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Employing Alternative Dispute Resolution: Working at Finding Better Ways to Resolve Employer-Employee Strife

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EMPLOYING ALTERNATIVE DISPUTE RESOLUTION: WORKING AT FINDING BETTER WAYS TO RESOLVE EMPLOYER-EMPLOYEE STRIFE

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> Employment litigation is a little like holy war and a lot like divorce. Both sides are so convinced their cause is just that compromise is possible only when litigants are convinced that trial will not produce justice. Delay favors the deep pocket. Before the settlement, legal fees mount, but the money holder gets an interest free loan. Not surprisingly, where liability insurers are the real party in interest, settlements generally occur only on the eve of trial after all possible income has been earned.
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> Artful lawyers fight to get their client the biggest piece of a dead relationship. The drama settles only in the final act when contestants fear a tragic conclusion.[1]

I. INTRODUCTION

The legal climate surrounding the resolution of employment related disputes in the United States is markedly changing.[2] Indeed, the widespread concern over this country's litigation explosion has in recent years spawned the search for a better way to resolve problems emanating from the employer-employee relationship. A large number of employers are endeavoring to transfer the adjudication of disputes pertaining to

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1. Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, *in* A.L.I.-A.B.A. COURSE OF STUDY IN ADVANCED EMPLOYMENT LAW AND LITIGATION, C779 A.L.I. A.B.A. 63, 65 (1992).

2. The traditional common law employment-at-will doctrine, which gave the employer the unfettered right to terminate employees who were not hired for a specified term, and thereby shielded employers from suit for wrongful termination, has given way to a number of statutory and judicial exceptions. *See generally* George H. Singer, *Wrongful Discharge: Issues and Answers* (1993) (unpublished manuscript on file with the author) (discussing the employment-at-will doctrine and its amelioration by various exceptions which include: exceptions based on public policy, implied in fact contract claims, various tort claims, and claims based upon a breach of implied covenants of good faith and fair dealing).

the employment relationship from the courtroom and its jury system to varying systems of *alternative dispute resolution* [hereinafter ADR].

ADR processes[3] offer unique mechanisms by which *existing* employment related disputes can be settled and the development of *future* disputes can be prevented.[4] Despite the fact that ADR is a generic term that has no generally accepted theoretical or abstract definition, it does have a fundamental premise upon which most agree: "[I]t is worthwhile both to reduce the costs of resolving disputes, however this can be accomplished, and to improve the quality of the final outcome."[5]

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3. Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424 (1986). The roster of ADR processes include: arbitration, mediation, conciliation, negotiation, and hybrid devices such as the mini-trial, mediation-arbitration, and the summary jury trial. *Id.*

4. Stephen A. Mazurak, *Alternative Dispute Resolution of Employment Claims: Exclusivity, Exhaustion, and Preclusion*, 64 U. DET. L. REV. 623, 623 n.1 (1987). Although there can be little doubt that the popularity of ADR has skyrocketed in recent years, it should be noted that the concepts of arbitration and mediation are age-old concepts which have existed since at least biblical times. *Id.*

5. Lieberman & Henry, *supra* note 3, at 425. A number of definitions of ADR have, however, emerged which may serve as the starting point for discussion:

> ADR is a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts.

Id. at 425-26. One of the leading critics of ADR, by contrast, has impliedly defined ADR to mean the creation of pressures or incentives that force settlement upon litigants to a dispute. Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985). *See generally* Honorable Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. 229 (1994). Judge Webb has recently opined, and this author fully agrees, that although the alternatives to the civil jury trial have a place in the resolution of disputes, such devices should not be forced upon parties through court-annexed ADR:

> The jury trial contemplates a definitive answer to a dispute—a clear winner. On the other hand, arbitration and mediation always look to compromise or middle ground and operate from what I believe to be a false premise—that the parties to a dispute are never either clearly right or absolutely wrong. Certainly, the civil jury resolution process encourages (but does not mandate) compromise by way of settlement when issues are not clear. In fact, most cases are settled. There is, however, the recognition by litigants that the case will have a clearly defined end when a jury decides the issue. Mandatory court-annexed ADR will, I believe encourage litigants to inflate initial demands when they recognize that "middle ground" is always the goal of ADR.
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> It appears at first blush that the function of both ADR and a civil jury trial is the resolution of a controversy. In a limited sense, that is true. In reality, however, ADR and civil jury trials (and so, traditionally, the courts) serve two very different and distinct functions. Alternative dispute resolution programs function solely to aid parties to resolve disputes. The courts, through the process of the civil jury trial, however, also protect the public interest, enforce public policy, educate and engage citizens in the democratic process, find the truth and protect principle. All of this is so much more than a resolution to an individual controversy. The traditional civil jury trial system assures the citizens of this country that each of them is entitled to have their rights vindicated—to have "their day in court." For that, there can be no "alternative."

Id. at 234.

Although no one ADR approach is the best for resolving all disputes, arbitration is the most widely accepted and utilized procedure for resolving issues that arise in the context of employment related disputes. Moreover, arbitration agreements are becoming increasingly commonplace and present viable solutions for dealing with problems which are peculiar to the workplace.[6]

There are many practical and legal considerations for both the employee and employer regarding the application of any ADR procedure to the resolution of employment related disputes. ADR provides *employers* with a procedure that is generally a cheaper and more efficient means by which to settle a dispute without the potential for the adverse publicity associated with litigation.[7] Additionally, management's credibility with its employees may be augmented by the utilization of equitable grievance or ADR procedures. Similarly, a grievance or ADR procedure often enables "employees" to acquire meaningful redress of their employment related disputes without being compelled to resort to potentially lengthy and costly litigation.

Regardless of each party's motivation or the ADR method employed, a number of conditions must exist in order for employees and employers to realize the potential benefits of the ADR process. For example, the employer must be assured that the resulting determination of the ADR procedure will preclude an employee from subsequently obtaining judicial relief for claims which stem from events arising from that same employment relationship. Stated differently, a crucial concern for employers is whether the employed ADR procedure will be treated by the judiciary as an employee's exclusive remedy or as merely an

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6. Alex Friend, *State Litigators Watching as Arbitration Zooms as Fastest Growing Legal Trend*, 7 WARFIELD'S BUSINESS RECORD 44, § 1, at 21 (Nov. 6, 1992). "'If there's any one class of potential litigation that has the incentive and the need to use arbitration agreements, it's employer-employee relationships, primarily due to the prolific nature of suits filed against companies . . . .'" *Id.* (quoting Leonard Pazulski, an attorney with Baltimore's Weinberg and Green). Indeed, the perception by employers that juries are unpredictable, frequently decide cases on the basis of sympathy rather than legal merit, and that jurors are essentially the peers of employees, fuels the fear of skyrocketing awards. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995).

7. It is significant to note that the employment-at-will doctrine may not apply to the relationship between employers and employees who agree to arbitrate their disputes: The employer's relationship with its employee specifically

> contemplated the use of the arbitration procedure as a means of settling employment-related disputes. This process necessarily alters the employment relationship from at-will to something else—some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship. If [the employee's] relationship was purely at-will, the arbitration procedure designed to interpret that employment relationship would serve no identifiable purpose.

Painewebber, Inc. v. Agron, 49 F.3d 347, 352 (8th Cir. 1995).

adjunct to the judicial process.[8] A prevailing employer will only experience a momentary victory if it is required to litigate the issue again in a judicial forum. Moreover, employees may question whether the ADR procedure has any real substance if the resolution of the employment related dispute will be determined solely by an employer controlled dispute resolution method. As such, prior to agreeing to waive any potential judicial action which may stem from the employment relationship, an employee will want to be assured that the ADR procedure will not be a "mere rubber-stamp of the employer's employment decisions and provides the employee with his 'day in court' before a neutral decision maker."[9] Additionally, employees need adequate assurance that a favorable ADR determination will be enforced by courts without the necessity of further adjudication.

