

Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards

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I. INTRODUCTION

The last part of the 20th Century witnessed an explosion in the use of alternate dispute resolution to settle claims.¹ Frustrated or simply hampered by the extraordinary time and expense involved in judicial determination of disputes, potential litigants have found in alternate dispute resolution a system where disputes can be finally and fairly resolved in a simple and speedy process.² Parties, by private contractual agreement, have great flexibility to choose a resolution method that parties believe is fair and impartial using neutrals with particular expertise in the area of dispute.³ Indeed, flexibility is limited only by the imagination of the contracting parties.

Arbitration is the method of dispute resolution whereby parties submit their disputes to the judgment of one or more persons outside of the judicial process for binding and final resolution.⁴ Congress and the courts favor arbitration, “a creature of contract,” as a quick and inexpensive alternative to ordinary litigation.⁵ Where an independent basis for federal jurisdiction exists, arbitration contracts are governed by the Federal Arbitration Act,⁶ which requires federal district courts to recognize and enforce private agreements to submit disputes to arbitration.⁷ Analogously, most states have

¹ For example, arbitration in the nonunion employment context was rare until the early 1990s. RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 1 (1997). Since then, however, employment arbitration has become “the cornerstone of national labor policy,” Marshall W. Grate, *Binding Arbitration of Statutory Employment Discrimination Claims*, 70 U. DET. MERCY L. REV. 699, 719 (1993); “an idea whose time has come,” Richard A. Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 635 (1994); and “here to stay” as a method of resolving employment disputes, Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A’s—Access, Adjudication and Acceptability*, 31 WAKE FOREST L. REV. 231, 294 (1996).

² See MARGARET C. JASPER, *THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 10 (2000).

³ For a discussion of voluntariness and consent in arbitration, see Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

⁴ See LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 2 (2000); Matthew N. Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG. Nos. 11–12, 6, 7 (1944).

⁵ *Fils Et Cables D’Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984); 9 U.S.C. §§ 1–16 (1999).

⁶ 9 U.S.C. §§ 1–16.

⁷ See 9 U.S.C. § 4; RICHARD D. ENGLISH, *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK* 101 (Nancy F. Atlas et al. eds., 2000).

enacted some form of the Uniform Arbitration Act as the basis of arbitral regulation and judicial enforcement of agreements in the absence of independent federal jurisdictional grounds.⁸

Various provisions in the FAA have been hotly litigated in the nearly eighty years since the statute's inception.⁹ Supreme Court decisions resolving these issues overwhelmingly and consistently demonstrate a liberal federal policy favoring arbitration and encouraging private contractual agreements to submit disputes to arbitration for resolution.¹⁰ One area in

⁸ See JAMES J. TANSEY, *COMMERCIAL ARBITRATION FOR THE 1990s* 43 (Richard J. Medalie ed., 1991); see also Stephen J. Ware, "Opt-in" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263 (1997) (reporting that 35 states have enacted the Uniform Arbitration Act and 14 other states have substantially similar laws). For an extensive discussion of the UAA and the state role in commercial arbitration, see Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175 (2002).

⁹ See generally Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. (forthcoming 2002) (manuscript on file with author). Examples include the application of choice-of-law clauses (see Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250 (2002) [hereinafter *Unnecessary Choice*]), the § 1 "contracts of employment" exclusion, (see *Circuit City Stores, Inc. v. Adams*, 531 U.S. 105, 112 (2001)), the requisite threshold of procedural fairness as a precondition to judicial enforcement (see *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999)), arbitrator qualification and neutrality (see *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 994–95 (S.D. Ind. 2001)); Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 601–13 (2001), access to discovery (compare, e.g., *Continental Airlines, Inc. v. Mason*, 87 F.3d 1318 (9th Cir. 1996) (enforcing arbitration agreement that did not provide for any discovery) with *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1332, 83 Cal. Rptr. 2d 348, 355 (Cal. Ct. App. 1999) (noting that restrictions on discovery "work to curtail the employee's ability to substantiate any claim against" the employer); see also *Geiger*, 134 F. Supp. 2d at 996 ("limited discovery, controlled by a potentially biased arbitration panel," creates unfairness which renders an arbitration agreement unenforceable), and the allocation of fees (see, e.g., *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556–57 (4th Cir. 2001) (fee-splitting provision which required employee to share costs of arbitration does not per se render an arbitration agreement unenforceable); *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999) (enforcing arbitral award which, among other things, imposed a \$3,150 forum fee on plaintiff); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999) (refusing to enforce arbitration agreement that required employee to pay for one-half of the arbitration fees)). The Supreme Court may have given some indirect guidance on the fee issue when it held, in a case brought under the Truth in Lending Act, that an arbitration agreement that does not mention arbitration costs and fees is not per se unenforceable. *Green Tree Fin. Corp. v. Ala. v. Randolph*, 531 U.S. 79, 89–92 (2000).

¹⁰ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (affirming the

which the Supreme Court has been silent, however, is that of expanded judicial intervention in the review and vacatur of arbitral awards.¹¹

Judicial review, vacatur, and/or modification of arbitral awards are governed by sections 9, 10 and 11 of the FAA.¹² Judicial award confirmation and review can only commence where parties have so provided in the arbitral agreement.¹³ Even where such an agreement is present, the stringent guidelines of the FAA constrain a federal district reviewing court, which may vacate and/or modify an award only in the extremely narrow circumstances delineated in the statute.¹⁴ Since a 1953 Supreme Court decision¹⁵ opened the door for judicial review under a “manifest disregard of the law standard,” courts have cautiously instituted limited non-statutory grounds for judicial

lower court’s decision that a claim under the ADEA could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (“We have previously held that the FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.”); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA, which makes contractual arbitration provisions enforceable, is binding on states and preempts state law which would otherwise invalidate such provisions); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (requiring that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[A]s with any other contract, the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability.”).

¹¹ See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 451 (1998).

¹² See 9 U.S.C. §§ 9–11 (1999).

¹³ See § 9.

¹⁴ See *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995). The FAA allows a reviewing court to vacate an arbitration award in limited circumstances, including “[w]here the award was procured by corruption, fraud, or undue means”; “[w]here there [existed] evident partiality or corruption [by] the arbitrators”; where there existed specified misconduct by the arbitrators, or “[w]here the arbitrators exceeded their powers.” 9 U.S.C. § 10. For a comprehensive discussion of the standards governing judicial review of arbitral awards, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

¹⁵ See *Wilko v. Swan*, 346 U.S. 427 (1953).

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award vacatur.¹⁶ In reality, however, vacatur under any standard is granted only in the rarest of circumstances.¹⁷

Parties attracted to the speed, efficiency and economy of the arbitration process are often disturbed about the finality of the decision.¹⁸ Concerned that the neutral may in fact be biased toward one party, especially in the employment or consumer context where arbitrators with specialized knowledge may be well known to one of the parties who has utilized their services in the past, or perhaps simply comfortable with the traditional judicial litigation route of dispute resolution where one appeal is normally a matter of right, parties have increasingly written into their arbitration contracts clauses expanding the scope of judicial review statutorily provided.¹⁹ Although many courts enforce such agreements under section 9 of the FAA, at least one court has refused, disapproving of parties' ability to circumvent the spirit and intent of the law by contracting around it.²⁰

The silence of the Supreme Court, coupled with the inconsistent lower court decisions, creates uncertainty and current tension in arbitration law.²¹ Absent Congressional intervention in the near future, the validity of private arbitration agreements expanding grounds for judicial review must be settled if the federal policy favoring arbitration is to be effectuated by disputants continuing to choose arbitration as their dispute resolution method of choice.

Most Americans trust the judicial system and value their "day in court" as a birthright of strong importance.²² In our overburdened judicial system,

¹⁶ See Edgar H. Brenner, *The Enforcement of Arbitration Awards*, ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 95 (Nancy F. Atlas et al. eds., 2000).

¹⁷ See Stephan J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 724 (1999). For a thorough discussion of how courts apply both the statutory (*e.g.*, bias, misconduct, or corruption on the part of the arbitrator) and non-statutory (*e.g.*, manifest disregard) grounds for judicial review of arbitration awards, see Hayford, *supra* note 11.

¹⁸ This is particularly true with regard to statutory claims, since individuals "have the right . . . to an effective vindication of their statutory rights." Nolan, *supra* note 9, at II-D; see also Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 447-54 (1999).

¹⁹ See *infra* Part III.

²⁰ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (holding that parties to an arbitration agreement may not contractually alter judicial standard of review of award).

²¹ See *id.* at 933-35.

²² John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 110 (2002) (noting that in Russia, as in the United States, "the perception of having been treated fairly, of having had one's day in court, is often more important than" an adjudicative outcome).

however, many disputing parties are relieved when disputes can be fairly settled without complex and expensive litigation.²³ The Rules of Civil Procedure, for instance, provide ample opportunity for judges to take active roles in encouraging settlement and alternate dispute resolution.²⁴

It is precisely that lack of active judicial participation that has led to a view that commercial arbitration is a sort of second-class “frontier” justice in which participants cannot place the same amount of confidence that they might in the traditional judicial system.²⁵ Losers, with the perception that justice can only be secured in the end by resort to court review, inevitably suspect the fairness and rigor of the arbitral process.²⁶ The conventional wisdom that a reviewing court is the insurer of accuracy and fairness of results of dispute resolution, whatever the form, has a destabilizing effect on the institution of commercial arbitration.²⁷ Many parties drawn to the simplicity and benefits of commercial arbitration nonetheless are uncomfortable with the idea that “a deal is still a deal regardless of the outcome.”²⁸ One way to make sure that such an outcome is grounded in correct legal interpretation is to provide contractually for expanded judicial review. Not a “second bite at the apple” as some commentators have alleged,²⁹ these contractual provisions provide for expanded review regardless of which party prevails, thereby sharing the risk and, at the same time, ensuring the fairness of the process.

Until 2001, the circuits directly deciding the validity of clauses expanding judicial review of arbitral awards agreed that both the liberal federal policy favoring private contracts to arbitrate and the purpose of the FAA to effectuate and ensure enforcement of the parties’ agreements required that courts recognize and enforce such agreements and review

²³ BALES, *supra* note 1, at 154–57 (explaining the benefits of reduced costs to the parties of employment arbitration agreements).

²⁴ See FED. R. CIV. P. 16(a)(5) (giving district court judges the discretion to call a pretrial conference to facilitate settlement of a case).

²⁵ See Hayford, *supra* note 11, at 499; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under The Federal Arbitration Act*, 77 N.C. L. REV. 931, 956 (1999) (criticizing consumer and employment arbitration as coercive and characterizing such arbitration as “rustic justice”); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036–49 (1996) (criticizing arbitration for, among other things, lack of due process protections).

²⁶ See Hayford, *supra* note 11, at 447, 495.

²⁷ *Id.* at 495.

²⁸ *Id.* at 500.

²⁹ *Id.* at 495.

