup> TASK FORCE REPORT, *supra* note 4, at 40.

<sup>92</sup> See MARK A. PETERSON ET AL., THE INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 8-9 (1987) (study of incidence of punitive damages finds that punitives were awarded in 2.5% of Cook County trials and 8.3% of San Francisco County verdicts between 1980 and 1984); William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REG., Sept.-Oct. 1986, at 33, 35 (study of federal product liability trials from 1982 to 1984 identifies 10 punitive damages awards out of 172 trials).

<sup>93</sup> See TASK FORCE REPORT, *supra* note 4, at 77-78 (describing discovery procedure in securities arbitration as one in which orders from the arbitrator are essential to obtain depositions under "fairly narrow circumstance"); SICA, ARBITRATOR'S MANUAL 10 (1992) (referring to the existence of a "traditional reservation about the overuse of depositions in arbitration"); C. Edward Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 453 (1987) ("discovery is available in arbitration proceedings; it is just more limited than in full-blown litigation"); Seligman, *supra* note 3, at 352 (describing status of discovery in securities arbitration to be one in which "[d]epositions for discovery purposes are discouraged and are recommended only to preserve testimony").

<sup>94</sup> The *Wall Street Journal* appears to regularly publicize important developments in arbitration. See, e.g., Jacobs, *supra* note 3; Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Dealt with a Sex Bias Case*, WALL ST. J., June 9, 1994, at A1; Deborah Lohse, *NASD Rule for Damages Is Criticized*, WALL ST. J., Feb. 3, 1997, at C1.

NASD<sup>95</sup> guarantees that major developments in securities arbitration receive some public airing. Nonetheless, the individual securities arbitrations remain essentially private affairs with little public awareness. Unlike conventional trials, securities arbitrations are essentially private.

Fourth, an NASD arbitration ends silently without written opinions or findings. The NASD now requires awards to state the issues covered.<sup>96</sup> Yet, this change is marginal. Awards remain inscrutable documents that give the losing party no idea whatsoever of the basis for decision. A statement summarizing the issues in an arbitration is a far cry from a statement of reasons. The arbitration loser wonders why the loss occurred and whether the arbitrators really understood the issues presented.

Fifth, securities arbitration remains lawless. The arbitrator need not apply substantive legal principles. The old "manifest disregard" of the law<sup>97</sup> standard appears close to dead.<sup>98</sup> We now hear the repeated refusals of appellate courts to review for "mere error of law."<sup>99</sup> While securities arbitration surely operates in the "shadow of the law," it is clear that the arbitrators need not apply law. This is a characteristic that may operate to the detriment of the securities industry. In my experience, arbitrators may well want to "give the investor something for his trouble" even when a substantive legal failure of the claimant to prove a *prima facie* case has occurred.

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<sup>95</sup> See *supra* text accompanying notes 11-18.

<sup>96</sup> NASD, CODE OF ARBITRATION PROCEDURE § 41(e) (1995) (award shall contain "a summary of the issues").

<sup>97</sup> See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

<sup>98</sup> See, e.g., Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241 (1993) (noting that no appellate court has ever used manifest disregard to uphold the vacating of an award); *Chameleon Dental Prods., Inc. v. Jackson*, 925 F.2d 223, 226 (7th Cir. 1991) (court of appeals refuses to apply manifest disregard standard and asserts "we have consistently held that the exclusive grounds for vacating or modifying a commercial arbitration award are found in § 10 and § 11 of the Arbitration Act").

<sup>99</sup> See, e.g., *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280 (9th Cir. 1982); *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992) (court will not set aside award merely because of erroneous application of law or erroneous fact-finding).

Sixth, despite the criticism of alleged "collateral litigation,"<sup>100</sup> the results of arbitration in general and securities arbitration in particular remain close to final. Awards are almost impossible to set aside. Courts have clearly drawn the line in refusing to set aside awards. Professor Speidel is correct in asserting that "finality is a core ingredient of arbitration."<sup>101</sup> Finality is and must be a contrasting characteristic of arbitration as compared to litigation. Yet, it is fair to say that arbitral awards are just as final today as they were ten and even twenty years ago.