A number of legal issues necessarily arise which go to the heart of the aforementioned concerns. If ADR processes are to be useful, other than as *ad hoc* anomalies, the concepts of exclusivity, exhaustion, preclusion, enforcement of statutory claims, and judicial review must be considered. This article, while not providing an exhaustive legal analysis, attempts to discuss each of these issues in a comprehensible fashion and highlights certain areas of concern.

II. DISCUSSION

A. EXCLUSIVITY

At common law, the courts were generally quite reluctant to specifically enforce an executory agreement to arbitrate.[10] Courts found a natural repugnance to arbitration agreements which essentially "ousted the jurisdiction" of the judiciary, which was the traditional forum for dispute resolution.[11] In order to overcome this common law aversion,

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8. Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245, 248 (1992). Indeed, any ADR mechanism utilized to resolve a labor dispute which does not result in a conclusive ruling only adds "to the expense, delay and disruption of the dispute resolution process. In such an environment, [ADR] would amount to a largely superfluous additional step which the parties would be likely to omit or not take seriously if they knew the outcome did not really matter." *Id.*

9. Joel Glanstein et al., Report of Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, *Labor Arbitration and the Law of Collective Bargaining Agreements*, 6 LAB. LAW. 805, 806 (1990).

10. Southland Corp. v. Keating, 465 U.S. 1, 13-14 (1984); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-21 (1924).

11. 5 AM. JUR. 2D *Arbitration & Award* § 36, at 547 (1962). An executory agreement to arbitrate present or future differences was not enforced by the courts under the common law. *Id.* § 71, at 572-73. *See* Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (holding that prospective extrajudicial agreements to arbitrate usurp the jurisdiction of the courts and are, therefore, illegal and unenforceable); Cocalis v. Nazlides, 139 N.E. 95, 98-99 (Ill. 1923) (finding an executory agreement to arbitrate to be void).

the federal and the majority of state governments have promulgated statutes which provide for the specific enforcement of arbitration agreements.[12] These statutory provisions generally provide for the specific enforcement of the duty of the parties to arbitrate, as well as provide for the vacation or enforcement of the arbitrator's award once it has been issued.[13] Most statutes provide the arbitrator with subpoena power and set forth other rules of procedure such as the selection of an arbitrator and discovery provisions.[14] Additionally, a number of United States Supreme Court decisions in the employment law arena are demonstrative

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12. *See* 9 U.S.C. §§ 1 to 208 (1994) (Federal Arbitration Act (FAA) (enacted in 1925)). *See also* ALA. CODE §§ 6-6-1 to -16 (1977); ALASKA STAT. §§ 09.43.010 to .080 (1994) (Uniform Arbitration Act); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1994) (Uniform Arbitration Act); ARK. CODE ANN. §§ 16-108-201 to -224 (Michie 1987 & Supp. 1995) (Uniform Arbitration Act); CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1996); COLO. REV. STAT. §§ 13-22-201 to -223 (1987 & Supp. 1995) (Uniform Arbitration Act); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1975) (Uniform Arbitration Act); D.C. CODE ANN. §§ 16-4301 to -4319 (1989) (Uniform Arbitration Act); FLA. STAT. ANN. §§ 682.01 to -.22 (West 1990) (Florida Arbitration Code); GA. CODE ANN. §§ 7-101 to -214 (Harrison 1989); HAW. REV. STAT. §§ 658-1 to -15 (1993); IDAHO CODE §§ 7-901 to -922 (1990) (Uniform Arbitration Act); ILL. ANN. STAT. ch. 710, para. 5/1 to 5/23 (Smith-Hurd 1992) (Uniform Arbitration Act); IND. CODE ANN. §§ 34-4-2-1 to -22 (Burns 1986) (Uniform Arbitration Act); IOWA CODE ANN. §§ 679A.1-.19 (West Supp. 1987) (Uniform Arbitration Act); KAN. STAT. ANN. §§ 5-401 to -422 (1991) (Uniform Arbitration Act); LA. REV. STAT. ANN. §§ 9:4201 to :4217 (West 1991); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West 1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1995); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West 1988) (Uniform Arbitration Act); MICH. COMP. LAWS ANN. §§ 600.5001 to .5035 (West 1987 & Supp. 1996); MINN. STAT. ANN. §§ 572.08-.30 (West 1988) (Uniform Arbitration Act); MISS. CODE ANN. §§ 11-15-1 to -37 (1972); MO. ANN. STAT. §§ 435.350-.470 (Vernon 1992) (Uniform Arbitration Act); MONT. CODE ANN. §§ 27-5-111 to -324 (1995) (Uniform Arbitration Act); NEB. REV. STAT. §§ 25-2601 to -2622 (1989) (Uniform Arbitration Act); NEV. REV. STAT. §§ 38.015-.205 (1986) (Uniform Arbitration Act); NEV. REV. STAT. §§ 614.010-.080 (1986) (Labor Arbitration Act); N.H. REV. STAT. ANN. §§ 542:1 to :11 (1974 & Supp. 1995) (General Arbitration Act); N.J. STAT. ANN. §§ 2A:24-1 to -11 (West 1987 & Supp. 1995) (General Arbitration Act); N.M. STAT. ANN. §§ 44-7-1 to -22 (Michie 1978) (Uniform Arbitration Act); N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980 & Supp. 1996); N.C. GEN. STAT. §§ 1-567.1 to .20 (1983) (Uniform Arbitration Act); N.D. CENT. CODE §§ 32-29.2-01 to -20 (Supp. 1995); OHIO REV. CODE ANN. §§ 2711.01 to .16 (Page 1992); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West 1993); OR. REV. STAT. §§ 36.300 to .425 (1995); 42 PA. CONS. STAT. ANN. §§ 7301 to 7320 (1982) (Uniform Arbitration Act); R.I. GEN. LAWS §§ 10-3-1 to -21 (1985 & Supp. 1995) (Arbitration Act); S.C. CODE ANN. §§ 15-48-10 to -240 (Law. Co-op. Supp. 1995) (Uniform Arbitration Act); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -38 (1987 & Supp. 1995) (Uniform Arbitration Act); TENN. CODE ANN. §§ 29-5-301 to -320 (Supp. 1995) (Uniform Arbitration Act); TEX. REV. CIV. STAT. ANN. §§ 171.001 to .023 (West Supp. 1996); UTAH CODE ANN. §§ 78-31a-1 to -20 (1992) (Utah Arbitration Act); VT. STAT. ANN. tit. 12, §§ 5651-5681 (Supp. 1995) (Vermont Arbitration Act); VA. CODE ANN. §§ 8.01-581.01 to -581.016 (Michie 1992) (Uniform Arbitration Act); WASH. REV. CODE ANN. §§ 7.04.010 to .220 (West 1992); W. VA. CODE §§ 55-10-1 to -8 (1994); WIS. STAT. ANN. §§ 788.01 to .18 (West 1981 & Supp. 1995); WYO. STAT. §§ 1-36-101 to -119 (1988) (Uniform Arbitration Act). Arbitration statutes that alter a party's substantive and procedural common law rights have been upheld against numerous constitutional challenges. *See* Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 279 (1932) (holding that arbitration of a maritime contract does not violate constitutional provisions vesting judicial power in constituted courts); Finsilver, Sill & Moss, Inc. v. Goldberg, Maas & Co., 171 N.E. 579, 583 (N.Y. App. Ct. 1930) (holding that arbitration does not violate due process).

13. *See, e.g.*, N.D. CENT. CODE § 32-29.2-02 (Supp. 1995) (setting forth proceedings to compel or stay arbitration); *id.* § 32-29.2-12 (vacating the arbitrator's award); *id* § 32-29.2-11 (providing for the confirmation of the arbitrator's award).

