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**"ARASOI O MIZU NI NAGASU" OR  
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Pedagogical Methods for Teaching Arbitration Law  
in American and Japanese Law Schools**

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**"ARASOI O MIZU NI NAGASU" OR "LET THE DISPUTE FLOW TO WATER":  
PEDAGOGICAL METHODS FOR TEACHING ARBITRATION  
LAW IN AMERICAN AND JAPANESE LAW SCHOOLS**

*Paul M. Secunda*<sup>1</sup>

"Legal education is 'a window on [a country's] legal system.' A nation's system of legal education tells us much about 'what the law is, what lawyers do, how the system operates or how it should operate.'"<sup>2</sup>

INTRODUCTION

Recently, Japanese law schools have adopted an American-based model of legal education.<sup>3</sup> As these Japanese law schools continue their development within this new model of legal education, increasing attention is not only being paid on *what* to teach within these schools, but perhaps more importantly, *how* to teach these courses.<sup>4</sup> Traditionally, Japanese universities

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<sup>1</sup> Assistant Professor of Law, University of Mississippi School of Law. This paper would have not been possible without the excellent and tireless research and writing assistance of Amelia Smith Morrison and Kristopher Carter, both of the University of Mississippi School of Law Class of 2005. A version of this paper was presented in a series of lectures presented at the Center for Legal Dynamics of Advanced Market Societies at the Kobe University Graduate School of Law in Kobe, Japan on March 15, 2005. May this paper, in its own small way, continue to foster the deepening of ties between the Japanese and American people.

<sup>2</sup> See James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 307 (2004) (quoting John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859 (1974), reprinted with a prefatory note in JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER* 53 (1999)).

<sup>3</sup> See Luke Nottage, *Reform in Japanese Legal Education: Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 2 ASIAN-PACIFIC L. & POL'Y J. 28, 34 (2001) (describing recent legal education reform in Japan). Indeed, over sixty new law schools began operation in Japan on April 1, 2004. See Maxeiner & Yamanaka, *supra* note 2, at 307 ("Under its new reforms, Japan is about to begin shifting part of the responsibility for teaching legal methods from practical training programs run by judges to law school courses given by academics.").

<sup>4</sup> See, e.g., Center for Legal Dynamic of Advance Market Societies (CDAMS) Web Site, at [http://www.cdams.kobe-u.ac.jp/aims\\_e.htm](http://www.cdams.kobe-u.ac.jp/aims_e.htm) (last visited June 2, 2005) ("The study of Legal Dynamics recognizes the need to incorporate the ideas of autonomous social ordering into the research and education of law and other methods of problem solving. Emphasis will be placed on theoretical and applied research as well as the practical training of practitioners in the skills of negotiation and agreement in a creative, rational, and peaceful manner.").

have utilized lectures, and not much else, in conveying legal information to students.<sup>5</sup> Yet, a new generation of Japanese law professors, inspired by the new reform movement and increasing interactions with American and European colleagues, have begun the process of revolutionizing their law school curriculum and how it is taught.<sup>6</sup>

In particular, the Japanese legal academy is interested in developing courses on alternative methods to expensive and time-consuming litigation practices and, as a result, have sought to place more emphasis on arbitration law.<sup>7</sup> Recognizing that arbitration law pedagogy may be vastly different than traditional teaching methodologies, Japanese law professors have sought insight into effective teaching techniques that their American legal colleagues have utilized.<sup>8</sup>

It was in this spirit that I was invited by my colleague, Professor Shunichiro Nakano of the University of Kobe Graduate School of Law, to present a series of lectures on pedagogical methods for teaching arbitration law for the Center for Legal Dynamics of Advanced Market Societies (CDAMS) in Kobe, Japan on March 15, 2005. The paper presented herein is a product of those lectures, as well as additional insights garnered from participants at the lecture. Importantly, the presentation of these lectures in Kobe caused me to face up to my own preconceived notions about arbitration and to reconsider the most effective ways in which to teach this challenging topic.

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<sup>5</sup> See Maxeiner & Yamanaka, *supra* note 2, at 309 ("In any given year there are approximately 45,000 undergraduates studying at nearly one hundred university law faculties within Japan. The first year of education is given over to general liberal arts courses. While classes in later years address law, they generally do so from a theoretical perspective and do not focus on case analysis. Law faculties typically provide large lecture classes and student participation is minimal."). One important difference between traditional Japanese and American legal education, however, is that in Japan would-be lawyers not only participate in academic education provided by universities, but also additionally in separate practical training provided by other institutions. See *id.* at 305-06.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

The purpose of this paper, then, is two-fold: first, to establish the importance of teaching arbitration law in the American and Japanese law school classroom based on historical and recent events surrounding arbitration; and second, to discuss effective pedagogical methods for teaching arbitration law. In order to highlight the intricacies surrounding the teaching of arbitration law in particular areas and the importance of taking the time to establish effective pedagogical techniques in the arbitration milieu, a separate section of this paper is devoted to outlining the complex nature of labor and employment arbitration law in both the United States and Japan. Overall, my hope is that this exercise in exploring effective pedagogical techniques will spur both American and Japanese law professors to consider alternative methods when teaching this important and often-neglected form of dispute resolution.

The paper proceeds in the following four parts. Part I presents a concise history of the development of arbitration law in the United States and Japan. Part II explores the current status of arbitration law in the two countries. Part III examines labor and employment arbitration to highlight the complexity and significance of different areas of arbitration law. Finally, Part IV considers the proper placement of arbitration in the law school curriculum, the ideal instructors for arbitration law, the appropriate scope of the curriculum, and the pedagogical techniques by which arbitration should be taught.

## I. THE HISTORY AND DEVELOPMENT OF ARBITRATION LAW

To reiterate, my larger point in this section is not to give a full-blown account of the American or Japanese history of arbitration, but merely to document how arbitration has developed into an important part of both American and Japanese legal culture.

### A. *The American Experience*

Arbitration law<sup>9</sup> in the U.S. is three-tiered, consisting of federal arbitration law, international arbitration laws, and a basic domestic arbitration law for each state.<sup>10</sup> The first American state to adopt arbitration legislation was New York in the form of the New York Arbitration Act in 1920.<sup>11</sup> Under this legislation, the traditional hostility toward arbitration law was transformed into a general legal presumption favoring the enforceability of arbitration agreements.<sup>12</sup> Shortly thereafter, federal legislation based on the New York law was enacted in the form of the Federal Arbitration Act of 1925 (FAA).<sup>13</sup> Similarly, the FAA sought to change legal and judicial attitudes toward arbitration and has largely been successful in this regard.<sup>14</sup> Since that time, most states have adopted a closely-related version of the FAA, the Uniform

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<sup>9</sup> Although the purpose of this paper is not to discuss the substantive components of arbitration law, suffice it to say at this time that under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and similar laws, arbitration agreements are *contracts*, subject to the same legal enforceability requirements which govern all other contracts. See STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES AND MATERIALS* 5 (1998) ("The private component [of arbitration law] is contract law: the basis for requiring parties to arbitrate a dispute is their prior agreement to arbitrate."). Consequently, arbitration agreements may be held unenforceable for many reasons, which include but are not limited to: 1) procedural or substantive unconscionability; 2) lack of sufficient consideration; or 3) lack of knowing and voluntary waiver of statutory rights. See JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, *THE LAW OF EMPLOYMENT DISCRIMINATION: CASE AND MATERIALS*, 2004 SUPPLEMENT 79-83 (2004). The United States Supreme Court has consistently upheld arbitration agreements and decisions, thus establishing arbitration as a preferred process for dispute resolution. See HUBER & TRACHTE-HUBER, *supra*, at 6.