To summarize, securities arbitration is grossly different than litigation. The Hotelling Principle, which posits that competitive firms will tend to offer very similar products,<sup>102</sup> has no real applicability to the present state of competition that exists between conventional litigation and securities arbitration. Judge Selya is correct in identifying that the Task Force Report and NASD have urged adopting features that have long been characteristics of litigation. Yet, these changes exist only at the margin of securities arbitration and do not change the core of a process that, while laden with some features of litigation, is still largely an arbitral process. If securities arbitration had collapsed into a form of litigation, the industry would not continue to use arbitration and the Arbitration Department of the NASD would have already been disbanded. No such event has occurred.

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<sup>100</sup> "Collateral litigation" refers to litigation related to the subject of a dispute being arbitrated. Collateral litigation is criticized by the Task Force. See TASK FORCE REPORT, *supra* note 4, at 23-25 (describing practice of NASD member firms seeking court relief based on eligibility rule or limitations after case submitted to arbitration but before award).

<sup>101</sup> Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 151, 191 (1987). The theory underlying arbitral finality is that the disputants prefer a final decision rather than an appellate court's second guess. See Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L.J. 667, 676 (1927).

<sup>102</sup> See Selya, *supra* note 5, at 1450.

### III. JUDICIALIZATION OF SECURITIES ARBITRATION ADVANCES IMPORTANT POLICIES

#### A. *Arbitration Discovery Enhances Arbitration Results*

Truth is the major goal in any system of adjudication,<sup>103</sup> including arbitration. If securities arbitration cannot reach outcomes that are accurate, justice is frustrated and investor confidence, a necessary factor in any successful market, is reduced.

The availability of discovery is essential to reaching accurate results in any dispute resolution context. Disputants need information to sort out the strengths and weaknesses of their own claims and those of their adversary. Arbitrators also need discovery. Without the sufficient evidence that flows from discovery, arbitrators are unable to achieve accurate results. Economists posit perfect information in order for decision makers to achieve efficiency. While perfect information exists in a heuristic assumption, a degree of partially complete information that stems from some discovery is the real world equivalent. Economic theory supports some discovery in arbitration, at least enough discovery up to the point where the costs of discovery exceed the benefits. Complex disputes simply need information to reach acceptable results.

This positive view of arbitration discovery is shared by Professor Joel Seligman. He has asserted that "discovery is the key to securities arbitration"<sup>104</sup> and reasons that effective discovery increases the probability of settling investor claims against brokers. Put differently, an arbitration system that bars discovery would force most claims to hearing because the disputants would be unable to compare the merits of their own

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<sup>103</sup> See RONALD DWORKIN, A MATTER OF PRINCIPLE 72-74 (1905) (accurate results are an important feature of dispute resolution); Geoffrey Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153, 167-71 (1986) (pursuit of a "right outcome" in litigation is a characteristic of legitimacy); Robert Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 1-3 (1974) (accurate results constitute a litigation value representing "good result efficacy").

<sup>104</sup> Seligman, *supra* note 3, at 355.

case to that of their opponent. Precluding any discovery would result in unnecessary arbitral hearings and cause those cases that do go to hearing to reach inaccurate results.

At present, a modest amount of discovery is available in securities arbitration.<sup>105</sup> Document requests are routine. While depositions are, in practice, uncommon, they remain possible and are entirely within the discretion of the arbitration panel.<sup>106</sup> The Task Force Report sets forth a sort of standardization of arbitration discovery by calling for automatic disclosure of "essential documents."<sup>107</sup> Under this proposal, the parties would identify and voluntarily turn over to their adversary the documents that are routinely requested in investor claims against brokers.<sup>108</sup> The Task Force Report makes an additional discovery proposal that further judicializes discovery. By calling for earlier selection of panel chairs,<sup>109</sup> the Task Force has recognized that unmanaged discovery breeds problems—adversary attorneys will bicker about discovery if unsupervised. The panel chair's ability to use a firm hand in managing any discovery squabbles should go far to remove the complaints that securities arbitration discovery has become an overly contentious mirror image of the problems that have burdened conventional litigation. It is a small wonder that the narrow quantum of document discovery that has characterized securities arbitration has worked at all without anyone in effective charge of the process that inevitably produces a measure of conflict. There is reason to be critical of the existing chaotic and unsupervised discovery process in securities arbitration. More, not less, discovery is needed, and the Task Force discovery proposals, while useful, could have gone even farther to routinize arbitration discovery that is shown to be essential to a party.