14. *See, e.g., id.* § 32-29.2-07 (providing for the issuance of subpoenas and discovery); *id.* § 32-29.2-03 (providing for the appointment of arbitrators).

of the fact that there is a judicial, as well as statutory, acceptance of arbitration as a means of resolving employment related disputes. As a result of these statutes and decisions, arbitration agreements in the realm of employment matters have increased in popularity and received extensive judicial attention.[15]

Courts will generally enforce written agreements between employees and employers that provide for final and binding arbitration of disputes which arise out of the employment relationship. Moreover, courts generally hold that the remedy afforded by the agreed upon arbitration procedure will be the exclusive remedy available for the resolution of that particular employment dispute. This rule generally applies with equal force to suits which sound in either contract or tort.[16]

The genesis of arbitration is its voluntariness. As such, a court must find that the parties have contractually agreed to arbitrate their dispute before it may find that a remedy provided by arbitration is exclusive.[17] Moreover, a court will not defer to arbitration unless there is affirmative evidence which establishes that the parties to the dispute expressly agreed that arbitration would be *the* method of dispute resolution.[18] The

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15. Mazurak, *supra* note 4, at 627. "The use of ADRs as an exclusive remedy has received much greater attention by courts, especially if the ADR provides for final and binding arbitrations." *Id.*

16. Glanstein et al., *supra* note 9, at 809. In most jurisdictions, arbitration will be enforced as the exclusive remedy if the type of injury alleged was contemplated by the parties as falling within the scope of the agreement to arbitrate. *Id. See* Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (involving intentional infliction of emotional distress); Lang v. Burlington N. R.R. Co., 835 F. Supp. 1104 (D. Minn. 1993) (dealing with wrongful termination); Carlson v. Hutzel Corp., 455 N.W.2d 335 (Mich. Ct. App. 1990) (involving constructive discharge). Additionally, most courts will resolve all doubts regarding the scope of an agreement to arbitrate in favor of arbitration. *See* Local Union No. 884 v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1352-53 (8th Cir. 1995); Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447, 1449 (9th Cir. 1986); Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 795 (Minn. 1995).

17. AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986). Generally, courts have declared statutes providing for "compulsory arbitration" that have the effect of coercing parties to submit to arbitration without any agreement or assent on their part to be unconstitutional. *See* Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 544 (1923) (depriving the parties of liberty and property without due process of law); *In re* Smith, 112 A.2d 625, 629-30 (Pa. 1955), *appeal dismissed*, 350 U.S. 858 (1955) (depriving parties of the constitutional right to a trial by jury).

18. Waldron v. Goddess, 461 N.E.2d 273, 274 (N.Y. 1984). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration [of] any dispute which he has not agreed to submit." *AT&T Technologies*, 475 U.S. at 648. *See Bridgestone*, 61 F.3d at 1352 (quoting *AT & T Technologies*, 475 U.S. at 648); Midwest Mech. Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748, 753 (5th Cir. 1986) (concluding that it is incumbent upon the court to determine whether the issues raised are within the reach of the agreement between the parties to arbitrate); Law Enforcement Labor Servs., Inc. v. City of Moorhead, 348 N.W.2d 405, 406 (Minn. Ct. App. 1984) (stating that the right to aribitrate is governed by contract and whether to arbitrate must be determined by the parties' intent, which is found in the language of the agreement); West Fargo Pub. Sch. Dist. v. West Fargo Educ. Ass'n, 259 N.W.2d 612, 617 (N.D. 1977) (opining that arbitration is a matter of contract and, as such, parties are only required to arbitrate those issues which they have contractually agreed to arbitrate).

agreement to arbitrate must be "clear, explicit and unequivocal and must not depend upon implication or subtlety."[19] Additionally, the Federal Arbitration Act (FAA)[20] and most state arbitration statutes require that any agreement to arbitrate be in writing in order to be enforceable.[21] Thus, arbitration affords parties the right to control the resolution of both present and prospective disputes arising out of the employment relationship by paying careful attention to the language of the agreement. The parties may narrowly limit arbitrability or, alternatively, may comprehensively provide that all disputes arising from the relation may be referable to arbitration.[22] The foregoing principles demonstrate that arbitrators derive their authority to resolve disputes solely from a voluntary agreement by both the employer and employee to have their grievance arbitrated.

The extent to which an arbitration agreement may be binding upon an employee and employer hinges upon the enforceability of the agreement to arbitrate. Since the question of a duty to arbitrate is contractual, the intent of the parties is dispositive and an employee is entitled to raise any and all of the typical contractual defenses when challenging the enforceability of an arbitration agreement.[23] Indeed,

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19. *Waldron*, 461 N.E.2d at 274 (citations omitted).

20. 9 U.S.C. § 2 (1994).

21. *See, e.g.*, N.D. CENT. CODE § 32-29.2-01 (Supp. 1995).

22. Schmidt v. Midwest Family Mut. Ins., 426 N.W.2d 870, 872 n.2 (Minn. 1988).

23. *See* 9 U.S.C. § 2 (1995) (arbitration agreements under the FAA are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"). The Supreme Court has reminded lower courts to "'remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (quoting Mitsubishi Motors Corp. v. Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)). Among the grounds for revoking a contract under state law—fraud, duress, mistake, unconscionability—the most relevant for employees attempting to avoid a compulsory arbitration agreement after signing it is the assertion that the contract is one of adhesion. Case law suggests, however, that agreements containing boiler-plate language requiring the arbitration of employment related disputes are not adhesion contracts simply because they are drafted by the more powerful party and required as a condition of employment. *See* Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993) (opining that adhesion contracts are not automatically void; the party seeking to avoid the contract must demonstrate its unconscionability); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992) (concluding that state law adhesion principles may not be invoked to bar the arbitration of disputes under the FAA); Adams v. Merrill Lynch, Pierce, Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989) (finding the boiler-plate nature of a contract not to be a sufficient basis for dissolving the terms of the parties' agreement to arbitrate); Lang v. Burlington N. R.R., 835 F. Supp. 1104, 1106 (D. Minn. 1993) (holding that the mere inequality of bargaining power is not grounds for finding the agreement to arbitrate to be unenforceable; there must be proof that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds for revoking any contract). *See generally* David v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 440 N.W.2d 269, 274 (N.D. 1989) (finding that where the language of a contract clearly and unequivocally provides for arbitration, the contract is not one of adhesion and it is no defense that it was not read). At least one court has even gone so far as to reject an employee's argument of adhesion when the employee was required to sign an arbitration agreement as a condition of continuing in the employment. *See* Griffith Lab. U.S.A., Inc. v. Pomper, 577 F. Supp. 903, 906

courts will generally scrutinize contractual defenses which challenge an alleged arbitration agreement with greater deference than defenses to other contractual provisions.[24]

In order for an arbitration agreement to be enforceable, the arbitration provision must generally be included in a contract that has not expired.[25] Consequently, an employee may often successfully avoid arbitration and institute judicial action if the agreement which provided for arbitration has expired.[26] This proposition holds true even if the employee remains employed by the same employer. It is also significant to note that the right to arbitration may be waived if not raised in a timely fashion.[27]

Employees may also contest the enforceability of an arbitration clause to a contract by challenging the mutuality of obligation. Although some jurisdictions recognize unilateral contracts, a fundamental tenet of contract law rests upon the view than an agreement is enforceable "only if both parties to the contract have agreed to legally bind themselves to the agreed upon terms. An agreement to arbitrate must therefore be equally binding upon the employer and the employee."[28]

B. EXHAUSTION

If the arbitration procedure utilized is nonexclusive, nonbinding arbitration for instance, courts will inevitably be confronted with the

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(S.D.N.Y. 1984), *aff'd*, 740 F.2d 954 (2d Cir. 1984) (ruling that contract was binding despite claim that threat of discharge rose to level of economic duress, making agreement void).

24. Waldron v. Goddess, 461 N.E.2d 273, 275-76 (N.Y. 1984) (stating that "the threshold for clarity of an agreement to arbitrate is greater than with respect to other contractual terms") (citing *In re* Doughboy Indus., 17 A.2d 216, 219 (N.Y. App. Div. 1962)).