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arbitral decisions using standards provided by the contract.³⁰ The Tenth Circuit disagreed in 2001, however, finding that parties cannot by agreement order the judiciary to engage in review contrary to statutory authority.³¹

These cases reflect tensions at both the theoretical and practical levels. The courts that conclude that parties should not be permitted to draft their own judicial review clauses emphasize a strict construction of the FAA's statutory language, and interpret that language as creating mandatory rules governing judicial review.³² These courts also argue that such an interpretation is necessary to insulate arbitration from judicial interference and, at a more practical level, to maintain the principal advantages of arbitration—its speed and relatively low cost—which depend in large part on extremely limited judicial review.³³ On the other hand, the courts that conclude that parties should be permitted to draft their own judicial review clauses emphasize the advantages of freedom of contract, and argue that this freedom encourages the use of arbitration by giving parties the flexibility to contract for expanded review if they so desire.³⁴

This article argues that courts should enforce private contractual agreements for expanded judicial review in arbitration agreements. This article demonstrates that the court decisions enforcing such arbitral contractual provisions are consistent with the FAA's purpose to ensure enforcement of parties' arbitral agreements, whatever the form. Furthermore, this article argues that the FAA does not preclude courts from reviewing awards under expanded grounds where parties so agree, because the statutory structure provides default rather than mandatory grounds for award vacatur. Finally, this article concludes that permitting the parties to contract for expanded judicial review serves the public policy favoring arbitration, insofar as it encourages arbitration by giving parties who may be extraordinarily concerned with obtaining the legally correct outcome the ability to contract for expanded judicial review.

³⁰ See *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 594 (5th Cir. 2001); *Synchor Int'l Corp. v. McLeland*, No. 96-2261, 1997 U.S. App. LEXIS 27375 (4th Cir. 1997); *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Gateway Tech., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995); *Fils Et Cables D'Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984).

³¹ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936-37 (10th Cir. 2001).

³² See, e.g., *id.* at 934-35.

³³ See, e.g., *id.* at 936 n.7.

³⁴ See, e.g., *Hughes Training*, 254 F.3d at 588; *Synchor Int'l*, 1997 U.S. App. LEXIS 27375, at *5; *Lapine Tech.*, 130 F.3d at 888; *Gateway Tech.*, 64 F.3d at 993; *Midland Metals*, 584 F. Supp. at 243.

Part II of this article provides both a historical and statutory context for the controversy. Part III summarizes court decisions both recognizing and rejecting the enforceability of contractual provisions in arbitral agreements expanding judicial review beyond the scope of the FAA. Part IV analyzes the legitimacy of private contractual provisions expanding judicial review in light of the American tradition of freedom to contract, the legislative purpose and statutory framework of the FAA, and consistency with the internal function of the arbitral process. Part V concludes.

II. ARBITRATION IN DISPUTE RESOLUTION

A. *Historical Background*

Probably as old as human society itself, the use of arbitration dates back to ancient history.³⁵ In medieval England it was the sole remedy for business merchants, and furnished almost exclusively the tribunals for commercial dispute settlement.³⁶ The finality of arbitration decisions was well suited to the commercial setting.³⁷ Dispute resolution was swift, and parties who tended to meet again and again in this forum believed that if they lost this particular dispute, they might win the next time around.³⁸ In addition, the arbitrator selected by the parties was familiar with the unique concerns of the particular business setting.³⁹

Today, arbitration is widely employed in a variety of settings; it is used most traditionally for labor disputes and in the commercial setting where merchants familiar with contract execution and needing speedy and inexpensive decisions to disputes still find this forum invaluable.⁴⁰ Arbitration also is increasingly common in employment and consumer settings where speedy resolution allows a swift return to the status quo ante.⁴¹

Typically, dispute arbitration is arrived at in one of two ways: by demand or by submission.⁴² Arbitration by demand arises where parties to a contract

³⁵ See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

³⁶ *Id.*

³⁷ *Id.* at 269.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See COOPER, *supra* note 4, at 6-7.

⁴¹ See EDNA I. ELKOURI & FRANK ELKOURI, *HOW ARBITRATION WORKS* 3 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

⁴² See JASPER, *supra* note 2, at 10-11.

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prospectively provide in their agreement that any disputes arising out of the performance of that contract will be resolved by binding arbitration.⁴³ Thus the parties, by their contract, bargain for judgment by neutral arbitrators rather than the court.⁴⁴ Arbitration, therefore, is wholly dependent upon a bargained-for agreement between parties, and parties cannot be compelled to submit a dispute to arbitration unless they have agreed as such.⁴⁵ Furthermore, parties contract for the procedural aspects of the arbitration.⁴⁶ In this scenario, one of the contracting parties may file a Demand for Arbitration pursuant to the arbitration clause when a dispute arises.⁴⁷

Arbitration by submission, in contrast, refers to the arbitration of an existing controversy where the parties agree to resolve the dispute by this method.⁴⁸ Resulting decisions may be non-binding, but binding decisions are a typical feature of this method of alternate dispute resolution.⁴⁹ Both types of arbitration usually comprise a process whereby the impartial third-party arbitrator or arbitrator panel considers the arguments of both sides in an arena similar to, but less formal than, a trial.⁵⁰ Discovery and witnesses

⁴³ *Id.*

⁴⁴ See *Fils Et Cables D'Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984).

⁴⁵ *Id.* at 244; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (“[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”).

⁴⁶ See *Midland Metals*, 584 F. Supp. at 245 (“[T]he arbitrator’s factual findings shall be conclusive . . . so long as they are supported by substantial evidence.”); *Unnecessary Choice*, *supra* note 9, at 2250 (“[P]arties dictate the terms of their own contracts, and the FAA does no more than ensure that those terms are enforced.”); see also *id.* at 2253 (“[T]he federal interest begins, and ends, with ensuring that private agreements to arbitrate are enforced according to their terms”); *Volt Info. Sci., Inc. v. Bd. of Tr.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”); *Mitsubishi Motors*, 473 U.S. at 625 (“The ‘liberal federal policy favoring arbitration agreements’ manifested by [9 U.S.C. § 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply ‘creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.’” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 25 n.32 (1983)) (citation omitted).

⁴⁷ *Midland Metals*, 584 F. Supp. at 245.

⁴⁸ See *JASPER*, *supra* note 2, at 11.

⁴⁹ STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* § 4.32 (2001).

⁵⁰ *Id.* at 265–66.

often are limited, and the Federal Rules of Evidence and Civil Procedure typically do not apply.⁵¹

B. *The Congressional Enactment of the FAA*

Traditionally, English jurists and their early American counterparts viewed the arbitration process with suspicion and fear that their judicial authority would be undermined.⁵² Indeed, early American courts held that the judiciary lacked the power to compel the performance of arbitration contracts and determined that public policy did not favor final and conclusive arbitration.⁵³ The courts, therefore, either questioned their ability to enforce or flatly refused to enforce arbitration awards.⁵⁴

In response to such pervasive judicial hostility, several state legislatures enacted laws directing courts to enforce agreements to arbitrate, culminating with the 1925 Congressional passage of the United States Arbitration Act, now codified to as the Federal Arbitration Act ("FAA").⁵⁵ The adoption of the Uniform Arbitration Act in 1956, now applicable in most states, permitted speedy enforcement of arbitration contracts in state courts.⁵⁶ The purpose of the federal legislation was to ensure the enforcement of arbitration agreements involving interstate commerce and maritime transactions.⁵⁷

⁵¹ See James J. Tansey, *The Principal differences between Arbitration and Litigation*, in COMMERCIAL ARBITRATION FOR THE 1990'S 42-43 (Richard J. Medalie ed., 1991).

⁵² See COOPER, *supra* note 4, at 3.

⁵³ See *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (D. Mass. 1845) (No. 14,065) (holding that specific performance of the agreement is not a right which a party can demand from a court of equity and that it is public policy not to force parties to submit to arbitration).

⁵⁴ *Id.*

⁵⁵ See Cohen & Dayton, *supra* note 35, at 266.

⁵⁶ See Tansey, *supra* note 51, at 43; see also Ware, *supra* note 8, at 263 (reporting that 35 states have enacted the Uniform Arbitration Act and 14 other states have substantially similar laws). For an extensive discussion of the UAA and the state role in commercial arbitration, see Stephen J. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration* 54 FLA. L. REV. 175, 208-26 (2002).

⁵⁷ See Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 45 (2000); Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 283 (1996).

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Congress' specific intent in enacting the FAA was to guarantee judicial enforcement of private arbitration agreements.⁵⁸

C. *The Structure of the FAA*

The FAA provides that agreements to settle disputes by arbitration shall be "valid, irrevocable, and enforceable" where the contract involves commerce among the states, territories, and the District of Columbia or with foreign nations or in maritime transactions.⁵⁹ Contracts of employment of seamen, railroad employees, and workers engaged in foreign or interstate commerce are specifically excluded from the Act's coverage.⁶⁰ The exclusion is narrowly construed, and thus, the Act is interpreted to cover prospective agreements for dispute arbitration in the employment contracts of all workers not specifically excluded.⁶¹

Furthermore, the FAA confers on the federal judiciary the ability to stay trial of any dispute where a party applies for such a stay and where the issue to be tried is referable to arbitration under a written agreement.⁶² The party seeking to enforce the contractual arbitration clause may then move the court to direct arbitration to proceed in the manner provided in the agreement.

The FAA does not create independent federal jurisdiction,⁶³ however, and a federal court may act only when jurisdiction has been established under Title 28.⁶⁴ But the Supreme Court has held that the Act creates a body of substantive federal law governing arbitration agreements within its coverage.⁶⁵ The FAA creates no new rights, but only provides a remedy to enforce an already existing arbitration agreement.⁶⁶

In addition to mandatory judicial enforcement of awards where parties so contract in their arbitration agreements,⁶⁷ Congress, in the FAA, provided

⁵⁸ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quoting *Volt Info. Sci. Inc., v. Bd. of Tr.*, 489 U.S. 468, 479 (1989)).

⁵⁹ See 9 U.S.C. § 2 (2000).

⁶⁰ See 9 U.S.C. § 1 (2000).

⁶¹ See generally *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (holding that arguments contesting the applicability of the FAA to a particular employment contract must be premised on the language in section one).

⁶² See 9 U.S.C. § 3 (2000).

⁶³ See 9 U.S.C. § 4 (2000).

⁶⁴ See 28 U.S.C. § 1 (2000).

⁶⁵ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–72 (1995)).

⁶⁶ *Id.*

⁶⁷ *Id.*

for judicial vacatur and modification of awards⁶⁸ in extremely limited circumstances.⁶⁹ The limited judicial review provided by statute renders binding arbitration decisions non-reviewable in all but the rarest of situations.⁷⁰

The FAA is comprised of fourteen sections consisting of three classifications of provisions.⁷¹ First, “front-end” issues address concerns that arise before the commencement of arbitration, such as determinations of substantive arbitrability.⁷² Next, procedural issues, such as the availability of pre-hearing discovery, govern the arbitration process itself.⁷³ Finally, “back end” issues, such as judicial confirmation, vacatur and modification of awards, deal with post-arbitration issues and effectuate the result of the arbitration process.⁷⁴

The act addresses “front-end” issues where the arbitration contract involves commerce or a maritime provision by mandating that such contracts are valid and enforceable by courts.⁷⁵ In addition, the Act directs courts, not only to order that any arbitration proceed in the manner so agreed, but also to stay any trial on the action until the agreed arbitration is completed.⁷⁶

Various “housekeeping” procedural issues addressed in the Act include directing the court to appoint an arbitrator where not so designated by the parties.⁷⁷ The Act also confers subpoena powers on arbitrators, allowing them to compel witness attendance at the proceedings.⁷⁸

The “back-end” issues, involving controversies arising after the completion of the arbitration proceedings, are addressed in sections 9 through 14 of the FAA.⁷⁹ Section 9 provides mandatory judicial award confirmation triggered only when “the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the

⁶⁸ See 9 U.S.C. § 10 (2000).