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<sup>105</sup> See TASK FORCE REPORT, *supra* note 4; Fletcher, *supra* note 93; Seligman, *supra* note 3;

<sup>106</sup> See, e.g., SICA, *supra* note 93, at 10 ("[T]he effective use of discovery tools such as depositions rests in the careful exercise of judgment by the arbitrators.").

<sup>107</sup> TASK FORCE REPORT, *supra* note 4, at 62. The disclosure should occur within 45 days of the filing of the respondent's answer. TASK FORCE REPORT, *supra* note 4, at 62.

<sup>108</sup> TASK FORCE REPORT, *supra* note 4, at 82-83.

<sup>109</sup> TASK FORCE REPORT, *supra* note 4, at 86.

## B. *Written Arbitration Opinions Improve the Quality of the Arbitration Process*

As the *Gateway Technologies*<sup>110</sup> decision shows, it is increasingly common for predispute arbitration clauses between sophisticated parties of equal bargaining power to require the arbitrators to include findings of fact, conclusions of law and reasons in their awards. Such written opinions advance the legitimacy of the arbitral process. An all too typical award that omits reasons and reveals only a one sentence result is completely inscrutable; it is insulting, puzzling and insensitive to the losing party. Every arbitration loser would like to know why he or she has lost. Even the arbitration winner is curious to learn what proof or strategy caused the result.

A short written opinion with reasons will also foster public confidence in securities arbitration. The present inscrutable but available award smacks of an industry desire for secrecy. The present situation implies that the industry has something to hide. A publicly available, brief award with reasons will advance the public opinion of the process substantially.<sup>111</sup>

Written arbitration opinions are helpful to clients. The compliance officer of a securities firm that has lost an arbitration should be aware of the practices that led to an adverse result. Without such information liability risks continue to exist.

Written opinions also aid the decisionmaking process and thereby help the arbitrators. The need for a written decision should sharpen the process of decision and avoid any possibility of a rushed or "compromise" award.

A short written opinion stating reasons for a securities arbitration award would provide a more efficient means of the narrow judicial review that exists under the FAA.<sup>112</sup> While the FAA places severe limits on a party seeking to set aside an award and does not provide a general appeal, various grounds

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<sup>110</sup> 64 F.3d 993 (5th Cir. 1995).

<sup>111</sup> The enhanced public confidence in securities arbitration that would accompany adoption of a short written opinion with reasons constitutes a positive externality. A third party, the investor public, will benefit from this change.

<sup>112</sup> For discussion of the ambiguity in the legislative history of the FAA surrounding judicial review of arbitral awards, see *supra* text accompanying notes 39-46.

for setting aside awards exist.<sup>113</sup> If these grounds are to be taken seriously, as they must, some means of communication between the arbitrators and the judge who must try to deconstruct a particular arbitral experience are essential. A brief written award with reasons should greatly enhance the court's ability to assess the propriety of an effort to set aside an award. The availability of reasons will not make it any easier to set aside awards; the grounds remain narrow and are not changed by a procedure that merely calls for explanation.<sup>114</sup>

Written awards will also help create a valuable corpus juris of decisions. While not binding on subsequent arbitration, these publicly available decisions may prove helpful to subsequent arbitrators who may need guidance to reach the correct decisions.<sup>115</sup> They would also be of value to a brokerage house interested in restructuring past practices which have led to excessive liability. Future investors of means might also have the incentive to research whether particular firms employ undesirable business practices or, conversely, whether a particular firm chosen as a broker enjoys a generally positive record in customer claims against brokers.

Required written opinions should also help the common law growth and evaluation of securities laws. *McMahon* and its progeny have effectively removed a large number of disputes from our courts. Without written and publicly available expository opinions, securities regulation has the danger of not evolving and remaining unresponsive to new development and trends.<sup>116</sup> An evolving common law with publicly available

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<sup>113</sup> See 9 U.S.C. § 10(a)(1) to (5) (1994).