25. *See* Coudert v. Paine Webber, Jackson & Curtis, 705 F.2d 78, 82 (2d Cir. 1983) (finding that there is no duty to arbitrate a grievance which arises after the termination of the contract between an employee and employer, even if the expired contract contained an arbitration clause). *See also* Local Union No. 884 v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1353 (8th Cir. 1995) (indicating that a dispute which arises after a contract has expired is subject to the arbitration provision in the expired contract only in very limited circumstances such as "where, under normal principals of contract interpretation, the disputed contractual right survives the expiration of the remainder of the agreement") (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 206 (1991)). *But see* Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447, 1450-51 (9th Cir. 1986) (finding a claim based upon defamation which occurred after the contract termination to be arbitrable since it arose from the employment relationship).

26. *Waldron*, 461 N.E.2d at 275-76.

27. American Family Mut. Ins. v. Farmers Ins. Exch., 504 N.W.2d 307, 308 n.2 (N.D. 1993). *See* N.D. R. CIV. P. 8(c) (requiring a defendant-employer to plead arbitration as an affirmative defense in its answer). *Cf.* Helmerichs v. Bank of Minneapolis & Trust Co., 349 N.W.2d 326, 327 (Minn. Ct. App. 1984) (opining that a party may lose his or her right to "object" to arbitration as the method of dispute resolution by actually participating in an arbitration proceeding without objecting).

28. Glanstein et al., *supra* note 9, at 807. *See* Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985). The court in *Hull* found than employer's reciprocal promise to arbitrate constituted the necessary consideration for the employee's agreement to arbitrate. *Id.* As such, an arbitration clause which requires an employee to arbitrate all employment disputes will not be enforced if the contract provides the employer with the *option* of whether or not to proceed to arbitration. *Id.*

issue of whether the particular arbitration procedure must be exhausted as a prerequisite to, or even in lieu of, the commencement of a civil lawsuit. The notion of exhaustion of nonexclusive ADR processes, as a prerequisite to the initiation of the judicial machinery, has not been the subject of extensive analysis or legal review. This lack of analysis or review can perhaps be explained by the fact that a large number of nonexclusive ADR processes are relatively novel, at least in a structured or formal sense.

An analogous issue which has received some judicial attention is the requirement in some employment contracts which contain nonexclusive arbitration clauses that an employee provide the employer with written notice of any employment related claim as a prerequisite to the institution of judicial action. Although not uniformly upheld in all cases, notice provisions in contracts as a precondition to judicial action have been enforced.[29]

For example, the Alaska Supreme Court in *Inman v. Clyde Hall Drilling Co.*,[30] upheld a clause in an employment contract which required notice to the employer within thirty days of any claim coupled with a six-month abatement before suit as condition precedents to court action.[31] Since the employee failed to comply with the conditions, the court dismissed the employee's suit for breach of an employment contract.[32] In enforcing the contractual provisions, the court held that a contrary result would permit parties to escape their contractual obligations.[33]

Despite cases like *Inman*, the issue of whether employment contracts which require the exhaustion of nonbinding adjudication of employee claims prior to the institution of legal action will be enforced remains unsettled. In all likelihood, however, courts confronted with the issue will enforce such agreements and compel employees to exhaust the ADR procedure before instituting legal action, assuming that the employee suffers no prejudice as a result of this requirement. The Supreme Court, although not directly addressing the precise issue in the non-union

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29. Glanstein et al., *supra* note 9, at 811. A small number of states have statutory or constitutional provisions which preclude the requirement of notice as a prerequisite to judicial action. *See id.*

30. 369 P.2d 498 (Alaska 1962).

31. Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 501 (Alaska 1962). The matter in *Inman* came before the court on appeal from a summary judgment motion that was granted in favor of the employer. *Id.* at 499.

32. *Id.* at 501. The court rejected the employee's argument that the contractual provision was violative of public policy and should be stricken. *Id.*

33. *Id. See* Powell v. Oman Constr. Co., 25 A.2d 566, 567 (N.Y. 1966) (finding a 60-day notice of claim provision to be an additional basis for granting summary judgment in favor of the employer). *See also* Annotation, *Provision in Employment Contract Requiring Written Notice Before Instituting Action*, 4 A.L.R.3d 439, 441 (1965).

context, has historically required employees to exhaust their remedies and submit to the established grievance procedure as a precondition to the institution of a civil action on claims under a variety of federal statutes.[34]

C. PRECLUSION

Perhaps the most frequently litigated and central issue which arises in an arbitration procedure is whether an arbitrator's determination will preclude the employee or the employer from pursuing a different outcome in a subsequent judicial action. The issue of preclusion arises when (1) an employee attempts to maintain a cause of action based on the same factual circumstances which has previously been adjudicated adversely to the employee in the arbitration; or (2) an employee seeks to enforce a favorable arbitration award in court and asserts that the employer is barred from relitigating the decision of the arbitrator. Obviously, the greatest perceived benefit of a binding arbitration procedure for resolving employment disputes is the possibility that the results of an arbitrator will preclude subsequent litigation over the same issues or claims that were previously addressed and resolved. At least one court has encouraged such a perception by indicating that an employer may avoid the perceived perils of the jury system by providing for alternative methods of resolving disputes in a written agreement.[35] For example, an agreement providing for a definite term and to discharge only for *cause* could also provide for binding arbitration as *the* mechanism for resolving issues of cause as well as damages.[36]

Substantively, an arbitration award will preclude inconsistent judicial action if:

> (1) the . . . arbitration procedure ended with a "final and binding" award;
> (2) there is no "scheme of remedies" that permits an assertion of a second claim (*i.e.*, there is no federal or state statutory claim);
> (3) the parties' arbitration agreement does not limit the binding effect of the award or provide that judicial action may be taken notwithstanding the arbitral award.[37]

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34. *See, e.g.*, Clayton v. UAW, 451 U.S. 679, 692 (1981) (indicating that the employer should have been afforded the opportunity to investigate and resolve the employee's claims under the procedure established without judicial interference); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) (requiring the aggrieved employee to exhaust the grievance procedure agreed upon by the union and employer as the mode of redress before instituting a lawsuit).

35. Toussaint v. Blue Cross & Blue Shield, Inc., 292 N.W.2d 880, 897 (Mich. 1980).

36. *Id.*

37. Glanstein et al., *supra* note 9, at 812.

Additionally, an arbitration procedure will preclude subsequent judicial action only if it satisfies certain *procedural* prerequisites which include:

> (1) adequate notice to the employees bound by the procedure;
> (2) the right of the employee to present evidence and legal arguments in support of his [or her] contentions and a fair opportunity to rebut the employer's evidence;
> (3) a formulation of the issues of law and facts to be determined in the particular . . . arbitration; and
> (4) a rule of finality whereby the arbitration yields a final decision.[38]

In other words, persons whose rights are affected by arbitration must be given a meaningful opportunity to be heard. An arbitration proceeding is not, however, a court of law and when contracting parties agree to have their dispute submitted to arbitration, they relinquish the right to certain procedural niceties that are typically associated with a trial.[39]

Upon the satisfaction of the aforementioned substantive and procedural prerequisites, the decision of the arbitrator will preclude any judicial action which is inconsistent with the arbitrator's award. Generally, when parties have submitted a dispute to arbitration, which has substantive and procedural safeguards, and the claim has been ruled on by the arbitrator, the award has the same efficacy of a judgment, completely settles the dispute between the parties, and, as long as it remains standing, precludes the party against whom it was rendered from resorting to any action at law to enforce his or her claim.[40] An arbitrator's award will thus be fully enforceable in court and will be subject only to limited judicial review.[41] If the above requirements are not met, however,

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38. *Id.*

39. Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (finding there to be no right to pretrial discovery).

40. *See* N.D. CENT. CODE § 32-29.2-14 (Supp. 1995) (providing that an arbitration award may "be enforced as any other judgment or decree").