<sup>10</sup> See James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L. L. 785, 793 (1994).

<sup>11</sup> See Willibald Posch, *Resolving Business Disputes Through Litigation or Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, available at <http://www.aals.org/profdev/international/posch.pdf> (last visited May 27, 2005).

<sup>12</sup> See HUBER & TRACHTE-HUBER, *supra* note 9, at 5.

<sup>13</sup> See *id.* (citing 43 STAT. 883 (1925)).

<sup>14</sup> See *id.* at 5-6.

Arbitration Act of 1955 (UAA), which makes hostile state arbitration legislation mostly a thing of the past.<sup>15</sup>

During this time, the American Arbitration Association (AAA) has become the preeminent arbitral organization in the United States.<sup>16</sup> It is the leading organization in setting rules for arbitration and providing trained arbitrators for all types of disputes between parties.<sup>17</sup> Additionally, and more recently, the United States has actively engaged in international arbitration and ratified in 1970 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>18</sup> To be consistent with developments in the international arena, the FAA was amended in 1970 and 1990 to provide for the enforcement of foreign arbitral awards.<sup>19</sup>

#### B. *The Japanese Experience*

Japan's first arbitration law was enacted in 1890 as Law No. 29.<sup>20</sup> Under Law No. 29:

[T]he arbitrators chosen by each party settle[d] disputes by conciliation in arbitration procedures (which is called *Schiedsverfahren* in German) much as mediators or conciliators do in conciliation procedures (which is *Guteverfahren* in German) instead of taking an adversarial or adjudicatory approach. Th[is]

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<sup>15</sup> Some thirty-seven states have now adopted the UAA, but all states have some form of an arbitration statute. In general, the provisions of the UAA parallel those of the FAA in favoring the use of arbitration. *See id.*

<sup>16</sup> *See* Stephen K. Huber, *Arbitration and Contracts: What Are the Law Schools Teaching?*, 2 J. AM. ARB. 209, 265 (2003).

<sup>17</sup> *See id.*

<sup>18</sup> *See* Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L. L. 303, 303 (2004).

<sup>19</sup> *See* HUBER AND TRACHTE-HUBER, *supra* note 9, at 5.

<sup>20</sup> *See* Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation*, INT. A.L.R. 2004, 7(2), 54-60. As Professor Tatsuhiko Hagizawa has explained: "The modern arbitration system or the arbitration law was first introduced in Japan in 1890 by the enactment of the Code of Civil Procedure (Law No. 29) that provided for arbitration procedure in Book VIII. The contents of the Law, which were a translation of Book X of the German Code of Civil Procedure of 1877 (in its original form), were almost identical to those contained in the German code." *See* Tatsuhiko Hagizawa, *Characteristics of International Commercial Arbitration in Japan -- With Primary Emphasis on Problems Associated with Revising the Japanese Arbitration Law*, 13 WORLD ARB. & MEDIATION REP. 17, 17 n.3 (2002).

conciliation ideology . . . underlie[d] the Law in Japan unlike arbitration laws in the vast majority of other national jurisdictions.<sup>21</sup>

Like the United States, on the other hand, Japan on the international front became a party to the New York Conventions<sup>22</sup> and has signed 14 bilateral treaties with other countries guaranteeing the enforcement of foreign arbitral awards.<sup>23</sup> In fact, to date, no Japanese court has refused to enforce foreign arbitral awards against Japanese citizens.<sup>24</sup>

While Japan in some ways has been ahead of the United States in enacting arbitration legislation and becoming party to international treaties regarding arbitration, arbitration has not traditionally been utilized and has not been regarded as an effective dispute resolution procedure in Japan.<sup>25</sup> Despite the creation of arbitral institutions and organizations such as the Japanese Commercial Arbitration Association (JCAA),<sup>26</sup> historically few disputes have been arbitrated in Japan.<sup>27</sup> On the other hand, Japanese companies are consistently parties to international

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<sup>21</sup> Hagizawa, *supra* note 20, at 18.

<sup>22</sup> Under the New York Conventions, "most treaties of friendship and commerce concluded by Japan provide that a final and enforceable foreign arbitral award is conclusive and enforceable... except where contrary to public policy." See Kazuaki Sono, *The Japanese Experience: The Legal Environment for Arbitration*, in UNCITRAL ARBITRATION MODEL IN CANADA: CANADIAN INTERNATIONAL COMMERCIAL ARBITRATION LEGISLATION 25 (1987).

<sup>23</sup> See Japan Commercial Arbitration Association, *Japan as the Place of Arbitration*, available at <http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/venue.html> (last visited May 27, 2005).

<sup>24</sup> See *id.*

<sup>25</sup> See Nottage, *supra* note 19, at 55.

<sup>26</sup> The JCAA was established as the International Commercial Arbitration Committee in 1950. See *Japan as a Place of Arbitration*, *supra* note 23.

<sup>27</sup> For instance, In 2000, the JCAA dealt with only nine cases. The Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange heard 15 shipping cases, and the Japan Intellectual Property Arbitration Centre heard five cases. See Nottage, *supra* note 19, at 55.



arbitration in venues outside Japan, as is evidenced by prominent cases involving Japanese companies in courts around the world contesting arbitration procedure or awards.<sup>28</sup>

Factors possibly responsible for arbitration's failure to take root in Japan include: (1) the Japanese government's less than enthusiastic attitude towards arbitration, (2) a lack of information about arbitration among the general public, and (3) the costs of arbitration being seen as high.<sup>29</sup> Furthermore, low caseloads have made it difficult to develop a pool of experienced arbitrators, and international arbitration had been hindered by the prohibition of foreign lawyers practicing in Japan until 1996.<sup>30</sup> Furthermore, the original Japanese arbitration legislation had seen virtually no updating (with the exception of a name change in 1996) for over 100 years.<sup>31</sup> And even though Japanese arbitration organizations have amended their procedural rules in past years, these rule changes have had little effect because arbitration in Japan has, until recently, been subject to antiquated arbitration legislation.<sup>32</sup>

## II. RECENT DEVELOPMENTS IN THE LAW OF ARBITRATION

Similar to the previous section, the aim here is not to comprehensively cover the current substantive provisions of American or Japanese arbitration law. Instead, this section merely highlights the importance of teaching arbitration law in the American and Japanese legal curriculum.

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.* Of course, even in Japan, arbitration is generally less expensive than litigation.

<sup>30</sup> *See id.* The Special Measure Law concerning the Handling of Legal Practice by Foreign Lawyers was promulgated as Law No. 65 of 1996 on June 12, 1996, and went into effect on September 1, 1996. *See Japan as the Place of Arbitration*, *supra* note 23.