<sup>114</sup> See Katzler, *supra* note 3, at 185 ("requiring written opinions . . . would not create new avenues for appeal").

<sup>115</sup> See Lipton, *Generating Precedent*, *supra* note 3 (present system is incapable of generating helpful precedent); Lipton, *Mandatory Arbitration*, *supra* note 3, at 888 (availability of written opinions will aid decisionmaking process of arbitrators). The written opinions would not be binding on a particular arbitration; arbitration would remain a fact based adjudication focusing on the individual proof proffered. See SICA, *supra* note 93, at 19 ("arbitrators are not strictly bound by case precedent or statutory law").

<sup>116</sup> See Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 20-21 (1987) (stressing that written opinions help law evolve and grow and thereby make law more effective); Katzler, *supra* note 3, at 177 (emphasizing that lack of written opinions causes securities laws to remain static).



decisions is generally efficient because it can respond to the information presented to a decisionmaker and, correspondingly, is constantly able to adjust to change.<sup>117</sup> Written decisions help to "shrink uncertainty and clarify opinions by stimulating fuller elaboration of rights and duties."<sup>118</sup> Without the ability to respond regularly to changes, periodic expensive and far reaching law reform efforts are a less efficient means to guarantee accurate and up-to-date laws.

The Task Force Report takes a halfway position on written awards. The Task Force would mandate written opinions on awards dealing with statute of limitations issues<sup>119</sup> and require an award granting punitive damages to explain what portion of the award is compensatory or punitive.<sup>120</sup> If punitive damages are assessed, the losing party may require the arbitrators to prepare a written explanation of "conduct [giving] rise to the award."<sup>121</sup>

These Task Force proposals constitute a half-step in the right direction. The overall lack of consent that characterizes the alleged investor agreement to arbitrate means that one party to a securities arbitration lack much, if any, appreciation of the subtleties of the arbitral process. The investor who loses an arbitration is unlikely to accept an award without reasons. Reasons are the essence of a fair, efficient system of justice and should be made routine in securities arbitration.

### C. *Required Application of Substantive Law Would Improve Securities Arbitration*

The Task Force recommended a significant use of mandatory substantive law application when it required the arbitrators to apply the statute of limitations principles when dealing

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<sup>117</sup> See Lipton, *Mandatory Arbitration*, *supra* note 3, at 888 (present system that lacks written awards is "incapable of advancing the law regarding customer/broker relations when such advancements are warranted").

<sup>118</sup> Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011, 1025 (1986); see George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (common law has built in advantage of adjusting to change).

<sup>119</sup> TASK FORCE REPORT, *supra* note 4, at 30.

<sup>120</sup> TASK FORCE REPORT, *supra* note 4, at 44.

<sup>121</sup> TASK FORCE REPORT, *supra* note 4, at 44. This, however, is not the same thing as requiring a legal basis for the award.

with allegations that investor claims are time-barred.<sup>122</sup> The Task Force tied this use of legal rules to a written opinion by requiring the panel to issue a written statement with reasons for a decision to grant or deny a motion to dismiss on limitations grounds and mandating a "reference to the law on which the arbitrators relied on reaching a determination."<sup>123</sup>

This recommendation advances important policies. Application of firm rules dealing with the statute of limitations should promote a clearer understanding of the likely outcome prior to the time an investor claim is filed. Accordingly, rigid law application increases the information available regarding the probability of success and enhances the chance of settlement. Settlement is a major goal in arbitration, just as it is in conventional trial.

It is particularly interesting to highlight an intriguing footnote in the Task Force recommendation that the arbitrators be directed to decide limitations issues based on substantive law:

[A]lthough we recognize that arbitration generally is considered to be an equitable forum, we believe that arbitrators should consider applicable statutory and common law with respect to all matters as to which they must make decisions in the arbitration forum, not just statute of limitations issues.<sup>124</sup>

This note flirts with but fails to require the securities arbitrator to apply legal principles to decide matters presented. The note should have gone all the way to universally mandate a legal result in all situations. A segment of the Task Force probably supported such an extension because the note's language smacks of compromise with the flexible "*should consider applicable*" law rather than a more rigid "*must apply applicable*" legal norms.

