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Questions About the Efficiency of Employment
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The growing popularity of arbitration agreements is well
documented. The academic literature on these agreements is
largely critical, arguing that such agreements jeopardize
important rights and enable employers to take unfair advantage
of employees and consumers. Standard economic analysis,
however, suggests that since these agreements are freely
negotiated, they presumably increase the utility of both parties
and are therefore efficient. This Article raises questions about
the efficiency of such agreements in the employment context. It
models the decisionmaking process by which a rational employee
would judge the desirability of an agreement, both after and
before a dispute has arisen. The model demonstrates that no
employee can, in reality, have the information necessary to make
a rational economic judgment about a predispute arbitration
agreement. In the absence of information, systematic behavioral
heuristics will lead employees to overlook or misjudge the costs
and benefits of such agreements. Given that employees are not
signing these agreements on the basis of rational economic
analysis, the Article considers possible arguments that the
agreements might still increase societal efficiency. Ultimately,
it concludes that proponents of predispute agreements need to
provide stronger evidence of such efficiencies. In the meantime,
courts, legislators, and commentators should focus more on the
decisionmaking imperfections that can lead to inefficient
arbitration agreements.

“May It Please the Camera, . . . I Mean the
Court”—An Intrajudicial Solution to an
Extrajudicial Problem ............................. Lonnie T. Brown, Jr. 83

This Article examines the ethical problems created when
lawyers zealously advocate on behalf of their clients to the “court
of public opinion,” rather than confining their advocacy to the
court of law. Within the context of a courtroom, there are various ethical and procedural standards that serve as checks on zealous advocacy. Similar constraints or safeguards, however, are lacking when attorneys advocate extra judicially before the court of public opinion. After examining the historical development of the existing regulatory framework and highlighting some of the recent problematic advocacy in which lawyers have engaged, the Article concludes by proposing the logical, but novel, solution of creating a system that will make the rules that govern intra judicial advocacy applicable in the extra judicial context.

Toward a Contractual Approach for
Arbitral Immunity ........................ Peter B. Rutledge 151

In the United States and elsewhere, arbitrators like judges typically enjoy an absolute immunity from civil liability. For more than a century, and despite the emergence of a robust, competitive market for dispute resolution services, that doctrine has gone unquestioned in both the case law and, with few exceptions, in the scholarship as well. Employing a law and economics methodology, this Article takes an original approach and argues that the doctrine of arbitral immunity should be abolished. Instead, any limit on or elimination of the arbitrator’s liability should come in the form of contractually negotiated liability waivers, a perfectly viable option under most institutional rules. Replacing the dominant regulatory regime with a contractual one better reflects the incentives in the marketplace for dispute resolution services, corrects price distortions caused by the immunity doctrine, and encourages the use of arbitration.

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On March 11, 1996, the Council of the European Union passed the Database Directive. This Database Directive placed the power of controlling data exclusively in the hands of database makers through the use of a sui generis, quasi-property right in databases that allows the database maker a fifteen-year period
in which to control and charge fees for the protected databases. But if a “substantial” investment is made to update the database and the database is made available to the public, the database maker may receive extensions on the original protection extending to perpetuity. Because of this property right, the Database Directive could have had a powerful destructive force on the availability of data for the general public as well as the scientific and educational scholarly communities. In order to understand how this data doomsday could have come to pass, this Note presents a brief history of the past and present state of database protection in the European Union. This Note answers the question: What are and will be the effects of the Database Directive on the quantity, quality, availability, and protection of databases and information in the EU? Finally, in its analysis and conclusion, this Note shows how the Database Directive as applied is equivalent to a “Super-Copyright” doctrine for self-created data and not a genuine property right in facts. In short, this Note shows that the Database Directive as applied is not likely to cause a data doomsday.

“A Manifest Disregard of Arbitration?” An Analysis of Recent Georgia Legislation Adding “Manifest Disregard of the Law” to the Georgia Arbitration Code as a Statutory Ground for Vacatur .... Brent S. Gilfedder 259

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