<sup>31</sup> In 2004, Japan enacted Law No. 138 of 2003, which went into effect March 1, 2004. *See discussion infra* Part II.B.

<sup>32</sup> *See* Nottage, *supra* note 19, at 56 ("Japan's law on arbitration did not reflect contemporary commercial realities nor global trends in law reform . . . toward more expeditious arbitral proceedings.").

### A. *The American Experience*

Arbitration has taken on staggering proportions in the United States.<sup>33</sup> The scope of arbitration encompasses disputes arising out of insurance claims, construction, medical claims, professional sports contracts, and international commercial transactions, just to name a few.<sup>34</sup> Even McDonald's contest rules call for arbitration.<sup>35</sup>

Arbitration's increasing popularity in the United States can be attributed to a number of factors. First and foremost is the *speed* of arbitration as a means of dispute settlement.<sup>36</sup> This is important because resolution in a judicial forum may take years to conclude.<sup>37</sup> Additionally, parties to an arbitration agreement may choose the procedure by which the arbitration will be governed.<sup>38</sup> Last, arbitration is often far less expensive than dispute resolution in a judicial forum, though, of course, this may vary according to the particular arbitration at hand.<sup>39</sup>

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<sup>33</sup> See Martha Neil, *Litigation Over Arbitration*, ABA JOURNAL, Jan. 2005, at 50.

<sup>34</sup> See *id.* at 51; see also Huber, *supra* note 16, at 211.

<sup>35</sup> See Huber, *supra* note 16, at 211.

<sup>36</sup> See STEVEN L. WILLBORN, STEWART J. SCHWAB & JOHN F. BURTON, JR., EMPLOYMENT LAW CASES AND MATERIALS 47 (3ed. 2002) ("The basic goal of arbitration is to resolve disputes quickly and cheaply.").

<sup>37</sup> In America, federal cases have been estimated on average to take over a year to conclude. See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 80 (1981) (calculating the average delay in deciding a civil case at 1.16 years). State cases are known to take much longer to conclude. In Japan, the numbers are not much better, especially with the shortage of lawyers under the current system. See Maxeiner & Yamanaka, *supra* note 2, at 304. There, a case, can take on average 15 months to decide. See Reylito A. H. Elbo, *Labor Tribunal System: Prospect of Japan's New Approach Towards the Efficient Settlement of Individual Labor Disputes* 2, available at <http://www.jil.go.jp/profile/documents/Elbo.pdf> (last visited June 1, 2005).

<sup>38</sup> See WILLBORN ET AL., *supra* note 36, at 56.

<sup>39</sup> See *id.* at 47.

### B. *The Japanese Experience*

Arbitration is becoming more prominent in Japan as well.<sup>40</sup> New Japanese arbitration legislation, Law No. 138 of 2003, which went into effect on March 1, 2004, regulates both domestic and international arbitration.<sup>41</sup> The new law is, for the most part, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law of International Commercial Arbitration.<sup>42</sup> This UNCITRAL model has been adopted by over 35 countries.<sup>43</sup>

The aim of the new legislation is to encourage greater use of international and domestic arbitration in Japan.<sup>44</sup> This legislation is therefore consistent with calls for increased use of arbitration in Japan made by Japanese arbitration institutions such as the JCAA and by foreign governments.<sup>45</sup> For instance, the U.S. Trade Representative's 2004 recommendations to Japan encouraged reforming its arbitration practices in a manner consistent with international practice to promote economic growth and private sector competition.<sup>46</sup>

As in America, then, the increasing emphasis on arbitration makes the effective teaching of this subject area in Japanese law schools critical. In fact, in light of the current state of affairs in

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<sup>40</sup> See Nottage, *supra* note 19, at 54.

<sup>41</sup> See *id.* at 56 (citing Law No. 138 of 2003, available at <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html> (last viewed on May 27, 2005)).

<sup>42</sup> The UNCITRAL Model Law on International Commercial Arbitration was adopted on June 21, 1985. See UNCITRAL Web Site, available at <http://www.uncitral.org/en-index.htm> (last visited May 31, 2005).

<sup>43</sup> See Huber, *supra* note 16, at 267.

<sup>44</sup> See Nottage, *supra* note 19, at 56. Nevertheless, the new Japanese Arbitration Law does not apply to the arbitration of individual labor and consumer disputes. See Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, JCAA NEWSLETTER, Apr. 2004, at 5-6.

<sup>45</sup> See *supra* note 23.

<sup>46</sup> See *US Encourages ADR in Japan*, 59-JAN DISP. RESOL. J. 7 (2004).

both America and Japan concerning arbitration, any Japanese or American attorney should have legal education and training in the arbitration process.

### III. A STUDY IN COMPLEXITY: LABOR AND EMPLOYMENT ARBITRATION LAW

In order to underscore the challenge in teaching arbitration law in particular subject areas, as well as the import of thoroughly crafting effective pedagogical techniques in the arbitration milieu, this section is devoted to delineating the convoluted nature of labor and employment arbitration law in both the United States and Japan. The expectation is that this cursory overview will further illustrate the need for creative and considered pedagogical techniques for teaching this area of the law.

#### A. *The American Experience*

With very few exceptions, labor and employment arbitration occurs only because the parties have *agreed* to it as a means of resolving a dispute.<sup>47</sup> But aside from this general foundational point, there are critical differences between arbitration in the union context and the non-union context, which makes this area of the law a bona fide legal minefield. For instance, in the union context, the arbitration agreement is generally a clause that is part of a broader collective bargaining agreement (CBA).<sup>48</sup> Moreover, rather than applying the FAA to labor arbitration provisions in a CBA, Section 301 of the Taft-Hartley Amendments to the National Labor Relations Act (NLRA) applies instead.<sup>49</sup> Although the court will generally enforce arbitration provisions under Section 301, there are special rules that apply to union attempts to waive their members statutory rights through mandatory arbitration clauses.<sup>50</sup> For example, in

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<sup>47</sup> See *supra* note 9.

<sup>48</sup> See WILLBORN ET AL., *supra* note 36, at 47.

<sup>49</sup> See 29 U.S.C. § 185.

<sup>50</sup> See WILLBORN ET AL., *supra* note 36, at 48.

*Alexander v. Gardner-Denver Company*<sup>51</sup> and *Wright v. Universal Marine Service Corporation*,<sup>52</sup> the Court made clear that in order for *unions* to contract away an individual's statutory rights (such as under Title VII or the ADA) through arbitration provisions, such waivers must be knowing and voluntary, and the language in the CBA must be "clear and unmistakable."<sup>53</sup>

In the non-union context, on the other hand, the majority of American private workers are "at will" workers and thus, do not enjoy the benefit of employment contracts.<sup>54</sup> Consequently, arbitration agreements are often found in separate agreement, signed at the commencement of an employee's employment without much fanfare.<sup>55</sup> Unlike the union context, mandatory arbitration provisions in individual employment agreements waiving employee's statutory or common law rights are easier to enforce, in line with the FAA.<sup>56</sup>

#### *B. The Japanese Experience*

The number of labor and employment disputes in Japan have increased in recent years, primarily as a result of Japan's recent economic troubles, which have lead to increased numbers of layoffs and pay reductions.<sup>57</sup> Yet, under current law, arbitration *per se* does not even occur in

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<sup>51</sup> 415 U.S. 36 (1974).