41. *Id.* An employer which desires to create a dispute resolution mechanism which would best fulfill the requirements for ensuring preclusivity would be well advised to follow the guidelines set forth in the RESTATEMENT (SECOND) OF JUDGMENTS:

> Section 84. Arbitration Award.
> (1) Except as stated in sub-sections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.
> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.
> (3) A determination of an issue in arbitration does not preclude relitigation of the same

an employer's promulgation of a grievance or arbitration procedure may actually lead to judicial action, rather than preclude it.[42]

An arbitration award may also be preclusive if the procedure established was agreed upon by both the employer and employee *after* the occurrence of the disputed event. Hence, if an employee voluntarily and knowingly consents to a particular arbitration procedure to resolve a specific post-event dispute, the decision of the arbitrator will properly preclude any further judicial action which stems from the claim.[43] Generally, in order to establish the requisite voluntary and knowing consent, the employee must sign a release and waiver. Agreements to submit the resolution of an employment dispute to arbitration after it has arisen, are more likely to be enforced than pre-event agreements because the procedural or substantive rights being waived are known at the time of the waiver.

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issue if:

(a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specifically expeditious; or

(b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

(4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

Id. § 84 (1982). The specific requirements for an "adjudicatory procedure" which § 84(3)(b) mandate are set forth in § 83(2) of the RESTATEMENT (SECOND) OF JUDGMENTS as follows:

An adjudicative determination by an administrative tribunal is conclusive under the rules of *res judicata* only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . . ;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) Such other procedural elements as may be necessary to constitute the proceeding of sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

42. *See* Renny v. Port Huron Hosp., 398 N.W.2d 327, 335 (Mich. 1986) (interpreting the promulgation of a company's grievance or arbitration procedure as a modification of the employment-at-will relationship which accordingly permitted judicial review of the employment relation despite the existence of such a procedure).

43. *See generally* Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 540-41 (8th Cir. 1986) (finding that a termination agreement effectively waived claims for implied covenant of good faith and fair dealing and for ADEA); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986), *cert. denied*, 479 U.S. 850 (1986) (concluding that a post-discharge general release, which was voluntarily executed for adequate consideration, waived any claim under the ADEA).

D. ENFORCEMENT OF STATUTORY RIGHTS

A major source of an employee's rights emanates from state and federal statutes which prohibit discrimination in employment on the basis of race, creed, color, sex, age, religion, handicap, and other bases.[44] Employment-based claims which stem from an alleged violation of a statutory provision "arise from disputes in which the public has a stake in the outcome because such disputes typically involve enforcement of laws designed to protect important societal interests."[45] The enforcement of statutory rights can readily clash with employment agreements which require that *all* employment related claims be submitted to arbitration. The fundamental issue in this realm relates to the enforceability of *prospective* agreements to arbitrate employment disputes which are based upon state or federal statutory claims and whether the arbitration of such disputes will be an employee's exclusive remedy.

1. An Early Reluctance to Enforcement

The traditional rule regarding the enforcement of statutory claims and prospective agreements between an employee and employer which subjugate an employee's right to arbitration was well-settled: "[C]laims based on federal [or state] statutes are not within the exclusive province of arbitration and may be relitigated in a judicial forum."[46] The rationale for such a hard and fast rule was premised upon the perception that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[47] Such a view reflected the ostensible

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44. James R. LaVaute, *Alternative Dispute Resolution and Enforcement of Statutory Rights*, 6 LAB. LAW. 107, 114 (1990). The majority of challenges to employment disciplinary actions and terminations are based upon the violation of statutory rights. *See generally* Civil Rights Act of 1964, Title VII, 78 Stat. 253, 42 U.S.C. §§ 2000e-2000e-17 (1988). Title VII provides in part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a). *See also* N.D. CENT. CODE § 14-02.4-01 to -21 (1991 & Supp. 1995) (providing similar state protections).

45. Jenifer A. Magyar, Case Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 642 (1992). The fact "that societal interests are at stake distinguishes statutory claims from contract claims, which typically affect only the parties to the contract." *Id.*

46. Glanstein et al., *supra* note 9, at 810.

47. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981).

unwillingness of the Supreme Court to permit the compulsion of employee claims of statutory violations to be adjudicated by nonjudicial decisionmakers. Thus, prospective agreements to arbitrate *all disputes*, even where the agreement specifically provided for the arbitration of statutory disputes, were not interpreted to include statutory claims.[48]

The Supreme Court effectively erected a barrier in front of the arbitration of federal statutory claims in the 1974 decision in *Alexander v. Gardner-Denver Co.*[49] In *Alexander*, the Supreme Court refused to accord preclusive effect to the arbitral resolution of a statutory claim.[50] The Court held that an employee's Title VII statutory right to a trial *de novo* for a claim of discharge based on racial discrimination was not foreclosed by the prior submission of the same claim to final arbitration, as required by a collective bargaining agreement.[51]

The plaintiff in *Alexander*, a discharged worker, filed a grievance under a collective bargaining agreement in force between the plaintiff's union and the company alleging unjust dismissal.[52] The collective bargaining agreement contained an anti discrimination clause and provided for a *just cause* standard for employee discharges.[53] The agreement also included a broad arbitration clause which required the arbitration of differences between union employees and the company which covered "any trouble aris[ing] in the plant."[54] Both the company and the union selected and paid the arbitrator whose decision was to be final and binding on all parties.[55] At the arbitration hearing, the plaintiff claimed, for the first time, that his discharge resulted from racial discrimination.[56] The arbitrator, after considering the employee's allegations of racial discrimination, ruled that the plaintiff had been "discharged for just cause."[57] After losing the arbitration, the plaintiff initiated suit for racial discrimination and wrongful discharge in federal court.[58] The district court dismissed the action, finding that the employee, having voluntarily elected to pursue the final arbitration procedure under the nondiscrimination clause of a collective bargaining agreement, was bound by the decision of the arbitrator and was thereby precluded

48. Mazurak, *supra* note 4, at 639.
49. 415 U.S. 36 (1974).
50. Alexander v. Gardner-Denver Co., 415 U.S. 36, 50-51 (1974).
51. *Id.* at 58-60.
52. *Id.* at 39.
53. *Id.*
54. *Id.* at 40 (quoting the language of the agreement).
55. *Alexander*, 415 U.S. at 41-42.
56. *Id.* at 42. Prior to the arbitration hearing, the plaintiff filed a claim of racial discrimination with the state civil rights commission, which subsequently referred the matter to the Equal Employment Opportunity Commission (EEOC). *Id.*
57. *Id.*
58. *Id.* at 43.

from maintaining a cause of action against the employer in court.[59] On appeal, the Court of Appeals for the Tenth Circuit affirmed *per curiam* on the basis of the opinion of the district court.[60]

The issue before the Supreme Court on appeal was whether the employee's voluntary election to pursue his claim through a binding arbitration procedure precluded the maintenance of a subsequent cause of action under Title VII.[61] The Supreme Court held that Title VII, and other statutory provisions, evinced a congressional intent to afford "parallel or overlapping remedies" which allowed an individual to independently pursue his or her rights under Title VII, as well as other applicable federal and state statutory provisions.[62] The Court found that Title VII was specifically designed to "supplement, rather than supplant, existing laws" and held that the purpose and procedure of the statutory provision suggested that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement."[63] In light of the strong federal policy which underlies statutory claims, the Court specifically declined to accord preclusive effect to arbitration decisions, or even require an employee to exhaust arbitration proceedings prior to instituting a civil suit.[64] The Court reasoned that arbitral procedures, while perhaps well suited to resolve contract disputes, were comparatively inappropriate for the final resolution of rights created by a federal statute.[65] The Court opined that the fact that the primary role of the arbitrator is to effectuate the intent of the parties rather than implement the statutory objectives of enacted legislation: "[t]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[66] The Court further opined that the fact-finding process of arbitration together with the informality of the procedure employed to resolve a particular dispute, renders arbitration comparatively inferior to the judicial process.[67]

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59. *Id.* The district court, in reaching its conclusion, found significant the fact that the employee had raised the claim of racial discrimination during the arbitration proceeding. *Id.* at 43 n.4.

60. *Alexander*, 415 U.S. at 43.

61. *Id.* at 38.

62. *Id.* at 47-48. The Court opined that the final responsibility for the enforcement of Title VII was vested in federal courts. *Id.* at 44.