⁶⁹ See 9 U.S.C. § 11 (2000) (establishing grounds for judicial modification of arbitral awards).

⁷⁰ See *Ware*, *supra* note 17, at 711.

⁷¹ See generally Stephan L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 74.

⁷² See generally *id.*

⁷³ *Id.* at 76.

⁷⁴ *Id.* at 74–75.

⁷⁵ 9 U.S.C. § 2 (2000).

⁷⁶ See 9 U.S.C. § 4 (2000).

⁷⁷ See 9 U.S.C. § 5 (2000).

⁷⁸ See 9 U.S.C. § 7 (2000).

⁷⁹ See Hayford, *supra* note 71, at 74.

arbitration.”⁸⁰ Section 9 also provides that, if one of the parties to the arbitration applies to the court specified in the agreement, or in the absence of specification, the federal district court in which the award was made within one year after the award for an order confirming the award, “the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11”⁸¹

D. Award Vacatur and Modification Under the FAA

Modification and/or correction of arbitral awards is available under section 11 and only at the discretion of the court.⁸² The district court may make an order modifying or correcting the award, under section 11, where there is a material miscalculation of figures or description, where an award is made upon a matter not at issue, or where the award is imperfect in form.⁸³ These modifications may be made to effectuate the intent of the parties or to ensure that justice is done.⁸⁴

Section 10 provides the standards for arbitral award vacatur.⁸⁵ The FAA provides that the federal district court in the geographic locale in which the award was made has the ability and may vacate an arbitration award and, at its discretion, order a rehearing only in the following limited circumstances:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁸⁶

A textualist reading of section 10 demonstrates a Congressional attempt to protect the proceedings against any misconduct by parties or neutrals that

⁸⁰ See 9 U.S.C. § 9 (2000).

⁸¹ *Id.*

⁸² See 9 U.S.C. § 11 (2000).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See 9 U.S.C. § 10 (2000).

⁸⁶ See *id.*

would result in an unfair proceeding, against a proceeding that resolved issues that the parties did not contract to arbitrate, or one that did not result in a final outcome and award.⁸⁷ Nothing on the face of the statute demonstrates a Congressional intent to insulate the parties against error of fact, law, or contract by arbitrators that result in inaccurate or unfair awards.⁸⁸ The statute does not explicitly permit the court to engage in a review of the merits of the case. Likewise, there are no guarantees of correctness of awards or justice for the parties. Rather, the provisions are procedural rather than protectionist in nature.⁸⁹

The courts strictly construe section 10 provisions, and parties attempting to compel judicial award vacatur by capitalizing on any ambiguities in the statute to mandate award vacatur are for the most part frustrated.⁹⁰ Most section 10 litigation involves section 10(a)(4), under which authority parties petition reviewing courts to examine the merits of the case for errors of law or fact in an attempt to prove that the award requires vacatur because the arbitrators “exceeded their power.”⁹¹ Courts have declined the invitation to broadly construe section 10(a)(4).⁹² Generally, the courts instead hold that an arbitrator’s authority is conferred by the arbitral contract.⁹³ A mere error of reasoning or law neither divests that power nor causes that power to be exceeded.⁹⁴ Courts hold that a commercial arbitration award can be vacated

⁸⁷ See Hayford, *supra* note 11, at 450.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Ware, *supra* note 17, at 711, 724–25.

⁹¹ See Hayford, *supra* note 11, at 455.

⁹² See, e.g., Fahnstock & Co. v. Waltman, 935 F.2d 512, 515–16 (2d Cir. 1991) (“We have consistently accorded the narrowest reading to section 10[(a)(4)]”); Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981) (“It is particularly necessary to accord the ‘narrowest of readings’ to the excess-of-authority provision of section 10[(a)(4)].”) (citations omitted).

⁹³ See Davis, 667 F.2d at 165. The Davis court stated:

Arbitration is . . . a matter of contract, and the contours of the arbitrator’s authority in a given case are determined by reference to the arbitral agreement. . . . [T]he genesis of arbitral authority is the contract, and arbitrators are permitted to decide only those issues that lie within the contractual mandate. By necessary implication, an arbitral award regarding a matter not within the scope of the governing arbitration clause is one made in excess of authority, and a court is precluded from giving effect to such an award.

Id. at 165 (citations omitted); see also Hayford, *supra* note 11, at 455–57.

⁹⁴ See, e.g., Tretina Printing, Inc. v. Fitzpatrick & Assocs., 640 A.2d 788, 793 (N.J. 1994) (per curiam) (“Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [section 2A:24-9 of

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under the “exceeded powers” standard only where the arbitrator exceeds the scope of the contract in resolving issues, involves parties not contracted for, or fails to comply with an express requirement of the parties.⁹⁵

E. *Nonstatutory Vacatur*

For many years after the passage of the FAA, its vacatur standards were the exclusive grounds upon which a court could review an award.⁹⁶ The Supreme Court has never directly determined whether the statutory vacatur standards are exclusive or can be expanded. For the most part, courts have strictly interpreted this portion of the FAA, meaning that if a confirmation petition was properly before the court, the court was compelled to confirm the award.⁹⁷ But in the 1953 Supreme Court decision of *Wilko v. Swan*,⁹⁸ the Court implied, in dicta, that “manifest disregard of the law” by an arbitrator would constitute an additional non-statutory ground for judicial vacatur of arbitral decisions governed by the FAA.⁹⁹ This, in turn, led federal courts to consider additional grounds for judicial review and vacatur, in effect creating a “federal common law of vacatur.”¹⁰⁰

Federal case law, varied by circuit, now recognizes non-statutory grounds for vacatur where the award is “arbitrary and capricious,”¹⁰¹ fails to “draw its essence” from the parties’ agreement, is contrary to established

the Act].” *Id.* at 793 (quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 399 (N.J. 1992) (Wilentz, C.J., concurring)).

⁹⁵ See, e.g., *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256–57 (7th Cir. 1994); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993); *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 260–62 (9th Cir. 1992); *Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982).

⁹⁶ See generally *Hayford*, *supra* note 11, at 462.

⁹⁷ See *Fils Et Cables D’Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984).

⁹⁸ *Wilko v. Swan*, 346 U.S. 427 (1953).

⁹⁹ The “manifest disregard of the law” nonstatutory ground for judicial vacatur is the result of the following language in *Wilko*:

While it may be true . . . that a failure of the arbitrators to decide in accordance with the provision of the [law] would “constitute grounds for vacating the award pursuant to section 10 [(a)] of the Federal Arbitration Act,” that failure would need to be made clearly to appear. In unrestricted submissions . . . the interpretations of the law by arbitrators in contrast to manifest disregard are not subject, in the federal courts to judicial review for error in interpretation.

Wilko, 346 U.S. at 436–37 (citations omitted).

¹⁰⁰ *Hayford*, *supra* note 11, at 492.

¹⁰¹ *Id.* at 450–51.

public policy, is “completely irrational,” or was derived by means of “a manifest disregard of the law.”¹⁰² Although the net result of these safeguards is that the arbitrators must grant a fundamentally fair hearing to all parties,¹⁰³ the standards for vacatur are invariably high. This is illustrated by the manifest disregard standard, which requires the reviewing court to find not only a clear error of law, but also that the arbitrator had a correct knowledge of the law and consciously ignored it.¹⁰⁴ In addition, even though the circuits may recognize nonstatutory grounds for vacatur, vacatur under these grounds is rarely granted.¹⁰⁵ In fact, vacatur has been granted under the “manifest disregard” nonstatutory standard in only one reported instance to date.¹⁰⁶

Reviewing courts are further constrained by the lack or dearth of written findings by the arbitrator.¹⁰⁷ One commentator suggests that the lack of reasoned awards is an intentional attempt by arbitrators to prevent courts from usurping arbitral awards and to protect the integrity, purity, and finality of their decision.¹⁰⁸

¹⁰² See *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (citing *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1997)).

¹⁰³ See Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 611 (1995).

¹⁰⁴ See Hayford, *supra* note 11, at 467; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986) (citation omitted), *quoted in* *Conntech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.* 102 F.3d 677, 687 (2d Cir. 1996); *Int’l Telepassport Corp. v. U.S.F.I., Inc.* 89 F.3d 82, 85 (2d Cir. 1996) (per curiam); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996); and *cited in* *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991) (“[i]llustrative of the degree of ‘disregard’ necessary to support vacatur under [the ‘manifest disregard’] standard is our holding that manifest disregard will be found where an ‘arbitrator ‘understood and correctly stated the law but proceeded to ignore it.’” (quoting *Siegl v. Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985) (per curiam)); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (stating that “if the arbitrators simply ignore the applicable law, the literal application of a ‘manifest disregard’ standard should presumably complete vacation of the award.”).

¹⁰⁵ See *Ware*, *supra* note 8, at 264.

¹⁰⁶ *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); *cf.* *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474 (Ga. July 15, 2002) (rejecting the “manifest disregard” standard in a case arising under a Georgia statute virtually identical to the FAA).

¹⁰⁷ See Hayford, *supra* note 11, at 475–76.

¹⁰⁸ *Id.* at 446–47.

III. CONTRACTS FOR EXPANDED REVIEW AND THE COURTS

The limited judicial review available on both statutory and non-statutory grounds falls far short of that available upon appellate review of judicial trial court decisions. Seeking to “have the best of both worlds,” some creative parties fashion both pre-dispute and post-dispute arbitration contractual clauses to provide for judicial review of the arbitrator’s decision expanded far beyond that envisioned in the FAA and related case law decisions.¹⁰⁹ Such contractual provisions, however, inevitably produce tension between the freedom to fashion contracts as the parties see fit and the very thing that makes arbitration attractive in the first place, the finality of the award.

A. Contractual Arbitral Agreements Trump FAA Review Provisions

The earliest case to directly address whether parties to an arbitration agreement can alter the nature of a federal court’s role under the FAA arose in 1984.¹¹⁰ In *Fils Et Cables D’Acier De Lens v. Midland Metals Corp.*,¹¹¹ parties to a commercial agreement included, within that contract, an arbitration clause where they agreed to expand federal district court review of any award to include the power to review whether the arbitrator’s findings of facts were supported by substantial evidence and whether the findings of law should be affirmed, modified, or vacated.¹¹² Upon review, the district court found that such an agreement was valid and reviewed the arbitrator’s findings accordingly, confirming part and rejecting part.¹¹³ The court said that such review was proper because of the contractual nature of the arbitration agreement.¹¹⁴ The court reasoned that since arbitration agreements are wholly created by contract, absent a jurisdictional or public policy barrier, there is no legal impediment to additional agreements to expand judicial review beyond the FAA.¹¹⁵ The court concluded that the arbitration agreement in the case did not offend public policy because, even

¹⁰⁹ See, e.g., *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996–97 (5th Cir. 1995).