The relationship of the application of law to securities arbitration's lack of meaningful investor consent justifies a more rigid position than that taken by the Task Force. Where two textile merchants agree to arbitrate in a setting in which they select a third merchant as the arbitrator—a situation not unlike that envisioned by the drafters of the FAA—the parties

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<sup>122</sup> TASK FORCE REPORT, *supra* note 4, at 31-32.

<sup>123</sup> TASK FORCE REPORT, *supra* note 4, at 32.

<sup>124</sup> TASK FORCE REPORT, *supra* note 4, at 31 n.51.

understand and expect an equitable result not bounded by substantive law. In contrast, the typical investor who signs a new account standard form contract with a brokerage house has little understanding of the meaning of the executed agreement to arbitrate. Lack of real consent to arbitrate is and remains the most serious problem underlying securities arbitration. To the degree that the investor has any expectation of possible future dispute resolution procedure, the reasonable investor would probably anticipate that the protections of legal principles would apply. A norm that requires the application of substantive rules would be consistent with rational investor expectations and, in a general sense, uphold the policy of meeting the intent of the parties.

## CONCLUSION

The judicialization of securities arbitration is well underway and, with the proposals of the 1996 Task Force Report, is gaining momentum. These changes are salutary and represent real improvement in the quality of securities arbitration.

The steps toward judicialization help create a more accurate and fair dispute resolution framework. Early appointment of panel chairs should yield a more efficient and symmetrical sharing of pre-trial information, which, in turn, should increase pre-hearing settlements by allowing the parties and their counsel a more informed vision of the dispute. Application of substantive limitations law should dispose of some cases by providing greater predictability of result, and is consistent with the intent of the substantive claims brought in arbitration. The availability of a written opinion in the small percentage of cases in which punitive damages are awarded seems only fair and advances legitimacy by giving the parties reasons for the award. An inscrutable award may help keep awards final, but it is a trouble spot in securities arbitration. The Task Force should have gone further and required a brief statement of reasons to accompany all securities arbitration awards.

In a general sense, we live in the day and age of the contract model of arbitration in which the parties bargain for particular arbitral procedures. The "folklore" model of arbitration is collapsing because many informed parties do not want

the jury-like risk of arbitrariness that can accompany grossly simplified arbitration. Instead, parties who are knowledgeable about arbitration can select the degree of informality desired. While judicialized features cost more, it appears that there is a real demand (and commensurate supply) for a more expensive type of arbitration. You get what you pay for in most ventures, including arbitration.

The lack of informed consent prevents the contract model from working its way into securities arbitration in the same way that contract bargaining is now working its way into the standard arbitration clause between two informed parties of relatively equal bargaining power. In securities arbitration there is no real consent to arbitrate and, on the part of the typical investor, no understanding of the nature of the arbitral process. Accordingly, the SRO must be a surrogate for the investor and, in a sort of public interest model of arbitration, create an arbitration that the rational investor would desire. In that regard, the direction of the Task Force toward adoption of judicialized features is consistent with the probable needs and intent of the rational investor.

Securities arbitration would be improved substantially by adoption of the Task Force proposals. Indeed, securities arbitration would improve even more greatly if steps toward judicialization beyond that of the Task Force recommendations were adopted. The rational investor would welcome (1) full application of legal principles, (2) an occasional deposition needed to flesh out the probable outcome of a potentially unnecessary hearing, and (3) a short written statement of reasons accompanying an award. Such procedures are already being adopted in arm's length negotiation of arbitration clauses between informed businesses. These safeguards are equally needed to improve securities arbitration and should be given serious consideration by the self-regulatory representatives of the public interest, the SROs.

Despite Judge Selya's protestations, there is little likelihood that securities arbitration will blend into litigation. Securities arbitrations still take place in private, far from public scrutiny. No jury is present to potentially increase awards greatly. Minimal discovery exists, and legal rights are only

rarely articulated and explicitly applied. In short, the Task Force changes, while important, do not transform securities arbitration into litigation.