<sup>52</sup> 525 U.S. 70 (1998).

<sup>53</sup> See *Wright*, 525 U.S. at 80-81.

<sup>54</sup> See WILLBORN ET AL., *supra* note 36, at 80-82. "At will" employees can be fired for good reason, bad reason, or for no reason at all, so long as the reason is not an illegal one. See *id.* at 95.

<sup>55</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitration agreement found in NASD broker registration statement). Employers tend to heavily favor arbitration as a means of dispute resolution because they tend to enjoy a significant advantage over employees in arbitrating agreements as "repeat players" in this process. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1063-64 (2000).

<sup>56</sup> See *Gilmer*, 500 U.S. at 26-28; *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 119 (2001).

<sup>57</sup> See Editorial, *Settling Labor Disputes Efficiently*, THE JAPAN TIMES, Jan. 9, 2004, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?ed20040109a1.htm> (last visited June 1, 2005).

the labor and employment context. This is because the new Arbitration Law,<sup>58</sup> states that arbitration agreements involving *individual labor disputes* are *invalid*.<sup>59</sup> Apparently, this provision was meant to primarily secure an individual's fundamental right of access to a national court.<sup>60</sup> That being said, this state of affairs is most likely based on the exceptional number of alternative systems and forums already available to Japanese employees and employers to resolve their labor disputes short of arbitration.

For instance, like the United States, Japan relies extensively on a number of external and internal dispute resolution mechanism as a precursor to administrative proceedings or litigation.<sup>61</sup> First, Japan has fostered Grievance Machinery Systems ("GMS") as mechanisms "through which employees may voice their disagreement with the way that their labor contracts are being administered."<sup>62</sup> Although GMS has been often set up through use of a union CBA, they have been largely ineffective as a result of underutilization.<sup>63</sup> Second, Japan has developed Labor-Management Consultation (LMC).<sup>64</sup> Indeed, industrial relations in Japan have been fairly stable in the past few decades, and a significant factor in this stability has been the spread of joint LMC,

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<sup>58</sup> See Arbitration Law, Law No. 138 of 2003 (enacted Mar. 1, 2004), *available at* <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html> (last visited June 1, 2005).

<sup>59</sup> See *id.* at Supp. Prov., Art. IV ("**Article 4. (Exception Relating to Arbitration Agreements Concerning Individual Labor-related Disputes).** For the time being until otherwise enacted, any arbitration agreements concluded following the enforcement of this Law, the subject of which constitutes individual labor-related disputes (which means individual labor-related disputes as described in article 1 of the Law on Promoting the Resolution of Individual Labor Disputes [Law No.112 of 2001]) that may arise in the future, shall be null and void.").

<sup>60</sup> See Nakamura, *supra* note 44, at 6.

<sup>61</sup> See Elbo, *supra* note 37, at 8. The phrase "*Arasoi o mizu ni nagasu*" – "*Let the dispute flow to water*" reflects the traditional Japanese view of labor dispute settlement. See *id.* at 2. That is, the object is to resolve the dispute as painlessly and amenable as possible, and allow the parties to return to good terms. See *id.*

<sup>62</sup> *Id.* at 8.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 9.

regardless of whether the business is union or non-unionized.<sup>65</sup> Third, is the Labor Tribunal System (LTS), which brings in a third party, the government, to attempt to resolve employment disputes.<sup>66</sup> Under the LTS, parties can choose between litigation and court arbitration, which allows for some flexibility in resolving disputes depending on the dispute's relevant characteristics.<sup>67</sup> Fourth, and most recently, under Law No. 112 of 2001,<sup>68</sup> Japan has set up more than 300 Comprehensive Labor-related Counseling Desks, a system of advice and guidance from the directors of the Prefectural Labor Bureaus, and a system through which Dispute Adjustment Committees of scholars and experts can provide aid to help resolve labor disputes.<sup>69</sup>

In short, the veritable maze of organizations, laws, and dispute resolution mechanisms that concern the resolution of individual labor disputes in Japan require that the Japanese law student be well grounded not only in arbitration law generally, but also in specific areas like labor and employment law which have developed their own dispute resolution lexicon outside of the new arbitration law.

#### IV. PEDAGOGICAL METHODS FOR TEACHING ARBITRATION LAW

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<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 2; *see also id.* at 6-7 ("Under the LTS, a panel of arbitrators composed of one professional judge, one trade union representative, and one employer representative, all of whom have expert knowledge and experience in handling labor-management problems, must conduct a maximum of three sessions of hearings into a labor dispute and attempt to mediate when there is a prospect for settling the dispute.").

<sup>67</sup> *See Settling Labor Disputes Efficiently*, *supra* note 57.

<sup>68</sup> *See* Law on Promoting the Resolution of Individual Labor Disputes, Law No. 112 (July 11, 2001), at [http://www.jil.go.jp/english/laborinfo/library/documents/llj\\_law8.pdf](http://www.jil.go.jp/english/laborinfo/library/documents/llj_law8.pdf) (last visited June 2, 2005).

<sup>69</sup> Law Number 112's relation to the LTS is that the two complement each other. *See* Elbo, *supra* note 37, at 5-6 ("Both have built their relative strength from judicial and administrative mechanisms provided by the Supreme Court and [Japanese Ministry of Labor, Health and Welfare], respectively."). The initial success of Law No. 112 has been remarkable. In 2002 alone, the directors of Prefectural Labor Bureaus received 2,332 applications for advice and guidance, which was a 63% increase from 2001. *See id.* at 5. Requests for conciliation by Dispute Adjustment Committees increased by 98% in 2002, with a total of 3,036 such requests. *Id.*

The previous three sections have clearly highlighted both the importance and complexity of arbitration law in the United States and Japan. So, it can hardly be considered surprising that nearly all law schools in the United States cover arbitration law to some extent, whether through an Alternative Dispute Resolution (ADR) class or through a stand-alone arbitration course.<sup>70</sup> Arbitration concepts are also increasingly appearing in first year law courses such as civil procedure, contracts, and legal research and writing.<sup>71</sup>

Having established the overriding importance of incorporating arbitration into American and Japanese law school curriculum, the following four subsections consider the optimal placement of arbitration law in the law school curriculum, the ideal instructor to teach such a curriculum, the appropriate scope of an arbitration curriculum, and finally, and I believe most crucially, the pedagogical method by which such courses should be taught.