¹¹⁰ See *Fils Et Cables D’Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984).

¹¹¹ *Id.*

¹¹² *Id.* at 242.

¹¹³ *Id.* at 247.

¹¹⁴ *Id.* at 244.

¹¹⁵ *Id.*

though the purpose of arbitration is to avoid the time and expense involved in invoking the judicial system to settle disputes, here the parties were only invoking the court's review of an already-determined matter.¹¹⁶ This type of action, therefore, resulted in far less work for the court than full-blown litigation would have.¹¹⁷

B. FAA Vacatur Standards as Default Provisions

Prior to 2001, the only three Circuit Courts of Appeals to definitively decide if parties could legally contract to expand judicial review of their arbitration agreements held that private parties may agree to expand the judicial standard of review.¹¹⁸ In the first of these cases, the Fifth Circuit, in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,¹¹⁹ reviewed a telecommunications dispute where the parties contracted that any disputes arising from their joint business venture would be arbitrated with de novo judicial review of errors of law.¹²⁰ When the parties petitioned the district court for either confirmation or vacatur of the arbitral award, that court affirmed the award in its entirety.¹²¹ In so doing, the district court purported to review the award applying the standards provided in the parties' contract, but using less scrutiny than that of an appellate court reviewing a trial court's decision, citing deference to the federal policy favoring arbitration.¹²²

The Fifth Circuit, in contrast, applied the parties' contractual review standards, vacating the arbitral award of punitive damages, while otherwise affirming the award.¹²³ That court, acknowledging that under the FAA the district court's review of an arbitration award is usually extraordinarily narrow, nevertheless concluded that the FAA provisions are default provisions for judicial review that parties may expand by contract.¹²⁴ The court focused on the contractual nature of the agreement which is to be

¹¹⁶ See *Fils Et Cables D'Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984).

¹¹⁷ *Id.*

¹¹⁸ See *Synchor Int'l Corp. v. McLeland*, CA-95-965-1, 1997 WL 452245, at *6-7 (4th Cir. Aug. 11, 1997); *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995).

¹¹⁹ *Gateway*, 64 F.3d at 993.

¹²⁰ *Id.* at 995-96.

¹²¹ *Id.* at 996.

¹²² *Id.*

¹²³ *Id.* at 1001.

¹²⁴ *Id.* at 997.

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enforced like any contract, noting that the Supreme Court has held that arbitration under the FAA is a matter of consent and not coercion and that parties are free to structure arbitration contractual provisions liberally including the issues to be arbitrated and the rules to be utilized.¹²⁵ While arbitration does provide a vehicle to resolve disputes quickly, the basic objective of the FAA is not expediency but the enforcement of commercial contracts.¹²⁶ The very purpose of the FAA is to put arbitration contracts on the same footing as all contracts.¹²⁷ The Fifth Circuit, therefore, held that contractual arbitration provisions providing for expanded judicial review merely add to rather than circumvent the default provisions of section 10 of the FAA.¹²⁸

C. Proceeding With Caution: A Middle Ground

The Ninth Circuit agreed with the Fifth and overturned a lower court's refusal to review an arbitration award under a contractual arbitration provision in the parties' agreement providing for judicial review of errors of fact or law.¹²⁹ In *Lapine Technology Corp. v. Kyocera Corp.*,¹³⁰ the court noted that the Supreme Court has enforced contract terms that have called for arbitration conducted under agreements limiting the scope of issues submitted for arbitration¹³¹ under rules other than those provided by the FAA,¹³² and under agreements to arbitrate punitive damages contrary to state law.¹³³ In light of these and other Supreme Court decisions emphasizing that the primary purpose of the FAA is to ensure the enforcement of contracts to arbitrate according to the terms of those agreements, the court reasoned that it simply does not make sense to interpret the FAA as preventing the enforcement of agreements to arbitrate under rules expanding its scope.¹³⁴ Thus the court held that federal courts may expand their review of an

¹²⁵ See *id.* at 996–97 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

¹²⁶ See *id.*

¹²⁷ See *id.* at 997.

¹²⁸ *Id.*

¹²⁹ See *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997).

¹³⁰ *Id.* at 888.

¹³¹ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

¹³² See *Volt Info. Sci. v. Bd. of Tr.*, 489 U.S. 468, 479 (1989).

¹³³ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52 (1995).

¹³⁴ See *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997).

arbitration award beyond the FAA limited only by the extent to which the parties have so agreed.¹³⁵

Judge Kozinski, however, was more cautious in his concurrence.¹³⁶ He pointed out that while the Supreme Court cases are helpful, none say that “private parties may tell the federal courts how to conduct their business . . . [or] impose on the federal courts burdens and functions that Congress has withheld.”¹³⁷ He reasoned, however, that since such a case must have an independent jurisdictional basis to be in front of the federal court, enforcing an arbitration agreement with enhanced judicial review consumes fewer judicial resources than traditional litigation.¹³⁸ He agreed that here, where the basis for review contracted for by the parties was essentially the same as the standard of review in appeals from administrative agencies, the bankruptcy court, or habeas corpus appellants, review should proceed according to the agreed terms.¹³⁹ The result would be different, however, if the standard of review contracted for was unfamiliar or absurd.¹⁴⁰ He acknowledged that the FAA is not quite an express congressional authorization of expanded judicial review under this agreement, but concluded that the policy of the Arbitration Act to enforce parties’ agreements sufficed to enforce this particular contract.¹⁴¹

The Fourth Circuit, in the unpublished decision of *Synchor International Corp. v. McLeland*,¹⁴² followed both the Fifth and Ninth Circuits. The *Synchor* court affirmed a federal district court’s order enforcing a final arbitration award using the standard of review provided in the parties’ arbitration agreement which provided that “the arbitrator shall not have the power to commit errors of law or legal reasoning and the award may be vacated or corrected by judicial review for any such error.”¹⁴³ Citing with approval both *Lapine* and *Gateway Technologies*, the court followed the reasoning of those cases and held that the contractual nature of arbitration and the purpose of the FAA to enforce arbitration contracts require the

¹³⁵ *Id.* at 889.

¹³⁶ *Id.* at 891.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Synchor Int’l Corp. v. McLeland*, CA-95-965-1, 1997 WL 452245, at *6-7 (4th Cir. Aug. 11, 1997).

¹⁴³ *Id.*

Article 9 judicial review restrictions to be interpreted as default provisions that parties may expand by mutual agreement.¹⁴⁴

D. 2001 Concurrence in the Employment Context

In 2001, the Fifth Circuit applied the reasoning of *Gateway* to a case arising in the employment context and held that arbitration agreements may expand judicial review beyond the scope of the FAA.¹⁴⁵ In *Hughes Training, Inc. v. Cook*,¹⁴⁶ Gracie Cook resigned her employment with Raytheon when, upon return from sick leave due to a stroke, Raytheon required her to complete a probationary period that had been imposed pre-illness due to sub-standard performance.¹⁴⁷ Cook was precluded from litigating her claim by a pre-dispute mandatory arbitration agreement that she had signed upon hire.¹⁴⁸ The agreement provided that all employment disputes would be submitted to final and binding arbitration.¹⁴⁹ Pursuant to this agreement, Cook arbitrated her claims of discrimination and intentional infliction of emotional distress.¹⁵⁰ The arbitrator found for Cook on the emotional distress claim, and Raytheon filed suit to vacate.¹⁵¹ While the arbitration agreement provided that either party could bring an action in a court of competent jurisdiction to vacate arbitration, the standard of review to be applied to the arbitrator's findings of facts and conclusions of law would be the same as that applied by an appellate court reviewing a judicial bench trial judgment.¹⁵² Raytheon, arguing that this standard of review was inconsistent with the nature of the arbitration agreement and unconscionable, filed suit in accordance with the FAA¹⁵³ to vacate the award.¹⁵⁴ Finding that it was lawful for the parties to contract for more expansive judicial review than that provided statutorily and by case law, the district court performed the contracted-for review. The court held that, as a matter of law, Cook was not

¹⁴⁴ *Id.*

¹⁴⁵ See *Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 591–92.

¹⁴⁸ *Id.* at 590.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 592.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 9 U.S.C. § 9 (2000).

¹⁵⁴ See *Cook*, 254 F.3d at 592.

entitled to recover on the emotional distress claim. The court therefore vacated the award.¹⁵⁵

The Fifth Circuit Court of Appeals affirmed.¹⁵⁶ The court reasoned that, since parties are generally free to structure their arbitration agreements in any manner they desire, that freedom includes contracting around the extraordinarily narrow review usually available to a district court in the arbitration context.¹⁵⁷ Any procedural rules adopted by the parties that add rather than limit those provided by the FAA work to supplement the FAA and would not be inconsistent with the terms of the arbitration agreement itself.¹⁵⁸ Speaking to plaintiffs' unconscionability argument, the court noted that arbitration agreements are not per se unconscionable.¹⁵⁹ Rather, the plaintiffs have the burden of proving unconscionability, since contracts of adhesion are not automatically void.¹⁶⁰

E. The Case Against Expanding Review

In 2001, the Tenth Circuit concluded that parties to an arbitration agreement are precluded from contractually altering the judicial standard of review of an award.¹⁶¹ *Bowen v. Amoco Pipeline Co.*¹⁶² involved a dispute by a landowner against a petroleum company that had been granted a pipeline easement in 1918.¹⁶³ Included in the easement agreement, ratified by a second agreement in 1943, was an arbitration provision.¹⁶⁴ After discovering that a creek on the property had been contaminated by oil suspected to be originating in one of the defendant's pipelines, the landowners sued in federal district court asserting claims for "damages to real property, nuisance, trespass, unjust enrichment, breach of contract and exemplary damages."¹⁶⁵ Ironically, it was the defendant, Amoco Oil, who filed the motion with the district court to stay the proceeding pursuant to the arbitration agreement and order the dispute to arbitration.¹⁶⁶ Before

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 595.

¹⁵⁷ *Id.* at 592-93.

¹⁵⁸ *Id.* at 593.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 593.

¹⁶¹ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

¹⁶² *Id.*

¹⁶³ *Id.* at n.1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 928.

¹⁶⁶ *Id.*

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proceeding with the court-ordered arbitration, the parties agreed both to use the Rules for Non-Administered Arbitration of Business Disputes and to modify those rules to expand judicial review so that either party would have the right to appeal the arbitration award to the district court within thirty days.¹⁶⁷ The expanded grounds for appeal included review under the standard that “the award is not supported by the evidence” and provided that the decision of the district court would be final.¹⁶⁸

The arbitration panel awarded plaintiffs over \$4,000,000 dollars in general damages and \$1,000,000 in punitive damages.¹⁶⁹ Amoco Oil then filed an objection to the plaintiffs’ motion to confirm the award, a motion to vacate the award, and a notice of appeal of the arbitration award pursuant to the modified arbitration agreement.¹⁷⁰ The federal district court, however, limited its review to that provided under the FAA rather than the parties’ contractually-expanded standard of review, declined vacatur, and confirmed the arbitral award.¹⁷¹

After Amoco Pipeline appealed the district court’s order, the plaintiffs challenged review by the Tenth Circuit for lack of appellate jurisdiction because the parties had contractually agreed that any decision of the district court was final.¹⁷² In determining its own appellate jurisdiction, the court examined section 9 of the FAA and noted that this provision allows for judicial intervention only where the parties have expressed their intentions regarding judicial confirmation of the arbitration award in their arbitration agreements.¹⁷³ The court found that, under this provision, it is possible for parties to eliminate judicial review by their arbitration contract, but their intention to do so must be clear and unequivocal.¹⁷⁴ The court reasoned that, by statute, appellate courts derive jurisdiction to review “all final decisions of the district courts.”¹⁷⁵ The court concluded that here, where the parties had

¹⁶⁷ See *Bowen*, 254 F.3d at 930.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Bowen*, 254 F.3d at 930 (citing 9 U.S.C. § 9 (2000)).