63. *Id.* at 48-49.

64. *Id.* at 55-58. The Court held that there could be no prospective waiver of a statutory right. *Id.* at 51.

65. *Alexander*, 415 U.S. at 56.

66. *Id.* at 56-57.

67. *Id.* at 56-58. The Court noted that:

> [T]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often

The Court parenthetically noted in a footnote that the "policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel."[68] Moreover, the Court, almost as an afterthought, concluded by noting that while a federal court should consider the claim of the employee *de novo*, the arbitral decision could be admitted "as evidence and accorded such weight as the court deems appropriate."[69]

Following *Alexander*, the nonexclusivity of arbitration for claims based upon employer-based statutory violations had been extended by analogy to violations of other state and federal statutory schemes.[70] The reasoning was founded on the premise that an arbitration proceeding could not serve as an adequate substitution for a judicial trial.[71] Al-

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> severely limited or unavailable. And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than federal courts.

Id. at 57-58 (citations and footnote omitted).

68. *Id.* at 49 n.10.

69. *Id.* at 60. In a final footnote, the Supreme Court posited:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it *great weight*. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should be ever mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Id. at 60 n.21 (emphasis added).

70. *See* Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570-71 (1987) (finding that the fact that the injury producing conduct may be subject to arbitration did not preclude a railroad employee from bringing a cause of action under the Federal Employer's Liability Act (FELA)); McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (holding that a claim under 42 U.S.C. § 1983 was not precluded by an agreement to arbitrate); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988) (opining that an employee was not required to arbitrate state law claims which were analogous to claims brought under Title VII); Wilmington v. J.I. Case Co., 793 F.2d 909, 918 (8th Cir. 1986) (indicating that an arbitral award entered in favor of an employer did not foreclose an employee from exercising his rights under 42 U.S.C. § 1981 in an action at law since such statutory rights were "independent and procedurally distinct").

71. A number of courts, however, acknowledged that federal statutory claims could be subject to exclusive arbitration if, *after* the event upon which the claim was based, the employee and employer have agreed to arbitrate the particular claim. *See, e.g.*, Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 540-41 (8th Cir. 1987) (finding that a claim for a violation under the Age Discrimination in Employment Act (ADEA) was effectively released, thereby making arbitration the employee's exclusive remedy).

though applied in a different context, the North Dakota Supreme Court has embraced the fundamental tenets established in *Alexander*.[72]

2. *A Changing Tide*

Chief Justice Burger's advocacy of alternative dispute resolution as a mechanism for the resolution of disputes, coupled with the increased workload of the federal courts in civil matters in the 1980's, were major catalysts behind a series of Supreme Court decisions which lead to a marked retreat from the seemingly steadfast and harsh position of *Alexander* with respect to statutory claims.[73] The judicial decisions in this realm reveals the fact that "the Supreme Court has disavowed some of its previous distrust of arbitrators and the arbitration process in general."[74]

In the 1991 decision of *Gilmer v. Interstate/Johnson Lane Corp.*,[75] the Supreme Court departed dramatically from the *Alexander* line of labor cases and upheld the compulsory arbitration of an employee's statutory age-discrimination claim.[76] The Supreme Court's decision in *Gilmer* resolved the conflict among the circuits regarding the arbitrability of Age Discrimination in Employment Act [hereinafter

72. *See* Moses v. Burleigh County, 438 N.W.2d 186, 190 (N.D. 1989). The plaintiff in *Moses* brought an action against the sheriff of Burleigh County for breach of an employment contract as well as for sex and racial discrimination. *Id.* at 187. The trial court, although finding that Moses had clearly proven unequal treatment, dismissed her suit and concluded that she had agreed to the discriminatory treatment in her employment contract. *Id.* The North Dakota Supreme Court, relying on *Alexander*, reversed and concluded that a contract cannot provide for the prospective waiver of a statutory claim. *Id.* at 190. The court did, however, note that "a clear subsequent contract may properly waive or settle prior discriminatory conduct." *Id.*

73. Robert L. Duston, *Gilmer v. Interstate/Johnson Lane Corp: A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. LAW. 823, 831 (1991). *See also* 138 CONG. REC. E3206-03 (1992) (statement of Rep. Gunderson as he introduced a bill entitled "The Civil Rights Dispute Resolution Act of 1992," in an effort to alleviate problems associated with the rise in statutory claims) "Congress has to be honest with itself. It cannot continue to pass new anti-discrimination statutes, to underfund the enforcement agencies, and then ignore the burden it has put on the Federal court dockets." *Id.* at E3207.

74. Thomas H. Stewart, Comment, *Arbitrating Claims Under the Age Discrimination in Employment Act of 1967: Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.), *cert. granted*, 111 S. Ct. 41 (1990), 59 U. CIN. L. REV. 1415, 1420 (1991). *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (enforcing an agreement to arbitrate in the commercial arena despite the existence of a substantive statutory claim).

75. 500 U.S. 20 (1991).

76. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35 (1991).

ADEA] claims[77] and represented an endorsement of arbitration as an alternative method of resolving disputes.[78]

Gilmer was an employee who was required, as a condition of his employment with Interstate, to register as a securities representative with various stock exchanges.[79] In order to become a registered representative, Gilmer was required to sign a contract in which he agreed to submit any dispute that arose out of the employment to arbitration.[80] Gilmer was sixty-two years of age when Interstate terminated his employment.[81] After filing an age discrimination charge with the Equal Employment Opportunity Commission, Gilmer brought suit in federal district court alleging that he had been discharged in violation of the ADEA.[82] Relying on the arbitration agreement which Gilmer signed, Interstate moved to compel arbitration of the claim.[83] The district court denied Interstate's motion based on the decision of *Alexander v. Gardner-Denver Co.*[84] The Court of Appeals for the Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."[85] The Supreme Court agreed with the court of appeals and found the claim to be arbitrable.

The Court framed its analysis by stating that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[86] The Court noted that it had previously recognized that "by agreeing to arbitrate a statutory claim, a

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77. *Compare* Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 202-03 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991) (finding a compulsory arbitration agreement of ADEA claims to be enforceable) *with* Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 227-28 (3d Cir. 1989) (holding that agreements which provide for compulsory arbitration of ADEA claims to be unenforceable since there was an "inherent conflict" between the remedial purpose of the ADEA and the enforcement of a statutory right by an arbitrator).

78. *See The American Arbitration Association Welcomes the Supreme Court's Gilmer Decision*, PR NEWSWIRE, May 14, 1991, *available in* LEXIS, NEWS Library, ASAPII file. Robert Coulson, 1991 President of the American Arbitration Association, welcomed the Supreme Court's decision in *Gilmer* and stated that "[t]his decision . . . will have a profound effect upon the business community's ability to resolve employee disputes out of court. The Supreme Court's willingness to enforce an arbitration agreement in a dispute between an individual employee and an employer will encourage a greater use of alternative dispute resolution." *Id.*

79. *Gilmer*, 500 U.S. at 23.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Gilmer*, 500 U.S. at 24. *See supra* notes 49-69 and accompanying text (discussing *Alexander*).

85. *Gilmer*, 895 F.2d at 197.

86. *Gilmer*, 500 U.S. at 26 (noting various statutory provisions under which arbitration agreements were held to be enforceable: the Sherman Act, the Securities Exchange Act of 1934, RICO, and Securities Act of 1933).

party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[87]

Gilmer argued that the social policies which underlie the ADEA are not adequately served through compulsory arbitration because it deprives claimants of a judicial forum.[88] The Supreme Court disagreed, stating that the arbitration of statutory claims resolves individual disputes as well as furthers significant social policies just as effectively as judicial resolution. The Court cited a number of federal statutes, such as the Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933, that, while designed to advance important social policies, claims thereunder were found to be appropriate for arbitration: As "long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial purpose and deterrent function."[89] The Court noted that Congress did not explicitly preclude the resolution of ADEA claims by arbitration or other nonjudicial means.[90] On the contrary, the text of the ADEA indicated a flexible approach to the resolution of claims:

> The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," which suggests that out-of-court dispute resolution such as arbitration is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."[91]

Gilmer raised a host of challenges to the adequacy of arbitration procedures in arguing that arbitration was inconsistent with the ADEA: (1) that arbitration is an inadequate remedy because arbitration panels will be biased; (2) that arbitration's discovery rules are more limited and

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87. *Id.* Additionally, the Court stated that "[a]lthough all statutory claims may be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1973)). The Court noted that in this regard, the burden was on Gilmer to demonstrate that Congress intended to preclude the waiver of a judicial forum for statutory claims. *Id.*

88. *Id.* at 27. *Cf.* Brief for Petitioner, Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20 (1991), No. 90-18 (LEXIS, Genfed. Library, Briefs file).