A. *The Optimal Placement of Arbitration in the Law School Curriculum*

Legal educators often declare the formative significance of the first year of law study. During the first year of legal education students form ideas about the duties of a lawyer and what law practice entails.<sup>72</sup> For this reason, introducing arbitration in the first year curriculum should have a profound impact on students' acceptance of arbitration as a valid and effective alternative to litigation. While references to arbitration law in substantive courses could send the message

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<sup>70</sup> See Tulane Arbitration Institute, Resource, *Teaching Arbitration in U.S. Law Schools*, 12 WORLD ARB. & MEDIATION REP. 224, 225 (2001) (finding that 155 of 168 surveyed law schools teach arbitration in one form or another, while 36 offered a general course in arbitration). Some law schools, in addition, offer specialized arbitration courses such as international arbitration or labor arbitration. See *id.* It might also be noted here that arbitration should be taught to undergraduates and other professional school students, such as Business School students. See Mark Levin, *Symposium: Legal Education in Japan. Legal Education for the Next Generation: Idea from America*, 1 ASIAN-PAC. L. & POL'Y J. 3, 5 (2000). While law students will be the ones most likely participating in actual arbitration proceedings as lawyers and judges of the future, some undergraduate students will become the nation's administrators and business leaders and be involved in that capacity. See *id.*

<sup>71</sup> See Stephen J. Ware, *Teaching Arbitration Law*, 14 AM. REV. INT'L ARB. 231, 231 (2003).

<sup>72</sup> See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution Into Standard Law School Courses: A Report On a Collaboration With Six Law Schools*, 50 FLA. L. REV. 589, 596 (1998).



that arbitration is not worthy of its own academic analysis, most first-year programs are unwilling to dedicate a substantial portion of their limited class time solely to teaching arbitration.<sup>73</sup> So, while not ideal, a brief introduction in first-year courses is superior to completely ignoring arbitration during the formative first year. Such an introduction can encourage students to seek out courses that offer an in-depth coverage of arbitration later in their studies.<sup>74</sup>

Due to the contractual nature of arbitration agreements, the topic fits naturally into a basic contracts course.<sup>75</sup> Curriculum can include not only the theories and procedures of arbitration, but also contract doctrines and problems that raise issues about arbitration such as the "battle of the forms."<sup>76</sup> Also, a course focusing on the rules of litigation, such as civil procedure, is an ideal setting for an introduction to arbitration.<sup>77</sup> A comparison of litigation and arbitration leads most students to determine that arbitration is an effective means of attaining an enforceable award without resorting to judicial intervention.<sup>78</sup> Furthermore, a traditional legal writing course seeks to teach first-year law students the research and writing skills necessary not only for success in law school but also in law practice.<sup>79</sup> In doing so, most classes require students to write at least one memorandum addressing a specific legal question or issue. One simple way to

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<sup>73</sup> See Tulane Arbitration Institute, *supra* note 70, at 226.

<sup>74</sup> And as discussed above, most law schools do have some variety of upper level, specialized arbitration classes. *See id.*

<sup>75</sup> See Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L. J. 915, 919 (2001).

<sup>76</sup> See Ware, *supra* note 71, at 240.

<sup>77</sup> *See id.*

<sup>78</sup> See Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) Into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 695-96 (1998).

<sup>79</sup> See Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709, 710 (1998).

include arbitration law is to assign a memo involving an issue relevant to arbitration such as arbitrability.<sup>80</sup>

Of course, arbitration also fits well in the upper-level law school curriculum.<sup>81</sup> Nevertheless, in ADR courses, arbitration may be overshadowed by conciliation, mediation, and negotiation.<sup>82</sup> Also, specialized courses such as labor arbitration and international arbitration, to the extent that they are offered,<sup>83</sup> tend to be low-enrollment courses not taken by most students.<sup>84</sup> Therefore, while appropriate for advanced students concentrating on specific types of arbitration, they are inadequate for providing the basic understanding of arbitration that all students should acquire. In this respect, arbitration is most effectively taught as a self-contained topic, not as an aspect of another doctrinal category.<sup>85</sup> Therefore, a course in general arbitration law is the optimal setting for instruction, though any coverage of arbitration is certainly better than none at all.

### *B. The Ideal Instructor for an Arbitration Course*

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<sup>80</sup> See *id.* at 714.

<sup>81</sup> See Tulane Arbitration Institute, *supra* note 70, at 225.

<sup>82</sup> See *id.*

<sup>83</sup> A recent survey showed that only 32 of 168 law schools taught labor arbitration, while 29 out of 168 law schools taught international commercial arbitration. See *id.* at 226.

<sup>84</sup> See *id.* at 225.

<sup>85</sup> See Huber, *supra* note 15, at 255. And yet only 36 out of 168 or 21% of law schools teach arbitration as a stand alone course. See Tulane Arbitration Institute, *supra* note 70, at 225.

Full-time professors are familiar with the law school environment and the educational needs of their students, and also have an understanding of teaching methodology.<sup>86</sup> That being said, many full-time professors lack substantive knowledge of arbitration, as well as experience as arbitrators and advocates in arbitration proceedings.<sup>87</sup> This lack of expertise can be overcome, however, by creating one's own teaching materials.<sup>88</sup> Preparing materials to be used in one's class reinforces the expertise of the teacher in his subject. It also gives the teacher an intellectual stake in the curricular effort and encourages the teacher to repeat the course in the future.<sup>89</sup>

Arbitrators and some attorneys, as part-time professors and adjuncts, understand not only the process in general, but also the practical implications of new developments in this rapidly growing field.<sup>90</sup> On the other hand, these professionals arbitrators and attorneys are often unfamiliar with teaching methodologies, the general goals of the law school curriculum, and the unique elements of the law school's administrative structure.<sup>91</sup> Team-teaching, combining the experiences of both full-time professors and practitioners, may therefore be the best way to proceed when teaching an arbitration course.<sup>92</sup>

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<sup>86</sup> See Katheryn M. Dutenhaver, *Dispute Resolution and Its Purpose in the Curriculum of DePaul University College of Law*, 50 FLA. L. REV. 719, 729 (1998).

<sup>87</sup> See *id.*

<sup>88</sup> See Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 647 (1998).

<sup>89</sup> See *id.*

<sup>90</sup> See Dutenhaver, *supra* note 86, at 726.

<sup>91</sup> See *id.* at 727.

<sup>92</sup> See *id.* Another option is utilizing guest lecturers or speakers. While full-time professors would teach classes, arbitrators and attorneys could occasionally be invited to speak to the class on specific issues. This allows students to benefit from the experiences of different professionals under the supervision of an experienced educator. See *infra* note 100.

### C. *The Scope of an Effective Arbitration Curriculum*<sup>93</sup>

It is reasonable to assume that the average person will know very little about arbitration.<sup>94</sup> Therefore, it is the duty of legally educated individuals to be able to explain basic details and answer common questions regarding the process. A course in arbitration should therefore enable the student to answer questions such as: How and where do arbitrations take place? Does an outside agency administer the proceedings? Who are the fact finders in arbitration? How are arbitrators chosen? What qualifies them to be arbitrators? Who do arbitrators work for? What happens if an arbitrator makes a mistake, is prejudiced against one party, or engages in other misconduct?<sup>95</sup>

In addition to helping students answer these central questions of arbitration law, an effective arbitration curriculum should have the following components. First, any introduction to arbitration should include a comparison of arbitration to other methods of dispute resolution such as litigation and conciliation, emphasizing that the appropriate method should be determined on a case-by-case basis.<sup>96</sup> Also an introduction should address the theories and motives behind arbitration, including discussions about time and money, creation of a flexible process with the ability to conform to the individual needs of parties, and resolutions that serve these needs.<sup>97</sup>

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<sup>93</sup> The suggested areas of study discussed below are a compilation of topics covered by syllabi on the Association of American Law School Alternative Dispute Resolution Section's web page. See Collected American Law School Dispute Resolution Syllabi, available at [http://www.law.missouri.edu/aalsadr/DR\\_syllabi.htm](http://www.law.missouri.edu/aalsadr/DR_syllabi.htm) (last visited June 1, 2005).