¹⁷⁴ *Id.* at 931 (citing *Dep’t of Airforce v. Fed. Labor Relations Auth.*, 775 F.2d 727, 733 (6th Cir. 1985); *Aerojet-Gen. Corp. v. Am. Arbitration Ass’n*, 478 F.2d 248, 251 (9th Cir. 1973)).

¹⁷⁵ 28 U.S.C. § 1291 (2000).

agreed that the district court's decision would be final, the parties had merely reaffirmed the appellate court's statutorily-derived jurisdiction.¹⁷⁶

The court then affirmed the decision of the district court, holding that neither the purposes underlying the FAA nor the principles subsequently announced in the various Supreme Court decisions interpreting the statute supported a rule allowing parties to privately contract to alter the judicial process.¹⁷⁷ The court held that a reviewing court may not vacate an arbitration award except where so provided by the narrow circumstances delineated in the FAA.¹⁷⁸ This is so, according to the court, because a central purpose of arbitration agreements is to avoid the expense and delay involved in litigating a claim in court.¹⁷⁹ Mindful of the strong federal policy favoring arbitration, the court noted that where parties consent to submit their claims to arbitration "a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹⁸⁰ Although acknowledging the judicially recognized exception of "manifest disregard of the law," the court stated that its interpretation of that term meant "willful inattentiveness to the governing law,"¹⁸¹ where the arbitrators knew the applicable law and explicitly disregarded it.¹⁸²

The court acknowledged the arguments that first, the parties here freely contracted for expanded judicial review by agreeing to the availability of appeal under the grounds that the arbitration award was not supported by the evidence; and second, that agreements in arbitration contracts are generally supported by the policy of the FAA.¹⁸³ Although the court agreed that the contractual nature of arbitration is well-established and that parties are free to structure their arbitration agreements as they wish, the court nonetheless declined to accept these arguments as controlling on these facts.¹⁸⁴ The court noted that while the Supreme Court has emphasized that parties may contractually specify which rules will govern their arbitration process, the parties were not permitted to interfere with the judicial process.¹⁸⁵ Absent

¹⁷⁶ *Bowen*, 254 F.3d at 931.

¹⁷⁷ *Id.* at 933.

¹⁷⁸ *Id.* at 932.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).

¹⁸¹ *Id.* (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995)).

¹⁸² *Bowen*, 254 F.3d at 932.

¹⁸³ *Id.* at 933.

¹⁸⁴ *Id.* at 934.

¹⁸⁵ *Id.* (citing *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring and Mayer, J., dissenting)).

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any indication from the Supreme Court that clearly allows private parties to determine the manner in which federal courts review arbitration awards, the court reasoned that the explicit guidance provided by Congress in structuring the FAA, to allow for only limited and specific areas of judicial review, must control.¹⁸⁶

The court noted that the primary purpose of the FAA is to further the policy of ensuring judicial enforcement of arbitration agreements.¹⁸⁷ The limited judicial review provided for by the FAA was deliberately designed to ensure that courts would respect a decision of an arbitrator and not overturn it except in the exceptional circumstances provided by statute. These limited exceptions further the federal policy favoring arbitration by preserving the independence of the process.

Furthermore, the court found that the statutory structure of the FAA evidenced a Congressional intent that judicial review be limited to that provided in the statute and not amendable by the will of the contracting parties.¹⁸⁸ The court noted that while section 4 of the FAA¹⁸⁹ allows parties to contract in their agreements for the ability to petition a federal court for an order compelling arbitration, section 10, in contrast, contains no similar language requiring federal courts to follow contractual provisions for expanded judicial review.¹⁹⁰

In addition, the court noted that such expanded review would defeat the benefits of arbitration by requiring arbitrators to generate written opinions with conclusions of law and findings of fact.¹⁹¹ Courts, unfamiliar with the structure and procedure of arbitration, would be placed in an awkward position of reviewing the creative and flexible remedies available to arbitrators with experience and expertise very different from that of the

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See Bowen*, 254 F.3d at 935.

¹⁸⁹ The mandatory language of 9 U.S.C. § 4 includes:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (2000).

¹⁹⁰ *Bowen*, 254 F.3d at 935.

¹⁹¹ *Id.* at 936 n.7.

judiciary applying traditional theories of remedy and equity in arriving at final judgments.¹⁹² Expanded judicial review, therefore, would threaten the independence of arbitrators and blur the distinction between arbitration and adjudication.¹⁹³

In holding that “parties may not interfere with the judicial process by dictating how the federal courts operate,”¹⁹⁴ the court acknowledged that it was the first circuit to hold that parties may not contract for expanded judicial review.¹⁹⁵ The Court did point out, however, that both the Seventh¹⁹⁶ and Eighth Circuits,¹⁹⁷ in dicta, have expressed disapproval of expanded review by contract.¹⁹⁸

¹⁹² *Id.* at 936.

¹⁹³ *Id.* (citing Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 151–52 (1997)).

¹⁹⁴ *Id.* at n.8.

¹⁹⁵ *Id.* at 936.

¹⁹⁶ See generally *Chicago Typographical Union v. Chicago Sun-Times, Inc.* 935 F.2d 1501 (7th Cir. 1991). Where a party to an arbitration involving a dispute over change in factory conditions under a “most favored nations” contract clause petitioned district court review of the award, the appellate court affirmed both the district court’s confirmation of the award and the ability of the district court to review the award under the Taft-Hartley Act. *Id.* Judge Posner, writing for the majority, determined that while it was appropriate for the district court to review the award, the district court could not substitute its judgment for that of the arbitrator absent conditions of fraud or conflict of interest. *Id.* In dicta, Posner commented:

[a]n agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator’s interpretation. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for *judicial* review of that award.

Id. at 1505.

¹⁹⁷ See generally *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998). Although parties to an arbitration agreement did not contract for expanded judicial review grounds, the losing party petitioned the district court to modify the award under state statutory grounds. The court held that, because the arbitration agreement evidenced no intent to the contrary, the FAA applied in this arbitration and that the only grounds under which the award could be modified or vacated were those so provided for in the FAA. The court addressed contractual expansion of vacatur and/or modification grounds in dicta. The court noted that it is not clear

that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur . . . Congress did not authorize *de novo* review of such an award on its merits; it commanded that when the exceptions do not apply, a federal court has no choice but to confirm.

Id. at 997.

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In so holding, the Tenth Circuit discounted the importance of freedom to contract and the inherently contractual nature of the arbitration process. The court conceded the availability of a public policy exception to the general rule against traditional limited judicial review where a court determines “whether the specific terms contained in [the contract] violated public policy by creating an explicit conflict with other laws and legal precedents.”¹⁹⁹ The court stated, however, that the exception was inapplicable under the present facts because it applies specifically and exclusively to contract disputes.²⁰⁰

IV. ANALYSIS: THE LEGITIMACY OF CONTRACTUAL REVIEW

The resolution of the circuit split requires an analysis of the dispute that pits the purpose of the FAA, to ensure enforcement of private arbitral agreements, against the language of the statute that arguably precludes such agreements when they involve expansion of judicial review standards. This analysis reveals that enforcing these agreements is congruent with the traditional American value of freedom of contract and with the purpose and the structure of the FAA while still providing for the purity, independence, and the very existence of arbitration as an alternative dispute resolution method.

A. *Current Tension in the Law of Arbitration*

The 2001 *Bowen and Hughes Training* circuit split demonstrates the current tension in arbitration law. Many circuits interpret section 10 of the FAA as merely a default provision that applies only where parties have failed to provide for judicial review standards in private arbitral agreements.²⁰¹ The Tenth Circuit, however, takes exactly the opposite stance, concluding that the plain language of the statute itself, the legislative history of the FAA, and the

Although the court recognized that other Circuits had upheld such contractual expansion in both *Gateway* and *Lapine*, the court was not prepared to accept that type of contractual arrangement as valid. *Id.*

¹⁹⁸ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001).

¹⁹⁹ *See id.* at 932 n.3 (quoting *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1024 (10th Cir. 1993)).

²⁰⁰ *Id.* at 932 n.3.

²⁰¹ *See Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001); *Synchor Int'l Corp. v. McLeland*, CA-95-565-1, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished); *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Fils Et Cables D'Acier De Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 244 (S.D.N.Y. 1984).

avoidance of the evisceration of the process of arbitration as we know it in the United States, requires that the statutory provisions in section 10 constitute the exclusive domain, with only a few judicially recognized exceptions, of review of arbitration awards.²⁰²

This split in the circuits can only lead to more uncertainty and less willingness to submit claims to arbitration. This result is compounded by the vastly different interpretations by the courts of the role of the FAA and the Congressional intent behind section 10.²⁰³ The majority of circuits directly confronting the issue consider the Supreme Court's broad view of the FAA's legislative purpose, to treat arbitration agreements on equal footing with all other contracts, as compelling the interpretation of section 10 as merely a default provision that can be expanded contractually.²⁰⁴ The Tenth Circuit, in contrast, interprets section 10 as a definitive and limited compendium to be expanded only where an arbitrator has manifestly disregarded the law in making an award.²⁰⁵ Both sides articulate cogent reasoning in arriving at opposite holdings. While both sides of the issue recognize the centrality of the enforcement of private arbitration agreements as the driving force behind the FAA and the very reason for its existence,²⁰⁶ it is the interpretation of that purpose and its impact on section 10 that holds the key to the resolution of the issue. The Fifth Circuit and those Circuits following it in the *Gateway/Lapine* line of cases, honor parties arbitration agreements at any price, even that of weakening the arbitral process, thereby relegating the section 10 "judicial review" exceptions to mere default measures coming into play only where parties fail to specify review standards in their agreements.²⁰⁷ The Tenth Circuit, however, views the section 10 provisions as vital to the structure and very nature of the arbitration process itself, protecting the independence and purity of the arbitration process, in effect "protecting" the process from interference by the judiciary and insuring that except in the rarest of circumstances, an arbitrator's award will stand.²⁰⁸

The question of which interpretation is correct centers not only on an academic debate about the Congressional intent behind the FAA, but also on what is practicable and acceptable to contracting parties in the Twenty-First Century. The motivation leading parties to agree to submit disputes to

²⁰² See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001).

²⁰³ See *supra* Part III.

²⁰⁴ See *Hughes*, 254 F.3d 588; *McLeland*, 1997 WL 452245 at *6; *Lapine*, 130 F.3d at 888; *Gateway*, 64 F.3d at 993; *Midland Metals*, 584 F. Supp. at 244.