89. *Gilmer*, 500 U.S. at 28.

90. *Id.* at 29. The Court was also unpersuaded by Gilmer's argument that arbitration of statutory claims would undermine the role of the EEOC in the enforcement of the ADEA. *Id.*

91. *Id.* (citations omitted).

therefore make age discrimination difficult to prove; (3) that the lack of written opinions by arbitrators makes judicial review difficult; and (4) that arbitrators are unable to grant broad, remedial relief.[92] In addressing these challenges, the Court noted that most of the aforementioned arguments had been previously rejected as insufficient to preclude the arbitration of statutory claims.[93] The Court found that

> [s]uch generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step without current strong endorsement of the federal statutes favoring [arbitration as a] method of resolving disputes."[94]

First, the Court stated that it refused to "indulge in the presumption" that arbitrators may be biased, since the arbitration rules which applied to the dispute in the case provide protections against biased panels.[95] The rules provided, among other things, for the overturning of arbitration decisions where evidence of partiality or corruption exist.[96]

Second, the Court believed that it was unlikely that age discrimination claims required more extensive discovery than other claims like antitrust and RICO, which had been previously found to be arbitrable.[97] Additionally, there was no showing in the instant matter that the discovery provisions, which allowed for the production of documents, subpoenas, and depositions were inadequate.[98] The Court noted that although the discovery procedures afforded by arbitration might not be as extensive as those afforded by the Federal Rules of Civil Procedure, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[99]

Finally, the Court rejected Gilmer's last two contentions since the arbitration rules adopted required arbitration decisions to be in writing and afforded arbitrators with the power to fashion broad, equitable relief.[100] The argument advanced by Gilmer in support of his contention that an arbitration agreement relating to statutory claims should not

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92. *Id.* at 29-32.
93. *Id.* at 29.
94. *Gilmer*, 500 U.S. at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).
95. *Id.*
96. *Id.*
97. *Id.* at 31.
98. *Id.*
99. *Gilmer*, 500 U.S. at 31.
100. *Id.* at 32.

be an employee's exclusive remedy, rested on the principle that there will often be unequal bargaining power between employees and employers.[101] Despite this facially appealing contention, which inures by virtue of the employment relation itself, the Court held that mere inequality in bargaining power was not a sufficient basis to find that arbitration agreements are never enforceable in the employment context.[102] The Court found Gilmer to be experienced in business and thus able to negotiate the terms of his contract. The Court did, however, leave room for some argument by indicating that its decision was not dispositive of all challenges to contractual clauses based on unequal bargaining power. This claim, opined the Court, "is best left for resolution in specific cases."[103]

The Supreme Court concluded that Gilmer had not met the burden of demonstrating that Congress, in promulgating the ADEA, intended to preclude arbitration claims which fell under the Act.[104] Accordingly, the Court affirmed the judgment of the Court of Appeals for the Fourth Circuit and enforced the agreement between the employer and employee which compelled arbitration.[105]

The *Gilmer* decision is the first case in which the Supreme Court found a statutory civil rights claim to be arbitrable. Prior to *Gilmer*, compulsory arbitration agreements were only upheld by the Court in cases involving statutory commercial claims.[106] Facially, the *Gilmer* decision is a significant victory for employers—increasing the potential for widespread utilization of arbitration clauses which cover both statutory and nonstatutory claims—even though a number of issues were left

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101. *Id.* at 33.

102. *Id.* The Court noted that the purpose of the FAA was to place agreements to arbitrate on the same footing with other contracts. *Id.* at 24.

103. *Id.* at 33.

104. *Gilmer*, 500 U.S. at 26. The Court avoided overruling *Alexander* and its progeny by distinguishing the two lines of cases. The dissent in *Gilmer* contended that the majority "skirt[ed] the antecedent question whether the coverage of the [FAA] even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue." *Id.* at 36 (Stevens, J., dissenting).

105. *Id.* at 23.

106. *See*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 482-83 (1989) (holding that pre-dispute agreements to arbitrate claims arising under the Securities Act of 1933 were enforceable even though the Act contained a nonwaiver provision); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 239-41 (1987) (enforcing pre-dispute agreements to arbitrate claims under RICO and the Securities Exchange Act of 1934); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-30 (1985) (enforcing a prospective agreement to arbitrate antitrust claims arising under the Sherman Act). *See generally* Heidi M. Hellekson, Note, *Taking the "Alternative" out of the Dispute Resolution of Title VII Claims: The Implications of Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435 (1994). The aforementioned decisions decided in the commercial context recognized a presumption of arbitrability that favors an arbitral forum over a judicial forum when the parties execute an agreement to arbitrate. *See also* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

unanswered by the Court, such as the extent of its applicability to other employment laws.[107] The Supreme Court has, however, seemingly signaled that *Gilmer* should be extended to claims under Title VII as well as to other employment related statutes.[108] Indeed, with the demise of the public policy exception to arbitration and the clear departure from the historic judicial hostility towards ADR, the appropriateness of agreements to arbitrate *all* disputes emanating from the employment relationship rests on a strong legal foundation.

E. JUDICIAL REVIEW

In order to take full advantage of the benefits of the labor arbitration process, the legal system has recognized the need for finality in employment arbitration. The relative speed, low cost, and informality of the labor arbitration process would be seriously undermined if the arbitration proceeding was routinely followed by an additional procedural hurdle from which a binding and final ruling on the dispute emerged. The dilemma courts confront is "that they recognize the need to support the labor arbitration process, but are concerned that their

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107. Duston, *supra* note 73, at 834. *See* Robert Layton et al., *Using Compulsory Arbitration to Resolve EEO Disputes*, N.Y. L.J. (July 14, 1992), *available in* LEXIS/NEXIS database (discussing the issues left open by the Court in *Gilmer*). *See generally* Robert A. Shearer, *The Impact of Employment Arbitration on Sex Discrimination Claims: The Trend toward Nonjudicial Resolution*, 18 EMPLOYEE REL. L.J. 479 (1992-93). Since *Gilmer*, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have all concluded that Title VII claims are subject to compulsory arbitration. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Nghiem v. NEC Electronics, Inc., 25 F.3d 1437, 1441 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 638 (1994); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992).

108. In Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991), a stockbroker who had signed a prospective agreement to arbitrate employment related disputes sued her employer alleging Title VII violations of sexual harassment and discrimination. *Id.* at 229. The employer moved to dismiss the case and argued that arbitration was the employee's exclusive remedy. *Id.* The district court denied the motion and the Court of Appeals for the Fifth Circuit, relying on *Alexander*, affirmed the decision of the district court. *Id.* On petition for certiorari, the Supreme Court, citing *Gilmer*, vacated and remanded the decision for further consideration. *Id.* On remand, the Court of Appeals for the Fifth Circuit concluded that *Gilmer* mandated a reversal of the district court decision and an order compelling arbitration. *Id.* at 229-30.