<sup>94</sup> This is especially true given the complexities of the arbitration field as demonstrated in Parts II and III above.

<sup>95</sup> These questions are drawn primarily from the syllabus of Professor Sternlight of the University of Nevada-Las Vegas School of Law. See Jean R. Sternlight, *Arbitration Syllabus for Fall 2003*, available at [http://www.law.missouri.edu/aalsdr/Syllabi/sternlight\\_syllabus\\_arbitration.htm](http://www.law.missouri.edu/aalsdr/Syllabi/sternlight_syllabus_arbitration.htm) (last visited June 1, 2005).

<sup>96</sup> See Riskin, *supra* note 72, at 594.

<sup>97</sup> See Sternlight, *supra* note 95.

The instructor should also stress that not all transactions are suited for arbitration, and not all forms of arbitration are relevant to all transactions.<sup>98</sup> Next, the role of the arbitrator or arbitrators should be covered, followed by a discussion of the characteristics, qualifications, and ethical duties of an arbitrator. Thereafter, the initiation of arbitration by demand and answer should be covered, as well as discovery and scheduling (emphasizing the limited nature of discovery). Finally, the arbitral hearing itself should be discussed with attention on: presentation of cases, evidentiary rules (or lack thereof), closing arguments and substitution of written briefs in place of personal appearance before an arbitral tribunal.

Additionally, special attention should be given to the arbitral award and the termination of proceedings. In discussing the arbitral award, the ability to limit potential awards should be tackled. Further discussion should include whether arbitrators are required to explain the reasoning behind their awards or give written opinions. Another important concern regarding arbitration deals with the limited judicial review given to arbitral awards. Discussion of this limited type of review should include enumeration of the relatively few circumstances under which judicial review will be granted.

Furthermore, no arbitration course would be complete without instructing students on drafting an arbitration clause. Emphasis should be placed on the drafter's ability to include provisions that benefit the particular client. The drafter's primary goal is to create (and in some cases negotiate) a clause that meets the client's needs and protects his interests. Drafters must remember to take full advantage of the flexibility provided by the arbitration process.

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<sup>98</sup> See Catherine Kessedjian, *Educating Lawyers for Transnational Challenges*, available at <http://www.aals.org/international2004/Papers/kessedjian.pdf> (last modified April 7, 2004). For instance, it is essential to address the issue of whether a dispute is arbitrable and thus subject to arbitration. See WILLBORN ET AL., *supra* note 36, at 48.

Last, not only is it important to instruct students on various domestic arbitration models, but also on international arbitration models and specific models adopted by other countries. Because arbitration allows parties to dictate the laws and rules governing their disputes, this latitude necessitates that lawyers be open to the advantages offered by the arbitral procedures of other jurisdictions, regardless of where they practice. In order to utilize these choices, attorneys must have a basic understanding of foreign procedures. The most common rules utilized in transnational arbitrations are those of the UNCITRAL, the International Chamber of Commerce, and the American Arbitration Association and some emphasis should be placed on each of these organizations.<sup>99</sup>

#### *D. Effective Pedagogical Methods for Teaching Arbitration Law*

This section divides potential teaching techniques into two broad, all-encompassing, categories: theory-centered methods and skill-centered methods. The theory-centered method focuses on modifying the traditional Socratic lecture format, along with applying other forms of theory-centered methods to teach arbitration law, while the skill-centered section primarily focuses on role-playing and different forms of cooperative learning.

##### *1. Theory-Centered Methods*

###### *a. Lectures*

The most obvious method of conveying the theories underlying arbitration law is through lecturing.<sup>100</sup> While students must learn the theories of arbitration law, simply presenting

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<sup>99</sup> See *supra* notes 16-17 and 42.

<sup>100</sup> See Pipkin, *supra* note 88, at 641. The lecture method, the Socratic approach being a popular variant in American law schools, is one of the most common teaching methods in the traditional law school curriculum and is useful in both large and small classes. However, in attempting to keep the class interested, it is not enough simply to regurgitate material; the professor should make sure and engage the students' interest, not only with thought-provoking questions, but by getting the students to voice their own thoughts as often as possible.

students with this body of information, without more, is likely to be unproductive. In order to be academically challenged, students must become intellectually engaged with the information put before them.<sup>101</sup> To encourage engagement in lectures, teachers should stress the importance of asking questions in class.<sup>102</sup> Instructors should also urge students to write down questions that they think of in-between classes and present them during the next class.<sup>103</sup> When multiple students have questions, it may be most effective to take several questions at once.<sup>104</sup> This allows the professor to allocate more time to answering questions deemed most beneficial to the entire class.<sup>105</sup> In utilizing this strategy, it is important to approach students, whose questions may not have been fully covered, outside of class to follow-up.<sup>106</sup>

#### b. Other Theory-Centered Methods

Another effective theory-centered method involves application of arbitration laws and arbitral organization rules to sample arbitration agreements. Through analyzing an agreement, students observe the flexibility of arbitration and are provided examples of how to draft effective

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<sup>101</sup> See Levin, *supra* note 70, at 10. Another way of keeping lectures interesting is by utilizing guest lecturers. Guest lecturers, especially practitioners or arbitrators, can be very effective in showing students what really goes outside the ivory tower of academics. These individuals can often bring new insight into the classroom and renew the student's interest in the subject material by relating their experiences from their actual practice of the material.

<sup>102</sup> Professors should attempt, through hypotheticals and real life examples, to give the students a practical grasp of how arbitration.

<sup>103</sup> Alternatively, another effective way to make students feel "invested" in the learning process is to assign students to lead class discussion. By requiring each student in a class to teach a lesson, this forces each student to learn at least part of the course material in considerably more depth than they might in a traditional lecture environment. When a student feels that the person teaching the class is a peer rather than a superior, it is likely that they will often be more willing to participate in the discussion at hand because there will be less of a feeling of intellectual inferiority towards the person with whom they are debating. Of course, such an approach would require a relatively small class size so that each student could be assigned to lead a class discussion.

<sup>104</sup> See John Barkai, *Innovations in ADR Pedagogy: What Do I Do In My ADR Class that You Might Not Be Doing?*, available at <http://www.aals.org/am2003/booklet.pdf> (Jan. 3, 2003).

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

provisions. Many arbitration professors in America also utilize student-written discussion questions.<sup>107</sup> Assigning students to submit written discussion questions and corresponding answers requires students to analyze the material gleaned from lectures and assigned readings. These questions can be used to promote class discussions, allowing other students to benefit from the insights of their classmates.