²⁰⁵ See *Bowen*, 254 F.3d at 932.

²⁰⁶ See, e.g., *id.* at 934.

²⁰⁷ See *Lapine*, 130 F.3d at 888; *Gateway*, 64 F.3d at 987.

²⁰⁸ See *Bowen*, 254 F.3d at 936.

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arbitration rather than litigation as a means of resolution generally focuses on the savings in cost, time, and complexity.²⁰⁹ Too often, the finality of the decision plus the risk that a party will not be the victor are not weighed as factors when deciding to submit a dispute to arbitration.²¹⁰ When parties recognize the risk factors, but value the benefits, creative participants have altered the contractual process to expand both the statutory and non-statutory grounds for judicial review in their agreements. Ironically, this result may compromise one of the features that made arbitration attractive in the first place, its finality.

The resolution of this particular tension in arbitration law requires a process of statutory interpretation and an examination of the statutory history of the FAA. In addition, the impact of contractual arrangements for expanded judicial award review on the overall arbitration process must be analyzed.

B. Freedom of Contract Requires Enforcement of Review Agreements

All courts directly examining the issue of enhanced judicial review by arbitration contract acknowledge the importance of recognizing and giving effect to the arbitration agreements of contracting parties.²¹¹ Where the courts differ, however, is in determining whether the language of the FAA, on its face, precludes enforcement of contract clauses requiring judicial review on grounds other than those provided by statute.²¹² In balancing the various considerations surrounding the controversy, and absent a statutory prohibition, the freedom to contract privately as the parties see fit should trump any contrary interests.

The law of contracts “permeates every aspect of society” affecting the lives of American citizens from their employment, to the purchase of goods they make from the fruits of that employment, to the insurance they buy to protect the goods, to the mortgages of their homes.²¹³ In such an environment it is difficult to imagine that this freedom to contract was not always

²⁰⁹ Hayford, *supra* note 11, at 498.

²¹⁰ *Id.*

²¹¹ *See, e.g., Bowen*, 254 F.3d at 934. This is required by the line of Supreme Court authority emphasizing the contractual nature of arbitration. *See Mastrobuono*, 514 U.S. at 57; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Volt*, 489 U.S. at 498; *Dean Witter v. Byrd*, 470 U.S. 213 (1985) (“The FAA’s enactment was ‘motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.’”); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²¹² *See supra* Part III.

²¹³ JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1.3 (1998).

available. Contract law was rudimentary in feudal England, however, with courts refusing to enforce contracts because secular bargained-for agreements were considered beneath the King's justice.²¹⁴ It was only when England emerged from the medieval area to become a commercial center with capitalistic underpinnings that freedom to contract became firmly entrenched.²¹⁵ This revolutionary spirit defined emerging American law and was prevalent in the 1920's milieu of the FAA.²¹⁶ Thus the notion of freedom of contract permeates the structure and function of the FAA.²¹⁷

It is well settled that the Congressional drafters contemplated the role of the courts in the scheme of FAA-administered arbitration as one of an enforcer of the contractual agreements of parties and the insurer of the effectuation of that contract.²¹⁸ The preamble to the 1925 Act stated that it is "[a]n Act [t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the State or Territories or with nations."²¹⁹ Indeed, "as drafted, the bill was understood by Members of Congress to 'simply provide for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts.'"²²⁰ The Act recognized that "arbitration agreements are purely matters of contract," and the bill was structured to make the contracting party live up to the bargain.²²¹ To

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ The FAA reflects an intent to place arbitration agreements "upon the same footing as other contracts" and to reverse judicial hostility to the enforcement of arbitration agreements. H.R. REP. NO. 68-96, at 2 (1924).

²¹⁷ See *Volt Info. Sci., Inc. v. Bd. of Tr.*, 489 U.S. 468, 479 (1989); see also *WARE*, *supra* note 49, at § 2.4 ("The FAA, enacted in 1925, is resolutely pro-contract.").

²¹⁸ Hayford, *supra* note 11, at 500; *Unnecessary Choice*, *supra* note 9, at 2250 ("parties dictate the terms of their own contracts, and the FAA does no more than ensure that those terms are enforced."); see also *Volt*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' manifested by [9 U.S.C. § 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 25 n.32 (1983)) (citation omitted)).

²¹⁹ 9 U.S.C. §§ 1-16 (1999).

²²⁰ *Circuit City Stores v. Adams*, 532 U.S. 105, 125 (Stevens, J., dissenting) (quoting 65 CONG. REC. 1931 (1924) (remarks of Rep. Graham)).

²²¹ H.R. 96, 68th Cong. (1st Sess. 1924).

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accomplish that goal, the bill provided a mechanism for enforcement in the federal courts.

The legislative history provides important clues to the applicability of the FAA to agreements for enhanced judicial review. The House Report accompanying the bill to the floor emphasized the importance of safeguarding the rights of the parties without judicial interference.²²² The legislators expressed their concern that the federal law be streamlined and simplistic, “reducing technicality, delay and expense to a minimum and at the same time safeguarding the rights of the parties.”²²³ The legislators emphasized that the FAA provided the “machinery . . . for the prompt determination of [claims] for arbitration . . . without interference by the court.”²²⁴

It seems likely, then, that the provision of “a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence or . . . some evident mistake not affecting the merits . . . in the award,”²²⁵ was included to protect the arbitration from uninvited judicial interference. Thus, “mere error” was insufficient to trigger judicial review unilaterally sought post-judgment by the losing party.

Such judicial interference is not a concern, however, where all contracting parties invite judicial intervention in their arbitration process. A contractual provision for expanded judicial review is consensual and demonstrates the parties’ willingness and desire for a reviewing court to examine the proceeding and award for conformity to a standard selected by the parties themselves. Hardly the judicial interference that the Act was enacted in part to avoid, this review is simply another feature of the private bargained-for arbitral agreement. Since neither party knows in advance who will be the arbitral victor, the bargain benefits both and gives both the reassurance they seek that an independent judicial examiner will scrutinize proceedings for fairness and accuracy. This further examination not only provides a safeguard for the rights of the parties, but also protects against judicial interference beyond that so contracted. Such agreements for expanded judicial review therefore are within the nature and intent of the FAA.

Certainly in the hostile judicial atmosphere of 1925,²²⁶ the 68th Congress could not foresee that a time would come where contracting parties would

²²² *Id.*

²²³ *Id.* at 2.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *supra* notes 52–58 and accompanying text.

desire judicial review of their award on the merits. Therefore, the FAA did not anticipate or address the situation where parties agree that judicial review of the award would proceed under standards other than those provided in the Act. The language anticipates and prevents judicial interference but does not preclude judicial review by invitation and contract.²²⁷

C. Supreme Court Favors Freedom of Contract in Arbitral Agreements

The federal policy in favor of the freedom to contract for arbitration is so strong that the Supreme Court has repeatedly held that the plain language of the FAA requires courts to enforce the bargain of parties to arbitrate even where the result is an inefficient use of the judicial system.²²⁸ Even the preemptive effect of the FAA is trumped by the parties' arbitration contract to conduct their arbitrations under state law, as long as the state law principles do not conflict with the prime directive underlying the FAA—that agreements to arbitrate be enforced.²²⁹

The overwhelming theme in recent Supreme Court cases is emphasis on the enforcement of parties' arbitration agreements according to their terms.²³⁰ For example, in *Dean Witter v. Byrd*,²³¹ the Court examined the discretionary abilities of the federal courts conferred by the FAA where a disappointed investor filed suit in federal district court alleging various SEC and state law violations.²³² When Dean Witter Reynolds filed a motion to compel arbitration of the state claims and stay arbitration pending settlement of the federal action, the Supreme Court examined the nature and the purpose of the FAA in resolving the dispute.²³³ The Court's reasoning provides several insights into its understanding of the function of the various sections of the FAA and the ability of a federal court to exercise discretion under the Act. First, because the FAA mandates that district courts shall direct the parties to arbitration where contractually agreed, under the plain language of

²²⁷ 9 U.S.C. § 2 (1999) (stating arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

²²⁸ See *Dean Witter, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

²²⁹ See generally *Volt Info. Sci., Inc. v. Bd. of Tr.*, 489 U.S. 468 (1989) (discussed *infra* at notes 239–56 and accompanying text); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (discussed *infra* at notes 236–38 and accompanying text).

²³⁰ See *Mastrobuono*, 514 U.S. at 57; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32–33 (1991); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²³¹ *Dean Witter*, 470 U.S. at 213.

²³² *Id.* at 214–16.

²³³ *Id.* at 215.

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the Act, courts are required to enforce the parties' agreement even where such enforcement possibly results in inefficiency by bifurcated proceedings in different fora.²³⁴

By its terms, the Act leaves no place for the exercise of discretion by a district court . . . [and] insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.²³⁵

The Court further emphasized that the FAA requires that agreements be enforced according to their terms, even where state law otherwise precludes such claims from arbitration, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*²³⁶ In *Mastrobuono*, the Court examined the issue of whether state law prohibiting punitive damages in arbitration awards, deemed applicable by the choice of law provision in an arbitration agreement, necessitated judicial vacatur of such an award.²³⁷ The Court held that the terms of parties' arbitral contracts are controlling and that where an agreement includes punitive damages issues among those to be arbitrated, the FAA ensures enforcement even if state law otherwise excludes such claims from arbitration.²³⁸

Perhaps the most definitive Supreme Court examination of the role of the FAA in the enforcement of private arbitral agreements, whatever the form, is found in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.²³⁹ In *Volt*, a construction contract contained a choice-of-law provision that the law of the location of the construction governed.²⁴⁰ When a dispute developed and one party sued the defendant and others in state court, one of the third parties sought to stay the proceedings and compel arbitration.²⁴¹ The California Court of Appeals construed the choice-of-law provision to mean that the parties intended that the California rules of arbitration, not those provided in the FAA, govern their dispute resolution.²⁴² Because the California Civil Procedure Code provided that third parties were not bound by arbitration agreements, the California Court

²³⁴ *Id.* at 218.

²³⁵ *Id.*

²³⁶ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

²³⁷ *Id.*

²³⁸ *Id.* at 53.

²³⁹ *Volt Info. Sci., Inc. v. Bd. of Tr.*, 489 U.S. 468 (1989).

²⁴⁰ *Id.* at 470.

²⁴¹ *Id.*

²⁴² *Id.* at 471-72.

of Appeals denied stay of litigation.²⁴³ The Supreme Court examined the California rules and found that they were designed to encourage parties to arbitrate disputes, thereby promoting the federal policy favoring arbitration.²⁴⁴ The Court therefore affirmed the state court holding that while the FAA enforces arbitration agreements in interstate commerce disputes, it does not preempt state law where the parties have agreed to be so bound.²⁴⁵ The Court stated that “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreement to arbitrate.”²⁴⁶ The Court, pointing to earlier holdings that the FAA ensures that agreements will be enforced according to their terms, concluded that nothing in the FAA prevents the enforcement of agreements to arbitrate under procedural rules different than those set forth in the Act itself.²⁴⁷

In so holding, the Court stressed the contractual nature of arbitration agreements and the purpose of the FAA to enforce private arbitration agreements.²⁴⁸ The FAA only preempts state laws where the application would render arbitration agreements unenforceable.²⁴⁹ The FAA does not confer a right to compel arbitration at any time; “it only confers the right to obtain an order directing that ‘arbitration proceed *in the manner provided for in [the parties’] agreement.*”²⁵⁰ Here, the parties had never agreed to require arbitration to proceed in the manner of the FAA.²⁵¹

The Court noted that it previously held that sections one and two, the substantive provisions of the FAA, are applicable in both state and federal court because the principal purpose of Congress in the FAA is “ensuring that private arbitration agreements are enforced according to their terms.”²⁵² Sections 3 and 4, in contrast, appear to only apply to federal court proceedings.²⁵³ Furthermore, “[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”²⁵⁴ Since the California rules were not an obstacle to the

²⁴³ *Id.* at 471.