A number of courts following *Gilmer* have compelled arbitration of employment related claims arising under various statutes. *See* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993) (relating to the Employee Retirement Income Security Act (ERISA)); Saari v. Smith Barney, Harris & Upham & Co., 968 F.2d 877, 881-82 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992) (pertaining to the Employee Polygraph Protection Act); Solomon v. Duke Univ., 850 F. Supp. 372, 373 (M.D.N.C. 1993) (addressing application to the Americans with Disabilities Act (ADA)); Hampton v. ITT Corp., 829 F. Supp. 202, 204 (S.D. Tex. 1993) (considering the Fair Labor Standards Act (FSLA)). Courts, citing *Gilmer*, have also found employment claims rooted in state statutory and common law doctrines to be subject to compulsory arbitration. *See* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992) (finding that state law claims in a sexual harassment suit against an employer were subject to arbitration); Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 800 (Minn. 1995) (concluding that ADEA claims are, in light of *Gilmer*, conclusively arbitrable when provided for in an agreement).

support not amount to a total abdication of judicial oversight."[109] In an effort to accommodate a balance, courts generally accord preclusive effect to the determinations made by the arbitrator[110] and give substantial deference to labor arbitration awards upon review.[111] Judicial intervention in the review of arbitration awards is thus significantly circumscribed by the courts.

As an alternative to reviewing the *merits* of an arbitrator's award, courts generally limit their review to the consideration of whether the arbitrator performed the assigned role.[112] The review of an arbitrator's adherence to performance standards does not, in theory, involve scrutiny of the award itself.[113] The sufficiency of the evidence on which an arbitrator bases his or her decision is likewise not a matter for judicial review.[114] In this regard, appeal rights do not generally parallel those commonly found in civil litigation; errors of fact *or* law by the arbitrator are usually not subject to review on appeal. This view has been embraced by the United States Supreme Court which has opined that since:

> the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.[115]

As such, the substantive aspect of the arbitrator's function can simply be viewed as the duty to interpret the arbitration agreement. However, the Court of Appeals for the Eighth Circuit has observed that a vacation of the arbitrator's award is appropriate:

> where the award's result is one so contrary to common experience and logic that is more likely than not that such result was not the intent of the parties, and where *additional* facts exist

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109. Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245, 248 (1992).

110. *See* Bryon's Constr. Co. v. North Dakota Dep't of Trans., 463 N.W.2d 660, 661 (N.D. 1990) (holding that *res judicata* barred a second arbitration of issues).

111. *See* Allstate Ins. Co. v. Nodak Mut. Ins. Co., 540 N.W.2d 614, 617 (N.D. 1995) (opining that it is the currently recognized general rule that arbitrators, who act and are limited by the authority conferred upon them in a statute or contract, are the judges of both the law and the facts).

112. Berger, *supra* note 109, at 258.

113. *Id.* at 258-59.

114. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (noting that the arbitrator's refusal to consider certain evidence was not a sufficient basis for nonenforcement of the arbitration agreement); Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc., 74 F.2d 533, 536 (4th Cir.), *cert. denied*, 295 U.S. 748 (1935) (stating that every reasonable presumption would be indulged to sustain an arbitration award).

115. *United Paperworkers*, 484 U.S. at 37-38.

> that strongly indicate that the arbitrator did not premise his award on the contract, notwithstanding his words to the contrary.[116]

Moreover, when the arbitrator crosses the line from interpretation to legislation, an award may and should be vacated:

> [A]n arbitrator is confined to the interpretation and application of the . . . agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the . . . agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse the enforcement of the award.[117]

Although the scope of reviewing an arbitration award is, as previously indicated, narrow, the satisfaction of procedural fairness is a paramount prerequisite to the enforcement of the arbitration award. This requirement can be best reflected by the notion that "[t]here can be no merit in immunizing from review decisions which are reached in an unacceptable fashion."[118] The Federal Arbitration Act as well as the North Dakota Century Code specify the types of principles that control when a court reviews the procedural fairness of the arbitration process. The North Dakota Century Code, like the majority of state statutory provisions, identifies circumstances which warrant the impeachment or vacation of an arbitration award that generally include: evidence that the

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116. George A. Hormel & Co. v. United Food & Commercial Workers, Local 9, 879 F.2d 347, 350 (8th Cir. 1989). In North Dakota, an arbitrator's award will only be vacated if it can be objectively viewed as "completely irrational." Carlson v. Farmers Ins. Group, 492 N.W.2d 579, 581-82 (N.D. 1992) (citing Byron's Constr. Co. v. State Highway Dep't, 448 N.W.2d 630, 632 (N.D. 1989)). The purpose of such a limited review and exacting standard of scrutiny has been expressed as follows:

> [T]he effect of applying the clearly irrational standard of review is to give to the arbitrators every benefit of every doubt. It affords them the widest latitude to exercise their authority and arrive at their decision without the customary restraints of traditional judicial review. It is but a reflection of the strong public policy favoring the arbitration process.

Id. at 582 (quoting Scherbenske Excavating v. North Dakota State Highway Dep't, 365 N.W.2d 485, 489 (N.D. 1985)). A decision is said to completely irrational "if it is either mistaken on its face or so mistaken as to result in real injustice or constructive fraud." Bryon's Constr. Co. v. North Dakota Dep't of Trans., 463 N.W.2d 660, 662 (N.D. 1990) (citing Nelson Paving Co. v. Hjelle, 207 N.W.2d 225 (N.D. 1973)). *Accord* Merrill Lynch Pierce Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (indicating that the clearly irrational standard limits judicial review on an arbitral award to those errors that are "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator").

117. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). *See* Local 238 Int'l Bhd. v. Cargill, Inc., 66 F.3d 988, 990 (8th Cir. 1995) (opining that the award of the arbitrator will not be vacated as long as it is at least arguable that the arbitrator is construing the contract and not simply furnishing his or her own brand of justice).

118. Berger, *supra* note 109, at 259.

arbitrator exceeded his or her authority or was biased, an award that was procured by fraud, corruption, or other undue means.[119]

It can be gleaned from the aforementioned laundry list that courts limit their scrutiny of the labor arbitration process and avoid second-guessing the substantive judgment of the arbitrator. When the parties to a dispute agree to choose an arbitrator, it is only when he or she fails to perform the designated function, or violates his or her duty in a fashion which is in contravention of a dominant and well-defined public policy that the rejection of an award will be appropriate.[120]

It is clear that legal challenges to labor arbitration awards are not easily made or looked upon with great favor by the judiciary:

> Arbitration will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and the suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once.[121]

III. CONCLUSION

Employers and employees contemplating an *alternative* to the machinery of the judicial process, would be well advised to evaluate their respective positions carefully and, perhaps most importantly, objectively. As judicial dockets continue to become increasingly crowded and the costs of litigating employment disputes become more and more expen-

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119. N.D. CENT. CODE § 32-29.2-12 (Supp. 1995). Section 32-29.2-12 of the North Dakota Century Code provides that the grounds for vacating an arbitrator's awards are as follows:

> a. The award was procured by corruption, fraud, or other undue means;
> b. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
> c. The arbitrators exceeded their powers;
> d. The arbitrators refused to postpone the hearing after sufficient cause was shown to postpone it or refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party; or
> e. There was no arbitration agreement and the issue was not adversely determined in proceedings . . . and the party did not participate in the arbitration hearing without raising the objection.
>
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

The FAA contains a similar provision. *See* 9 U.S.C. § 10 (1994) (setting forth the grounds for rehearing or vacating an arbitrator's award).

120. Berger, *supra* note 109, at 266-67.

121. Production & Maintenance Employees' Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163 (7th Cir. 1990). In an attempt to discourage frivolous litigation over arbitration awards, some courts have imposed sanctions for improperly challenging claims that were previously decided during an arbitration proceeding. MARLIN M. VOLZ & EDWARD P. GOGGIN, HOW ARBITRATION WORKS 3 (4th ed. Supp. 1985-89).

sive, there is mounting pressure to explore alternative methods of resolving employer-employee strife. Alternative dispute resolution, while having many advantages and disadvantages to *both* the employer and the employee, involves a number of trade-offs and is not a panacea for the resolution of all workplace disputes. For whatever is gained, something is lost. There is little doubt, however, that employment agreements providing for an alternative method of dispute resolution will continue to gain acceptance as a viable mechanism for avoiding what can often amount to lengthy and costly litigation.