As part of this same approach, students can be assigned to keep arbitration journals. The purpose of requiring students to write journal entries is to assist students in reflecting on what they are learning and chart the progress of that learning.<sup>108</sup> If the teacher requires students to submit journal entries at intervals during the course, these entries may also provide the instructor with feedback on the learning that is occurring and the effectiveness of the teaching methodologies being used.<sup>109</sup> If the teacher does not require the submission of journal entries until the end of the course, the feedback provided can still be utilized in altering the methodologies for teaching the class in the future.<sup>110</sup>

Journal entries should address what the student is learning and experiencing in the course: what was learned from simulation experiences, was a technique used more or less effective compared to one used in a previous exercise, how have particular reading assignments or class discussions impacted the student's perception of arbitration.<sup>111</sup> The entries should be

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<sup>107</sup> See, e.g., Alan Freed & Kathleen Whitby, *Alternative Dispute Resolution Theory and Practice Syllabus*, available at <http://law.wustl.edu/Students/Courses/Whitby/Fall2004/ADRSyllabusFLO4update.doc> (last modified Sept. 16, 2004).

<sup>108</sup> See John Barkai, *Negotiation and ADR Syllabus and Related Materials*, available at <http://www2.hawaii.edu/~barkai/neg> (last visited June 2, 2005).

<sup>109</sup> See *id.*

<sup>110</sup> See Sternlight, *supra* note 95.

<sup>111</sup> See *id.*



analytical, not just merely a record of what happened in class on a certain day.<sup>112</sup> Criticism of opinions expressed in a reading or in class discussion is appropriate if it is supported by analysis.<sup>113</sup> Instructors should emphasize the personal and confidential nature of journal entries and students should be encouraged to focus on personal reflection, not just what they assume the instructor wants to read.<sup>114</sup>

Finally, another theory-centered strategy involves the traditional approach of assigning students to write a research paper.<sup>115</sup> The teacher can either suggest topics or allow the students to choose issues that particularly interest them. Potential topics may involve policy issues, sociological insights, or practical concerns implicated by arbitration.<sup>116</sup> For this assignment to be truly effective, instructors should require that these papers be based on outside research, not just the assigned reading for the course.<sup>117</sup> One way that the entire class can benefit from these research papers is by requiring the authors to give a presentation of their research.<sup>118</sup> These presentations can be given in a lecture format or they can include simulations or other interactive exercises.<sup>119</sup> Regardless, the important aspect of having students present their papers is that it gives them a

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<sup>112</sup> See Barkai, *supra* note 108.

<sup>113</sup> See *id.*

<sup>114</sup> See Sternlight, *supra* note 95.

<sup>115</sup> *Id.* This teaching method can be very effective in giving students a thorough knowledge of subject material because it forces the students to spend a significant amount of time researching and considering the material. However, with this method, the majority of study takes place outside of the classroom, so it should be combined with other methods.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> Creative presentations, however, would more likely be effective in engaging the class in an interesting discussion.

chance to develop their oral advocacy and communications skills, an essential weapon in the arsenal of the complete lawyer.

## 2. Skill-Centered Methods

While a basic theoretical understanding of arbitration law is necessary, once such foundational knowledge is established it is also imperative to develop the student's practical skills as well.<sup>120</sup> The most effective way of refining skills is by allowing students to demonstrate these skills through interaction with their peers.<sup>121</sup> In this vein, "learning by doing"<sup>122</sup> or cooperative learning is the primary skill-centered technique utilized in teaching arbitration.<sup>123</sup>

### a. Role-Playing and Cooperative Learning

There are many different types of role-playing, but what follows are some suggested alternatives. One idea is to issue general rules and instructions explaining the nature of these exercises and the student commitment that they will require.<sup>124</sup> These role-playing exercises

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<sup>120</sup> See Kimberlee Kovach, *ADR Education: The Promise of Our Future*, 51-SEP. DISP. RESOL. J. 56, 58 (1996).

<sup>121</sup> *Id.* There are generally three basic approaches in which students may interact with each other as they learn. First, (the approach which is currently dominant) the students may simply compete to see who is "best;" i.e., who can get the best grades, work the hardest, etc. Second, students can work individualistically towards a goal without paying attention to the other students. Third, however, students can work cooperatively with a vested interest in each other's learning as well as their own. This third method is known as "cooperative learning" and is discussed throughout this section. See Roger T. Johnson & David W. Johnson, *An Overview of Cooperative Learning*, in J. Thousand, A. Villa & A. Nevin, *Creativity and Collaborative Learning* (1994), available at <http://www.cooplearn.org/pages/overviewpaper.html> (last visited May 31, 2005).

<sup>122</sup> See Riskin, *supra* note 72, at 597.

<sup>123</sup> There are five basic elements that must be present in an effective cooperative learning curriculum according to Johnson & Johnson: (1) students must learn the assigned material and ensure that all members of the group learn the assigned material ("positive interdependence"); (2) there must be promotive, face-to-face interaction in which individuals encourage and facilitate each other's efforts to achieve, complete tasks, and produce in order to reach the group's goals; (3) there must be personal responsibility and accountability through having the performance of each individual student assessed; (4) there must be emphasis on interpersonal skills by rewarding the use of social skills; and (5) students must engaging in "group processing" by reflecting on group sessions to clarify and improve the effectiveness of the members in contributing to the collaborative efforts to achieve the group's goals. See Johnson & Johnson, *supra* note 121.

<sup>124</sup> See Freed & Whitby, *supra* note 107.

begin by providing participating students with a script of facts tailored to their assigned roles.<sup>125</sup>

A student or a team of students is assigned to represent each party in the arbitration. Students may also be assigned to take on the role of arbitrator.<sup>126</sup>

Another alternative is to assign specific roles, and give “secret” instructions and goals. Regardless of group size, this helps keep students interested in the project, while simultaneously giving them a more realistic view of how arbitration works in practice. The student should be instructed to strive to their utmost to achieve this goal during the course of the arbitration. The professor may additionally assign the students various goals with differing levels of importance. This will demonstrate to the student how truly difficult it can be to attain the goals that their employer, union, or client want them to achieve, and can thus be a very effective teaching technique.

On the other hand, the “fish bowl” technique can be a powerful teaching tool for larger group of students.<sup>127</sup> Under the “fishbowl” technique, a small group of role players or actors play their roles in front of the rest of a larger classroom.<sup>128</sup> This is almost like watching a fish inside a bowl and is a good way for students not involved in the actual role play to observe the

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<sup>125</sup> See Pipkin, *supra* note 88, at 641.

<sup>126</sup> See *id.*

<sup>127</sup> See generally Wolfgang Beywl & Susan Mäder, *The Fishbowl Method in Evaluation - Work In Progress*, at [http://univation.org/download/Fishbowl\\_engl\\_kurz.pdf](http://univation.org/download/Fishbowl_engl_kurz.pdf) (last visited May 31, 2005). This is an especially valuable technique insofar as large arbitration classes are concerned, as there seems to be some prejudice by professors to use role-playing as a teaching method only in smaller groups. See Dwight Golann, *The More the Merrier? Teaching a Large ADR Survey Course*, available at [http://www.law.missouri.edu/aalsadr/Syllabi/golann\\_teaching\\_large\\_survey\\_class.htm](http://www.law.missouri.edu/aalsadr/Syllabi/golann_teaching_large_survey_class.htm) (last visited May 27, 2005). Nevertheless, larger classes may be the only practical option when teaching arbitration and large classes are advantageous because they give more students access to the curriculum. See *id.*

<sup>128</sup> See Beywl & Mäder, *supra* note 127, at 1. Those selected to participate in the fish bowl role play can be given additional points for the additional work entailed.

proceedings from an objective or detached standpoint, from which they often may be able to more aptly recognize problems or learn good techniques.<sup>129</sup>

An essential part of the "fish bowl" method is that the students (both those involved in the actual role play and those observing) must be able to reflect and discuss what they have seen. When a professor sees something good or bad happening, or simply wants to take a moment to discuss what is happening in a role play activity, he may choose to "freeze frame" and open the class up for discussion. That is, he will tell the role players to stop where they are in the role play so that the class may reflect on what they have seen. This can be a very effective method of bringing role-playing to larger classes, and thus "spicing up" the normal lecture curriculum.