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 479.

²⁴⁶ *Id.* at 476.

²⁴⁷ *Id.* at 479.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 474–76 (emphasis added).

²⁵¹ *See id.* at 479.

²⁵² *Id.* at 476.

²⁵³ *Id.* at 477 n.6.

²⁵⁴ *Id.* at 477.

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purposes of Congress and did not conflict with federal law, they did not undermine the goals and policies of the FAA.²⁵⁵ The Court took a very pro-private agreement stance, stating:

It does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself . . . Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues that they will arbitrate, so too may they specify by contract the rules under which the arbitration will be conducted . . . By permitting the courts to 'rigorously enforce' such agreement according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.²⁵⁶

The pro-private agreement Supreme Court philosophy, articulated in *Volt*, has ramifications for the validity determination of the contractually expanded judicial review controversy. Since expanded judicial review provisions in parties' arbitration agreements are the result of a free and fair bargained-for exchange, *Volt* indicates that so long as the primary policies of the FAA (*i.e.*, to prevent judicial interference in the arbitral process) maintain their integrity, contractually expanded review is acceptable and enforceable in the statutory scheme.

D. FAA Statutory Construction Permits Enhanced Contractual Judicial Review

Even if the effectuation of the private arbitral contract requires that such agreements for expanded judicial review be enforced, some argue that the structure of the FAA itself may preclude such agreements from effectuation.²⁵⁷ *Gateway* and its progeny view section 10 as a default provision that takes effect absent private contractual provisions to the contrary.²⁵⁸ It could be argued, however, that in allowing enforcement of such contractual provisions, the *Gateway/Lapine* courts do not address the plain language of the FAA that specifies both when judicial intervention comes is appropriate and exactly what form that intervention takes.

²⁵⁵ *Id.* at 479.

²⁵⁶ *Id.*

²⁵⁷ See Hayford, *supra* note 11, at 489.

²⁵⁸ *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

The FAA leaves no room for district court discretion in deciding whether to enter a judgment based on an arbitral award.²⁵⁹ Judicial intervention can only occur where parties have provided in their agreements that a court order may be made to confirm any arbitral award.²⁶⁰ Thus, it is the private contractual agreement itself that provides the legal basis for federal court involvement in the “back-end” of arbitration.²⁶¹

If the agreement provides for judicial intervention, the court must enter an order confirming the award.²⁶² The court, in that circumstance, can only exercise discretion in vacating, modifying, or correcting the award where existing circumstances fall within the narrow exceptions circumstances described in sections 10 and 11.²⁶³

Section 10 of the FAA enumerates those circumstances in which “the United States court in and for the district wherein the award was made *may* make an order vacating the award upon the application of any party to the arbitration.”²⁶⁴ This permissive language is repeated in section 11 dealing with modification of awards, but stands in sharp contrast to mandatory directives elsewhere in the statute commanding a court, for instance, that it *must* grant an order confirming an arbitration award where parties have so agreed.²⁶⁵ Thus, under section 10, a district court is not compelled to vacate an award even under the plain language of the statute. Most notably, Congress has never expressly authorized courts to review arbitral awards under the standards devised by parties in private arbitration agreements.²⁶⁶ Certainly the FAA does not require courts to review arbitrators’ legal rulings or substantive awards. The issue, then, becomes whether the FAA permits the private contract of the parties to compel a court of jurisdiction to review an award using standards specified in the contract.

Keeping in mind the underlying FAA policy of preventing judicial interference in the arbitral structure,²⁶⁷ the strict construction of sections 9,

²⁵⁹ 9 U.S.C. § 9 (2000).

²⁶⁰ 9 U.S.C. §§ 9, 13.

²⁶¹ See WARE, *supra* note 49, at § 2.40 (“Judicial enforcement of arbitration awards is an example of courts enforcing contracts. The parties agreed to comply with the arbitrator’s decision and if a party refuses to do so then that party is in breach of contract.”).

²⁶² *Id.*

²⁶³ See 9 U.S.C. §§ 10–11 (2000).

²⁶⁴ 9 U.S.C. § 10 (emphasis added).

²⁶⁵ See 9 U.S.C. § 9 (2000).

²⁶⁶ WARE, *supra* note 17, at 735.

²⁶⁷ For a general discussion of arbitral autonomy in the employment setting, see Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687,

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10 and 11 makes sense. Federal district courts cannot enter the process sua sponte unless invited by the parties, and once invited, cannot undermine that process by vacating or modifying an award on the merits. Sections 9, 10 and 11, however, only delineate those areas where a court *may* interfere in the arbitral process on its own volition.²⁶⁸ Nowhere do the sections prevent parties from agreeing to involve the court in the process by seeking judicial review of the award on standards devised by the parties. Nor does such an arrangement do “violence to the policies behind the FAA.”²⁶⁹ A textual reading of the FAA in this light does not prevent enforcement of parties’ agreements to enhanced judicial review. Section 10, therefore, is a default provision that only takes effect where parties agree to judicial confirmation by court order recognizing arbitral awards, but where the agreement does not include specific standards for judicial review.

E. Judicial Integrity not Undermined by Contractual Review Expansion

Even if the FAA is interpreted as allowing for the enforcement of private contracts for expanded judicial review of arbitral awards, some jurists, including the Tenth Circuit *Bowen* majority, bristle at the proposition that the courts are at the mercy of the private contract of a party and that a party can compel a court to act by merely agreeing to such action in a contract.²⁷⁰ Perhaps these courts see such agreements as a threat to their current preference for alternate dispute resolution tools as a means to encourage settlements and reduce their own workloads.²⁷¹

Admittedly, the courts are public institutions designed to serve a public function, and private litigants’ requests for non-traditional judicial intervention may pose a threat to the integrity of the judicial institution, especially where standards of review contracted for in a private agreement are beyond those with which the court is familiar. The *Bowen* court expressed concern that the tools of the arbitrator are unfamiliar to the court and that “expanded judicial review places federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar

745–49 (1997); R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 Hous. L. Rev. 1863, 1865–66 (1994).

²⁶⁸ 9 U.S.C. §§ 9–11 (2000).

²⁶⁹ See *Volt Info. Sci., Inc. v. Bd. of Tr.*, 489 U.S. 468, 479 (1989).

²⁷⁰ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 n.3 (10th Cir. 2001).

²⁷¹ See generally Sarah R. Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000).

rules and procedures.”²⁷² Courts that perform contractually-expanded review could potentially find themselves in areas of unfamiliarity where arbitrators with particularized expertise in a discrete area fashion novel and flexible remedies unavailable in traditional litigation.²⁷³

Circuit courts directly deciding the enforceability of enhanced judicial review have arrived at three different responses.²⁷⁴ The *Gateway* court upheld the validity of private arbitral agreements providing for expanded judicial review while not addressing the issue of the propriety of private agreements directing the court’s role in arbitral award vacatur and/or modification.²⁷⁵ The *Bowen* court, in contrast, found that expanded judicial review threatened both the institution of the courts and the independence of arbitration and weakened the distinction between the two systems.²⁷⁶ A middle ground was struck in the *LaPine* concurrence, which justified private encroachment on the public judicial domain by reasoning that what the district federal court was being asked to do under enhanced review was not unlike the work it performs in review of bankruptcy and administrative decisions.²⁷⁷ As long as the parties’ arbitral agreement included traditional standards with which courts are familiar, such as review of errors of law and fact, no unreasonable encroachment on the judiciary institution was found.²⁷⁸

While it is undeniable that courts need a reliable and consistent framework on which to base their decisions, thus far parties have asked courts to review arbitral awards using traditional standards such as for errors of law or fact.²⁷⁹ Although the freedom for parties’ stipulation of terms of arbitral agreements is as broad as the independence to choose idiosyncratic terms in any contract,²⁸⁰ where parties involve the judiciary, respect for

²⁷² See *Bowen*, 254 F.3d at 934, 936.

²⁷³ *Id.*

²⁷⁴ See *Cole*, *supra* note 271, at 1250–53.

²⁷⁵ See *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

²⁷⁶ See *Bowen*, 254 F.3d at 934, 936.

²⁷⁷ See *Lapine v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

²⁷⁸ *Id.* at 890.

²⁷⁹ See, e.g., *Gateway*, 64 F.3d at 997 (enforcing arbitration agreement in which parties agreed that any disputes arising from their joint business venture would be arbitrated with de novo judicial review of errors of law).

²⁸⁰ See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). Judge Posner, commenting on the freedom of parties to construct arbitration agreements as they wish, noted:

Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern

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tradition and the institution itself are important considerations. The *LaPine* concurrence, combining both the policy of the FAA of party autonomy in fashioning agreements and the recognition of judicial stature and the integrity of the institution of the courts, is a valid compromise in enforcing agreements that provide for enhanced judicial review.²⁸¹ Thus, like so much else in the law, parties are free to agree for expanded review within reason. In structuring their arbitration, they can choose to avoid the courts completely. They can devise a procedure completely independent of judicial interference or review of their award. But, if they choose to involve the courts in the confirmation and review of the arbitration award, the standards they choose for that review must be reasonable and applicable within the traditional structure of the judiciary.²⁸²

Another argument against enhanced judicial review by arbitral contract is that the FAA only confers jurisdiction on the federal district courts to review arbitral awards as specified in the statute.²⁸³ It is well settled, however, that the FAA does not confer jurisdiction on the courts, but a federal district court may only enforce an arbitral agreement where an independent basis for federal jurisdiction exists.²⁸⁴ Thus, the power of the federal court to act derives either from diversity or a federal question. The court, therefore, has the power to review under expanded grounds if provided for in the bargain of the parties.²⁸⁵

F. *Protecting the Integrity of the Arbitral Process*

The *Bowen* court encapsulated the seminal issue for determination in analyzing the validity of private arbitral agreements expanding judicial review as whether the alternate scheme conflicts with federal policies furthered by the FAA.²⁸⁶ The court concluded that “[t]he FAA’s limited judicial review . . . prevents courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitrations.”²⁸⁷

the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.

Id.

²⁸¹ See *supra* Part III-C.

²⁸² *Id.*

²⁸³ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934–35 (10th Cir. 2001).

²⁸⁴ 9 U.S.C. § 4 (2000).

²⁸⁵ See *Lapine v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

²⁸⁶ See *Bowen*, 254 F.3d at 934–35.