Regardless of the technique utilized, after the scenario is acted-out, feedback and reflection are essential. Teachers need to provide feedback on the techniques used during the simulation to emphasize good techniques and to discourage bad ones. Group debriefing allow students not only to learn from the experience but also to teach their fellow students.<sup>130</sup> Teachers may also want to videotape the simulations.<sup>131</sup> While post-exercise discussion is helpful, only so much of what occurred can be remembered. Also, of course, memory is not always perfectly accurate. By replaying the video, a student can observe his own performance to determine what needs improvement and what was effective.<sup>132</sup>

There are many advantages to the simulation method. Simulations are a substantial departure from the typical method of teaching: the lecture.<sup>133</sup> The exercises cause students and

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<sup>129</sup> *See id.*

<sup>130</sup> *See Vaughn, supra* note 78, at 704.

<sup>131</sup> *See id.* at 705.

<sup>132</sup> *See Kovach, supra* note 120, at 152.

<sup>133</sup> *See Pipkin, supra* note 88, at 641.

teachers to view the method as something “special,” resulting in students allocating more time and effort to the exercises.<sup>134</sup> Also, students enjoy the break from traditional class routine and appreciate the social aspect of these exercises.<sup>135</sup> The student interaction afforded by simulations allows students the opportunity to become more familiar with their classmates and thus encourages them to be more diligent in their participation for the benefit of others as well as themselves.<sup>136</sup> Simulation exercises are also memorable, not only because they are entertaining or unusual but because they require both physical and mental activity, thus engaging the students’ whole persons.<sup>137</sup>

b. Other Effective Skill-Centered Methods

Besides simulations and role-playing, other effective skill-centered methods exist. For example, the teacher may assign students to write arbitral opinions. The instructor gives students a simulation fact pattern, instructing them that as the arbitrators they are to write an award opinion. Emphasis should be placed on the ability to issue awards for one party, all parties, or no parties. This exercise can be effective for reviewing the duties of an arbitrator and the constraints (or lack thereof) on their ability to issue awards.<sup>138</sup> Alternatively, students could be asked to write an arbitral brief on behalf of one side or the other of the dispute. The professor would give students a simulation fact pattern, instructing them that as the lawyers for one of the parties involved they are to write a brief that will replace the in-person arbitral hearing.<sup>139</sup> This

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<sup>134</sup> See *id.* at 640.

<sup>135</sup> See *id.* at 641

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> For instance, one may examine the role that external law may play in the arbitrator’s decision.

<sup>139</sup> The fact pattern may even be the same simulation used for the arbitral award exercise described previously.

exercise reviews the process of the arbitral hearing and reiterates that arbitrations can be conducted not only in person, but also by different forms of communication as well.

A further strategy that certainly will help students develop skills is holding moot arbitration competitions. While similar to classroom simulation exercises, the competitive nature of the moot replicates the burden to succeed for one's client in a true arbitration.<sup>140</sup> Recognizing the pressure to "win" for one's client is imperative, given the limited review of arbitral decisions. These types of moot arbitration exercises could be accomplished through internationally linked classes of, for instance, Japanese and American law students.<sup>141</sup>

Finally, observation of arbitral procedures during field trips is an indispensable part of a comprehensive arbitration education. Although it would be ideal for students to have the opportunity to witness live arbitral proceedings, not all students will be presented with this opportunity.<sup>142</sup> Therefore, it may be beneficial for students to watch videotapes of arbitral proceedings. Another benefit of these videos is that they can also be used in designing exam questions.<sup>143</sup> Through the use of video, students can be presented with realistic replications of situations likely to be faced in practice.<sup>144</sup>

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<sup>140</sup> See Vaijayanti Joshi, *How to Teach? What to Teach? Some Reflections on Pedagogy*, available at <http://www.aals.org/international2004/Papers/Joshi.pdf> (last visited May 27, 2005).

<sup>141</sup> See *id.*

<sup>142</sup> See Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995, 2003 (1993). There is nothing quite like see an arbitration in action to bring a point home, and students may learn things that may never occur to a professor to teach to them. A possible difficulty with field studies lies in the fact that some arbitrations may not allow visitors to attend or so many students to attend at once. In addition, it may be difficult to get all of the students to attend an event that occurs outside of the normal class time, even if it is made mandatory.

<sup>143</sup> See Kovach, *supra* note 120, at 152.

<sup>144</sup> See *id.*

## CONCLUSION

Just as the process of arbitration is flexible, the law professor of arbitration law must be as well.<sup>145</sup> An instructor should modify the teaching methods utilized based on class dynamics and the educational needs of students. While all of the pedagogical methods presented in this paper are effective for teaching arbitration law to one degree or another, a professor should not confine himself or herself to one teaching method, but rather should combine the many different techniques in the way that most effectively allows students to learn and understand the material. For instance, a professor could lay the groundwork for a role-playing exercise by utilizing lectures and guest speakers, along with field trips to an arbitration. Subsequently, cooperative learning, either of the traditional role-playing variety or fish-bowl kind for larger classes, could be utilized so that students may actively interact with other students and explore the nuances of arbitration law. Finally, the professor could assign students to write arbitral decisions, briefs, or research papers on facets of the simulation.

In short, an arbitration law professor should constantly evolve his or her teaching methods both to the material and to the students, utilizing what works the best, and discarding that which seems ineffective. Furthermore, because there are so many different types of learners, what might work well in one class or with one student may not work effectively (or at all) with a different class or student. Consequently, arbitration professors must remain vigilant at all times and continually strive to be as creative as possible in conveying the material as effectively as possible within the constraints of the academic environment.

In the end, even if the implementation of an effective arbitration curriculum will inevitably cause the conscientious professor to confront seemingly intractable issues and

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<sup>145</sup> See *id.* at 151.

problems of pedagogy, thereby causing frustration and disappointment, ignoring arbitration law all together is no longer an option. Law students, as the leaders of tomorrow, will be instrumental in helping to resolve local, regional, national, and even international disputes.<sup>146</sup> It is essential, therefore, they be well practiced in this effective form of dispute resolution and its multifarious uses. In turn, this familiarization will breed respect for the arbitral process and lead to the promotion of arbitration as a valid, if not preferable, alternative to litigation. Under such circumstances, surely more future disputes, in both America and Japan, will flow readily to water.

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<sup>146</sup> See Pipkin, *supra* note 88, at 618.