²⁸⁷ *Id.*

Furthermore, “the FAA standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of arbitration” and the finality of the award.²⁸⁸ The court cited practical impediments to the arbitral process arising from expanded judicial review, including increased district court dockets and practical problems with reviewing in the absence or dearth of arbitrators’ findings of fact and conclusions of law.²⁸⁹

Although the *Gateway/Lapine* line of cases view such contractual clauses as alternatives to the default provisions of section 10,²⁹⁰ it can be argued that these expansion clauses weaken the position of the arbitrator’s decision as a final, binding, and judicially enforceable award. Accordingly, private agreements for expanded judicial review may eventually destroy the process of arbitration. Such an interpretation of section 10 as a default provision, effective only where judicial review standards are not otherwise alternatively contracted, can therefore be viewed as inconsistent with the FAA itself, because the FAA was enacted to ensure enforcement of arbitration agreements effectuating a federal policy favoring arbitration.²⁹¹

The FAA was enacted to combat three “evils” all related to inefficiency: delay in finality of litigation, expense of litigation, and the failure of litigation to arrive at decisions considered “just” in the business world.²⁹² Thus, while enacted to promote freedom of contract in the arbitration setting, the FAA was structured to effectuate the process of arbitration because of its benefits, especially in commercial dispute resolution.²⁹³ It makes sense, then, that the drafters created the legislation to further all of these goals. While parties are free to structure their arbitration agreements as they see fit, protecting the purity of the arbitration process from judicial intervention and routine vacatur of awards can ensure the vitality of the process. If section 10 is ultimately interpreted as merely a default provision where parties may contract around the enforceability of substantive law, the legal standard of care may soon provide for arbitration agreement drafts routinely including expanded review options. Consequently, arbitration would no longer be an

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See, e.g., *Lapine*, 130 F.3d at 890.

²⁹¹ See, e.g., *Dean Witter v. Byrd*, 470 U.S. 213, 220 (1985) (The FAA’s enactment was “motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.”).

²⁹² Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 424 (1998).

²⁹³ *Circuit City Stores, Inc. v. Adams*, 531 U.S. 105, 125 (2001) (Stevens, J. dissenting) (quoting 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham)); cf. *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996–97 (5th Cir. 1995).

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alternative to litigation, but merely another version of the initial fact-finding trial court in the costly and time-consuming journey up the judicial appellate ladder.²⁹⁴

Additionally, keeping within the “freedom to contract” construct of the FAA, creative parties can explore alternatives to judicial review if uncomfortable with the finality of an arbitrator’s award. One proposed solution is that parties can agree to parameters for arbitral awards.²⁹⁵ Analogous to a “high-low” award in a civil suit, such parameters work in that an award made outside the limits would have no effect.²⁹⁶ Shielding the arbitrator from knowledge of the limitation ensures independence of the process.²⁹⁷

Another alternative, suggested by several circuit courts, is review by an arbitral appellate panel under standards designated by the arbitration agreement.²⁹⁸ Panel utilization avoids those criticisms of judicial arbitral review that center on the unfamiliarity of the courts with the arbitral process, especially with the flexibility in remedies, the inability of a reviewing court to remand the case to the now-disbanded fact finding panel, and the impracticality of a re-arbitration of complex procedures that take years to complete.²⁹⁹ Arbitration review boards provide the expertise and familiarity to provide some measure of review to parties reluctant to submit to the finality of arbitration.³⁰⁰ Rather than entangling the courts in reviewing the merits of challenged arbitral awards, appellate arbitral review panels merely add a second level to the contractual arbitral procedure so that losing parties may secure a degree of protection from the risk of an award they perceive to be unjust.³⁰¹ Optional internal arbitral appellate review with the arbitral system is already established by some organization rules including the CPR Arbitration Appeal Procedure and the JAMS Comprehensive Arbitration Rules and Procedures.³⁰²

²⁹⁴ Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 364 (2001).

²⁹⁵ Cullinan, *supra* note 292, at 427.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001); *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991).

²⁹⁹ See Revised Uniform Arbitration Act, cmt. B(6).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

These arguments, however, fail to consider that any problems encountered by expanded judicial review are created by the agreement of the parties themselves, are anticipated by the parties, and are addressed in the parties' agreement. Presumably, parties will contract for expanded judicial review only after balancing the benefits and burdens so associated. Parties desiring finality and speed will not opt for enhanced review. If they want "instant justice," they presumably won't contract for expanded review. Since reasoned awards are necessary for judicial review, the parties will provide in their agreements that the proceedings will be recorded and the arbitrator will generate such a report.

Any time judicial review is expanded, additional burdens and problems must be expected. In this case, however, the burdens are outweighed by the benefits. Providing increased options for expanded review means that arbitration will become more appealing to disputing parties. No longer deterred by a perception of arbitration as "frontier justice," parties will be more willing to submit disputes to this alternative resolution method. Any increase in the court docket created by the contracted-for review of arbitral awards will be offset by the increasing number of disputing parties submitting the fact-finding portion of their claim resolution to arbitration rather than to the courts. Lengthy district court involvement in pre-trial judicial case management and the trial fact-finding phase of a dispute will be replaced with less time-intensive case review. The net effect of recognizing the validity of arbitral agreements for expanded judicial review will be that courts have less work than under the traditional FAA regime.³⁰³ In addition, depending on how costs are allocated in the arbitral contract, arbitration with expanded review is still likely to be much cheaper than litigation, both for the parties and the courts.

Providing a "middle ground" between traditional arbitration and full-blown litigation, arbitration with expanded judicial review can be a viable option to parties who anticipate the increased expense and time involved but who value a reasoned and correct decision over instant justice. In many settings, parties might have legitimate reasons for preferring instant decisions to those that are judicially reviewed. In the employment context, for example, arbitration is a popular dispute resolution method precisely for that reason.³⁰⁴ If the employee wins or the award calls for discipline other than discharge, the employee can be back on the job within weeks to a few

³⁰³ See *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 244 (S.D.N.Y. 1984) (finding that arbitration with expanded review results in less work for the court than full-blown litigation).

³⁰⁴ See BALES, *supra* note 1, at 153-54.

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months after the dispute arose.³⁰⁵ In a contractarian paradigm, courts will respect the parties' desire for finality over reviewability and vice-versa.

G. Judicial Review and the Expanding Scope of Arbitration

An obvious area of concern where judicial review of arbitration awards is limited to traditional FAA review is the fear of a denial of the parties' rights where arbitrators apply the wrong law but the error falls short of "manifest disregard" or other vacatur grounds. Currently, in the arbitration setting, "[t]he court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong."³⁰⁶

Until recently, many claims were inarbitrable. For years, arbitration was limited to commercial and labor disputes.³⁰⁷ In the past twenty-five years, however, Supreme Court decisions have resulted in an unprecedented expansion of arbitration into areas previously considered off-limits.³⁰⁸ The Court has concluded, for example that many new types of claims, including those involving antitrust³⁰⁹ and securities law³¹⁰ are arbitratable upon private agreement. Most notably, valid agreements to arbitrate employment disputes involving statutory claims will be enforced.³¹¹ At least one commentator has suggested that these recent Supreme Court decisions have transformed arbitration into merely another trial court of general jurisdiction.³¹² It is argued that these decisions, compounded by a dearth of reasoned awards accompanied by findings of fact and conclusions of law, a lack of transcripts of arbitration proceedings, and the limited judicial review allowed by the FAA, compel the limitation of arbitration to commercial and labor issues.³¹³

³⁰⁵ *Id.* at 160.

³⁰⁶ *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (citations omitted).

³⁰⁷ *Ware*, *supra* note 17, at 712.

³⁰⁸ *Id.* at 712-13.

³⁰⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

³¹⁰ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). The Supreme Court held that agreements to arbitrate claims under the Securities Exchange Act were arbitrable because "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.* at 232.

³¹¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

³¹² *WARE*, *supra* note 17, at 715.

³¹³ *Id.*

Legislation to limit the scope of the FAA to exclude employment contracts has been proposed in almost every session of Congress since *Gilmer*. Some courts³¹⁴ have expressed reservations concerning the limited scope of judicial review in arbitrations of statutory claims, especially where such claims are deeply rooted in public policy (e.g., employment discrimination). Permitting parties to agree to an expanded scope of judicial review may help alleviate, though not eliminate, such concerns.

Perhaps one answer is that the FAA, which has worked well for over three-quarters of a century, is antiquated in the current era of expansive arbitration application. A closer examination of the FAA, however, shows that although the statute precludes judicial intervention *sua sponte*,³¹⁵ enhanced judicial involvement pursuant to an agreement between the parties is both permissible and desirable, effectuating the policies that the FAA was intended to promote.

V. CONCLUSION

The FAA, enacted in 1925 to ensure the judicial enforcement of agreements to arbitrate, has remained essentially unchanged to date, governing all contracts to arbitrate disputes involving commerce and maritime transactions.³¹⁶ Courts, addressing what effect should be given to contractual provisions for judicial review expanded beyond the very narrow circumstances contemplated by the FAA, are split as to whether the freedom to contract trumps the benefits of arbitration effectuated by the section 10 limitations. The current tension in the law creates uncertainty for parties attracted to the simplicity and cost-effectiveness of arbitration but who desire judicial recourse if the result is one they perceive to be unfair.

The FAA was enacted in an atmosphere of judicial hostility and reluctance to enforce private contractual arbitration agreements.³¹⁷ The *Gateway/Lapine* reasoning, which emphasizes the importance of the freedom to contract for expanded judicial review, is consistent with the Supreme Court's interpretation of the FAA as ensuring that parties may structure their

³¹⁴ See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (finding, in age discrimination case, that an arbitration panel "manifestly disregarded the law or the evidence or both."); *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) ("[T]he strict deference accorded to arbitration decisions in the collective bargaining arena may not be appropriate in statutory cases in which an employee has been forced to resort to arbitration as a condition of employment.").

³¹⁵ See 9 U.S.C. § 4 (2000).

³¹⁶ 9 U.S.C. § 2 (2000).

³¹⁷ H.R. REP. NO. 68-96, at 2 (1924) (noting Congressional intent to reverse judicial hostility to enforcing arbitration agreements).

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arbitration agreements in any way they deem fit.³¹⁸ In addition, the structure of that part of the FAA dealing with the “back-end” issues of confirming arbitral awards with judgment orders protects parties from uninvited judicial interference into the arbitral process. Conversely, private agreements for enhanced judicial review contemplate, anticipate, and contract for judicial review of arbitral awards based on standards provided by the parties rather than sua sponte judicial interference and are therefore not precluded by either the FAA or its underlying policy.

Even though arbitrations with enhanced judicial review might involve more time and expense than those dispensing “instant justice,” this construct provides a middle ground between traditional arbitration and litigation, thereby sparing judicial resources at the fact-finding phase. Any increase in judicial docket because of a higher number of appeals will be offset by greater numbers of potential litigants turning to the now more attractive forum of arbitration for dispute resolution. The purity, independence, and the very existence of arbitration can still be guaranteed by a more liberal view of section 10 as interpreted by the non-statutory exceptions currently recognized in case law. Following the directives of the FAA by recognizing and enforcing private arbitral contracts, for example, can only improve the overall process of arbitration.

³¹⁸ See *supra* Part IV B–C.

